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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).

JUDGMENT GRANTING AFFIRMATIVE DEFENSES

Archer Western Contractors, LLC (AWC) entered into a Joint Venture Agreement with McDonnel Group, LLC (TMG) for the construction of the Orleans Parish Sheriff's Office Inmate Processing Center/Templeman III and IV, Replacement Administration Building. During the course of the project, the owner caused the Joint Venture to incur additional costs requiring it obtain additional capital contributions from its constituent parties, AWC and TMG. As the managing party, AWC made numerous determinations for working capital contributions and TMG failed to make any such contributions. AWC sued TMG and moved for summary judgment. TMG alleged a number of affirmative defenses in its Answer. The court grouped the affirmative defenses into three categories: material breach defense, fault-based defenses, and the failure to mitigate defense. The district court considered each category.

As to the material breach defenses, AWC argued they must be dismissed because TMG waived its right to object to any breach by AWC through continued participation in the agreement despite it having knowledge of AWC's breaches. Louisiana recognizes the principle of where one party substantially breaches a contract, the other party to it has a defense and an excuse for non-performance. This right may be waived when a non-breaching party fails to protest or notice an objection, thereby waiving its right to do so. Waiver occurs when there is an existing right, a knowledge of its existence and an actual intention to relinquish it or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that is has been relinquished. The court held while the jurisprudence concerns a party's waiver of a claim rather than an affirmative defense, it saw no meaningful distinction between a waiver of one's right to bring a claim for breach of contract and waiver of one's right to assert prior breach of contract as an affirmative defense. The policy behind waiver as an excuse for non-performance is equitable in nature and is designed to prevent the waiving party from lulling the other

party into a belief that strict compliance with a contractual duty will not be required and then suing for non-compliance. TMG contended that jurisprudence was outdated. The court found TMG misread the case law which instructs there is no requirement a plaintiff chose irrevocably between the remedies of specific performance and damages when he files suit based on a contract. It affects the relief a plaintiff may choose to seek when it files suit in the wake of a breach. It does not allow a plaintiff to continue execution of a contract while simultaneously litigating the breach of contract.

TMG argued, additionally, even if it did waive its right to non-performance by continuing to execute the agreement despite knowledge of AWC's breaches, AWC's waiver argument failed because dissolution of the agreement was not a practical option. The court held the common law doctrine of commercial impracticability had no application under Louisiana law. The fact that compliance with a contract or agreement may be more expensive than originally anticipated is no defense. The court found TMG had knowledge earlier of many of the identified breaches and did not offer any summary judgment evidence refuting AWC's evidence TMG waived AWC's prior alleged breaches. AWC met its burden as to all instances of waiver by AWC. Summary judgment was appropriate as to TMG's affirmative defenses on the issue.

The second category consisted of fault-based defenses. They rested on the idea TMG could not be liable for AWC's relating capital contributions claims because TMG was not responsible for the Joint Venture's need for the capital. AWC argued because the parties agreed to share losses in proportion to their interests in the joint venture, except in instances of bad faith. AWC then argued TMG did not plead bad faith in its answer and it did not present evidence of bad faith on the part of AWC. TMG argued it was not required to plead bad faith because bad faith is merely an element of its fault-based affirmative defenses. The court held the language of the agreement was clear, and it was undisputed the parties agreed to share any losses in proportion to their shares in the Joint Venture, provided the losses were not caused by a party's bad faith. Even if TMG did plead bad faith, it failed to offer any evidence AWC acted in bad faith. AWC was entitled to judgment as a matter of law on these defenses.

The third category of affirmative defenses was failure to mitigate damages. The court held the agreement expressly provided the parties would bear the joint venture's losses in proportion to their shares in the Joint Venture. The sole exception to this was in the case of bad faith with respect to which TMG did not offer any evidence AWC was in bad faith. Summary judgment on the defenses was appropriate.

The court granted the motion of AWC. TMG could not invoke the affirmative defenses which were the subject of the motion. *Archer Western Contractors, LLC v. McDonnel Group, LLC*, 22-5323 (ED.La 9/30/24), 2024 WL 4346383.

JUDGMENT AWARDING DAMAGES FOR AN AUTOMOBILE ACCIDENT REVERSED AND AMENDED ON REHEARING AMENDED

Barber Brothers Contracting Company, LLC contracted with the Louisiana Department of Transportation and Development for an asphalt project on Interstate 10 in Laplace. Early one morning, it was in the process of removing warning cones placed the evening before. A Capitol City Produce Company, LLC truck driven by Frank Cushenberry collided with the Barber Brothers' truck which was being utilized in the removal process while it was backing on the shoulder of the road. Cushenberry sustained a traumatic brain injury and bodily injuries to his face, neck, shoulder, cervical and lumbar spine requiring numerous surgeries and sued for damages. His wife and two children sued for loss of consortium.

A jury awarded damages to Cushenberry totaling $10,750,000.00 for his injuries. It also awarded $2,500,000.00 to Mrs. Cushenberry and $1,500,000.00 to each of the two children for loss of consortium and found the sole cause of the accident was the fault of Barber Brothers. The court of

appeal affirmed. The Louisiana Supreme Court reversed the damages awards together with the finding the sole fault of the accident was attributed to Barber Brothers.

The Supreme Court found Cushenberry, who held a commercial drivers license, did not heed the DOTD warning signs of the construction zone ahead and took no action to avoid the accident. Cushenberry failed to see what he should have seen. The Court reapportioned the finding of fault of the lower court. It assigned twenty percent fault to Cushenberry and eighty percent to Barber Brothers. As to damages, the Court found the awards were greatly disproportionate to past awards for similar injuries, and at one point stated the awards were "beyond the pale." The highest reasonable award for Mr. Cushenberry was determined to be $5,000,000.00. The highest reasonable award for loss of consortium for Mrs. Cushenberry was determined to be $400,000.00 and the highest reasonable award for each of the children was determined to be $100,000.00. *Barber Brothers Contracting Company, LLC v. Capital City Produce Company, LLC*, 2023-00788 (La. 6/28/24), 388 So.3d 331.

On rehearing, the Louisiana Supreme Court re-examined the general damage and loss of consortium awards. The court held to find an abuse of discretion warranting the disturbance of a factfinder's award of general damages, a reviewing court must find the award is so high or so low in proportion to the injury that it shocks the conscience. A review of prior awards is not the only factor to be considered in evaluating whether a general damage award is an abuse of discretion. The review of prior awards will simply serve to illustrate and supply guidance in the determination of damages. Such factors as the facts or circumstances peculiar to the case under consideration, that is, the particular injury to the particular plaintiff under the particular circumstances must always be considered as well. To determine whether a trier of fact abused its discretion in its award for general damages, an appellate court is to consider the particular facts and circumstances of the case in conjunction with a review of prior awards. This applies to claims of excessiveness as well as insufficiency of an award. Prior jurisprudence summarized the required two-step analysis for appellate review of a damage award: 1) determining whether abuse of discretion occurred by examining the particular facts and circumstances of the case under review while including a consideration of prior awards in similar cases, and 2) if abuse of discretion is found, the court is to then also consider prior awards to determine the highest or lowest point which is reasonably within that discretion.

Within this framework, the court concluded the record indicated Mr. Cushenberry sustained extensive physical injuries and a traumatic brain injury. He suffered residual problems with anxiety, depression and insomnia. The injuries impacted his life; he was no longer the person he used to be. He testified everything had changed since the accident. Despite these changes, he acknowledged he can still care for himself in many respects. The Supreme Court found, on rehearing, the jury's award while on the high end of the range of reasonable awards was not greatly disproportionate to the mass of prior awards. A review of prior awards is not the only factor, however, to be considered in evaluating whether a general damages award is an abuse of discretion; it is a starting point. The court stated it could not, and must not, overlook the facts or circumstances peculiar to the case under consideration.

The analysis in the original decision of the Supreme Court did not adequately account for the voluminous and largely unrebutted trial record demonstrating the particularly detrimental effect the accident had on Mr. Cushenberry's personality, lifestyle, identity and self-image. As a result of the injuries, he was not able to engage in his normal fulfilling identity-defining activities. The Court concluded the jury's general damage award was not the result of passion or prejudice, but rather bore a reasonable relationship to the damages which were supported in the evidence presented at trial. The Court found the award did not shock the conscience, and did not constitute an abuse of discretion. The reduction of the award for Mr. Cushenberry's injuries to $5,000,000.00 was in error. The Court returned the general damage award of the jury of $10,750,000.00, subject to the apportionment of fault of 20% assigned to Mr. Cushenberry.

The Court originally concluded the jury abused its discretion in awarding loss of consortium of $2,500,000.00 to Mrs. Cushenberry and $1,500,000.00 to each of the two minor children. That conclusion was maintained, but the Court amended the finding as to the highest loss of consortium awards reasonably within the jury's discretion. The Court concluded in reducing the loss of consortium awards to $400,000.00 for Mrs. Cushenberry and $100,000.00 for each of the two minor children, it did not sufficiently account for the negative impact Mr. Cushenberry's extensive injuries have had and will have on his family. It found the highest award reasonably within the jury's discretion for loss of consortium was $1,000,000.00 for Mrs. Cushenberry and $500,000.00 for each minor child. All damage awards were subject to the 20% apportionment of fault assigned to Mr. Cushenberry in the original decision. *Barber Brothers Contracting Company, LLC v. Capital City Produce Company, LLC*, 2023-00788 (La. 12/19/24), _____ So.3d _____, 2024 WL 5162733.

THE TANGLED WEBS WE WEAVE

Jefferson Parish issued an advertisement for bids for the West Esplanade Avenue U-Turn (vicinity of Harvard Avenue) project. Boh Bros. submitted the lowest bid, and Command Construction, the next lowest bid. Jefferson Parish rejected Boh's bid as non-responsive because it was not on its revised Public Bid Form and Unit Price Form. Command was announced as the lowest bidder and was awarded the project. Boh protested the award to Command. Jefferson Parish rejected the protest. The trial court upheld the rejection of the bid of Boh as non-responsive and denied its request for relief. It also found Command was the lowest responsive bidder. Boh appealed. While the appeal was pending, Jefferson Parish and Command entered into a contract for the project. Jefferson Parish subsequently instructed Command to perform additional work.

The Louisiana Fifth Circuit Court of Appeal reversed the trial court's judgment which upheld the rejection by Jefferson Parish of Boh's bid. It, further, enjoined Jefferson Parish from awarding the contract to Command and ordered Boh be declared the lowest responsive bidder for the contract. Jefferson Parish never ordered Command to stop working on the project and Command asserted it was not in a position to refuse to continue work because failing to do so would have placed its payment and performance bond at risk.

The project engineer for Jefferson Parish determined the project was substantially completed in December 2021. Jefferson Parish took possession of the project on December 30, 2021 and has been using it ever since. The project engineer signed a recommendation a change order be approved and recommended final acceptance. Jefferson Parish refused to issue and execute the final acceptance and refused to execute the change order and to make final payment to Command for the work performed. Jefferson Parish contended Command was entitled to costs, but not overhead and profit. At no point during the project did Jefferson Parish direct it to stop work or indicated it would not pay Command in full for the work performed. Command sued Jefferson Parish seeking full payment for the project including overhead and costs. Command moved motion for partial summary judgment seeking to have the trial court declare Jefferson Parish accepted the project. Jefferson Parish moved for summary judgment to declare, based upon the earlier decision of the court of appeal, the contract between the Parish and Command was an absolute nullity and because the contract was an absolute nullity Command was only entitled to its costs without profit or overhead. The trial court granted the motion for partial summary judgment of Command finding Jefferson Parish accepted the project. Additionally, the trial court denied the motion for summary judgment of Jefferson Parish. Jefferson Parish filed a writ application with the Louisiana Fifth Circuit Court of Appeal seeking to reverse the decision of the trial court.

C.C. art. 2033 provides an absolutely null contract, or a relatively null contract that has not been declared null by the court is deemed never to have existed. The parties must be restored to the situation that existed before the contract was made. If it is impossible or impractical to make restoration in kind,

it may be made through an award of damages. Nevertheless, a performance rendered under a contract that is absolutely null because its object or its cause is illicit or immoral may not be recovered by a party who knew, or should have known, of the defect that made the contract null. The performance may be recovered, however, when that party invokes the nullity to withdraw from the contract before its purpose is achieved and also in exceptional circumstances when, in the discretion of the court, recovery would further the interest of justice.

Jefferson Parish, based on the ruling of the court of appeal in the Boh matter raised, as an affirmative defense to the claims of Command, the absolute nullity of the contract contending because the contract was an absolute nullity, Command was only entitled to costs. Command contended the actions of Jefferson Parish in failing to order Command to stop work on the project after the earlier ruling of the court of appeal and/or after the Supreme Court denied writs, and in requesting additional work to be performed on the project, in utilizing the project after completion without acceptance, and in alleging nullity of the contract seeking to pay Command only its costs after settling with Boh and hiring the attorneys who previously represented Boh, constituted actions/inactions that precluded the Parish from asserting nullity of the contract under the "clean hands doctrine" of C.C. art. 2033.

The court of appeal found genuine issues of material fact existed as to the parties' knowledge, intent and good faith regarding the defect that made the contract an absolute nullity, *i.e.*, application of C.C. art. 2033 to the contract between Jefferson Parish and Command. The claims of Command and other related allegations of fact might constitute "exceptional circumstances." It also concluded Jefferson Parish was not entitled to judgment as a matter of law limiting recovery of Command only to costs without profit and overhead on the basis the contract was an absolute nullity. The arguments raised by Jefferson Parish presupposed the contract with Command was an absolute nullity. It had not been so found.

The writ application of Jefferson Parish was denied. The trial court's denial of Jefferson Parish's motion for summary judgment and the trial courts granting of the motion for partial summary judgment of Command Construction were maintained. *Command Construction, LLC v. Parish of Jefferson*, 23-356 (La.App. 5 Cir. 5/31/24), 392 So.3d 638.

APPLICATION OF THE LOUISIANA CONSTRUCTION ANTI-INDEMNITY ACT

The court considered the application of the Louisiana Construction Anti-Indemnity Act, L.R.S. 9:2780.1 (LCAIA) in the context of a personal injury claim. An agreement between the owner and contractor provided to the extent claims, damages and losses or not covered by insurance purchased by the contractor, the contractor (here the indemnitor) shall indemnify and hold harmless the owner, architect, architect's consultants and agents and employees of any of them from and against any and all claims, damages, losses and expenses, including, but not limited, to attorneys' fees arising out of or resulting from the performance of the work, provided such claim, damage or loss or expense is attributable to bodily injury or to injury or destruction of tangible property (other than the work itself), but only to the extent caused by the negligent acts or omissions of the contractor, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, *regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified thereunder*. The CGL and umbrella policies provided by the contractor named the owner as an additional insured and included a waiver of subrogation in favor of the owner.

The LCAIA provides any provision in a construction contract, purporting to indemnify, defend or hold harmless the indemnitee (the owner, etc.) from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the indemnitee (the owner, etc.), an agent or employee of the indemnitee, or a third party over which the indemnitor has no contract, is contrary to the public policy of the state and is null, void and unenforceable. Additionally, any provision

in a construction contract, which purports to require an indemnitor to procure liability insurance covering the acts or omissions or both of the indemnitee, or its employees or agents, or the acts or omissions of a third party over whom the indemnitor has no control is null, void and unenforceable. The LCAIA does not prohibit the enforcement of a clause in a construction contract, wherein the indemnitor promises to indemnify, defend or hold harmless the indemnitee or an agent or employee of the indemnitee if the contract also requires the indemnitor to obtain insurance to ensure the obligation to indemnify, defend or hold harmless and there is evidence the indemnitor recovered the cost of the required insurance in the contract price. Further, the Act does not prohibit the enforcement of a clause in a construction contract that requires the indemnitor to procure insurance or name the indemnitee as an additional insured on the indemnitor's policy of insurance but only to the extent the additional insurance coverage provides coverage for liability due to an obligation to indemnify, defend or hold harmless authorized pursuant to the statute, provided such insurance coverage is provided only when the indemnitor is at least partially at fault.

The Louisiana Fourth Circuit Court of Appeal held such agreements are void and enforceable only to the extent they purport to require indemnification and/or defense where there is negligence or fault on the part of the indemnitee. Further, that court held a party which is solely or even concurrently negligent or at fault (strictly liable) may enforce a contractual provision calling for it to be made as an additional insured on the other parties' insurance policy or receive the benefit of such additional insured status.

The court found the provisions of the contract requiring the contractor to indemnify the owner from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the work, but only to the extent caused by the negligent acts or omissions of the contractor, regardless of whether or not such claimed damage, loss or expense is caused by the owner, was enforceable to the extent the contractor or its employee's negligence only. The requirement the contractor name the owner as an additional insured was enforceable only if the contractor promised to indemnify, defend or hold harmless the owner if the contract required the contractor to obtain the insurance and there is evidence the contractor recovered the cost of the insurance in the contract price, but only to the extent coverage is provided when the contractor was at least partially at fault. It was established there either was no additional charge to the contractor to have the additional insured coverage, or, to the extent there was an increase in the premium for the additional insured coverage (an amount that could not be provided by the insurer), the payment tendered to the contractor by the owner for performance of a construction contract included a ten percent charge for overhead, which included insurance costs as testified to by the contractor. Therefore, the additional insured coverage for the indemnification and defense obligation was only enforceable to the extent of negligence of the contractor or its employee. The additional insured coverage for the indemnification and defense obligation was only enforceable if the contractor was at least partially at fault. It stood to reason the insurer was not required to provide the coverage unless and until there is a determination the contractor was negligent. The insurer relied on the LCAIA. Coupled with the fact the owners fault had not been determined to fully evaluate whether coverage to the owner under the statute was prohibited, the court of appeal found the insurer had a reasonable basis to dispute the coverage. *Ladner v. Ochsner Baptist Medical Center, LLC*, 2024-0543 (La.App. 4 Cir. 12/10/24), _____ So.3d _____, 2024 WL 5054503.

PAYMENT REQUIRED FOR CHANGE ORDERS AND REJECTION OF ALLEGED SET-OFF CLAIMS

A contractor filed a lien and a lawsuit to obtain payment for change orders. The owner filed a motion for partial summary judgment to cancel the lien. The contractor filed a motion for partial summary judgment to recover the amounts for the approved change orders. The trial court granted the

contractor's motion for partial summary judgment and denied the motion of the owner. The owner appealed.

There were ninety-nine change orders of which thirty-one were paid by the owner. The owner refused to pay the remaining sixty-eight change orders which were signed and approved by it and the architect. It was undisputed the contractor performed all of the work described in the change orders. The unpaid approved change orders were not implicated or specifically plead by the owner in its reconventional demand for claims for defective work. The Louisiana Third Circuit Court of Appeal found the contractor carried his burden of proof and presented evidence sufficient to show the previously approved unpaid change orders were liquidated and presently due.

The burden then shifted to the owner to present specific facts to dispute the contractor's claim and show there was a genuine issue of material fact for trial as to the change orders at issue. The court held a review of the record reflected the owner failed to present any specific facts in dispute, and further, it failed to carry its burden to prove set-off amounts as alleged in its reconventional demand and its opposition to Unicorp's motion were liquidated and currently due. Thus, the set-off amounts claimed by the owner in its motion for partial summary judgment were unliquidated and not currently due. Because the alleged set-off claims by the owner, at that time, were unproven and unliquidated, they could not be raised to offset or reduce the contractor's claim for approved change orders at issue which the court found were liquidated and were presently due and owing. *Unicorp, LLC v. BRADD, LLC*, 24-176 (La.App. 3 Cir. 11/6/24), ___ So.3d)_____, 2024 WL 4684982.

CONTRACT PROVISIONS CONSTRUED AGAINST THE PARTY WHICH DRAFTED IT

A general contractor terminated its contract with a subcontractor for convenience. A dispute arose as to how the contract would be construed for purposes of payment to the subcontractor. The U.S. Fifth Circuit Court of Appeals found the contract provisions were ambiguous and the text was susceptible to two reasonable interpretations. It found there was no meeting of the minds as to the proper interpretation of the contract and the contract would be construed against the party which drafted it, in this instance, the subcontractor. *Keiland Construction, LLC v. Weeks Marine, Incorporated*, 109 F.4th 406, (5th Cir. 2004).

A CONTRACT FOR SALE VERSUS A CONSTRUCTION CONTRACT AND PEREMPTION

W&W Fiberglass Tank Company entered into a contract with Reed Industrial Systems, LLC for the design and installation of a stack and ventilation system for W&W's manufacturing plant. W&W sued Reed in federal court alleging one of two ventilation stacks failed at a section joint, blew over, and damaged both the stack and W&W's plant. It claimed the stack did not comply with the revised plans which called for each section of the stacks to be secured with twenty one-half inch bolts. Rather, the stacks were secured to one another with sixteen one-half inch bolts. W&W sued under the Louisiana Products Liability Act and Louisiana redhibition law. Reed moved for summary judgment.

L.R.S. 9:2772, which was at issue, applies only to contracts of construction. Generally, the courts weigh the economics of the situation to determine whether the primary obligation is one "to give" (a sales contract), or "to do" (a construction contract). When a contract contains elements of both a construction contract and a sales contract, the court analyzes the contract to determine which of the two obligations is fundamental. Courts sometimes make this determination based on a three factor test. First, in a contract to build, the buyer has some control over the specifications of the contract. Second, the negotiations in a contract to build take place before the object is constructed. Third, a building contract contemplates that not only that one party will supply the materials, but also that party will furnish his skill and labor in order to build the desired object. Courts also utilize the "value test" to determine whether the labor expended in constructing the item, or the material incorporated therein,

constitute the principal value of the contract. Courts may also pay particular attention to the extent to which the manufacturer custom designed the product for the purchaser, or whether the product was merely a stock item.

The court held the undisputed facts were the contract required Reed to custom design the ventilation system for W&W's specific location and install the ventilation system. Reed's obligation to use his design and engineering skills to create the ventilation system is akin to an artist's obligation to use his skill to paint a picture. The court found the predominant objects of the contract were obligations "to do." Since the peremption statute was applicable, the burden shifted to W&W to show the action was not time barred under the statute. It failed to meet this burden. The claims were perempted pursuant to L.R.S. 9:2772. *W&W Fiberglass Tank Company v. Reed Industrial Systems, LLC*, 22-5837 (WD.La 7/30/24), 2024 WL 3607181.

DISMISSAL OF A THIRD-PARTY DEMAND FOR INDEMNITY ON AN EXCEPTION OF PREMATURITY REVERSED

In a lawsuit by an owner against a general contractor and several of its subcontractors for design and construction defects the general contractor filed a third-party demand for indemnity against the subcontractors. The subcontractors excepted to the demands contending the general contractor had not yet been cast in judgment and the demands were, therefore, premature. The trial court granted the exceptions and dismissed the claims. Although the dismissal was without prejudice and prescription would likely not be a bar to future claims, there was the risk later claims could be barred by peremption.

The court of appeal reversed the trial court finding the earlier decision of the Louisiana Supreme Court in *Bennett v. DEMCO Energy Servs., LLC*, 23-01358 (La. 5/10/24), 386 So.3d 270, was retroactive. The court in *Bennett* held a claim for indemnity was not premature until the indemnitee is cast in judgment. It drew a distinction between the right to demand indemnity and the right to obtain a judgment for indemnity. *Graphic Packing International, LLC v. ARCO National Construction Company, LLC*, 55,962 (La.App. 2 Cir. 11/20/24), ____ So.3d. _____, 2024 WL 4830552.

LIMITATION OF LIABILITY CLAUSES

The United States District Court for the Eastern District of Louisiana considered a motion for partial dismissal of claims against a defendant. The motion sought dismissal of claims for consequential damages which were expressly excluded by the terms and conditions of a Sale Agreement. The Agreement governed an order for the overhaul of cylinders used in the operation of cranes. The exclusion was treated as a limitation of liability clause.

The respondent to the motion to dismiss, in its opposition, asserted the limitation of liability clause contained in the Sale Agreement did not apply because respondent alleged the mover's representations regarding the quality and performance of the seals were not true, and, therefore, constituted intentional or gross fault, gross negligence, and/or deliberate disregard for its contractual duties. It also claimed it had alleged more than simple negligence, and the petition demonstrated the respondent's misrepresentations regarding the propriety of the seals, which were made with knowledge of the incompatibility of and defects in the seals, constituted, at a minimum, gross negligence and a deliberate disregard of contractual duties. The mover maintained the limitation of liability clause applied and constituted valid waivers of consequential damages. It, further, argued respondent's voluminous complaint was devoid of any allegations of negligence, gross fault, gross negligence, or deliberate disregard of its contractual duties.

The court focused on Louisiana Civil Code article 2004 which provides, in part, "any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party." The issue was whether the allegations of the petition alleged gross

negligence. The court found gross negligence and ordinary negligence are significantly different in degree. Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. Louisiana courts have defined gross negligence as the entire absence of care, the want of even slight care and diligence, and the utter disregard of the dictates of prudence amounting to complete neglect of the rights of others. They have also refused to enforce contractual limitations of liability where the breaching party's conduct amounted to a deliberate disregard of a contractual duty. Mere inadvertence or honest mistake does not amount to gross negligence.

The allegations against the defendant failed to show the defendant's actions amounted to "willful, wanton and reckless conduct" or the "entire absence of care." They suggested the mover's actions constituted ordinary negligence, mere inadvertence or honest mistake, none of which are synonymous with gross negligence. The petition failed to support assertions the defendant knowingly made misrepresentations about the seals. It was alleged the product was improperly installed and too large and the defendant made "mistakes" in "error." The allegations failed to allege sufficient facts to show the conduct amounted to intentional or gross fault, gross negligence and/or a deliberate disregard of contractual duties and they failed to establish the defendant's culpability exceeded simple negligence and failed to establish the limitation of liability clause contained in the Sale Agreement was null.

The motion to dismiss was granted. The claimant was, however, granted leave to file an amended pleading to address the alleged deficiencies with respect to the pleadings, failing in which an order would be issued dismissing the claims for consequential damages with prejudice. *Harvey Gulf International Marine, LLC v. Hydradyne, LLC*, 24-592, (E.D.La 10/17/24), 2024 WL 4512419.

SUMMARY JUDGMENT GRANTED IN FAVOR OF A CONTRACTOR AND AGAINST A PERSONAL INJURY PLAINTIFF

This is an interesting decision rejecting a claim for personal injuries that should not have been pursued. The plaintiff contended she fell in a hole in a paved street in New Orleans. Because Hardrock Construction, LLC was the pavement contractor for the city at the time of the incident, the plaintiff sued Hardrock claiming it negligently created the hole and failed to repair it. Hardrock had multiple contracts with the City over a number of years for street repairs. Hardrock contended it was not until sixteen months following the accident a written work order was issued by the City for it to perform work at the intersection at issue. It filed a motion for summary judgment. Hardrock pointed out neither it nor the City had evidence Hardrock ever maintained or worked on the hole, and without evidence it was contracted to do work on the hole, it could not have a duty to maintain the area.

Plaintiff claimed because Hardrock was the pavement specialty contractor for the City and had a work order to repair the same intersection several feet from the hole at issue, it had a duty to maintain the hole plaintiff allegedly fell into. The City and Hardrock represented a contractor would not conduct work for the City without a work order which was not issued until sixteen months after the accident. Plaintiff failed to point to specific facts except for the absence of evidence. The court held assumptions and inferences were not enough at the summary judgment stage to save her claim. Summary judgment in favor of Hardrock was granted. *Goerner v. New Orleans City*, 19-11772 (ED.La 8/24/22), 2022 WL 22865027.

ABILITY OF AN UNLICENSED CONTRACTOR TO SUE FOR MONIES OWED

The United States District Court for the Eastern District of Louisiana considered a claim by Allan Contracting Enterprises to recover for services rendered to Cummins Inc. Cummins moved for summary judgment to dismiss the claims on the basis Allan was an unlicensed contractor, and as a result, any contract between it and Allan was an absolute nullity.

Cummins contended, as an unlicensed contractor under Louisiana law, Allan could only recover the actual cost of material, labor and services rendered, but argued such recovery was barred because Allan's services fell under the substandard work exception recognized by the Louisiana courts. Allan argued its work did not require a Louisiana contractor's license because it was engaged as an outsourced maintenance provider and merely mowed grass, moved items/inventory from one side of the facilities to another, transported equipment and outsourced and procured equipment. Further, it provided maintenance work on an open account basis with no particular job related to another, and none of the maintenance services provided or any of the individual invoices ever approached the $50,000.00 threshold required to be considered a contractor under Louisiana law.

The federal district court stated while the US Fifth Circuit Court of Appeals has recognized courts are split as to whether a party must demonstrate the existence of a contract to recover on an open account in Louisiana, the Fifth Circuit has suggested a contractual relationship is required to recover an open account claim. There was no evidence indicating there was a written contract between Allan and Cummins. The parties, however, seemed to agree they had a contractual relationship whereby Allan as a vendor for Cummins agreed to perform facility maintenance work at Cummins' two facilities in Louisiana.

The parties disputed the validity of their purported agreement which turned on whether Allan was required to have a contractor's license to perform the work. Any contract made with an unlicensed contractor is an absolute nullity which is deemed never to have existed. Such a contract may not be confirmed. The court considered whether the services provided by Allan fell within the categories of services listed in the licensing statute, and if so, whether the entire cost of those services was $50,000.00 or more. If the services Allan provided fell within the statutory definition of "contractor" and cost at least $50,000.00, the agreement between the parties was absolutely null and Allan's breach of contract claim, bad faith breach of contract claim and open account claim would fail as a matter of law. If the services performed by Allan did not require a contractor's license or did not exceed $50,000.00, the motion for summary judgment of Cummins would be denied with respect to those claims. If the court found the work performed by Allan fell under any one of the terms in the statute, Allan necessarily met the definition of "contractor." The court found the evidence showed many of the services performed by Allan fell squarely within the definition of "contractor."

Allan argued it did not need a contractor's license because it acted at the continuous direction of Cummins representatives and because it did not provide services related to a construction contract. The court held Allan's contention it did not perform construction work did not take it outside the scope of the statute. Some of the services did not fall within the statutory activities. While the court found Allan provided several services to Cummins that required a contractor's license, Cummins failed to submit evidence of the entire cost of those services was $50,000.00 or more, but it was unclear from the face of the invoices what services Allan billed for each invoice. Cummins failed to direct the court to any evidence in the record demonstrating the total amount billed by Allan for the services the court determined required a contractors license. As a result, the court found a genuine issue of material fact existed regarding the cost of those services which precluded the court from making a determination regarding whether the contract between the parties was an absolute nullity because Allan did not have a contractors license. Cummins failed to carry its burden of proving it was entitled to summary judgment on those claims. The motion for summary judgment was denied to the extent Cummins sought dismissal of those claims.

Cummins, further, argued it was entitled to summary judgment on Allan's unjust enrichment claims because the services Allan provided were substandard which barred its recovery of its actual costs under the substandard work exception recognized by Louisiana courts. The court found Allan raised a genuine issue of material fact regarding whether the work it performed fell within the

substandard work exception. An unlicensed contractor can still recover the actual cost of materials, services and labor, but not any overhead or profit, unless the contractor fraudulently obtained the contract, if he had been inexperienced in the work performed, or if his work had been substandard. A genuine issue of disputed fact existed between the parties concerning whether Allan's work was substandard. Cummins failed to show it was entitled to summary judgment on Allan's unjust enrichment claim, and the motion for summary judgment was denied as to it. *Allan Contracting Enterprises v. Cummins Inc.*, 23-2632 (E.D.La. 11/4/24), 2024 WL 4665256.

AMENDMENT TO STATE A NEW CAUSE OF ACTION AFTER JUDGMENT ON EXCEPTIONS WHICH ALLOWED CURATIVE AMENDMENTS NOT ALLOWED

In a non-construction setting, the defendants filed exceptions of vagueness or ambiguity, non-conformity of the petition and no cause of action. The trial court sustained the exceptions of vagueness or ambiguity and allowed plaintiffs the opportunity to amend the petition to remove the grounds for the objections. Plaintiffs were granted leave of court to file an amended and supplemental petition for that purpose. Plaintiff did not seek leave of court to assert new claims. The new supplemental and amended petition included claims for breach of contract, negligence and interference with a contractual relationship. Defendants moved to dismiss the new petition arguing instead of curing the deficiencies previously identified, the new amended petition asserted entirely new claims based on an entirely new set of facts which exceed the scope of the amendment allowed by the trial court.

The First Circuit Court of Appeal held the Code of Civil Procedure articles that address amendment of a petition to cure the grounds for exceptions which are sustained do not authorize an amendment to state new claims. Since plaintiff's newly-asserted claims could not be considered, and since the previously asserted claims had been dismissed, no claims against the defendants remained. The trial court did not err in sustaining the exception of no cause of action and dismissing all claims against the defendants in the new amended petition. *Daigle v. Integra Insurance Services, LLC,* 2024-0026 (La.App. 1 Cir. 8/21/24), 2024 WL 3886641, *writ denied*, 2024-01170 (La. 11/27/24), 2024 WL 4899718.

PLEADING FRAUD OR MISTAKE

Plaintiffs owned several auto dealerships in Lake Charles and Sulphur, Louisiana. They sued Claremont Property Company who was retained to make repairs to the property following Hurricane Laura in federal court. They alleged Claremont did not perform as required under the agreement by: 1) failing to provide all necessary equipment for the repairs; 2) failing to provide invoices every two weeks; and 3) failing to complete portions of the repairs in a good and workmanlike manner which caused additional damage to the property. Plaintiffs asserted claims for 1) absolute nullity of the contracts; 2) failure to perform and bad faith breach of contract; 3) recission of the contracts based on fraud and/or error; and 4) negligence. Claremont moved for dismissal of the claims for breach of contract, negligence and recission for fraud and/or error.

The trial court held a claim under Louisiana law for recission of a contract due to fraud or error is subject to a heightened pleadings standard. When a plaintiff alleges fraud or mistake, he must state with particularity the circumstances constituting the fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. The court held the plaintiff did not, in alleging fraud, identify Claremont's representative who allegedly uttered the statements concerning its qualifications upon which the plaintiffs relied, as well as the method of communication, and the place and manner in which the communication occurred. Also, there was no description of the skills/equipment misrepresented by Claremont. Still further, the allegations concerning unspecified fraudulent invoices were not specified. The court held plaintiff's pleadings did not provide sufficient particularity as to the specific circumstances of fraud and/or error as to each individual plaintiff, but

allowed the plaintiffs the opportunity to amend their complaint. *Billy Navarre Certified Used Car Imports, LLC v. Claremont Property Co.*, 24-00085 (WD.La 7/31/24), 2024 WL 3607474.

PETITION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION SEEKING A DECLARATION A CONTRACT WAS INVALID AND UNENFORCEABLE DENIED

The Plaquemines Port, Harbor & Terminal District (Port) sought to declare as absolutely null a contract between the Louisiana Department of Transportation and Development and Plenary Infrastructure Belle Chasse, LLC for the Belle Chasse Bridge and Tunnel Replacement Project contending the contract violated state law since its written agreement was not obtained. The court found the Port was aware of the project in 2017. The contract was entered into in December, 2019. The petition of the Port was filed in May, 2023. The contract had been in full force and effect for nearly five years, and construction commenced over four years prior.

The court held it could not undo what had already been done. Because the bridge had been erected, whether the Port was entitled to a permanent injunction was moot. Moreover, a judgment rendered now declaring the contract invalid and enjoining work on a nearly completed project could serve no useful purpose and give no practical relief. The claims of the Port were moot, and the appeal of the trial court's judgment was dismissed. *Plaquemines Port, Harbor & Terminal District v. State of Louisiana, Department of Transportation & Development*, 2024-0099 (La.App. 1 Cir. 9/20/24), ____ So.3d _____, 2024 WL 4248929.

LAW OF THE CASE AND RES JUDICATA

The Louisiana Fourth Circuit Court of Appeal considered application of the doctrines of law of the case and res judicata. It held the law of the case was a discretionary, jurisprudential doctrine under which courts, both trial and appellate, ordinarily will not reconsider their prior rulings in the same case. The doctrine refers to: a) the binding force of trial court rulings during later stages of the trial, b) conclusive effects of appellate rulings at the trial on remand, and c) the rule an appellate court will not ordinarily reconsider its own rulings of law on a subsequent appeal in the same case. Simply stated, law of the case bars reconsideration of issues between the same parties in the same case. The doctrine of *res judicata* bars re-litigation of the same issues between the same parties in a second, subsequent case.

The jurisprudence does not apply the law of the case doctrine inflexibly. Rather, it has applied the doctrine when there is merely doubt as to the correctness of the former holding, but not in cases of palpable former error or so mechanically as to accomplish manifest injustice. It has not been applied to supplant the Code of Civil Procedure provision which clearly permits reconsideration of the overruling of peremptory exceptions. The doctrine has not been applied when the underlying, operative facts upon which a courts prior decision was based have changed. It has also not been applied against those who were not parties to the litigation at the time the prior decision was rendered. *Ebony Holmes v. City of New Orleans, Sewerage and Water Board of New Orleans*, 2024-0269 (La.App. 4 Cir. 9/26/24), ____ So.3d _____, 2024 WL 4297478.

REQUEST FOR MATERIAL ESCALATION COSTS REJECTED

Rigid Constructors, LLC was awarded a project by the United States Army Corps of Engineers. It contracted with Crosby Construction Services, Inc. to perform work on the project. Crosby alleged it became aware of a dramatic increase in steel pricing and sued Rigid, among other things, for breach of contract under state law. Rigid moved for summary judgment.

The court found the Master Subcontract Agreement (MSA) between Rigid and Crosby was clear: no additional payments were due absent written change orders and no changes to payment could occur

without a written change order. The court found the contract was an unambiguous fixed-price contract and it was stipulated no written change order was ever executed related to the cost of steel. The breach of contract claim for escalation cost was rejected. Because the parties did not include a material escalation clause in the MSA or any of the other contract documents, and there was no evidence of an oral modification or mutual error between the parties, the breach of contract claim failed as a matter of law. *Crosby Construction Services, Inc. v. Rigid Constructors, LLC*, 23-00438 (W.D.La. 10/30/24), 2024 WL 4634057.

RELIANCE ON A SUBCONTRACTOR'S BID AND LAWSUIT FOR DAMAGES NOT PREMATURE

DRP Masonry, LLC submitted a bid proposal to Landis Construction Co., LLC in the amount of $656,853.00 to perform masonry work as a subcontractor for a project for which Landis was in the process of preparing its own bid to become the general contractor. Landis was awarded the contract and awarded the masonry subcontract to DRP. DRP subsequently determined the unit price form contained inaccuracies. It updated its bid proposal to Landis and asked Landis to revise the subcontract to reflect a new bid in the amount of $1,035,000.00. Landis responded to DRP's request stating inaccuracies in the unit price form could be addressed in the form of a future change order. DRP did not sign the contract with Landis.

Landis awarded the job to another subcontractor, WT Construction, for $1,025,075.00. Landis sued DRP alleging it had detrimentally relied on DRP's bid proposal and DRP breached the bid proposal when it refused to perform the masonry work for the original stated price. Landis alleged it sustained lost profits and other economic harm. DRP excepted to the lawsuit claiming it was premature, arguing Landis filed suit before its right to recover damages accrued. The trial court denied the exception. DRP sought supervisory review of that decision.

DRP contended the suit was premature because there were still outstanding payments to be made and change orders to be reviewed for the project rendering the final cost of the scope of the masonry unknown. According to DRP, because Landis may still recover its alleged damages through change orders submitted to the owner due to the discrepancies of the unit price form, Landis had not sustained any damages at the time it filed suit and the claims were, therefore, premature.

The court of appeal held the Louisiana Supreme Court stated although damages suffered must at least be actual and appreciable, there is no requirement they be certain or that they be fully incurred, or incurred in some particular quantum, before the plaintiff has a right of action. Prescription begins to run from the date on which the plaintiff suffered actual and depreciable damages. The court of appeal held there was no manifest error in the trial court's denial of the exception of prematurity, nor in its apparent determination DRP failed to meet its burden of proving Landis had not incurred any damages at the time it filed suit. Exact damages are not required when filing a breach of contract claim and are prohibited from being pled in a tort action. *Landis Construction Co., LLC v. DRP Masonry, LLC*, 24-510 (La.App. 5 Cir. 10/31/24), 2024 WL 4635585.

CLAIM BY A SUBCONTRACTOR FOR PAYMENT UNDER THE LOUISIANA PUBLIC WORKS ACT

A masonry subcontractor sued a general contractor for payments allegedly due under the Louisiana Public Works Act for extra materials and work. The subcontractor submitted proposed change orders which were not accepted and paid by the general contractor and filed a sworn statement of claim and privilege for the unpaid balance. The general contractor moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the claims on the basis there were insufficient facts to show the subcontractor was entitled to additional compensation. It also argued certain defenses under the subcontract.

The United States District Court for the Eastern District of Louisiana held the category of "claimants" under the Act includes any person to whom money is due pursuant to a contract with the owner, contractor or subcontractor for doing work performing labor, or furnishing material or supplies for the construction of any public work. However, a determination of whether money is due pursuant to a Public Works contract was improper at the current Rule 12(b)(6) phase. The Rule provides for a challenge to a claim for failure to state a claim upon which relief can be granted.

A review of the complaint showed the subcontractor set forth a plausible claim for relief under the LPWA which stated the general contractor and the project architect expressly directed plaintiff to order new materials and perform extra work, the general contractor expressly agreed to pay plaintiff for the extra work, plaintiff submitted written change orders for the unpaid amounts pursuant to the subcontract, and the general contractor's actions and express communications effectively modified the subcontract pursuant to Louisiana law. Louisiana law provides written contracts may be modified by oral contracts or by the conduct of the parties, even when the written contract contains a provision they must be modified in writing. Modification of a written agreement can be presumed by silence, inaction, or implication. While the general contractor argued the subcontractors allegations the subcontract was modified have no merit, resolution of the issue requires a factual determination.

From the face of the complaint there must be enough factual matter to raise a reasonable expectation discovery will reveal evidence as to each element of the asserted claims. It is inconsistent with the legislative intent of the LPWA to protect those performing labor and furnishing materials for a public work to dismiss the claims at the current stage without allowing time for discovery on whether the contract was modified. The motion to dismiss was denied. The complaint stated a claim for relief under the LWPA. *Small Construction Group, LLC v. Berkshire Hathaway Specialty Insurance Company*, 23-6866, (ED.La. 12/3/24), 2024 WL 4953543.

CLAIM FOR INDEMNITY DISMISSED

Lemoine Company, LLC as the general contractor subcontracted with FL Crane for certain work. Crane then contracted with Max Access LLC for the scaffolding. Max filed a third-party complaint against Crane asserting Crane was negligent and in breach of contract for violation of an alleged indemnity provision. Crane moved to dismiss the claim.

The United States District Court for the Western District of Louisiana as to the negligence claim held comparative fault principles applied unless Max asserted valid claims for contribution or indemnity under tort theories of negligence. There were no valid claims asserted for contribution. Contribution permits a tortfeasor who has paid more than his share of a solidary obligation to seek reimbursement from other tortfeasors for their respective shares of a judgment, which shares are proportionate to the fault of each. Solidary liability arises pursuant to Civil Code art. 2324 only if tortfeasors conspired to commit an intentional or willful act. Absent intentional or willful conduct, a joint tortfeasor will not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damage attributable to the fault of such other person. Crane did not conspire to commit intentional tort or acts. Because no intentional act occurred, joint and solidary liability could not exist between Max and Crane with respect to the claims.

Further, Max did not state a valid claim for indemnity under contract principles. The court held Louisiana contract law provides contribution and indemnity are only available to solidary obligors. An obligation is solidary when multiple obligors or obligees agree to render one inseparable performance. Thus, a single obligor could be called upon to perform the entire obligation. The court held solidarity did not arise by contract in the matter presented. Crane was not solidarily liable with Max and the

analysis stopped there. There was no valid claim for indemnity by contract. All claims of Max were dismissed. *Craft v. Max Access, LLC*, 22-05899 (WD.La. 11/21/24), 2024 WL 4859095.

THIRD PARTY DEMAND

An individual sued the owner of a parking lot when the gate, as she was exiting, malfunctioned and fell on top of her. She sued the owner for damages. The owner filed a third party demand against the contractor who made repairs to the gate alleging the injuries were caused by the contractors negligence and fault and avered if the owner was found liable to plaintiff, it was entitled to indemnity and contribution from the contractor. The contractor filed an exception of prematurity and an exception of no cause of action. The district court denied the exceptions. The contractor sought supervisory review by the court of appeal.

The court of appeal found the owner's allegations against the contractor were not solely constructive or derivative. The district court, after trial on the merits, could allocate a percentage of fault to the owner. Because the owner's own negligence would be considered in an allocation of comparative fault, a claim for tort indemnity could not simultaneously exist. A party seeking indemnification must be without fault. As a result, the weighing of the relative fault of others has no place in the concept of indemnity. The operative facts giving rise to the owner's tort indemnity claim were separate and distinct from the breach of contract claim. The owner stated a cause of action for breach of contract even if the tort indemnity claim failed.

The court of appeal held because the petition did state a cause of action, it would not dissect the matter at that point in the litigation. Although the supervisory writ was granted, the relief sought by the contractor was denied. *Cavet v. ABC Insurance Company*, 2024-0428 (La.App. 4 Cir. 8/5/24), _____ So.3d _____, 2024 WL 3648069.

DAMAGES AWARDED AS A RESULT OF A RESIDENTIAL CONTRACTOR'S FAILURE TO OBTAIN A LICENSE

The Rincons contracted with Hicks for a renovation to their house which consisted of construction of screen porch with an outdoor kitchen and improvement of yard drainage. The original contract price was $50,200.00. The contract price was later increased to over $100,000.00. The Rincons were unhappy with Hicks' work and terminated the arrangement. They sued Hicks. Hicks filed for Chapter 11 bankruptcy. The Rincons objected to the dischargeability of Hick's debt in bankruptcy. They filed an unsecured claim against Hicks in the bankruptcy proceeding in the amount of $142,366.00. As a result of a previous order, the monetary damages were limited to $124,949.00.

The Rincons alleged Hicks was guilty of fraud contending he was unlicensed, misrepresented that fact at the outset of the contractual relationship and several times thereafter, and the Rincons would not have chosen him as their contractor had he been truthful with them about his lack of a contractor's license.

It was undisputed neither Hicks nor his company was a licensed contractor in Louisiana at any time while working for the Rincons. Mrs. Rincon testified they asked Mr. Hicks whether he was a licensed contractor and he responded affirmatively. She also testified she asked Hicks several times for his license number, but he continuously made excuses for not providing it to her. Mrs. Hicks made contemporaneous notes consistent with her testimony.

Louisiana law requires persons performing home improvement projects between $7,500.00 and $75,000.00 to be licensed home improvement contractors, and any party contracting to do residential construction over $75,000.00 must have a residential contractors license. The cost of the project was originally $50,200.00, but it more than tripled due to changes and additions requested by the Rincons.

Therefore, Hicks was required by Louisiana law to hold a home improvement license at least at the outset of the project and a residential contractor's license when the change orders increased the price.

Because the original contract was unenforceable, the Rincons had no breach of contract claim against Hicks. Although damages for breach of contract are not available, Louisiana law with respect to null contracts nevertheless requires courts to restore the party to the situation that existed before the contract was entered into. The decision rested on whether the Rincons met their burden of proof on each line item of damages.

The Rincons met their burden of proof as to $50,884.00 of their claim, not including attorneys' fees. The court was then required to decide whether this liquidated debt was incurred by fraud pursuant to Louisiana law, and if so, to what extent the Rincons are entitled to attorneys' fees. La. C.C. art. 1953 defines fraud as a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction. The jurisprudence established three elements of fraud: 1) 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 circumstances substantially influencing the victim's consent to the contract. As reviewed earlier, the Rincons testified they asked Hicks whether he was licensed contractor and he responded affirmatively. Mrs. Rincon testified she asked Hicks several times for his license number but he continuously made excuses for not providing it to her. Mrs. Rincon's contemporaneously made notes corroborating her testimony.

Hicks admitted he was unlicensed but denied telling the Rincon's he was licensed. He testified the Rincon's never asked if he was licensed. Hicks' testimony was at odds with an affidavit he submitted in connection with his response to a motion for summary judgment filed earlier in the proceeding. In the affidavit, he attested Mr. Rincon asked if he had a residential contractor's license and he stated he did not.

The court found the Rincon's proved, by a preponderance of the evidence, Hicks falsely represented to them that he was a licensed contractor, and proved their first element of fraud. As to the second element, intent to obtain an unjust advantage or to cause damage or inconvenience to another, the court found the Rincon's proved by a preponderance of the evidence Mr. Hicks had the intent to gain an unjust advantage over the Rincons by misrepresenting he was a licensed contractor. The third element of fraud, relating to a circumstance substantially influencing the victim's consent to the contract, was reviewed. The court found the Rincons testified credibly they would not have hired Hicks had they known he was not licensed and the Rincons proved by a preponderance of the evidence their consent to hire Hicks was substantially influenced by his misrepresentation. The Rincons proved all elements necessary to show Hicks committed fraud under Louisiana law.

As to attorneys' fees, La.C.C. art. 1958 provides a party against whom recission is granted because of fraud is liable for damages and attorneys' fees. Hicks was required to hold a license by statute. The statute is a textbook example of a rule of public order. The lack of a license renders a contract an absolute nullity. The Rincons did not seek recission because the contract between the Rincons and Hicks was absolutely null, making its recission as a relative nullity both unnecessary and duplicative. Even though the Rincons had not sought recission, they were entitled to attorneys' fees for their successful prosecution of a fraud damage claim.

The Rincons sought $52,758.00 in attorneys' fees. The court held it could not, however, ignore the ultimate claim award which was slightly below the fee requested. A significant portion of the fee request related to prior proceedings in the bankruptcy matter for which a creditor is not entitled to reimbursement for fees. The Rincons proved a damage claim of $50,884.00 plus attorneys' fees of $19,300.00 for a total claim of $70,184.00. The court found Hicks knowingly and fraudulently led Mrs.

Rincon on as to his license when she asked for the number. This, according to the court, showed his intent to deceive. Both Mr. and Mrs. Rincon testified they would not have hired Hicks had they known he was unlicensed. The court believed that testimony. Therefore, they proved their reliance on Hicks' false statements about being licensed, and that reliance was justifiable. The amount owed was not dischargeable in the bankruptcy. *In re: Kasey Hicks Debtor, Gabriel Rincon, Angela Rincon v. Kasey Hicks Defendant*, 23-10289 (Bankr.MD. La.) 2024 WL 4126755.

PEREMPTION UNDER L.R.S. 9:2772

Laurie and Gordon Mosher added an addition to their home. They contracted with Wilserv Corporation to install spray foam insulation. The work was completed on April 1, 2013. In early 2021, the Moshers noticed soft spots on the floor. In August of that year, they discovered gaps and holes in the spray foam insulation under their bathroom floor. They sued against Wilserv on July 20, 2022 alleging it used a mixture of open and closed cell insulation where only closed cell insulation was required.

Wilserv filed a peremptory exception of peremption arguing the claims were perempted under L.R.S. 9:2772 which provides a five-year peremptive period for construction contracts. The Mosher's contended the contract with Wilserv was for a service and/or contract to sell and not a construction contract. Wilserv argued it was a contract to build and L.R.S. 9:2772 was applicable.

Louisiana courts consider three factors in determining whether a contract is a contract of sale or a contract to build or to work by the job, referred to as construction contracts. First, in a contract to build, the purchaser has some control over the specifications of the object. Mr. Mosher testified they did not have a say in the type of foam used, whether closed or open cell, or how it was applied. The second factor considers the timing of the negotiations which take place before the object is constructed in a contract to build. Mr. Mosher testified Wilserv's sales agent presented the proposal to the Moshers before the insulation was installed. Last, and most important, a building contract contemplates not only the builder will furnish the materials, but that he will also furnish his skill and labor to build the desired object. The jurisprudence has held a contract involving work to be done is a construction contract even when the undertaker (contractor) is required to furnish some of the materials.

In a footnote, the court of appeal stated courts have also applied the "value test" to determine the nature of a contract. Under that test, the court determines whether the labor expended in constructing an item, or the materials incorporated therein, constitute the principal value of the contract. The record did not establish a separate value of Wilserv's labor and materials. Therefore, the court of appeal did not consider the value test.

The trial court held the contract was a contract to build or to do work by the job and the claims against Wilserv were perempted. The Moshers appealed. They contended the statute requires a "builder" and did not apply because Wilserv did not build or construct anything. The court of appeal held the statute was not so limited. The insulation was incorporated into the home, an immovable, such that it became immovable or constituted an improvement to immovable property under L.R.S. 9:2772. Insulation is a material that, according to prevailing usages, serves to complete a residence. The court of appeal held the claims were perempted since the Moshers failed to assert them against Wilserv before the expiration of the five-year peremptive period. *Mosher v. Wilserv Corporation*, 2024-0212 (La.App. 1 Cir. 9/27/24), _____ So.3d _____, 2024 WL 4311570.

INSURERS ENTITLED TO PRELIMINARY INJUNCTION TO ENJOIN PROSECUTION OF AN ARBITRATION DEMAND AND MOTION TO COMPEL THE ARBITRATION DENIED

Crescent City Aviation Team contracted with the City of New Orleans through the New Orleans Aviation Board to perform professional engineering and architectural design and related services for

the construction of the new terminal facility at the Louis Armstrong International Airport. The contract contained an arbitration clause. The City of New Orleans filed an arbitration demand against Crescent City Aviation and its insurers demanding $51,000,000.00 in damages for errors and omissions and a fifty percent extracontractual penalty under L.R.S. 22:1892. The insurers sued the City of New Orleans in a declaratory judgment action contending it had no right to demand arbitration and they should not be parties to the arbitration. The insurers moved for a preliminary injunction. The City moved to compel the arbitration.

In seeking a preliminary injunction, the court found the insurers must show: 1) a substantial likelihood they would prevail on the merits; 2) a substantial threat they would suffer irreparable injury if the injunction is not granted; 3) threatened injury outweighs the threatened harm to the party sought to be enjoined; and 4) granting the preliminary injunction would not disserve the public interest. A preliminary injunction should only be granted when the party seeking is has clearly carried the burden of persuasion on all four requirements. The City of New Orleans did not contend the second, third and fourth requirements for injunctive relief were not met. While non-signatories to an arbitration agreement can be compelled to arbitrate under various state law theories, the insurers averred those theories were not applicable. The parties disputed whether the Louisiana Direct Action Statute permits a direct-action plaintiff to demand arbitration from an insurer with which the plaintiff has no privity of contract.

The court found the insurers did not agree to arbitrate and the Louisiana Direct Action Statute does not compel third-party insurers to submit to binding arbitration where their insureds have agreed to arbitrate but the insurers have not. Even so, non-signatories may be bound by an arbitration clause in certain circumstances. Six theories for binding non-signatories to an arbitration agreement have been recognized: a) incorporation by reference; b) assumption; c) agency; d) veil-piercing/alter ego; e) estoppel; and f) third-party beneficiary. The court, after reviewing each possible circumstance, concluded no state-law theory to bind a non-signatory to an arbitration agreement existed in this instance.

The insurers carried their burden of showing a substantial likelihood of success on the merits by demonstrating the claims of the City of New Orleans against them were non-arbitable. The motion of the insurers for a preliminary injunction was granted. Since the insurers did not agree to arbitrate the claims asserted by the City of New Orleans, and none of the state-law theories for enforcing an agreement against a non-signatory applied, the motion the City of New Orleans filed to compel the arbitration was denied. *Chubb Capital Limited v. New Orleans City*, 23-5806 (ED.La 5/6/24), 732 F. Supp. 3rd 558.

ARBITRATION

Mary John Family, LLC as the owner contracted with Stevens Construction & Design, LLC for the renovation of a gas station. Disputes arose between the parties. Mary John sued Stevens alleging breach of contract, negligence and violation of the Louisiana Unfair Trade Practices Act. Stevens filed an exception of prematurity. The contractual dispute resolution procedure provided for in the contract required, as a first step, submitting claims to an Initial Decision Maker before being mediated. The project architect was selected as the Initial Decision Maker. Mary John opposed the exception, arguing it was not bound by the terms of the construction contract requiring an initial review process because the parties, by their oral statements and actions, modified the written terms of the agreement. The trial court granted the exception and ordered the parties to participate in the Initial Decision Maker's review process.

The architect issued his report, and the trial court issued a written judgment granting the exception of prematurity. Stevens moved to confirm the decision of the architect, characterizing it as final. Stevens averred Mary John waived its rights to pursue litigation because it failed to file for

mediation, a required step in the dispute resolution process. The trial court confirmed the initial decision of the architect as final and binding. Mary John appealed.

The contract required litigation and rejected arbitration. There was no valid agreement to arbitrate and the trial court erred in granting Stevens' motion to confirm an arbitration award. The court of appeal stated the question before it was whether a party may be allowed to entirely skip the second step of the dispute resolution process, mediation, in favor of litigation. It found the selection of binding dispute resolution, litigation, applied to any claim subject to, but not resolved by mediation. There was to be a progression from an initial decision to mediation to litigation. Litigation was to be pursued only after mediation.

The contract provided the initial decision would be final and binding on the parties but subject to mediation and, if the parties failed to resolve their dispute through mediation, to binding dispute resolution, here, litigation. It also provided the parties may accept the decision or either party may, after an initial decision, file for mediation or demand in writing the other party do so. If such a demand is made on the other party to file for mediation, and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

Mediation was a prerequisite to litigation and Mary John elected not to pursue mediation. Stevens informed Mary John it was electing not to file for mediation. The court held Mary John could have initiated the mediation process, but elected not to do so. If neither party filed for mediation within the time limit required by the contract, then both parties waived the right to mediate or pursue binding dispute resolution proceedings. Neither party filed for mediation and both waived their right to litigate the issues. *Mary John Family, LLC v. Stevens Construction & Design, LLC*, 24-132 (La.App. 5 Cir. 10/30/24), ____ So.3d _____, 2024 WL 4613294.

ARBITRATION AGAINST A SURETY DENIED AND STAY OF THE PROCEEDINGS

The United States District Court for the Eastern District of Louisiana held despite a clause in a contract between a general contractor and subcontractor, to which the surety was not a party, generally requiring arbitration of disputes, the surety was not required to arbitrate the subcontractor's Miller Act claim. Absent express contractual intent to subject Miller Act claims to arbitration, or an equitable basis to do so, courts would not force arbitration of claims against non-parties, nor would the parties be forced to arbitrate Miller Act claims against any defendant where an express waiver is statutorily required but did not exist.

The general contractor contended the subcontractor should be equitably estopped from litigating its claims against the surety. Courts have recognized equitable estoppel as a defense to Miller Act claims when the subcontractor made misleading representations to the general contractor and the surety. Additionally, the Miller Act requires express, written waiver of a right to bring an action in federal court. There was no argument the subcontractor made misleading representations to the contractor and the surety to their detriment or otherwise engaged in misleading conduct or a waiver executed. Equitable estoppel did not apply. The court, however, stayed the proceeding pending arbitration of claims between the subcontractor and general contractor. *United States of America, for the Use and Benefit of D. Hayes Enterprise, LLC v. Justin J. Reeves, LLC*, 24-868 (ED.La 8/30/24), 2024 WL 4006164.

REVERSAL OF A DISTRICT COURT JUDGMENT VACATING AN ARBITRATION AWARD

Willow Grove – North, LLC contracted with Durr Heavy Construction, LLC to relocate and replace a 1-1/2 mile stretch of Dawson Creek in Baton Rouge. Durr filed an arbitration proceeding against Willow Grove for breach of contract for failure to pay its charges for fill. Durr claimed it was due $120,187.89. Willow Grove filed a counter-claim in the amount of $521,500.00 for Durr's failure

to complete the work and/or defective work. The arbitrator rendered an award in favor of Willow Grove. Willow Grove filed a proceeding in district court to confirm the arbitration award. Durr responded with a request the award be vacated. Durr argued the arbitrator used extrinsic evidence from before the contract was entered into to determine the contract's sum and improperly used an earlier proposal sent years in advance of the contract, as well as an email sent months prior to the contract that was not made a part of the contract. The district court vacated the arbitration award finding the arbitrator exceeded his power. It denied Willow Grove's request to confirm the award. Willow Grove appealed.

L.R.S. 9:4210 provides a district court shall issue an order vacating an award: a) where the award was procured by corruption, fraud or undue means; b) where there was evident partiality or corruption on the part of the arbitrators or any of them; c) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced; and d) where the arbitrator's exceeded their powers or so imperfectly executed them that a mutual, final and definitive award upon the subject matter submitted was not made. L.R.S. 9:4211 directs a district court to modify or correct an award: a) where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award; b) where the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted; and c) where the award is imperfect in matter or form not affecting the merits of the controversy.

The court of appeal held a judgment vacating an arbitration award is reviewed *de novo* on appeal, with great deference given to the arbitrator's decision and district court's ruling confirming or vacating an arbitration award presents a legal issue. An arbitrator exceeds his authority only if he acts outside the scope of his contractually delegated authority by issuing an award reflecting his own methods of economic justice rather than drawing its essence from the contract. Because the parties bargained for an arbitrator to interpret their contract, a decision even arguably construing or applying the contract must stand, regardless of the district court's review of its merits. By consensually substituting arbitration for litigation, it is presumed the parties accept the risk of procedural and substantive mistakes of either fact or law by the arbitrator, which mistakes are not reviewable by the district court. Errors of fact or law do not invalidate a fair and honest arbitration award. It is not the role of the judiciary to correct errors of fact or law, therefore, the calculation of damages is beyond review by the courts. The courts do not review how or why the arbitrator made its award. Instead, they examine whether the arbitrator had the contractual authority to issue its award. The court of appeal found the arbitrator's award set forth factual findings and analyzed the parties' claims.

The court of appeal determined the arbitrator acted within the scope of authority contractually conferred. Durr's allegation that the arbitrator misinterpreted the parties' contract is not subject to judicial correction. This type of substantive review of an arbitrator's findings and interpretations of a contract between the parties is simply not contemplated within the scope of the statute. Even if the court were to disagree with the arbitrator's decision on the merits, there is no evidence the arbitrator exceeded or imperfectly executed his powers, nor is there any evidence of corruption, fraud, undue means, partiality, or other misconduct in the proceeding.

Moreover, the court of appeal found there were no grounds for the district court to vacate or modify the arbitration, and the court was prohibited from reviewing the merits of the arbitrator's decision. The parties may not seek review of the merits of a case that has been submitted to arbitration by couching their argument in terms of the arbitrator having exceeded his authority. An arbitrator's conclusion drawn from conflicting evidence does not equate to misconduct or use of undue means in resolving disputed facts, and, consequently, does not provide a basis for vacating an arbitration award. Durr's argument to the arbitrator using extrinsic evidence did not justify modifying or vacating an

arbitration award as it is based on error of law. Errors of fact or law do not invalidate a fair and honest arbitration award.

The court of appeal found Durr had not raised valid issues challenging the arbitration award in accordance with the statute. It found the district court erred in denying Willow Grove's motion to confirm the award. *Durr Heavy Construction, LLC v. Willow Grove – North, LLC*, 2024-0090 (La.App. 1 Cir. 8/6/24), 2024 WL 3665532.

DUTY OF AN ENTITY WHICH ORDERED PARTS

Cohen Industrial Supply Company was alleged to have performed a material takeoff for a pump station project and ordered pipe connections which allegedly failed causing personal injuries to an employee at the site. Cohen moved for summary judgment on the basis the injured party could not establish all of the required elements of negligence alleged. The trial court granted the motion. The judgment was appealed.

There was no allegation of a product defect, only the construction used incorrect parts. The affidavit of an engineer retained by one of the parties stated the plans called for a flanged connection for the pipes that allegedly separated and caused the injury.

The Louisiana Fifth Circuit Court of Appeal found the record did not show any party complied with Cohen's Order Shipment Notice to check the material received against the listing of parts and to properly inform Cohen of any discrepancies. Cohen's undisputed role consisted of identifying parts for the project at issue from Providence's design and forwarding the order of any parts to Starr Pipe for fulfillment. It was clear and undisputed Cohen had no responsibility whatsoever for providing packaging or installing the materials, which would have fallen to Star Pipe, nor was it responsible in any way for installing or supervising the installation of Star Pipe's products. The record did not show other parties sought clarification on any part's use before installation or sought a determination of whether a given part exactly matched the specification required by Providence's overall design.

The court held the identification and installation of correct parts were within the prevue of the sophisticated users who acquired them. Their failure to use a flanged connection when the plans called for one could not be attributed to Cohen when sending the parts to the site. Cohen's duty fell within the confines of the purchase order and ended with the delivery of the products. The judgment of the trial court was affirmed. *Cavalier v. St. James Parish*, 23-424 (La.App. 5 Cir. 4/24/24), 386 So.3d 340.

REFORMATION OF AN INSURANCE POLICY

A subcontractor agreed to procure insurance for a project. The contract between the general contractor and the subcontractor required the policy would name the general contractor as an additional insured. It was not, however, identified as an additional insured. The general contractor sought equitable reformation of the policy in order to afford it coverage as an additional insured based on the assertion the insurer agreed to include it as an additional insured but failed to do so or the insurer misrepresented the terms of the policy offer leading the general contractor to reasonably believe he was an additional insured. Insurance policies may be reformed, as can other written agreements, if through mutual error or fraud, the policy as issued does not express the agreement of the parties. In the absence of fraud, the party seeking reformation has the burden of proving a mutual error in the written policy.

The insurer's underwriter sent a formal proposal to the insurance broker of the subcontractor. There was no mention in the proposal of the general contractor being an additional insured. The proposal stated, among other things, some coverage or endorsements provided in the proposal may differ from those requested and the proposal should be reviewed carefully. Further, the document stated the recipient should notify the insurer's underwriter if any of the information contained in the

proposal was incorrect. The managing member of the subcontractor admitted he did not review the insurance application submitted on the subcontractors behalf or the policy to determine whether the coverage provided met the subcontractors needs, and the subcontractor's broker testified his office issued the certificate of insurance without either reviewing a copy of the policy or contacting the insurer to verify the coverage.

The court held there was no evidence of a genuine issue of material fact as to whether the insurer either offered or agreed to include the general contractor on the policy as an additional insured. There was no evidence the insurer actually offered, or implied it was offering, the subcontractor the coverage sought for the general contractor. The court concluded the general contractor was not entitled to coverage under the policy as an additional insured. *Chet Morrison Contractors, LLC v. Spartan Directional, LLC*, 2023-0981 (La.App. 1 Cir. 6/14/24), 391 So.3d 1103.

LIABILITY OF AN INDEPENDENT CONTRACTOR

The Louisiana Workers' Compensation Act provides that independent contractors are expressly excluded from the provisions of the law unless a substantial part of the work time of an independent contractor is spent in manual labor by him in carrying out the terms of the contract, in which case the independent contractor is expressly covered by its provisions. This is known as the manual labor exception. The Louisiana Second Circuit Court of Appeal held the exception is limited to the independent contractor and not the independent contractor's employees or its independent contractors. *McBride v. Old Republic Insurance Company*, 55,772 (La.App. 2 Cir. 10/9/24), _____ So.3d _____, 2024 WL 4447068.

APPLICATION OF AMENDMENTS TO LOUISIANA DIRECT ACTION STATUTE

In a maritime personal injury claim the injured party sued a tugboat owner and operator and, under the Louisiana Direct Action Statute, its insurers. The insurers moved to dismiss the claims against it as a result of the 2024 amendments to the statute. Before the August 1, 2024 amendments, an injured party could bring suit against insurers, jointly and *in solido*, with its insured if the policy had been issued in Louisiana. The injured party could bring an action the insurer alone, but only if one of six qualifying circumstances were present. After the August 1, 2024 amendment, the permissive joint-suit against insurers and insured were eliminated, maintaining direct actions against insurers only under extenuating circumstances.

The insurers argued the statute was procedural and, therefore, applied retroactively. The injured party contended the legislation provided a substantive right of action and the law at the time of filing of the petition controlled. The court found the insurers correctly interpreted the procedural nature of the statute which granted a procedural right of action against the insurers where the plaintiff has a substantive cause of action against the insured. The legislative amendment was silent on the application of the revised text. Therefore, the statute was properly understood to have retroactive application.

Nevertheless, the court concluded the dismissal of the claims against the defendant insurers nearly a month before trial did not provide the injured party with sufficient due notice and an opportunity to be heard. The claim as pled over three months before amendment to the Statute was properly brought against the insurer. *Maise v. River Ventures, LLC*, 23-5186 (ED.La 9/23/24), 2024 WL 4266698.