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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).

ONE-YEAR PRESCRIPTIVE PERIOD SUPERCEDED BY L.R.S. 9:5607

The Louisiana Second Circuit Court of Appeal held the one-year prescriptive period for actions of tort in C.C. art. 3492 is superseded and displaced by L.R.S. 9:5607, the five-year peremptive period for actions against professionals such as architects and engineers. It is likely an application for a writ of *certiorari* to the Louisiana Supreme Court will be filed. *City of Shreveport v. CDM Smith, Inc.*, 56,154 (La.App. 2 Cir. 7/16/25), _____ So.3d _____, 2025 WL 1947593.

MOTION TO VACATE AN ARBITRATION AWARD DENIED AND CROSS-MOTION TO CONFIRM THE AWARD GRANTED

A dispute arose between United States Trinity Energy Services, LLC and Southeast Directional Drilling, LLC concerning standby charges assessed by Southeast when its drilling equipment and personnel were on site but unable to drill. The matter was submitted to arbitration. A panel of three arbitrators found Southeast was entitled to $1,662,000.00 for standby costs. Trinity filed a petition to vacate the award in the United States District Court for the Northern District of Texas. The district court denied the motion to vacate and granted the cross-motion of Southeast to confirm the award. Trinity appealed to the United States Court of Appeals, Fifth Circuit.

Trinity claimed the arbitration panel failed to harmonize numerous subcontract provisions limiting its obligation to pay standby costs and manifestly disregarded Texas law in interpreting the contract and therefore exceeded its authority as provided by federal law. The court of appeals found

the arbitration panel decided the matter based on briefing provided by the parties and oral argument. The final award revealed the arbitration panel reviewed the evidence presented, considered the effects of various provisions in the subcontract, and concluded Trinity owed Southeast for standby costs. Trinity failed to show the arbitration panel exceeded its powers by entirely disregarding the subcontract.

Manifest disregard of the law is not a freestanding ground for vacating an arbitration award in the Fifth Circuit. Trinity was attempting to "subterfuge" that non-standing ground for vacating the award within the grounds established by federal law for doing so. The specific grounds for vacating an arbitration award by exceeding their powers under Federal law include conduct such as corruption, fraud, evident partiality and misconduct. 9 U.S.C. § 10. Vacatur was unjustified under the federal arbitration law. The parties bargained for the dispute resolution arrangement. The court concluded the panel's "construction holds, however good, bad, or ugly." *United States Trinity Energy Services, LLC v. Southeast Directional Drilling, LLC*, 24-10833, 135 F.4th 303, (5th Cir. 2025).

DAMAGES TO IMMOVABLE PROPERTY

The Louisiana Fourth Circuit Court of Appeal held prescription of a claim for damage to immovable property commenced to run when the plaintiff had sufficient knowledge to put him on inquiry and on his guard to ascertain the true facts. The court, in reaching that conclusion, relied upon Civil Code art. 3493 which, at the time, provided a prescription period of one year for damage caused to immovable property which commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage. The article was revised to reflect the current prescriptive period for damages to immovable property of two years. Otherwise, the article, now C.C. art. 3493.2, is the same as the prior article. The court held the plaintiff personally observed the damage to his property and contemporaneously hired an expert with whom he consulted. Plaintiff then had one year to obtain all information and file a lawsuit.

The court of appeal also considered the plaintiff's argument the damage was a continuing tort sufficient to extend the date prescription began to run. The court rejected the argument holding a continuing tort requires continual acts, not continual effects and damages. There was no evidence the work performed which caused the damages continued beyond the date plaintiff acquired actual knowledge of the damages. The operating cause of the damage was a discreet event, discontinuous in nature. There was not a continuing tort. *Scurlock v. Kurt Heitmeier*, 2025-0096 (La.App. 4 Cir. 6/23/25), _____ So.3d _____, 2025 WL 1733121.

INDEMNITY

The Louisiana Fourth Circuit Court of Appeal in a matter which did not involve a construction contract held a contractual indemnity agreement will not be construed to require the indemnitor to indemnify the indemnitee for the indemnitee's own negligence unless that intention was expressed in unequivocable terms in the indemnity agreement. In the matter at hand, the court found the indemnity agreement did not constitute an agreement by which the indemnitor would indemnify the indemnitee against losses resulting from the indemnitee's own negligence because the indemnification provision contained no unequivocable intention to that effect.

The court also considered whether the indemnity agreement was otherwise premature. The court recognized prior jurisprudence which held where an indemnitee's negligence or lack thereof has not been determined, any obligation the indemnitor had to indemnify and defend have not yet arisen, and the indemnitee's claims for indemnification and defense are premature. However, the court of appeal recognized Louisiana Supreme Court jurisprudence which held, as a general matter, a third-party demand for indemnity is not premature when asserted before a finding of liability. The court,

relying on that jurisprudence, held the indemnitee had a right to claim indemnity and defense, but not the right to collect indemnity and defense costs from the indemnitor since there had not been an allocation of fault to establish the percentage of indemnification and defense for which the indemnitor might be responsible. The indemnitee stated a cause of action in its third-party demand but had not yet attempted to enforce the agreement for an allocation of fault to establish the percentage of indemnification and defense for which the indemnitor might be responsible. *Anderson v. Briggs*, 2023-0814 (La.App. 4 Cir. 4/25/25), ___ So.3d ___, 2025 WL 1201891.

DEMAND FOR INDEMNITY

A general contractor, Myers, was sued by an owner for damages as a result of defects in the work performed allegedly caused solely by the negligence of the general contractor. The general contractor subcontracted the window work to a subcontractor, Relief. The subcontractor was required to install all wood windows on the project. The subcontract contained indemnity and defense obligations which required the subcontractor to indemnify the general contractor for claims arising out of or connected with the performance by the subcontractor of the work unless it was caused solely by the negligence of the general contractor. The general contractor filed a third-party demand against the subcontractor seeking indemnification for purported derivative liability. It argued if it was held liable for its work on the project, some of the work, the window work, was performed by Relief pursuant to the subcontract.

The subcontractor filed a motion to dismiss the third-party demand against it. The court held a third-party claim may be used for derivative liability claims, and Louisiana law has long recognized the right of a general contractor to obtain a defense and indemnity for defects arising out of inherent design defects and faulty installation which were the work of a subcontractor. The subcontractor, apparently, attacked only the third-party demand on factual plausibility and the Louisiana Anti-Indemnity Act. If plaintiff's allegations extended to defective windows, Myers faced liability for Relief's conduct, even though Myers did not actually perform window work. This was not a case where the general contractor suggested the subcontractor, not it, is liable to plaintiff. Instead, if the general contractor was held liable to plaintiff for defects in the projects exterior, that are ultimately, in part, traceable to the subcontractor's window work, this technical constructive liability could be subject to indemnification by the subcontractor.

The court held it was plausible the water leaks were caused by defects in the property's exterior included windows. The subcontractor did not dispute it was responsible for the window installation and that such windows were installed in the exterior walls. The court held the allegations at this stage plausibly included all exterior work, and, therefore, the third-party demand was factually plausible. The court, further, found the Louisiana Anti-Indemnity Act (LAIA) did not apply because the indemnitee, was the general contractor and not the subcontractor. To violate the LAIA, the subcontract would have to require the subcontractor to defend the general contractor from the consequences of the general contractor's actions. Rather, the indemnity and defense clauses required the subcontractor to defend indemnify the contractor in any way arising out of or connected with the performance by the subcontractor of the work, unless it was caused solely by the negligence of the contractor. The clauses plainly excluded indemnification of the general contractor for its own negligence. Therefore, the subcontract, insofar as it applied to the subcontractor's acts and omissions, was valid under the LAIA. The motion to dismiss of the subcontractor was denied. *535 Iberville, LLC v. F.H. Myers Construction Corp.,* 24-cv-56 (ED.La. 2/18/25), 2025 WL 522701.

RESOLUTION OF A DISPUTE AS A RESULT OF A CHANGE ORDER AND L.R.S. 38:2216(H)

Pontchartrain Partners, LLC entered into a public bid contract with the Terrebonne Levee and Conservation District to perform levee construction work for the Morganza to the Gulf – Hurricane Protection Interim Flood Risk Reduction Project. The project as originally designed was unable to be

completed utilizing the quantity of materials specified in the contract, requiring a change of design resulting in delays which eventually culminated in the execution of certain change orders. Pontchartrain filed a Petition for Breach of Contract against Terrebonne alleging it incurred significant costs and delays not within its control over the course of the contract. Further, it contended it dredged a certain amount of cubic yards that were billable but was directed to bill for only a reduced amount and to bill the remainder of the dredged material differently causing its earnings to be reduced.

Terrebonne moved for partial summary judgment arguing, pursuant to Section 10.8 of the contract, Pontchartrain waived all claims for increase in price and delays due to the project's design after negotiating and executing change orders. Pontchartrain, among other things, contended it was impossible for it to waive claims for delay damages when waiver of such claims is precluded by L.R.S. 38:2216(H). The statute provides any provision contained in a public contract purporting to waive, release or extinguish the rights of a contractor to recover cost of damages, or obtain equitable adjustment, for delays in performing such contract, if such delay is caused in whole or in part by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void or unenforceable. The trial court granted the motion for partial summary judgment.

Section 10.8 of the contract between Terrebonne and Pontchartrain stated the increase or decrease in contract price or contract time, or both, in a written amendment or a change order signed by the contractor shall unequivocally compromise the total price and/or time adjustment due or owed for the work or changes defined in the written amendment or change order. By executing a written amendment or change order, the contractor acknowledged and agreed the stipulated increases or decreases in contract price and/or time represented full compensation for all increases and decreases in the cost of or the time required to perform the work under the contract, including costs and delays associated with the interruption of schedules, extended overheads, delay, etc.

The court of appeal held a plain reading of paragraph 10.8 provides the contractor agrees execution of change orders constitutes full and mutual accord and satisfaction for the adjustment in contract price for costs and delays for the entire work arising directly or indirectly from the changes as well as the cost and time of performance caused directly or indirectly from the changes. Paragraph 10.8 can be interpreted to waive a claim for costs of work arising directly or indirectly from change orders and caused directly or indirectly from them. Change orders could refer to work previously performed. The court held it was not clear whether referenced costs arising from or caused by the change orders contemplated costs incurred prior to the execution of the change orders.

The court found the contract documents were ambiguous and were susceptible to differing interpretation. As a result, extrinsic evidence could be used to determine the true intent of the parties. The court found the trial court erred in granting the motion for partial summary judgment, and to the extent interpretation of the ambiguous contract required evidence to determine the true intent, the trial court erred in striking a paragraph contained in an affidavit which expressed Pontchartrain's intent or understanding in executing the change orders. The judgment of the trial court was reversed and the matter remanded for further proceedings. *Pontchartrain Partners, LLC v. Terrebonne Levee and Conservation District*, 2024-0982 (La.App. 1 Cir. 2/28/25), 407 So.3d 956, *writ denied,* 2025-C-00422, (La. 6/17/25), 2025 WL 1692566.

COLLATERAL SOURCE RULE

In the Texas Brine litigation following the collapse of a salt mine cavern near Bayou Corne in Assumption Parish, Texas Brine, a defendant, filed an incidental demand against Legacy Vulcan, asserting tort and contract claims. Legacy Vulcan moved for partial summary judgment seeking to dismiss Texas Brine's claims for recovery of insured losses and liabilities under the collateral source

rule for losses related to the sinkhole which had already been paid and/or reimbursed to Texas Brine by its liability insurers. Legacy Vulcan contended Texas Brine was prohibited from such recovery because the collateral source rule did not apply to it as it was a tortfeasor and not a tort victim.

The collateral source rule provides a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies a plaintiff receives from sources independent of the tortfeasor's procuration or contribution. Payments received from an independent source are not deducted from the award a tort victim would otherwise receive from the tortfeasor, because the tortfeasor is not allowed to benefit from outside benefits provided to the tort victim. The rule reflects the beliefs the tortfeasor should not profit from the victim's prudence in obtaining insurance, or benefitting from other sources, and reducing the amount the tortfeasor would have to pay hampers the deterrent effect of the law.

A troubling aspect of the Rule for Louisiana courts is the "double recovery" or "windfall" that might arise as a consequence of the victim's receipt of an outside payment. The guiding principle of awarding tort damages are to deter wrongful conduct and to make the victim whole. This goal is thwarted, and the law is violated, when the victim is allowed to recover the same element of damages twice. The Louisiana Supreme Court, however, has determined an objectionable "windfall" does not occur when the injured parties patrimony was diminished to the extent that he was forced to recover against outside sources and the diminution of his patrimony constituted additional damages suffered.

Recognizing the conflict, the Louisiana Supreme Court promulgated two considerations to guide a court's determination with respect to the applicability of the collateral source rule: 1) whether applying the rule will further the major policy goal of tort deterrence; and 2) whether the victim, by having a collateral source available as a source of recovery, either paid for such benefit or suffered some diminution in his patrimony because the benefit was available, such that he is not reaping a windfall or double recovery.

In this instance, the trial court granted the motion of Legacy Vulcan and dismissed the claims of Texas Brine for double recovery of insured losses and liabilities with prejudice, finding Texas Brine could not recover from Legacy Vulcan for losses that already had been paid by Texas Brine's own insurers. Texas Brine appealed.

The court of appeal agreed with the trial court finding the collateral source rule inapplicable. The tortious actions by both Texas Brine and Legacy Vulcan caused damages to the plaintiff and resulted in both parties being held liable for them, such that the parties could be solidary obligors. There was no adjudication Texas Brine was the victim of a tort, although it asserted several claims against Legacy Vulcan, including negligent misrepresentation and fraudulent inducement. Texas Brine may have been the obligor/tortfeasor who initially rendered performance to plaintiffs, but that does not make it a tort victim, only the possessor of a right of contribution. As between two tortfeasors attempting to quantify amounts of contribution, the goal of tort deterrence did not appear to be furthered at all. Thus, this argument in favor of the collateral source rule was unpersuasive. The court of appeal affirmed the trial court's judgment dismissing with prejudice Texas Brine's claim for double recovery of insured losses and liabilities finding Texas Brine could not recover from Legacy Vulcan for losses that were paid by Texas Brine's liability insurers. *Pontchartrain Natural Gas System v. Texas Brine Company, LLC*, 2023-0986 (La.App. 1 Cir. 12/12/24), 405 So.3d1078, *writ denied,* 2025-C-00062 (La. 5/20/25), 409 So.3d 213.

CLAIM THAT A ROOFING MANUFACTURER UNDERTOOK A DUTY TO INSPECT THE INSTALLATION OF A ROOF REJECTED

St. Charles-Guillot Investment, LLC and Luling Living Center, LLC (collectively "Luling") claimed a GAF-manufactured roof installed by One Source Roofing, Inc. on a nursing home they owned and operated was severely damaged when portions of the roof were pulled off during Hurricane Ida. The nursing home was destroyed as a result. Luling sued GAF, One Source Roofing and others involved in installing the roof. The issue was whether GAF, which did not supervise the installation of the roof, affirmatively undertook a subsequent inspection duty by sending a representative to conduct a surface inspection of the roof for the benefit of GAF and for the limited purpose of deciding if GAF would issue a leak-proof guarantee. GAF moved for summary judgment.

The scope of work stated the manufacturer's representative would inspect and certify the new roof system and then present a no dollar limit total system warranty to the building owner. GAF did not control how the installation was performed, nor did it instruct One Source Roofing how to install the roof. A GAF representative did not visit the property until the roofing installation was completed and was requested to perform a surface inspection required for the issuance of a guarantee. The contract documents required GAF to guarantee it would repair leaks and certain materials used by the contractor met SMACNA standards. The guarantee did not cover conditions other than leaks such as improper installation or unusual weather conditions or natural disasters, including, but not limited to, winds in excess of 55 mph. The guarantee stated inspections made by GAF were limited to a surface inspection only and were for GAF's sole benefit.

Luling's expert opined poor roofing practices and an attachment failure caused catastrophic failure of the membrane roofing. Luling generally alleged GAF assumed a duty to conduct a reasonable post-installation inspection of the roof by sending employees to the property to warn Luling of any defects in the installation and to ensure the roof was installed in a good and workmanlike manner and GAF had breached that duty when it failed to warn Luling of the deficient installation.

The court held Luling had not pointed to summary-judgment evidence allowing it to conclude GAF affirmatively undertook a tort duty to conduct a reasonable post-installation inspection of the roof, for Luling's benefit and beyond the mere surface inspection the guarantee contemplated. The post-installation inspection of the roof was for the limited purpose of determining if GAF would issued the guarantee. The inspection was limited to a surface inspection only and was for GAF's sole benefit. GAF could not have compelled One Source Roofing to correct the alleged errors that led to the failure of the roof. GAF did not intend to affirmatively undertake a duty to conduce a reasonable post-installation inspection for Luling's benefit and beyond the mere surface inspection contemplated by the guarantee. It also held industry custom indicated GAF's underlying intent was not to undertake any duty to inspect the nursing home's roof for Luling's benefit.

The court concluded Luling had not carried its burden as a non-movant to point to summary-judgment evidence for which the court could conclude GAF, a manufacturer, did not supervise or otherwise exercise meaningful control over One Source Roofing's installation of the roof, affirmatively undertook a duty to conduct a reasonable post-installation inspection of the roof for Luling's benefit and beyond the surface inspection contemplated by the guarantee. Even if the court assumed GAF affirmatively undertook some, lesser inspection-related duty, there was no genuine dispute GAF did not breach that duty in a manner that caused Luling's alleged damages. The court held the alleged issues that led to the failure of the roof could not have been observed during its inspection by the GAF representative for purposes of the guarantee. Further, even if the GAF representative could have observed the alleged issues, the record reflected that GAF could not have compelled One Source Roofing to fix it.

The court concluded the summary-judgment record viewed in Luling's favor did not allow it to conclude GAF affirmatively undertook a duty to conduct a reasonable post-installation inspection of the roof for Luling's benefit and beyond the mere surface inspection called for by the guarantee. Even if the court assumed the record supported GAF affirmatively undertook some other lesser inspection-related duty, for example, a duty to conduct a visual inspection only for the already installed roof, the summary-judgment record viewed in Luling's favor did not support a finding GAF breached any such duty in a manner that caused Luling's alleged damages. The motion for summary judgment of GAF was granted. *St. Charles-Guillot Investment, LLC v. One Source Roofing, Inc.,* 23-30 (ED.La. 1/10/25), 2025 WL 71877.

INDEPENDENT CONTRACTORS AND WORKERS' COMPENSATION

The Louisiana Supreme Court held an employee who is injured during the course and scope of his employment is entitled to workers' compensation benefits under Louisiana law. Independent contractors, however, are expressly excluded from the workers' compensation laws and thus are not entitled to benefits for work-related injuries. Independent contractors who are injured while performing manual labor for a substantial part of their work time are covered by the workers' compensation laws. Correspondingly, the principal for whom the independent contractor performed the work is immune from a tort lawsuit.

The primary issue in the matter before the court was whether an independent contractor's employees and its own independent contractors fell within the manual labor exception set forth in the statute, LRS 23:1021(7). The court held both the independent contractors of the independent contractor and the employees of an independent contractor do not fall within the manual labor exception. As a result, the independent contractor's employees and independent contractors are not limited to workers' compensation and may assert tort claims against a tortfeasor. To the extent workers' compensation benefits are available, the employee may pursue those claims from their direct employers. The Louisiana Workers' Compensation law provides certain circumstances in which a non-direct employee may recover workers' compensation benefits. One circumstance is where a statutory employer relationship is created.

The manual labor exception applies only to an independent contractor who has contracted with a principal to perform work, where a substantial part of the work time is in manual labor. Where an independent contractor's direct employees have not entered into a contract with the principal, the employees are not principal's independent contractors for purposes of the manual labor exception. The principle applies equally to the independent contractor's own independent contractors. Accordingly, the employees and independent contractors of an independent contractor are not covered by the manual labor exception and may assert tort claims against a principal.

The compensation law sets forth a straightforward and uncomplicated method by which a principal may avail itself of the protection provided by the compensation law. The method by which a principal may avoid a claim in tort by an employee is statutory employment. Although statutory employment renders a principal in workers' compensation, it also provides corresponding tort immunity. *McBride v. Old Republic Insurance Company*, 2024-01519 (La. 6/27/25), _____ So.3d _____, 2025 WL 1788625.

FORUM SELECTION CLAUSE UPHELD

A contract provided the law of the State of Texas governed the agreement between the parties and the parties consented to personal jurisdiction in any action in any court, federal or state, within the State of Texas. The court of appeal found both Texas and Louisiana courts have determined forum selection clauses in agreements are presumptively valid and enforceable. The Legislature has only

declared forum selection clause unenforceable and against public policy, in very limited circumstances. Forum selection clauses are considered *prima facie* valid.

The court noted the parties were commercially sophisticated entities who have a history of conducting business together. It found no prohibition under the facts to prevent the parties from contracting to limit their disputes to any forum of their choosing, and there was nothing in the record which would support a refusal to enforce the clause. The Texas court rendered a final judgment the forum selection clause was valid and enforceable and because of that, Texas was the proper forum to hear the matter. Judgment of the Louisiana trial court dismissing the matter was affirmed. *Gulf Coast Brake & Motor, Inc. v. MHWIRTH, Inc.*, 24-603 (La.App. 3 Cir. 4/23/25), _____ So.3d_____, 2025 WL 1173302.

DOCTRINE OF NEGLIGENT PROFESSIONAL UNDERTAKING AND UNJUST ENRICHMENT

The Louisiana Supreme Court held, without passing the viability of claims for negligent professional undertaking, the plaintiff failed to allege a cause of action for such a claim since there was a valid contract between the parties. The Louisiana Supreme Court found courts which have applied the doctrine have done so in instances where there is a lack of contractual privity between the parties. The plaintiff, accordingly, failed to allege a cause of action.

The Louisiana Supreme Court also found the plaintiff failed to state a cause of action for unjust enrichment. One of the prerequisites to establishing such a cause of action is an absence of justification or cause for the unjust enrichment. If a contract exists between the parties, the contract is the law between them and serves as a legal cause or justification for the enrichment. Because a contract existed between the parties, plaintiff failed to state a cause of action for unjust enrichment. *H&O Investments, LLC v. Parish of Jefferson, through its Parish President, Cynthia Lee Sheng*, 2025-CC-00086 (La. 5/20/25), _____ So.3d _____, 2025 WL 1442471.

CLAIM FOR DAMAGES UNDER THE COPYRIGHT ACT

A plaintiff sought damages for copyright infringement. The dispute concerned the construction and redevelopment of several properties on Canal Street in New Orleans. The claim was for actual damages. The defendant moved for summary judgment.

The elements for infringement were identified as: 1) ownership of copyright material; 2) factual copying; and 3) substantial similarity. The Copyright Act provides that a Certificate of Copyright Registration made before or within five-years after first publication of the work shall constitute *prima facie* evidence of the validity of a copyright. An unrebutted presumption is sufficient evidence a plaintiff has a *prima facie* case for ownership of a valid copyright. The court found the plaintiff satisfied the first element.

As to the second element, factual copying can be inferred from (1) proof the defendant had access to the copyrighted work prior to creation of the infringing work (access) and (2) probative similarity. If the two works are so strikingly similar as to preclude the possibility of independent creation, copyrighting may be provided without a showing of access. Striking similarities are similarities that can only be explained by copying rather than by coincidence, independent creation, or prior common source. Here, the plaintiffs could not show striking similarity and, therefore, were required to independently show access. The court held the designs at issue were not significantly similar for a reasonable jury to find striking similarity. Access requires a showing the person who created the allegedly infringing work had a reasonable opportunity to view, or hear, the copyrighted work. A bare possibility of access is not enough nor is a theory of access based on speculation and conjecture. A

plaintiff must present evidence that is significantly probative of a reasonable opportunity for access. The defendants effectively conceded access to the copyrighted work. The court held, as to the requirement for probative similarity, plaintiffs must raise a genuine issue of material fact the designs, when compared as a whole, are adequately similar to establish appropriation. Probative similarity is, however, not substantial similarity. Similarities between two works, even as to unprotectable elements, that, in the normal course of events would not be expected to raise independently, suffice. The court held the plaintiffs met their burden to show similarities between the two designs.

Turning to the third element, substantial similarity, the court held there must be substantial similarity between the two works. Summary judgment may be appropriate if the court can conclude no reasonable juror could find substantial similarity. Substantial similarity is assessed in two parts. First, the courts distinguish between the protectable and unprotectable elements of the copyrighted work. This "filtration" should eliminate from comparison the unprotectable elements of ideas, processes, facts, public domain information, merger material (when an idea or concept can be expressed in very few ways, the idea and expression are said to be "merged"), *scènes à faire* material (copyrighted materials are not protected when they are mandated by or customary to the genre), and other unprotectable elements suggested by the particular facts under examination. The court conducts a side-by-side comparison to determine whether the allegedly infringing material bares a substantial similarity to the protectable aspects of the original work.

Under step 1 of the filtration process, merger doctrine and *scènes à faire*. The mere fact a plaintiff's works are copyrighted does not mean that all aspects of those works are automatically protected. Rather, if parts of the work constitute an idea, concept, method or *scènes à faire*, the copyright does not extend does not extend to the unprotectable elements. *Scènes à faire* are expressions that are standard, stock or common to a particular subject matter or are dictated by external factors. Elements that are customary to or dictated by the genre or field are not protected because they are not original. Plaintiffs suggested their copyright infringement claims are not based on specific elements but concern the whole project. They argued even if the arrangement consists of wholly unprotectable elements, the arrangement of the units and composition of spaces in the project is protectable. The court agreed with the defendants the plaintiffs design options were limited by the merger doctrine and unprotectable *scènes à faire*. The merger doctrine is based on the statutory prohibition against copyright protection for ideas. Design features used by all architects are not entitled to protection.

The court found there was no genuine dispute of material fact the designs were heavily constrained by applicable regulations. The regulations limited the original choices and originality. The regulatory restrictions, thus, limited the number of ways the original author could have arranged the units or spaces for the project. Because of these limitations, the court, in the side-by-side analysis, was required to find more similarities to conclude there was a genuine issue of material fact as to substantial similarity. The court stated it must consider overall design and arrangement as a protectable whole. The court determined the scope of protection here was thin because there was little originality.

In evaluating step 2 of the side-by-side comparison, the court held after filtering the courts typically assess side-by-side "whether the allegedly infringing work bares a substantial similarity to the protectable aspects of the original work." When copyrighted works are entitled to "thin" protection, a work must be virtually identical to infringe. The court held reviewing the two designs side-by-side for the whole project, it was evident no reasonable juror would find the two to meet the heightened substantial similarity standard. At best, the alleged similarities occur only in some floors for one of the two parts in the copyrighted design. Even when the plaintiffs alleged similarities, the designs were not close to being identical. The court concluded, considering the two designs as a protectable whole, they contained evident differences, and for many areas of the project, plaintiffs did not suggest any similarities. Thus, there was no genuine dispute of material fact the copyrighted design failed to meet

the enhanced substantial similarity standard for the thin copyright protection. Defendants were entitled to summary judgment. *Redmellon, LLC v. Mohamed "Hammy" Halum*, 23-5754, (E.D. La. 2025), 2025 WL 932397.

DAMAGES FOR DEFECTIVE WORK

Robin and Joshua Caronna contracted with Outdoor Living to install a swimming pool the fiberglass shell for which was manufactured by Latham Pool Products, Inc. Problems developed with the pool following construction which were not resolved. The Caronnas sued Outdoor Living and Latham. The Caronnas settled their claims with Latham. Those claims were dismissed. The trial court rendered judgment on the merits in favor of the Caronnas and against Outdoor Living and Latham fixing damages in the amount of $68,572.20 which was comprised of $14,234.70 for demolition and removal of the pool and $54,337.50 for its replacement. Fifty percent fault was allocated to Outdoor Living and fifty percent to Latham. Since the Caronnas settled with Latham prior to trial, the total amount awarded to the Caronnas was $34,286.10. The trial court denied the Caronnas' request for non-pecuniary damages. The Caronnas appealed contending the trial court erred in failing to conclude their claims were based in redhibition and to award commensurate damages and attorneys' fees in allocating fault to Latham.

The court of appeal held the contract for the installation of the swimming pool was a building contract, not a sale, and was, therefore, not subject to the principles of redhibition. The record supported the trial court's implicit finding the contract between the Caronnas and Outdoor Living for the construction of the swimming pool was a building contract to which the theory of redhibition was inapplicable.

To the extent the claims of the Caronnas were based on the implied warranty of good workmanship in building contracts, Outdoor Living argued the Caronnas failed to carry their burden of proving Outdoor Living's workmanship was defective or that it was the cause of their damages. Outdoor Living argued the Caronnas failed to prove it breached the expressed warranty provision in the building contract as well. Every building contract implicitly obligates the contractor to perform the work in a good, workmanlike manner, free from defects in either materials or workmanship, with the work suitable for its intended purpose. Where defects are such they cannot be corrected except by removing and replacing the construction, the jurisprudential remedy is to award whatever it takes to put the homeowner in the position he deserved to be in when the construction was completed as if the obligation had been fulfilled, i.e. the owner is entitled to the cost of repairs necessary to convert an unsound structure into a sound one or the amount paid to remedy the defect. The court of appeal held it was unnecessary to determine whether the express contractual warranty was in effect since it found Outdoor Living was responsible for the repair or replacement of the defective construction as a result of its breach of the implied warranty of good workmanship. Consideration of the argument was pretermitted.

Outdoor Living argued on appeal the pool and concrete decking could have been repaired fairly quickly and at a much lower cost to the defendants than the removal and replacement cost awarded by the trial court. They asserted the Caronnas' refusal to allow the defendant's to repair the pool and insistence on a full replacement of the pool and concrete decking constituted a failure to make a reasonable effort to mitigate their damages and should result in a reduction or denial of the damages. The court of appeal held the duty of an injured party to mitigate damages presumes further damage has occurred following the tort or breach of contract. Rather than arguing future damage to the pool occurred, Outdoor Living's argument on the issue of mitigation of damages seemed to be the Caronnas should have accepted their offer of repairs because the repairs would be less expensive for the defendants than a full replacement. But, where the defects in workmanship are such that they cannot be corrected except by removing or replacing the construction, the jurisprudential remedy is to award

whatever it takes to place the homeowner in the position he deserved to be in when the construction was completed, as if the obligation had been fulfilled. The court of appeal found it could not say the trial court erred in failing to reduce the Caronnas' damages based on their refusal to accept the offered repairs.

The Caronnas contended the trial court erred in failing to award non-pecuniary damages for their mental anguish, distress, inconvenience and aggravation. Damages for non-pecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a non-pecuniary interest and, because of the circumstances surrounding the formation or the non-performance of the contract, the obligor knew, or should have known, his failure to perform would cause that kind of loss. Where factually appropriate, non-pecuniary damages may be proven and recovered in a breach of contract case. Outdoor Living knew, or should have known, its failure to perform would cause that kind of loss to the Caronnas. Importantly, the court noted the record reflected that immediately after the damage occurred, it began efforts to have damage to the pool and concrete decking repaired so the Caronnas could resume use of the pool. Robin Caronna rejected all offers of repair in attempts to address her concerns. The court of appeal held based on the evidence presented, it could not say the trial court abused its discretion in denying a claim for non-pecuniary damages.

The Caronnas argued the trial court erred in allocating any fault to Latham since they only contracted with Outdoor Living for the pool. C.C. art. 2323 provides: If a person suffers injury, death or loss as a result of partly of his own negligence and partly as the result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree of percentage of negligence attributed to that person. Although Latham was dismissed from the suit prior to the judgment after settling with the Caronnas, the court of appeal found the trial court was required to determine the fault of all persons causing or contributing to injury, death or loss, regardless of whether the person is a party to the action or a non-party, and regardless of the theory of liability asserted against that party. There was no evidence presented which would prove, by a preponderance of the evidence, Latham or any defective condition of the pool shell caused or contributed to the damages. *Caronna v. Outdoor Living, LLC*, 2023-1048 (La.App. 1 Cir. 12/30/24), 403 So.3d 1164.

ABANDONMENT

Louisiana Code of Civil Procedure, Article 561, provides, with the limited exception of succession proceedings under certain circumstances, an action is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of three years. Abandonment is self-executing and is operative without formal order. Abandonment is a form of liberative prescription, two principles which are acknowledgement and renunciation. Acknowledgment is the recognition of a creditor's right or obligations that halts the progress of prescription before it has run its course. Renunciation is the term used for the decision to abandon rights derived from a prescriptive period that has accrued. Renunciation must be clear, direct and absolute and manifest by words or actions of the party in whose favor prescription has run. The concept of post-abandonment waiver is similar to renunciation which may either be express or tacit.

The Louisiana Supreme Court found abandonment is a form of liberative prescription. Submission of an abandoned case for decision effects a waiver of the right to have the suit dismissed because of want of prosecution under C.C.P. art. 561. The proper analysis of a defendant's post-abandonment action is through principles of renunciation, not acknowledgment. Post-abandonment waiver is limited to a situation where a defendant takes an action which renunciates the defense of abandonment by clearly or directly demonstrating his preference and intent to proceed, such as submitting the case for decision to obtain a judicial resolution on the merits.

In the matter at hand, a general denial answer filed only after receiving notice of a motion to confirm a default judgment and followed days later by a motion to dismiss as abandoned, could not be construed as renunciation or abandonment. The filing did not clearly or directly demonstrate the parties preference and intent to proceed with the litigation. *Foundation Elevation & Repair, LLC v. Kenneth Miller*, 2024-00810 (La. 5/9/25), 408 So.3d 893.

ENFORCEMENT OF A CONTRACT PROVISION

Mrs. Senneca Boudreaux entered into a construction contract with Patrick Jackson and Supreme Developers, LLC, to build a new home. Problems developed during the course of the work. Mrs. Boudreaux sued Jackson and Supreme for breach of contract for defects in the work. Jackson and Supreme reconvened for the balance of the contract price.

The trial court rendered judgment in favor of Mrs. Boudreaux awarding her damages. Jackson and Supreme relied on a provision in the construction contract which provided the owner agrees not to occupy the home until the contract was paid in full. The owner did, in fact, occupy the home before the contract was fully paid. In enforcing the contract provision, the court of appeal assessed damages in favor of Jackson and Supreme which were deducted from the trial court's award to Mrs. Boudreaux. *Boudreaux v. Jackson*, 24-440 (La.App. 5 Cir. 4/9/25), ___ So.3d _____, 2025 WL 1065234.

ENFORCEMENT OF POLICY EXCLUSIONS WITH RESPECT TO WORK PERFORMED

Guy Perrodin purchased a home constructed by Oak Alley Construction, LLC from Anthony James Stymest. The Act of Sale indicated the home was a sale of a newly constructed home and was subject to the provisions of the New Home Warranty Act. Problems with the home were noticed shortly after Perrodin moved in. Repairs were performed but the problems continued. The home was inspected by two contractors who determined it had structural issues. Stymest refused to correct the problems. Perrodin sued Stymest and Oak Alley and its insurer, Western World Insurance Company. Western World filed a motion for summary judgment arguing the exclusions for damage to the work and your product did not provide coverage. The trial court granted summary judgment in favor of Western World. Perrodin appealed.

The Louisiana 3rd Circuit Court of Appeal affirmed the judgment of the trial court. Despite the assertion the "Your Product" exclusion did not apply because the house was real property was found to be without merit. The "Damage to Your Product" exclusion applied because the home was the product of the insured. Finally, the court concluded claims with respect to warranties provided by the New Home Warranty Act did not change the result. The policy was not intended as a guarantee of the quality of the insured's products or work. Liability policies are not performance bonds. The defects for which recovery was sought fell squarely within the risks specifically excluded from coverage. *Perrodin v. Western World Insurance Company*, 2024-524 (La.App. 3 Cir. 3/26/25), _____ So.3d _____, 2025 WL 911081.

PARTY NOT ENTITLED TO ARBITRATION AND DEFAULT JUDGMENT ANNULLED

The Louisiana First Circuit Court of Appeal held in interpreting a contract with respect to a claim for arbitration the document did not mandate either mediation or arbitration. By its explicit terms, mediation and arbitration could be excluded as an alternative resolution to a dispute and equitable relief could be sought in a court of appropriate jurisdiction which is what was done through the filing of a petition on an open account. The court of appeal concluded the trial court correctly determined the party claiming arbitration was not entitled to it.

The party which was denied arbitration challenged a default judgment entered against it. The party which obtained the judgment introduced into evidence at the hearing on the judgment a letter addressed to the other party stating it was sent by certified mail and advised the other party it was put on notice it intended to obtain a default judgment against it. The court of appeal reviewed two statues: L.R.S. 13:3205 and C.C.P. art. 1702(A)(5). L.R.S. 13:3205 requires, in order for a default judgment to be valid, there must be proof a notice of intent to obtain a default judgment was properly made and delivered, showing the date, place and manner of delivery in the record. Because proof of the notice of intent is a necessary element for intent requirement to obtain a default judgment, absent the mandated proof, the default judgment rendered is an absolute nullity. The record was devoid of the required proof and the default judgment was an absolute nullity. *Southeast Dirt, LLC v. D.R. Horton, Inc.*, 2024-0724 (La.App. 1 Cir. 12/27/24), 404 So.3d 90.

EFFECTS OF A RELEASE OF LIEN BOND

Greenwood 950, LLC was not paid for all of the work it performed on a project. The general contractor was Milam & Co Construction, Inc. The owner was Penske Truck Leasing Co., LP. Greenwood sued asserting a claim against Milam on open account. It also filed a claim against Penske and a lien against the property based on the Louisiana Private Works Act. Milam filed a Release of Lien bond. Penske moved for partial summary judgment seeking dismissal of all claims against it.

The Private Works Act states a claim against an owner and the privilege securing it which are granted by the statute are extinguished if a bond is filed by the contractor or subcontractor as provided by L.R.S. 9:4835. The statute provides if a statement of claim or privilege is filed, any interested person may deposit with the recorder of mortgages a bond of a lawful surety company to guarantee payment of the obligation secured by the privilege. If the recorder of mortgages finds the bond is in conformity with the statute, he is to take certain actions including cancellation of the statement of claim or privilege from his records. Penske submitted uncontested summary judgment evidence in the form of an affidavit of a representative of Milam who had personal knowledge of the contractor's operations. The affiant testified Milam procured a lien bond in an amount sufficient to release Greenwood's privilege against the Penske property. Upon the filing of the bond, the parish clerk of court issued a Release of Lien on Bond that released the privilege on the Penske property.

The United States District Court for the Western District of Louisiana held the only claims Greenwood asserted against Penske were based on the Private Works Act, both Greenwood's claim and the privilege securing it granted by the Act were extinguished when Milam filed a bond in compliance with the statute and obtained the statutory release. Penske was entitled to summary judgment dismissing all claims of Greenwood against it. Greenwood *950, LLC v. Milam & Co. Construction, Inc.*, 25-009 (WD.La. 4/23/25), 2025 WL 1186897.

LOUISIANA UNIFORM PUBLIC WORK UNIT PRICE BID FORM AND THE PUBLIC BID LAW

The Plaquemines Port, Harbor & Terminal District advertised a project for Alliance Water Booster Station and Feed Line Upgrades. The lowest bid for the project was submitted by J. Caldarera & Company, Inc. The second low bidder was Bryon E. Talbot Contractor, Inc. The bidding documents included the three-page Louisiana Uniform Public Work Bid Form, Unit Price Form. Attached to the form was a list of specifications to be used in submission of the bids. The documents included an item for mobilization costs which provided the price for mobilization shall not exceed 5% of the total project bid price. Caldarera's lump sum unit price for mobilization costs significantly exceeded 5% of its total project bid. Caldarera's bid was found to be non-responsive based on the mobilization costs.

Caldarera objected to its bid being found non-responsive, arguing the 5% cap for mobilization costs violated the Louisiana Public Bid Law, specifically L.R.S. 38:2212(B)(2), and could not be

considered in the award of the contract. The Port reversed its decision as to Caldarera's bid and determined it was the lowest responsive and responsible bidder and should be awarded the contract. Talbot sued seeking a temporary restraining order, preliminary and permanent injunction, mandatory injunction and declaratory judgment against Caldarera and the Port. Talbot contended Caldarera's bid failed to comply with the mobilization specification since its price exceeded the 5% cap for that item. The trial court granted Talbot's request for permanent injunction and enjoined the Port from awarding the contract to any bidder other than Talbot. Caldarera appealed.

The court of appeal found the bidding instruction to limit mobilization costs to no more than 5% of the total project bid price merely exceeded, but did not conflict with, the statutory requirements and procedures set forth in the Public Bid Law. Caldarera argued the Port's inclusion of the 5% specification placed a qualification on what can be included on the form as the unit price for mobilization. The court of appeal found the specification was not an impermissible price specification.

The court of appeal, further, held the specification at issue did not mandate a particular price on any item included in mobilization costs, but merely added the requirement the total cost for mobilization expenses could not exceed 5% of the total project bid price. It found no merit in Caldarera's argument the 5% specification was a prohibited prequalification and/or inhibited free and unrestricted competition among bidders in violation of the Public Bid Law. Finally, Caldarera argued the trial court erred in considering the 5% mobilization specification as the reason to find its bid non-responsive since it conflicted with the statute and was invalid on its face. The court of appeal found, as reviewed above, the specification the mobilization cost not exceed 5% of the total project bid price was not an additional requirement for information. Rather, it merely exceeded, but did not conflict with, the statutory requirement and procedures set forth in the Public Bid Law. The court of appeal found the Port's initial decision to award the contract to Caldarera was in error because it disregarded the specification the amount stated for mobilization costs not exceed 5% of the total project bid price. The Port was not entitled to waive this specification and erred in so doing in its initial award of the contract to Caldarera. The judgment granting the permanent injunction in favor of Talbot was affirmed. *Bryon E. Talbot Contractors, Inc. v. Plaquemines Port, Harbor and Terminal District*, 24-0646 (La.App. 4 Cir. 4/21/25), _____ So.3d _____, 2025 WL 1156189.

PRESCRIPTION

Centric Gulf Coast, Inc filed a Petition for Damages and Breach of Contract against Bullseye Masonry, LLC. Centric and Bullseye had agreed Bullseye was to perform the masonry scope for the Marrero Wastewater treatment plant safe room. The masonry leaked. Testing showed the masonry product failed a water test. Oldcastle APG, Inc., the masonry supplier, acknowledged the masonry products for the project were defective. Bullseye filed a third-party demand against Oldcastle. Bullseye contended Oldcastle acknowledged the masonry product supplied by Oldcastle did not contain the water repellant. Oldcastle filed a peremptory exception of prescription contending the distribution of the masonry product to Bullseye was a contract of sale rather than a contract for construction work. Bullseye averred the cause of action was a tort. Bullseye also contended Oldcastle previously had made continuous affirmative representations it would remedy the defect, but ultimately refused to do so. The trial court sustained Oldcastle's exception of prescription. Bullseye appealed.

Oldcastle represented Centric sued Bullseye for breach of contract and default of the contract to build, and Oldcastle and Bullseye could not, therefore, be joint tortfeasors. Oldcastle argued it was solely a supplier of movables to Bullseye, and an action against a seller for an alleged defect or vice in the thing purchased is one in redhibition. The court of appeal held the same acts or omissions may constitute breaches of both tort duties and contractual duties. A plaintiff may assert both actions and is not required to plead the theory of his case. Contract damages flow from the breach of a special obligation contractually assumed by the obligor. Tort duties flow from the violation of a general duty

owed to all persons. Where a person neglects to do what he is obligated to do under a contract, he has committed a passive breach of contract. If he negligently performs a contractual obligation, he has committed active negligence and, thus, an active breach of contract. A passive breach of contract warrants only an action for breach of contract; an active breach of contract may also support an action in tort.

The court of appeal held the third-party demand of Bullseye failed to allege Bullseye's injuries were caused by Oldcastle's negligent performance of the contract. Instead, the demand alleged the injuries were caused by Oldcastle's non-performance of the contract, namely Oldcastle's failure to provide the masonry product that contained a water repellant. The court concluded Bullseye alleged a passive breach of contract which did not support a claim in tort. Bullseye's demand was not a tort action. The allegations in Bullseye's demand arose from contractual obligations.

A contractual obligation is a personal action subject to liberative prescription of ten years. An action for redhibition prescribes one year from the date the defect was discovered by the buyer. A breach of contract claim based upon the sale of an allegedly defective product would be founded in redhibition and subject to the one-year prescriptive period. Bullseye did not file its demand against Oldcastle until well over a year after Bullseye had notice of the allegedly defective product. Accepting Bullseye's well-pleaded allegations as true, the court of appeal found its third-party demand was prescribed on its face. Because Bullseye failed to introduce any evidence at the hearing on the exception of prescription, the court also found it failed to prove the prescriptive period had been interrupted or suspended.

Alternatively, Bullseye argued since the defect was initially detected, Oldcastle made continuous affirmative representations it would remedy said defect on the project, but ultimately refused to do so. Oldcastle argued the third-party demand of Bullseye was prescribed on its face. As such, Bullseye was burdened with proving prescription was suspended or interrupted and Bullseye failed to introduce any evidence at the hearing on the exception of prescription. Neither party introduced any evidence at the hearing on the exception of prescription. Since there was no evidence before the court to consider in support of Bullseye's claims Oldcastle made continuous affirmative defenses it would remedy the defect, but failed to offer acceptable proof thereof, the court found it failed to prove its third-party demand against Oldcastle was not prescribed. The judgment of the district court was affirmed. *Centric Gulf Coast, Inc. v. Bullseye Masonry, LLC*, 24-319 (La.App. 5 Cir. 4/2/25), _____ So.3d _____, 2025 WL 984579.

THE NEW YORK ARIBTRATION CONVENTION AND PREEMPTION OF L.R.S. 9:2779

A construction contract for an industrial facility in Ascension Parish provided in the event of any dispute, question, or difference of opinion, must be referred to the London Court of International Arbitration (LCIA) for arbitration. The Convention governs the recognition and enforcement of arbitration agreements between citizens of nations that are signatories to the Convention. The nations relevant in this instance for were all signatories. The Convention is implemented by the Federal Arbitration Act (FAA) which provides for arbitration enforcement in United States courts. It incorporates the FAA except where it conflicts with the Convention. The courts should compel arbitration if : 1) there is an agreement in writing to arbitrate the dispute; 2) the agreement provides for arbitration in the territory of a Convention signatory; 3) the agreement arises out of a commercial legal relationship; and 4) a party to the agreement is not an American citizen. A court must enforce the arbitration clause unless if finds the said agreement is null and void, inoperative, or incapable of being performed. The arbitration provision states a party "may" give notice to the other party specifying the dispute and requiring its resolution under the clause. The word "may" is construed to give either aggrieved party the option to require arbitration. The court found the alleged arbitration agreement was, in fact, such an agreement.

The court held, according to the contract, any dispute concerning arbitrability had been delegated to the arbitrator. Requiring that arbitration occur in the London Court of International Arbitration (LCIA) in London, England the arbitration agreement states the LCIA rules are deemed to be incorporated by reference. The LCIA rules provide the tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing the existence, validity, effectiveness or scope of the arbitration agreement. The court found the rules serve as a valid delegation which must be accepted by it.

L.R.S. 9:2779 provides, with respect to construction contracts, subcontracts and purchase orders for public and private works projects, when one of the parties is domiciled in Louisiana and the work to be done and the equipment and materials to be supplied involve construction projects in this state, provisions in such agreements requiring disputes arising thereunder, be resolved in a forum outside of the state or requiring their interpretation to be governed by the laws of another jurisdiction are inequitable and against public policy of Louisiana and are null and void and unenforceable as against public policy. The court found the FAA and the Convention preempt the statute. Additionally, the statute directly conflicts with the FAA because it conditions the enforceability of arbitration agreements on selection of a Louisiana forum; a requirement not applicable to contracts generally. The statute is preempted by both the FAA and the Convention because the Convention encompasses certain provisions of the FAA and prevents the Convention from being rendered meaningless. All four factors were satisfied. *CSRS, LLC v. Element 25 Limited*, 24-358 (M.D. La. 2025), 772 F.Supp.3d 689.

REQUEST FOR MANDAMUS DENIED

The New Orleans Regional Transit Authority (RTA) and BRC Construction Group, LLC (BRC) entered into a contract for BRC to provide facility maintenance and construction support services to repair RTA's physical structures at different locations. BRC submitted an invoice for the work completed which were paid by the RTA with the exception of $455,966.00. BRC sued the RTA requesting a writ of mandamus pursuant to L.R.S. 38:2191 for the amount owed. The trial court granted the writ requiring RTA to pay the amount owed plus attorneys' fees and interest. RTA appealed.

L.R.S. 38:2191 requires public entities to promptly pay all obligations arising under public contracts when the obligations become due and payable under the contract. Failing to make progressive stage payments within forty-five days following receipt of a certified request for payment, the public entity shall be liable for reasonable attorneys' fees and interest charged at the rate of 1/2% accumulated daily, not to exceed 15%. Failing to make progressive stage payments arbitrarily or without reasonable cause or any final payment when due subjects the public entity to mandamus to compel payment of the sums due under the contract up to the amount of the appropriation made for the award and execution of the contract, including any authorized change orders.

The court of appeal found BRC failed to introduce evidence in support of its writ of mandamus. While the record showed multiple documents were appended to RTA and BRC memoranda, evidence not properly and officially introduced into evidence cannot be considered even if it is physically placed in the record. Documents simply attached to memoranda do not constitute evidence and cannot be considered as such on appeal. The court of appeal held it could not consider the documents attached to RTA and BRC memoranda in the trial court. It found it could not review the contract between the parties to determine if the payment requested became due and was payable. Further, there was nothing in the record reflecting receipt of a certified request for payment. BRC had the burden of proof to establish a clear and specified right to compel the performance of administerial duties for purposes of a request for mandamus. BRC failed to establish it had such a right, i.e., to compel payment of the amount requested. BRC did not provide proof the requirements outlined in the statute were satisfied. The decision of the trial court was reversed. *BRC Construction Group, LLC v. New Orleans Regional Transit Authority*, 24-0657, (La.App. 4 Cir. 4/1/25), _____ So.3d _____, 2025 WL 972296.

MOTION TO VACATE AN ARBITRATION AWARD

Plaintiff, the owner of commercial property, entered into a contract with the defendant for remediation services. At the time of the contract, the defendant was not a licensed contractor. The owner sought to rescind the contract. The court dismissed the claims finding they were subject to the arbitration provision of the contract. The arbitrator rendered an award in favor of the defendant and against the plaintiff which included damages, interest, attorneys' fees and arbitration fees and expenses. The owner sought to vacate the arbitration award arguing the arbitrator's manifest disregard of the law in awarding attorneys' fees and interest since the arbitrator did not find a breach of contract or the existence of a contract to justify the award.

The plaintiff contested the arbitration award primarily arguing under Louisiana law the defendant was an unlicensed contractor, and would not have been able to contract with plaintiff, a Louisiana domiciliary, for services. The court found the Federal Arbitration Act permits a district court to vacate an arbitration award where the arbitrator was 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 any other misbehavior by which the rights of any party have been prejudiced. The court held every failure of an arbitrator to receive relevant evidence does not constitute misconduct requiring the court vacate an arbitrator's award. To constitute misconduct requiring that an award be vacated, an error in the arbitrator's determination must be one that is not simply an error of law, but which so effects the rights of a party that it may be said he was deprived of a fair hearing.

The plaintiff contended during a deposition it was discovered involvement of a party in the project had been misrepresented and plaintiff was unable to conduct further discovery into those facts which it believed may have further developed certain defenses such as fraud, overbilling, and breach of contract. The court found plaintiff's contention was speculative and merely conclusory at best. There was nothing in the record that indicated the arbitrator was guilty of misconduct in denying the continuance. The arbitrator could have easily determined the parties had sufficient time to complete discovery, and permitting the plaintiff additional time would not have resulted in the discovery of evidence that would have changed the outcome of the arbitration proceeding.

The defendant moved, under Federal Rules of Civil Procedure, Rule 12(b)(6), to dismiss the motion to vacate the award. Under 9 U.S.C. § 10 of the Federal Arbitration Act, courts may vacate an arbitration award only 1) where the award was procured by corruption, fraud, or undue means; 2) where there was evident partiality or corruption in the arbitrator's or either of them; 3) where the arbitrator's 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; or 4) 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. The court must sustain an arbitration award even if it disagrees with the arbitrator's interpretation of the underlying contract as long as the arbitrator's decision draws its essence from the contract. Doubts or uncertainty's must be resolved in favor or upholding an arbitration award. The sole question is whether the arbitrator (even arguably) interpreted the parties contract, not whether he got its meaning right or wrong. Unless an arbitration award is vacated, modified or corrected as prescribed, the court must confirm the award.

"Manifest disregard" of the law is no longer an independent ground for vacating arbitration awards under the Federal Arbitration Act. Plaintiff contended the arbitrator's award was in violation of the law because there was no finding of breach of contract. According to the plaintiff, no contract existed between the parties. A decision by the arbitrator that a contract is null and void does not, for that reason alone, render invalid an arbitration clause. To justify vacating an arbitration award for manifest disregard of the law, the parties bear the heavy burden of demonstrating more than an error,

or even a serious error, on the part of the arbitrator. Vacature on this ground is only available where the arbitrator has acted outside the scope of his contracturally delegated authority by issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract. The court held the arbitrator's decision was drawn from the "essence" of the contract.

Louisiana law, L.R.S. 9:2779, provides provisions in contracts requiring disputes arising thereunder be resolved in a forum outside of the state or requiring their interpretation to be governed by the laws of another jurisdiction are inequitable and against public policy of Louisiana. The court held, however, the Federal Arbitration Act preempts the statute which would have invalidated the parties' choice-of-law provision of the agreement which provided the contract and all related documents are governed by the laws of the State of Texas. The arbitrator was impowered accordingly, to disregard Texas law.

The court held the plaintiff failed to provide any facts to state a plausible claim for relief under any grounds for vacating the arbitration award under the Federal Arbitration Act. *Kingman Holdings, LLC v. Blackboard Insurance Company*, 24-875 (ED.La. 2025), 2025 WL 932774.

TWO- CONTRACT STATUTORY EMPLOYMENT DEFENSE TO TORT ACTIONS

Luther Charles was injured in a workplace accident while he was in the course and scope of his employment with Hydrochem, LLC while transporting water from a nearby lake to a pipeline facility referred to as Station 54 which was owned by The Williams Companies, Inc. The general contractor was Tucker Energy Solutions, LLC. Williams and Tucker, among others, were sued by Charles. They filed motions for summary judgment contending they were immune from liability as the statutory employers of Charles. The trial court granted the motions. Charles appealed.

There are two ways in which a principal can become a statutory employer: 1) the principal can contract with another for the execution of work that is part of the principal's trade, business or occupation; or 2) the principal can contract with another to perform all or part of the work which the principal is contractually obligated to perform. The latter situation is commonly referred to as the "two-contract" statutory employment defense to tort actions. The court of appeal found the requirements of the defense were satisfied. Tucker was the statutory employer of Charles. Williams was also the statutory employer. It was a principal that entered into a written contract with Tucker who was also determined to be Charles' statutory employer since it contracted with Tucker who served as the general contractor under a contractual relationship with Blue Fin Services, LLC. Blue Fin then hired Hydrochem, the direct employer of Charles, to perform certain work. Tucker was the statutory employer of Charles under the two-contract employment defense to tort actions. *Charles v. Transcontinental Gas Pipeline, LLC*, 2024-405 (La.App 3 Cir. 3/12/25), 408 So.3d 491.

PRESCRIPTION OF A SUBROGATION CLAIM

Hospitality Management Services, LLC owned and operated a hotel in Kenner, LA. A pipe within the hotel's sprinkler system ruptured resulting in water damage to the hotel. Hospitality sued several parties for damages including Brassco, Inc. alleging it was hired for the purpose of inspecting, servicing and maintaining the hotel's fire alarm system and was negligent in inspecting and maintaining it, resulting in the ruptured pipe and subsequent damage. Hospitality contended Brassco negligently reported the sprinkler system was in proper working condition. Hospitality also sued Axis Insurance alleging bad faith in that Axis failed to provide proper payment under its commercial and dwelling policy of insurance. Axis filed a cross-claim against Brassco contending as the insurer of Hospitality, it was subrogated to the rights and actions asserted in the original petition against Brassco. Axis represented Brassco was negligent in maintaining and inspecting the sprinkler system and in a service call at the hotel a few months prior to the incident Brassco discovered couplings between the pipes of

the sprinkler system were leaking in the hotel's attic and Brassco's failure to perform hydrostatic testing prevented its discovery of corroded pipes.

Brassco filed an exception of prescription to the claims of Axis against it. The trial court granted the exception of prescription. Axis appealed. The court of appeal held Louisiana law recognized three exceptions to the general rules of prescription: 1) C.C.P. art. 1153 allows an amending petition to relate back to the original pleading; 2) C.C.P. art 1041 allows an additional ninety days for an incidental demand; and 3) in circumstances where the parties share a single cause of action. Axis argued as the subrogee of Hospitality, it was subrogated to the rights and actions asserted in the original petition. Subrogation allows an insurer to stand in the shoes of the insured. When several parties share a single cause of action (as through partial subrogation), suit by one interrupts prescription as to all. Axis contended the filing of the original petition against Brassco by Hospitality interrupted prescription as to the subrogation cross-claims within the incidental demand against Brassco. A cause of action in the context of a peremptory exception, such as prescription, is defined as the operative facts which give rise to the plaintiff's right to judicially assert the action against the defendant. To constitute the same cause of action, the claims of both Hospitality and Axis must be based in the same cause of action that consists of the same material facts which formed the basis of the right to recover damages.

The court found the original petition of Hospitality and incidental demand of Axis indicated the two pleadings share a single cause of action. Axis and Hospitality collectively alleged specific occurrences in which Brassco negligently reported the sprinkler system was in proper working condition prior to the pipe rupturing. In both pleadings they also contended that if Brassco would have properly inspected the sprinkler system, the corrosion that lead to the ruptured pipe would have been discovered. Thus, the allegations within the incidental demand of Axis arise from the same factual occurrence pled in the original petition by Hospitality. Brassco contended the two pleadings requested different forms of damages – damages covered under the Axis insurance policy and those not covered under the policy. This did not negate the fact both pleadings maintain the same negligence claims against Brassco. The court of appeal found the facts alleged in the original petition gave Axis a right to assert subrogation cross-claims against Brassco. Since the pleadings shared a single cause of action, the timely filing of the original petition interrupted prescription as to the cross-claims asserted by Axis against Brassco. The court of appeal reversed the judgment of the trial court granting the exception of prescription. *Hospitality Management Services, LLC v. Axis Surplus Insurance Company*, 2024-0137 (La.App. 4 Cir. 9/16/24), 400 So.3d 236, *writ denied,* 2024-C-01274 (La. 1/14/24), 398 So.3d 651.

WAIVER OF CLAIMS, WHETHER A PARTY BREACHED AN AGREEMENT AND WHETHER A PARTY BREACHED ITS FIDUCIARY DUTY

The court considered motions for summary judgment of two parties to a Joint Venture. Other decisions of the court with respect to the Joint Venture and disputes between the parties were reported in earlier editions of the Update. Since then, the two parties, Archer Westin Contractors, LLC (AWC), the managing member, and The McDonnel Group, LLC (TMG), moved for summary judgment on several issues.

The first motion was concerned with the issue of whether AWC waived its claims against TMG to make capital contributions. The court recognized the principle where one party substantially breaches a contract, the other party to it has a defense and an excuse for non-performance. That right may be waived when the non-breaching party fails to protest or notice an objection thereby waiving its right to do so. The court, after reviewing the summary judgment evidence, held AWC did not express its intent to relinquish its rights. Accordingly, the court declined to grant summary judgment in favor of TMG.

The next motion concerned the issue of whether TMG breached the Joint Venture Agreement by failing to approve and make capital contributions. The court's prior ruling found only what was required for capital contributions to be binding on the parties. The question presently before the court was distinct and asked whether TMG was obligated to approve the capital contributions at issue. The court found the Agreement did not require the Executive Committee approve capital contributions simply because AWC, as the managing partner, raised the issue. It did require the Committee take steps to ensure the Joint Venture had sufficient funds to pay its accounts and subcontractors. The court specifically stated it did not find the portions of the Agreement cited by AWC required the Executive Committee to fund post-construction litigation. AWC appeared to argue this obligation arises under the Agreement's instruction that all working capital when and as required for the performance of the contract shall be furnished by the parties in accordance with their proportional shares. "Work" was defined as the construction of the project. The court did not find the Agreement obligated TMG vote to approve any and all capital contributions when and as required for the performance of the contract. Having found the Agreement required TMG to approve capital contributions to the extent capital was required to fund the Joint Venture's accounts payable and pay its subcontractors, the remaining question before the court was whether the Joint Venture needed additional capital to make these payments. The court found there was a genuine issue of fact as to whether the cash calls were necessary.

Finally, the court considered AWC's claim TMG breached its fiduciary duties by failing to vote to approve capital contributions, failing to provide necessary capital contributions and refusing to participate in the Executive Committee meetings. A claim for breach of fiduciary duty under Louisiana law requires: 1) the existence of a fiduciary duty on the part of the defendant; 2) an action taken by the defendant in violation of that duty; and 3) the damages to the plaintiff as a result of that action. The court held a partner owes a fiduciary duty to the partnership and to its partners. He may not conduct any activity, for himself or on behalf of third persons, that is contrary to his fiduciary duty and is prejudicial to the partnership. If he does so, he must account to the partnership and his partners for the resulting profits. The court found the standard seeks to prohibit activities prejudicial to the partnership and is based on the idea the relationship of the partners is fiduciary and imposes upon them the obligation of good faith and fairness in their dealings with one another with respect to the affairs of the partnership.

There was no dispute the first element, the existence of a fiduciary duty, was met. Louisiana law is clear: members of a Joint Venture, like partners to a partnership, owe fiduciary duties to one another. What was disputed was whether any action taken (or not taken) by TMG violated its fiduciary duty to AWC. AWC argued TMG knew and acknowledged the Joint Venture required funds to pay subcontractors to complete the project, and knew the owner was not properly compensating the Joint Venture, and yet refused to pay its share. The court found there were factual issues that precluded summary judgment.

Although AWC presented evidence the Joint Venture was experiencing cash flow issues, the record showed it was exploring options at funding the Joint Venture outside of capital contribution calls. Specifically, the Joint Venture was considering whether liquidated damages from the owner could resolve the cash flow issues. A party does not breach an agreement by exercising its contractual rights. Thus, viewing the evidence in a light most favorable to TMG at this juncture, the court could not determine TMG breached its fiduciary duty in failing to approve and/or contribute capital before it determined whether it was required to do so. The necessity of the capital calls and TMG's obligation to vote to approve those calls and contribute capital went to the material elements of breach of fiduciary duty. Because there were genuine issues of fact, the court denied AWC's motion for summary judgment as to breach of fiduciary duty with respect to TMG's alleged failure to approve and/or make capital contributions.

AWC's claim for breach of fiduciary duty as to TMG's alleged failure to meaningfully participate in the Executive Committee faired no better. TMG pointed to evidence after AWC placed TMG in default, AWC declined to allow TMG to vote on Joint Venture decisions. AWC's motion for summary judgment as to its breach of fiduciary duty claim was denied. *Archer Westin Contractors, LLC v. The McDonnel Group, LLC,* 22-5323 (ED.La. 2025), 2025 WL 316343.

DISQUALIFICATION OF A BIDDER

The Terrebonne Parish School Board advertised for bids for a project. Five bids were received. The two lowest bidders were non-responsive and were disqualified. The Board awarded the bid to Group Contractors, LLC on January 24, 2023. The contract was signed on February 1, 2023. Edward J. Laperouse Metal Works, Inc. was the next lowest bidder. It objected to the award contending Group failed to follow certain requirements of the bidding documents. The Board filed a petition for declaratory judgment. Laperouse filed a petition for intervention, preliminary injunction, permanent injunction, mandamus relief and a declaratory judgment.

Laperouse claimed the Board's actions in entering into a contract with Group before post-bid submissions were provided (or due) constituted an inappropriate waiver of the requirements of the Public Bid Law and the project documents. Laperouse also alleged Group's post-bid submission of documentation regarding a non-authorized and non-approved roofing system failed to meet the requirements of the bidding documents and the Board's waiver of the requirement of an authorized or approved roofing system was a violation of The Public Bid Law.

Laperouse's motion for preliminary injunction was denied. Following a trial, the district court signed a judgment declaring the contract between the Board and Group dated February 1, 2023 was null and void. The trial court ordered Laperouse be given an adequate opportunity to conform to the bidding instructions as the next apparent lowest bidder and it be awarded the contract if it produced all documentation in the requisite period of time as required in the bidding instructions and under the Public Bid Law. Group appealed.

The bidding instructions for the submittal of post-bid information provided the lowest responsible bidder would submit to the architect and the owner prior to award of the contract, a letter from the manufacturer that the manufacturer will issue the roof system guarantee based on the specified roofing system and include the name of the applicator acceptable to the manufacturer for installing the specified roofing system. The manufacturer was to be one who received prior approval or was named in the specifications.

Group contended because the bidding instructions required the roofing manufacturer to submit the roof system guarantee prior to award of the contract, it created a shorter timeline then that established by law. L.R.S. 38:2212(B)(3)(a). More specifically, according to Group, any bidding instruction that implies a deadline earlier than ten (10) days for bidders who are not the apparent lowest bidder was in conflict with the requirements of the Public Bid Law and is invalid as a matter of law. The Board awarded the project to Group seven days after the bid opening. Group maintained the bidding instruction at issue effectively shortened the time for Group to submit the manufacturer letter to seven (7) days in contravention of the statute.

The court found, after a review of the bidding instruction, the instruction, on its face, did not violate the Public Bid Law. The instruction did not derogate from the requirement under the Public Bid Law that the bidding documents shall not require any bidder other than the apparent low bidder furnish any other information or documentation any sooner than ten (10) days after the date bids were opened. The instruction required the lowest responsible bidder to submit to the architect and the owner prior to award of the contract, a letter from the manufacturer guaranteeing the roofing system and including

the name of the installer of the specified system. The instruction did not contain any language shortening the time period for the required post-bid roofing manufacturer submittals. These documents were required to be submitted after the bid opening and prior to award of the contract.

Nothing in the instructions mandated the roofing manufacturer guarantee be submitted within seven (7) days of the bid opening. The instruction merely required the guarantee be submitted to the architect prior to award of the contract and Group had ten (10) days to do so. The decision to award the contract to Group at the special meeting of the board on January 24, 2023, only seven days after the opening of the bids for the project, did not make the bidding instruction itself invalid as a matter of law. The court could not say the instruction conflicted with the requirements of the Public Bid Law.

Next, Group argued the statute prohibits an entity, which is not the apparent low bidder, furnish post-bid submittals any sooner than ten (10) days after the bids are opened. Group suggested the bidding instruction was inapplicable to it as it was the third lowest bidder and not the apparent low bidder in accordance with the statute. The court of appeal disagreed with the argument Group was not the apparent low bidder and the instruction was inapplicable to it. The two lowest bidders were declared non-responsive, and the Board could not consider those bids. Therefore, Group became the apparent low bidder, and had a maximum of ten (10) days from the bid opening to produce any required post-bid submittals.

The court of appeal turned to the question of whether Group violated the bidding instruction. On January 24, 2023, the Board awarded the contract to Group seven (7) days after the opening of the bid. On January 31, 2023, Group submitted a manufacturer letter from Soprema which was a non-authorized and non-approved roofing system. On February 6, 2023, twenty (20) days after the opening of bids and thirteen (13) days after the contract was awarded to Group, Group submitted a manufacturer letter from Garland Company, Inc., an approved roofing system. Laperouse asserted Group's failure to timely submit the manufacturer's guarantee for the specified roofing system in accordance with the bidding instruction invalidated Group's bid. Group tried to move forward with the project using the Garland system, producing a letter from the manufacturer of the Garland system. The court of appeal held Group did not provide the required letter from an approved roofing manufacturer until February 6, 2023, twenty (20) days after the opening of the bids and thirteen (13) days after the contract was awarded to Group. The bidding instruction unambiguously provided the apparent low bidder ten (10) days from the bid opening was to produce any required post-bid submittals, and Group failed to comply with that requirement making it a non-responsive bidder and resulting in the automatic disqualification of its bid.

Even if not considered the apparent low bidder, Group failed to comply with the statute as the next lowest bidder since it did not provide the letter from the approved manufacturer within the ten (10) days from when it was awarded the contract on January 24, 2023. As the next lowest bidder, Group had not less than ten (10) days from the date the first low bidder and the second low bidder were declared non-responsive. Group did not provide a letter from an approved manufacturer until February 6, 2023, which is more than ten (10) days after the first low bidder and second low bidder were declared non-responsive. Group, accordingly, failed to comply with the requirements of the statute.

The provisions and requirements of the Public Bid Law and those stated in the bidding documents are not to be waived by any entity. The Board's award of the contract to Group before receiving the roofing system guarantee from the manufacturer was in violation of the bidding instruction and constituted its waiver. Further, as the next lowest bidder, as opposed to the apparent low bidder, Group failed to submit the required post-bid manufacturer letter within the ten (10) days provided by the statute and the Board effectively waived the requirement of the Public Bid Law as well. Accordingly, the trial court did not err in rendering the contract between the Board and Group null and

void. The judgment of the trial court was affirmed. *Terrebonne Parish School Board v. Group Contractors, LLC*, 2023-1339 (La. 1 Cir. 1/31/25), 406 So.3d 470.

REMOVAL OF A LIEN AND *RES JUDICATA*

Roy Anderson Corp. (RAC) was the contractor for the conversion an office building into an apartment complex, hotel and parking garage. The owner was 225 Baronne Complex, LLC (225 Baronne). RAC filed a lien alleging it was owed $15,401,300.00 for work on the contract. 225 Baronne filed a petition to remove the lien contending, among other things, it did not properly set forth the amount and nature of the obligations giving rise to the claim or privilege and reasonably itemize the elements comprising it. The trial court ordered removal. RAC appealed. The court of appeal reversed the trial court finding the lien met the procedural requirements of the Private Works Act. RAC filed a petition to enforce the lien. 225 Baronne filed a writ application with the Louisiana Supreme Court which denied the application. Following denial of the application by the Louisiana Supreme Court, RAC requested reinstatement of the lien. The Recorder of Mortgages complied with the request. Two years later, the legislature amended L.R.S. 9:4833(E) of the Public Works Act effective January 1, 2020.

225 Baronne filed a petition for cancellation of the lien pursuant to the amended statute which was more than one (1) year after RAC filed its lien. RAC contended at no time during the pendency of the first removal lawsuit did 225 Baronne amend its pleadings or file a separate action to request a cancellation of the lien pursuant to L.R.S. 9:4833 based on RAC;s purported failure to file a Notice of *Lis Pendens*. The trial court granted the second lien removal petition of 225 Baronne. The trial court, with respect to the second removal petition, found amended L.R.S. 9:4833(E) required the filing of the Notice of *Lis Pendens* within a year of the recordation of the lien which was not accomplished.

RAC filed an Exception of r*es judicata*. The trial court found RAC did not meet the fourth element of r*es judicata,* i.e., whether the cause of action asserted in the second suit existed at the time of the final judgment in the first litigation. The trial court overruled the r*es judicata* exception and ordered the Recorder of Mortgages to remove the lien. RAC appealed.

The court of appeal first considered whether RAC was required to file a Notice of *Lis Pendens* within one year of filing its lien on December 22, 2015. RAC asserted it could not have filed its Notice of *Lis Pendens* until after the Louisiana Supreme Court issued its writ denial on April *7,* 2017 because there was nothing in the Orleans Parish mortgage records regarding RAC's lien's after the trial court rendered its first removal judgment in April, 2016. RAC claimed it could not have complied with the amended L.R.S. 9:4833(E) requirement that a Notice of *Lis Pendens* shall contain a reference to the recorded statement of claim or privilege. 225 Baronne countered RAC had only one year after filing the lien to file its Notice of *Lis Pendens*.

The court of appeal held in accordance with long-standing principle of statutory interpretation, statutes creating liens and privileges are *stricti juris* and their provisions are to be strictly construed against the parties in whose favor the liens are created. The amended statute, L.R.S. 9:4833(E) provided a recordation of statement of claim or privilege and the privilege preserved by it are not effective as to third persons unless filed within one year after the date of filing the statement of claim or privilege. The notice of pendency, i.e, Notice of *Lis Pendens,* must contain a reference to the recorded statement of claim or privilege. A Notice of *Lis Pendens* serves to inform the general public of the precise property involved in the litigation and the object or purpose of the suit with respect to the property concerned. RAC argued to hold, in this instance, the notice had to have been filed within one year of recording the lien would lead to the absurd consequence that RAC would have had the "impossibility" of filing a Notice of *Lis Pendens* when the lien was no longer inscribed in the mortgage records thereby preventing RAC from referencing the lien. The court of appeal agreed with 225 Baronne RAC could have included a notation in the Notice there was a pending appeal. Further, even if RAC had filed a Notice of *Lis Pendens*

at some point during the one year period and 225 Baronne sought removal of the Notice of *Lis Pendens* during the time when the trial court's first removal judgment was in effect, RAC would have and should have nonetheless covered its bases under the statute by having filed the notice. The court of appeal found the legislature's intent in requiring a lien holder to file a *Lis Pendens* within one year of recording the lien, in accordance with the amended statute, was to provide the public with timely notice of a dispute regarding the property and ultimately to bind third parties to the outcome of the suit. RAC failed to satisfy the temporal element of the amended statute, thereby subjecting its lien to cancellation.

The court of appeal then considered whether *res judicata* barred 225 Baronne's second removal petition. RAC argued the claims of 225 Baronne in its second removal petition existed during the first removal lawsuit. RAC contended the court's initial decision was the final judgment that must be considered for *res judicata* purposes and the transaction or occurrence for purposes of *res judicata* in both the first and second removal petitions was its lien.

Res Judicata is a concept of which a party may defeat an action by declaring the claim extinguished because it already has been litigated. To establish *res judicata* precludes a subsequent action, five elements must be established: 1) the judgment is valid; 2) the judgment is final; 3) the parties are the same; 4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and 5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation. A party asserting *res judicata* must prove all five elements by a preponderance of the evidence and establish each element beyond all question. As to the fourth element, i.e., whether the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation. The court of appeal must determine whether 225 Baronne's cause of action asserted in the Second Amended Petition existed at the time of the first amended suit. The court stated a subsequent suit based on a substantive change in the law is barred by *res judicata* unless there is clear evidence of the legislatures intent the substantive change is to be applied retroactively. The amended statute specifically states it was to apply retroactively. As a result, the court of appeal found *res judicata* did not preclude the second removal petition of 225 Baronne. The court of appeal concluded the fourth element of *res judicata,* 225 Baronne's cause of action asserted in the second removal suit, did not exist at the time of the first removal suit. RAC failed to prove the fourth element. The transaction or occurrence in the first removal suit was RAC's recording of its lien. The transaction or occurrence asserted in the second removal suit was its failure to timely file its Notice of *Lis Pendens*. 225 Baronne's first and second removal suits did not arise from the same transaction. The trial court's judgment which granted 225 Baronne's petition for cancellation of the lien was affirmed. The *res judicata* exception of RAC was overruled. *225 Baronne Complex, LLC v. Roy Anderson Corp., 2024-0401* (La.App. 4 Cir. 1/31/25), 408 So.3d 291.

APPLICABILITY OF LOUISIANA LAW ON A FEDERAL ENCLAVE AND THE LOUISIANA CONSTRUCTION ANTI-INDEMNITY ACT

In a matter involving an interpretation and application of the Louisiana Construction Anti-Indemnity Act, L.R.S. 9:2780.1, the United States District Court for the Western District of Louisiana considered a claim by the indemnitor Louisiana state law had no application under the federal enclave doctrine since the incident in question, a personal injury, resulting in death, occurred on a U.S. military base. The court held under the doctrine, state law in force at the time fills any gaps in federal law for private rights. Congress created a right of action for wrongful death on federal enclaves but provided state law would govern with respect to such actions and actions arising from personal injuries on federal enclaves. Louisiana law would, therefore, govern the rights of the parties and extend to indemnity claims against private parties arising from the same accident.

One of the issues was whether the alleged indemnitee was an additional insured under the policies provided by the indemnitor. The additional insured exception only requires evidence the

indemnitor recovered the cost of the required insurance in the contract price. The bid indicated the contract price might have been inflated to account for the required insurance premiums, but the court held the fact the indemnitor might have considered insurance coverage in calculating its bid does not establish it paid the full amount of the premium or did not pay any material part. The exception does not apply when any material part of the insurance cost is born by the indemnitee as the subcontract at issue appeared to contemplate.

The parties submitted conflicting affidavits and created an issue of fact as to whether the indemnitee provided sufficient funds to cover the applicable indemnity/additional insured requirements and summary judgment was, therefore, inappropriate.

The indemnitee also argued it was seeking indemnity for claims arising from the indemnitor's negligence. The court held indemnity provisions are voided under the statute only to the extent they purport to require indemnification and/or defense where there is negligence or fault on the part of the indemnitee; otherwise, they are enforceable just as any other legal covenant. The court found there had been no determination as to whether the indemnitee was negligent. The court held it was unable to grant summary judgment based on the arguments. Maura Greer v. Sauer Construction, LLC, 2:23-cv-01243 (WD.La. 2/6/25), 2025 WL 420544.

INDEMNITY CLAUSE UPHELD

An owner sued an elevator company for indemnity for any damages it was required to pay in response to a personal injury claim related to an alleged elevator malfunction. The elevator company filed a motion for summary judgment contending the Louisiana Construction Anti-Indemnity Act, L.R.S. 9:2780.1, did not apply since the owner would never pay damages for anything it did or did not do, and any defense by the owner would be because of its own actions or inactions. The elevator company, further, alleged it was not at fault, thus the owner could not have paid any attorneys' fees because of its joint or contributing negligence. The elevator company relied upon C.C. art. 2324 which provides he who conspires with another person to commit an intentional or willful act is answerable, *in solido*, with that person, for the damage cause by such act. If liability is not solidary pursuant to the foregoing, then liability for damages caused by two or more persons is a joint and divisible obligation. A joint tortfeasor would not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such person.

The contract between the owner and the elevator company provided the contractor's obligations to defend the owner, including the payment of attorneys' fees and costs, shall apply regardless of any contributing fault or negligence of the owner, provided however, if a court of competent jurisdiction ultimately determines the claims subject to such an obligation was the result of the sole or contributing negligence of the owner, the contractor shall be entitled to recover the percentage of such verified expenses actually incurred in relation to such defense that is equal to the percentage of fault attributed to the owner by such court. Notwithstanding anything to the contrary, the contractor's obligations shall not be affected or excused by any contributing fault or negligence of the owner, nor shall the eventual finding of a lack of causation against the contractor have any effect on the obligation of the contractor to defend the owner. Further, while the contractor shall not be required to indemnify the owner for that portion of any claims, loss or injury arising directly from the owner's negligent actions or omissions, this shall not be interpreted to bar or prevent the defense or indemnification provisions in favor of the owner.

The court analyzed jurisprudence relative to the Louisiana Oilfield Ant-Indemnity Act (LOAIA), L.R.S. 9:2780. That Act, according to the Louisiana Supreme Court, only prohibits indemnity for cost of defense where there is negligence or fault (strict liability) on the part of the indemnitee, and did not apply where the indemnitee was not negligent or at fault. Whether or not an indemnitee is free from

fault, and thus outside the scope of the LOAIA can only be determined after a trial on the merits, and if it is established the indemnitee is not at fault or negligent. The Louisiana Supreme Court has held such defense and indemnity agreements are void only to the extent they purport to require indemnification and/or defense where there is negligence on the part of the indemnitee; otherwise, they are enforceable just as any other legal covenant. The court found the owner did not seek defense or indemnity for its own negligence. The agreement between the parties for defense and indemnity did not run afoul of the law and therefore the owner was entitled to recover its cost and attorneys' fees incurred. *Lee v. Boyd Racing, LLC*, 22-cv-00174 (WD.La. 1/31/25), 2025 WL 359286.

JUDGMENT DISMISSING A CLAIM UNDER THE PUBLIC WORKS ACT REVERSED

An electrical supply company sold electrical supplies and related materials and equipment to a subcontractor for a project. The subcontractor failed to pay the supplier for the materials. The supplier filed a statement of claim or privilege under the Private Works Act (PWA) and a lawsuit against the subcontractor to collect the amount of the debt. The defendants moved for summary judgment seeking to dismiss the supplier's claims arguing the supplier failed to adequately preserve its claim or privilege by not reasonably itemizing the materials supplied in the statement of claim as required by the PWA. According to the defendants, the use of the phrase "electrical supplies" by the supplier in its claim did not comply with the PWA. The district court granted summary judgment in favor of the defendants and against the supplier dismissing all claims. The supplier appealed.

The court of appeal reversed the trial court judgment finding the supplier's statement of claim contained a reasonable itemization of the elements comprising the nature of the obligation giving rise to the claim or privilege. *Crawford Electrical Supply Company, Inc. v. Loga Holdings, LLC*, 2024-0870 (La.App. 1 Cir. 2/21/25), 406 So.3d 634, *writ denied,* 2025-CA-00463, (La. 6/17/25), 2025 WL 1692356.

RIGHT OF ACTION

St. Augustine High School, Inc. leased a gym from St. Joseph Society of the Sacred Heart, Inc. Damages to the roof and wooden court were caused by Hurricane Ida. Covington Flooring Company, Inc. was retained by St. Augustine to repair the damage. Covington hired Jose Carlos Rodriguez to perform sanding and finishing work on the gym floor. Rodriguez allegedly applied products to the floor that contained compounds known to self-heat and combust if improperly disposed of. A fire occurred in the gymnasium causing significant damage to the floor, walls, roof and other parts of the building. St. Augustine sued Covington in state court for the damages. St. Augustine alleged Covington failed to adhere to its contract obligations and proper safety protocols resulting in the fire and the extensive property damage that followed. The matter was removed to federal court. A pre-trial order listed contested legal issues including whether St. Augustine had a right of action for property damage to the leased gym. The district court ruled it did. The case proceeded to trial. The jury found Covington liable for breach of contract and negligence, and awarded $6,396,096.00 to St. Augustine. The district court entered judgment in accordance with the jury verdict. Covington appealed.

St. Augustine argued Covington waived its argument St. Augustine, as a lessee, lacked a right of action for property damage to the gymnasium under a breach of contract theory. In its view, Covington's argument was limited to tort law. The court of appeal held Covington did not waive the argument.

Covington's position was distilled to a single point: the lease agreement does not grant St. Augustine a right of action for the gymnasium damages. The court of appeal disagreed. C.C. art. 2702 grants a lessee a right of action for property damage. It provides a lessor is not bound to protect the lessee's possession against a disturbance caused by a person who does not claim a right in the leased

thing. In such a case, the lessee may file any appropriate action against that person. The court of appeal held the damage to the gymnasium constituted a "disturbance in fact" under C.C. art. 3659 because it prevented St. Augustine from enjoying its possession by rendering the gym unavailable for the high school's use. St. Augustine could file any appropriate action against Covington, including claims for breach of contract and negligence. *Indian Harbor Insurance Company v. Covington Flooring Company, Incorporated*, 24-30243 (US 5 Cir. 2/6/25), 2025 WL 416992.

ABANDOMENT

The Louisiana Supreme Court held a defendant's motion to continue and reset a hearing date constituted a step in the resolution of the case and did not waive the defense of abandonment. The motion did not request a continuance without date, but reflected an intent to reset the hearing and was accompanied by an order which provided a date for the trial court to reset the hearing. Motions to continue a hearing, accompanied by orders to reset the hearing date, evidence an intent to advance a lawsuit and steps taken in the prosecution or defense of an action in accordance with La.C.C.P. art. 561. *Pinnacle Construction Group, LLC v. Devere Swepco JV, LLC*, 2024-c-00406 (La. 2/6/25), 400 So.3d 878.

ARBITRATION

The Louisiana Fifth Circuit Court of Appeal in enforcing an arbitration clause in a contract held the issue of whether the party seeking arbitration of a dispute waived its right to arbitration must be decided by the arbitration panel. The arbitration statute does not allow a trial court to determine waiver issues. *J. Caldarera & Company, Inc. v. Triumph Construction Company, Inc.*, 24-451 (La.App. 5 Cir. 12/18/24), 410 So.3d 872.

ORDER VACATING AN ARBITRATION AWARD AFFIRMED

The Louisiana district court granted the motion of Carver Theater, LLC, the plaintiff, to vacate an arbitration award. The defendants appealed. The defendants argued the Theater's claims were governed by the Federal Arbitration Act (FAA). They contended, pursuant to the FAA, the Federal Severability Doctrine (also referred to as the Separability doctrine) was key to the appeal. According to the doctrine, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is decided by the arbitrator. The court of appeal found the Memorandum of Understanding (MOU) between the parties which contained the arbitration provision lacked a nexus to interstate commerce and the FAA did not apply. It held Louisiana arbitration law governed and L.R.S. 9:4201 required the validity of the entire contract be determined by the Louisiana district court rather than an arbitrator.

L.R.S. 9:4210 provides the exclusive grounds for vacating an arbitration award. One of those grounds provides an award may be vacated where it was procured by corruption, fraud or undue means. The court of appeal found the appellants engaged in undue means by undertaking inconsistent positions and unfair forum shopping to obtain a favorable arbitration award. In seeking a stay pending arbitration, the appellants' express position was the MOU was valid and mandated arbitration. At no point did they merely argue the arbitration provision alone was severable and valid, even if the underlying MOU was invalid or ineffective. The appellant argued later for the first time the MOU was ineffective, and it had no intention of abiding by its terms.

According to the court of appeal, the law could not permit such gamesmanship. Appellants affirmatively represented to the district court the MOU was valid and binding, not merely the arbitration clause could be severed, but the MOU itself governed the parties' relationship. The Theater relied on those representations, as did the district court, which stayed the litigation and compelled arbitration. Only after securing the benefits of arbitration did the appellants deny the validity of the

Agreement they had invoked. Such conduct constituted undue means within the meaning of the statute and compelled vacatur of the arbitration award.

A party is permitted to refine legal theories as a case develops but is not permitted to present factual assertions to a court as true, secure a procedural ruling based on those assertions, and then reverse position once the strategic advantage is obtained. Such conduct is not ordinary litigation strategy but is a misrepresentation that compromises the integrity of the judicial proceedings. The court of appeal affirmed the ruling of the district court. Carver Theater, LLC v. Melancon, 2024-0468 (La.App. 4 Cir. 5/5/25), _____ So.3d _____, 2025 WL 1292495.

MANDAMUS RELIEF DENIED

LA Contracting Enterprise, LLC contracted with South Lafourche Levee District for repairs to a flood wall, elevation of a roadway ramp over the levee and civil site work as required by the drawings. The project was designed by GIS Engineering, LLC. A dispute arose as to the location from where material was to be taken, how much would be taken and how the material would be categorized under the contract. The Levee District voted to terminate the contract for convenience. LA Contracting filed a suit for mandamus pursuant to the Public Works Act seeking funds it contended were due under the contract. The trial court determined the Levee District's decision to not pay the full amount of an application for payment was not arbitrary or without reasonable cause, but, instead, was based on the recommendation of the project engineer. The trial court further determined the dispute resulted from a disagreement between the parties as to the contract's interpretation. It concluded that mandamus relief was not available. LA Contracting appealed.

The Louisiana Civil Code defines mandamus as a writ directed to a public officer to compel him to perform an administerial duty required by law. An administerial duty is a duty in which no element of discretion is left to the public officer. It is a simple, definite duty, arising under conditions admitted or proved to exist and imposed by law. A mandamus will not lie in matters in which discretion and evaluation of evidence must be exercised. The court of appeal held LA Contracting was not required to show relief was not available by ordinary means or the delay involved in obtaining ordinary relief may cause injustice. Nevertheless, a public entity is not subject to mandamus compelling payment when the terms of the contract give the public entity discretion as to whether payment is due and payable.

L.R.S. 38-2191 sets forth two circumstances where mandamus relief is available against public entities: 1) when a public entity has failed to make progressive stage payments arbitrarily or without reasonable cause under a contract; or 2) when a public entity has failed to tender a final payment when due under the contract. A public entity's obligation to pay applies to approved change orders. Thus, in order to be entitled to mandamus relief against the Levee District, LA Contracting was required to establish the Levee District arbitrarily or without reasonable cause failed to make progressive stage payments or failed to make final payment when due under the contract. "Reasonable cause" for non-payment exists when the terms of the contract do not mandate payment under certain circumstances.

The court of appeal found both sides presented compelling arguments outlining their opposing interpretations of the contract. The contract, however, provide the Levee District shall make payments as recommended by the engineer, and for the reasons assigned by the engineer, the engineer made no such recommendation for full payment. Considering the engineer's comments on the fourth pay application, which it returned to LA Contracting with instructions to amend and resubmit, and the correspondence exchanged between the parties explaining how they arrived at different amounts due under their respective interpretations of the contract, the court of appeal could not say the Levee District's decision to withhold the fourth and final payment was made arbitrarily or without reasonable cause. Such a finding is required before a writ of mandamus may issue.

The court of appeal found LA Contracting had not established it was entitled to mandamus relief to compel payment pursuant to the statute. LA Contracting's request for a writ of mandamus was not an appropriate substitute for the thorough vetting permitted through ordinary process. The issues raised through the respective interpretations of the contract by the parties were disputed and highly technical. The demand the trial court resolve all of the disputes presented within an abbreviated timeframe of a mandamus proceeding would do a disservice to the litigants. The judgment of the trial court was affirmed. *LA Contracting Enterprise, LLC v. South Lafourche Levee District*, 2024-0272 (La.App. 1 Cir. 12/20/24), _____ So.3d _____, 2024 WL 5182339.

RES JUDICATA AND INTEREST

Wallace C. Drennan, Inc. litigated through a mandamus proceeding claims against The Town of Lafitte for payments due. The mandamus litigation did not include claims for statutory interest. Drennan filed an ordinary proceeding to recover statutory interest. Lafitte contended the claims for interest in the ordinary proceeding were barred by *res judicata* as a result of the mandamus litigation. The trial court granted the exception of Lafitte of *res judicata*. Drennan appealed. Pursuant to L.R.S. 13:4231, a second action is prohibited by the doctrine of *res judicata* when all of the following are satisfied: 1) the judgment is valid; 2) the judgment is final; 3) the parties are the same; 4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and 5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation.

The court of appeal held the court has the authority to exercise its discretion to balance the principles of *res judicata* with the interests of justice; the discretion must be exercised on a case-by-case basis and such relief should be granted only in truly exceptional cases. Drennan argued *res judicata* could not apply to preclude its statutory interest claims because it could not bring its mandamus claims and statutory interest claims in the same proceeding. It argued L.R.S. 38:2191(D) limits the use of summary mandamus proceedings to the amount of the appropriation by the public entity for the award and execution of the contract. Drennan claimed because Lafitte had not appropriated any amounts for statutory interest it sought to recover, the statute required it to pursue these claims in a separate ordinary proceeding.

The court of appeal found L.R.S. 38:2191(D) allows for a summary mandamus procedure to compel payments up to the amount of the appropriation made for the public contract and expressly contemplates the possibility of both ordinary and summary mandamus proceedings as well as more than one mandamus or ordinary proceeding during the course of public contract performance. The court cannot compel immediate payment from a public entity by means of mandamus unless the amount has been appropriated, or when the legislature has specifically authorized mandamus authority beyond the appropriated amount. It was conceivable a statutory interest claim could be brought in a mandamus proceeding if the public entity appropriated an amount that would cover the interest. The plain language of L.R.S. 38:2191(B) limiting a mandamus proceeding to sums due under the contract and the appropriated amount prohibited Drennan from seeking a judgment of mandamus to compel Lafitte to pay statutory interest.

Accordingly, Drennan could file multiple mandamus actions for amounts due and appropriated and a separate ordinary action for statutory interest for each alleged tardy progressive stage payment and final amount. The court of appeal concluded while a statutory interest claim is not prohibited in a mandamus proceeding in every instance, it is unlikely, for all practical purposes, the appropriated amount would ever include such sums.

The court of appeal held there were no exceptionable circumstances applicable. Drennan was not barred from proceeding with an ordinary proceeding by the *res judicata* effect of the judgment

rendered in the mandamus proceeding. Drennan was not required to include its statutory interest claims in the mandamus proceeding because the amount appropriated for the award and execution of the contract did not include the sums to cover statutory interest, and the statutory interest claims were, further, not litigated in that proceeding. The judgment of the trial court granting the exception of *res judicata* was reversed. *Wallace C. Drennan, Inc. v. Timothy P. Kerner, in his capacity as Mayor of the Town of Lafitte and the Town of Lafitte*, 23-428 (La.App. 5 Cir. 12/18/24), 409 So.3d 893, *writ denied*, 2025-C-0000900, (La. 4/8/25), 405 So.3d 570.

PEREMPTION FOR A PUBLIC WORK

L.R.S. 38:2189 provides a five-year period for claims with respect to public contracts running from substantial completion or acceptance, whichever occurs first. On May 25, 2018, the owner terminated the agreement. On January 8, 2018, before termination, the owner filed suit against the contractor. The agreement between the owner and the contractor required arbitration. The trial court ordered all claims stayed pending completion of arbitration. On August 7, 2018, the trial court stayed all claims against the contractor pending the completion of arbitration. Over five years later, in August, 2023, the contractor filed a peremptory exception of peremption. The owner argued its timely suit interrupted or suspended the peremptive period and the claim was viable pending completion of arbitration. The owner contended the claim was still alive even though over five years had passed with no request for arbitration. The district court granted the exception of peremption of the contractor dismissing the claims of the owner.

The arbitration provision of the contract provided an arbitration demand must be made no later than the date when the institution of legal proceedings based on the claim would be barred by the applicable statute of limitations, i.e., L.R.S. 38:2189. The owner did not make the required written demand for arbitration within the five-year period. Since the lawsuit was filed outside of the five-year period of L.R.S. 38:2189, the court of appeal held the district court did not err in finding the owner's lawsuit was ineffective to exercise its contract claim. The judgment of the lower court was affirmed. *Bienville Parish School Board v. Thrash Construction Services, LLC*, 56,021 (La.App. 2 Cir. 12/18/24), 402 So.3d 696, *writ denied,* 2025-C-00085, (La. 4/8/25), 405 So.3d 569.

BODILY INJURY EXCLUSION OF A PROFESSIONAL LIABILTY POLICY UPHELD

In a lawsuit against a real estate agent with respect to property management services the agent's liability policy contained a bodily injury exclusion. The Louisiana Third Circuit Court of Appeal held while the policy of insurance may cover certain property management damages, the claim was for bodily injuries. The language of the policy's bodily injury exclusion clearly and unambiguously excluded the damages sought. *O'Neal v. Foremost Insurance Company*, 2024-212 (La.App. 3 Cir. 6/25/25), _____ So.3d _____, 2025 WL 1749368.