

Pugh Accardo

ATTORNEYS AT LAW

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).

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TERMINATION FOR CAUSE, IMMUNITY OF A CONTRACTOR UNDER L.R.S. 9:2771, AND NON-LIABILITY CAUSED BY A FORTUITOUS EVENT

Rosehill Construction, LLC contracted with Ted Hebert, LLC for Hebert to perform sewer related work on a project. Hebert began work but experienced problems due to weak soil and water intrusion. A change order increasing the cost of Hebert’s contract was entered into. Hebert completed the sewer installation, but inspection by the City of Baton Rouge/East Baton Rouge Parish failed. Two additional inspections after further work by Hebert also failed. The work never passed a final inspection. Rosehill contracted with Hendrick Construction, Inc. to complete the sewer system project. Hendrick’s work passed inspection.

Rosehill filed a petition for damages against Hebert alleging Hebert breached the subcontract by failing to perform the work in accordance with the subcontract. Hebert filed a reconventional demand for breach of contract for non-payment of the work it performed. Following a trial by jury, the jury returned a verdict awarding Rosehill \$48,500.00 for liquidated damages, \$306,566.00 for the costs of the replacement contractor and \$76,586.00 for extended project overhead. Hebert’s reconventional demand was denied. Hebert appealed.

The court of appeal considered the determination by the trial court Hebert was terminated for cause. Rosehill was entitled to the damages to which the parties contractually agreed which expressly provided for extended project overhead and any liquidated damages payable by the contractor. The damages assessed were not delay damages as well as liquidated damages, but rather for defective performance under the contract. The damages were what Rosehill actually lost due to Hebert’s defective performance. The court of appeal found no authority to conclude that it is not proper for a prime contractor to pass to a subcontractor through contract, liquidated damages owed to the owner

that were caused by the subcontractor when the subcontractor was terminated for cause which it determined was the nature of Hebert's termination. The jury determined Hebert delayed the construction of the project and Rosehill was entitled to liquidated damages totaling \$48,500.00.

Hebert contended the trial court erred in finding it was not immune from liability for following construction plans and specifications and by finding subsidence of the sewer pipe in the poor soil conditions after proper installation did not make Hebert's work impossible. As to immunity, the court of appeal considered L.R.S. 9:2771 which provides no contractor shall be liable for destruction or deterioration of defects in any work constructed or under construction by him if he constructed, or is constructing the work according to plans or specifications furnished to him, which he did not make or cause to be made and if the destruction or defect was due to any fault or insufficiency of the plans or specifications. The court of appeal held a contractor is not the guarantor of the sufficiency of the plans and specifications drawn by another, and if he complies with those plans and specifications it is entitled to statutory immunity. A contractor cannot, however, rely blindly on plans and specifications. Rather, to avoid liability, the contractor must prove either the condition created was not hazardous or it had no justifiable reason to believe its adherence to the plans and specifications created a hazardous condition. There is no immunity when a contractor does not follow plans and specifications provided to him by another. Similarly, there is no immunity or protection under the statute when the evidence shows the defects were not the result of the insufficiency of plans and specifications, but were the result of the quality of the work done by the contractor.

The sewer would eventually be public and be taken over by the City/Parish. Therefore, as provided in the subcontract, the sewer system had to be installed to meet all of the City/Parish requirements. The Parish determined a sag in the sewer pipe was greater than that allowed by the City/Parish specifications. Issues with means and methods used by Hebert were recorded in the observation reports. The documentation provided that a manhole was installed in the wrong location, a trench was not completely backfilled, a pipe was damaged and sloped at the wrong angle, and ground water that infiltrated the trench possibly because the trench was left open too long, and standing water. Hebert did not attempt to pump or bail out any of the water entering the excavation and was attempting to install the pipe with water in the excavation. Observation reports of an engineer showed the previously installed tie-in of the pipe to a manhole was placed in the opposite slope which was required. The pipe was found to be cracked, flattened and inverted. A second manhole had been stacked and sealed incorrectly. There was a visible two-inch lip between the base of the first rise of the manhole. Further, there was a log buried along the pipe run and the pipe laid by Hebert was displaced approximately two feet in an effort to go around the log. The court of appeal found a reasonable basis existed for the jury to conclude the defects were not the result of insufficiency of plans and specifications, but were the result of the quality of the work done by Hebert.

Hebert contended, pursuant to Civil Code art. 1873 it was not liable. The article provides an obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible. To relieve an obligor of liability for a fortuitous event, the event must make the performance truly impossible. An obligor is not released from his duty to perform under a contract by the mere fact such performance has been made more difficult or more burdensome by a fortuitous event. The fortuitous event must pose an insurmountable obstacle in order to excuse the obligor's nonperformance. The court of appeal found there was no manifest error in the jury's determination there was no fortuitous event that made Hebert's performance impossible. There was no evidence to prove the weather or water intrusion issues were insurmountable obstacles to the installation of the sewer. Hendrick was able to complete the project and pass the City/Parish inspection using the same plans as Hebert.

The judgement of the trial court was confirmed. *Rosehill Construction, LLC v. Ted Hebert, LLC*, 2024-0834 (La.App. 1 Cir. 11/21/25), ___ So.3d ___, 2025 WL 3249213.

INFERENCE OF FAULTY WORKMANSHIP

In a district court decision with respect to a residential construction project, the Louisiana First Circuit Court of Appeal considered the decision in *Joyner v. Aetna Casualty & Surety Co.*, 259 La. 660, 251 So.2d 166, (La. 1971), where the Louisiana Supreme Court applied an inference of faulty workmanship. In *Joyner*, the Louisiana Supreme Court addressed the issue of whether the contractor and/or the premises owner had the burden to prove an injury/defect resulted from faulty construction or from misuse after completion of the contract and delivery to the owner. The Supreme Court held an inference of faulty workmanship or material arises when construction designed as a permanent installation fails shortly after being put to use.

The court of appeal noted the Supreme Court in *Joyner* stated its holding was not intended to modify the requirement that before the inference of fault arises, the party claiming injury must establish by a preponderance of the evidence that after the construction left the control of the contractor upon its delivery to the owner no fault independent of the contractor's workmanship or material (such as the injured party's own fault) caused the failure. The party injured must also prove, by a preponderance of the evidence, his damages were caused by reason of the failure of construction.

Thus, in the matter before the court of appeal, before any inference of fault arises, *Joyner* required the homeowners to first establish by a preponderance of the evidence no fault, independent of the contractor's workmanship or material, caused the damage complained of after the contractor's work was completed and the project returned to the homeowners. The homeowners were also required to prove by a preponderance of the evidence their damages were caused by the failure of construction. The owners must prove by a preponderance of the evidence: 1) a defect exists; 2) faulty materials or workmanship caused the defect; and 3) the cost of repairing the defect. *Organ v. Juarez*, 2025-0321 (La. App. 1 Cir. 11/7/25), ____ So.3d ____, 2025 WL 3125796.

CONTRACTUAL INDEMNITY REQUIREMENT UPHELD

The United States District Court for the Western District of Louisiana held an indemnity provision in a contract was not barred by L.R.S. 9:2780.1, relative to indemnity agreements with respect to construction contracts. The indemnity claim at issue specifically stated that the party seeking indemnification did not seek defense and indemnity relief for any alleged negligent work of the indemnitor, but only for the negligent or deficient work performed on the projects by the third-party defendants. The court noted indemnity agreements are void under the statute only to the extent they purport to require indemnification and/or defense when there is negligence or fault on the part of the indemnitee; otherwise, they are enforceable just as any other legal covenant. The claims for indemnity did not seek defense and indemnity for the indemnitee's own negligence. *LBH LLC v. V1Fiber, LLC*, 23-00436 (WD.La. 2025), 2025 WL 2525056.

INDEMNITY

The workers' compensation insurer of United Bulk Terminals Davont, LLC (UBT) paid workers' compensation benefits on behalf of an employee of its insured. The insurer claimed Buck Kreihs, another party to the litigation, agreed to fully indemnify UBT for any injuries arising out of Buck Kreihs' work except where UBT was solely at fault. There were two agreements. Buck Kreihs contended the second agreement applied to the claims and, under that agreement, UBT owed a duty to indemnify and defend it against plaintiff's liability claims and the insurer's reimbursement claims. Buck Kreihs moved for summary judgment which was granted by the district court. UBT appealed.

The court of appeal held the subsequent agreement contained a mutual indemnity obligation that allocated responsibility for employee-related injuries along party lines, regardless of comparative

fault, a “knock-for-knock” provision. Each party assumed responsibility for its own employees regardless of fault.

Additionally, the court of appeal held indemnity obligations arising out of a contract may be enforced even before liability is determined where the scope of indemnity is not in dispute. Here, according to the court of appeal, the latter agreement expressed a clear intent to allocate risk and indemnity obligations in advance of any finding of negligence. Because the subsequent agreement was the governing contract, and was clear and unambiguous, UBT was contractually obligated to defend and indemnify Buck Kreihs. *Jones v. Buck Kreihs Marine Repair, LLC*, 2024-0837 (La.App. 4 Cir. 6/11/25), 421 So.3d 202.

CLAIM FOR BREACH OF CONTRACT

Ardaman & Associates, Inc. entered into a contract with French Engineering, Inc. with respect to the construction of a new frac sand plant facility in Atkins, LA. The contract required Ardaman to perform marine borings to determine sand depths in the Red River in the vicinity of the new proposed facility. Among other things, the contract also required Ardaman to perform tests for the sand investigation phase of the work, including a Grain Size Analyses consisting of 2” through a 200 Sieve, ASTM C136, performed on every sample. The estimate of the total number of samples was 250. Additionally, Ardaman was to perform evaluations necessary to characterize the subsoil conditions of the site and develop a report which would include a “general discussion” of sand investigation results.

The contract required French to pay Ardaman a fee of \$87,500.00 for its work plus interest accrued on any unpaid amount at the rate of 18% per year and all attorneys’ fees and expenses associated with the collection of past due invoices. French failed to pay Ardaman for its work. Ardaman sued French for damages for breach of contract and filed a motion for partial summary judgment for the damages sought. The trial court granted the motion. French appealed.

French, in opposing the motion for summary judgment, primarily contended Ardaman’s report failed to include information necessary to conclude whether the sand in the vicinity of the proposed plant could be used as frac sand which was the sole reason Ardaman was hired. Ardaman contended the contract, although it provided for sand depths and a grain analysis and grain size determination of the sand, did not include anything concerning the actual suitability for frac sand. French representatives agreed but argued it was implied. The trial court, in granting Ardaman’s motion, stated an implication was not enough and any language concerning the determination of the suitability of the sand as frac sand had to be found within the four corners of the contract.

The court of appeal held the essential elements of a breach-of-contract claim are: 1) the obligor undertook and obligation to perform; 2) the obligor failed to perform the obligation; and 3) the failure to perform resulted in damages to the obligee. It found French’s argument the words “general discussion” required by the contract for sand investigation results could not be used as a catch all phrase to include a request for the frac sand analysis, and conflicted with the contract requirement for information on particle shape, gradation classification, crush strength of the particle, and whether the particle met the requirements of the specification as provided in an email sent by a representative of French to Ardaman. The court of appeal held the term “general” as used in the contract phrase means “miscellaneous, considering or dealing with broad or important aspects, elements, etc.; not specific. The specifications concerning frac sand as requested by French could not, by definition, fall under the umbrella of a “general discussion” on sand investigation results.” Ardaman performed as expected under the contract; French did not. It was obligated to pay Ardaman the damages sought.

The judgment of the trial court was affirmed. *Ardaman & Associates, Inc. v. French Engineering, Inc.*, 56,620 (La.App. 2 Cir. 11/19/25), ___ So.3d ___, 2025 WL 3223889.

CLAIM FOR UNJUST ENRICHMENT

Gilstrap sued Cross Realty for damages for unjust enrichment arising from work performed by Gilstrap on immovable property owned by Cross Realty. Gilstrap alleged the parties entered into a verbal agreement wherein Gilstrap would undertake renovations to the property and then Cross Realty would sell the building at issue at fair market value to Gilstrap minus the amount Gilstrap spent to fix the property. Cross Realty filed a motion for summary judgment contending Gilstrap did not have sufficient evidence to support all the elements necessary for a claim of unjust enrichment. Contract claims of Gilstrap were dismissed. Following a bench trial, the district court awarded damages to Gilstrap for unjust enrichment claims. Cross Realty appealed.

The court of appeal reviewed the requirements for a claim of unjust enrichment. A person who has been enriched without cause at the expense of another person is bound to compensate that person. C.C. art. 2298. The term “without cause” is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law. The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less.

The remedy of unjust enrichment is subsidiary in nature and is not available if the law provides another remedy. To succeed in proving a claim for unjust enrichment, a claimant must show: 1) an enrichment; 2) an impoverishment; 3) a connection between the enrichment and impoverishment; 4) an absence of justification or cause for the enrichment and impoverishment; and 5) no other available remedy at law. The claimant must prove all five elements. If any element is not proven, the claimant’s recovery is barred.

The parties stipulated the first three elements required to establish a claim of unjust enrichment were met. Cross Realty contended because Gilstrap did not attempt to perfect a written contract with it and Gilstrap could have pursued reimbursement through a lien as a material supplier, the fourth and fifth elements for an unjust enrichment claim had not been proven.

“Cause” is not, in this instance, the meaning commonly associated with contracts, but, rather, it means the enrichment is justified if it is the result, or the court finds its explanation in, the terms of a valid juridical act between the impoverishee [Gilstrap] and the enrichee [Cross Realty] or between a third-party [buyer] and the enrichee. A valid juridical act with the enrichee is essential to a finding of “cause.” If cause is found, enrichment is not unjustified and the attempt to invoke the action must fail. It is not every unjust enrichment which warrants the resort to equity; only the unjust enrichment for which there is no justification in law or contract allows equity a role in the adjudication.

It was clear from the record Gilstrap did not intend to confer a benefit upon Cross Realty without receiving something in return, or to benefit the third party at all to the extent it may have. The court of appeal found there was no valid juridical act, or justification, for the cause of the enrichment or the impoverishment. Thus, the fourth element was justified. Further, prior to the ultimate sale of the property, both Gilstrap and Cross Realty received a benefit through the rents they were able to collect by leasing the renovated space.

The court of appeal then considered whether Gilstrap had any other alternative remedy at law available to him. It found Gilstrap established the fifth element of the requirements for a finding of unjust enrichment. The district court previously found there was no action arising under contract between Gilstrap and Cross Realty. The court of appeal held the trial court did not err when it found Cross Realty was unjustly enriched by Gilstrap’s actions and affirmed the finding of the district court Gilstrap was entitled to a finding of unjust enrichment on the part of Cross Realty. It also found, however, Gilstrap failed to prove the exact amount of its losses, but the evidence proved it sustained losses. The award of

damages by the district court was reduced. *Gilstrap v. Cross Realty, Inc.*, 25-45 (La.App. 5 Cir. 12/23/25), ___ So.3d ___, 2025 WL 3715641.

DAMAGES CAUSED BY UNLICENSED CONTRACTOR

An unlicensed contractor sought to escape liability for faulty work and work which it had not performed on the basis it did not have the proper license when it entered into the contract and could not be sued for breach of contract. The court of appeal held the purpose of the licensing requirements is to protect the public from incompetent, inexperienced, unlawful, and fraudulent acts of contractors with whom they contract, and the contractor did not fall within the intended scope of protection under the licensing statutes. The plaintiff homeowner met its burden of proof to show there were no genuine issues of material fact regarding the breach of contract claims and was entitled to judgment as a matter of law.

The defendant contractor, an LLC, was cast in judgment for the breach of contract claim, together with its individual sole member. The contractor contended the plaintiff homeowner failed to satisfy the requirements for piercing the corporate veil. The court of appeal found plaintiff did not establish the requirements of L.R.S. 12:1320 for casting a member, manager, employee or agent of an LLC in judgment. Poor workmanship was not sufficient to hold the member of the LLC responsible for damages. *Thang Nguyen v. Chris Atkins*, 56,636 (La.App 2 Cir. 12/17/25), ___ So.3d ___, 2025 WL 3669501.

ALLEGED BUILDING DEFECT AND MOTION FOR SUMMARY JUDGMENT

SSW Properties, LLC purchased immovable property on Magazine Street in New Orleans for use as a private medical practice. SSW hired Axelrad & Associates to conduct an inspection of the property. Axelrad prepared an inspection report which did not reveal a dangerous condition associated with the second-floor balcony railing and recommended only cleaning and painting. SSW hired MZ Architecture and Design, LLC to develop the renovation plans. It contracted with Mayer Building Company to perform the work. Mayer subcontracted the painting work to Crown Painting and Home Improvement, LLC. The claimant, Hector Ordonez, was an employee of Crown. He alleged he fell over the balcony while painting the ceiling overhang on the exterior second floor balcony and sustained injuries. Ordonez filed a petition for damages naming SSW as a defendant.

SSW filed a motion for summary judgment contending Ordonez was unable to establish SSW had custody of the property when the alleged accident occurred, or that it knew or should have known of any alleged defect in the second-floor balcony handrails which were essential elements of the negligence claim. The district court granted SSW's motion for summary judgment concluding Ordonez failed to satisfy his burden of proof as it related to constructive notice. The district court stated absent some type of testimony or expert report or something indicating the condition of the railing was something that would create a greater level of concern or suspicion with regard to constructive notice, it had to grant the motion. Ordonez appealed.

The court of appeal held in order to recover from a building owner having custody of immovable property to maintain such property in a reasonable condition, the claimant, in order to recover, must prove: 1) the ownership of the building; 2) the owner knew, or in the exercise of reasonable care, should have known of the ruin or defect; 3) the damage could have been prevented by the exercise of reasonable care; 4) the owner failed to exercise such reasonable care; and 5) causation. Plaintiff's inability to prove any of these factors would defeat the negligence claim. The dispositive factor in the matter before the court was whether there was a genuine issue of material fact concerning SSW's actual or constructive knowledge of the defective balcony handrails prior to the accident.

Constructive notice is defined as the existence of facts which infer actual knowledge. Constructive notice can be found if the condition which caused the injury existed for such a period of time that those responsible, by the exercise of ordinary care and diligence, must have known of their existence in general, and could have guarded the public from injury. The concept of constructive knowledge imposes a reasonable duty to discover apparent defects in things under the defendant's garde.

A plaintiff is required to show the owner or custodian of the allegedly defective thing (or premises) knew, or in the exercise of reasonable care, should have known of the ruin, vice, or defect. It is the defendant's awareness of the dangerous condition of the property that gives rise to a duty to act.

SSW attempted to present evidence the second-floor balcony handrails were not in need of repair, immediate attention, or presented a safety issue. It presented the inspection report it obtained prior to purchasing the property. The summary section of the report identified areas of concern regarding the property that would require immediate attention or could pose a potential safety issue to be considered prior to purchasing the property, but, it did not mention the second-floor balcony. The report, with respect to the first-floor balcony, observed some minor rotting and recommended repair, cleaning and painting. As to the second-floor balcony, it did not observe any apparent rotting, nor was there a task recommendation to repair. The report, as to the second-floor balcony handrail, noted the presence of open seams and rust on the handrails. Although the term "rotting" was not used to describe the condition of the second-floor balcony handrails, it explicitly noted the presence of "open seams" and "rust" on the handrails.

According to the court, this demonstrated SSW constructive knowledge as it was made aware of the condition of the handrails prior to the accident and had a duty to cure these defects. Photographs depicting rust on the underside of the handrails created an inference such a condition would have been apparent before the accident. At a minimum, the photographs created a presumption that one of the defects, "rust" on the handrails, existed for a considerable period of time and would have been discovered through SSW's exercise of ordinary care and diligence. The photographs, coupled with the inspection report that mentions "open seams" and "rust," created a genuine issue of material fact as to whether SSW had constructive knowledge of the defective handrails. *Ordonez*, therefore, produced factual support sufficient to establish the existence of a genuine issue of material fact concerning SSW's constructive knowledge of defects on the second-floor balcony handrails. The court of appeal held SSW was not entitled to summary judgment as a matter of law. *Ordonez v. SSW Properties, LLC*, 2025-0224 (La.App. 4 Cir. 11/12/25), __ So.3d ___, 2025 WL 3158599.

GOVERNMENT CONTRACTOR DEFENSE

In an asbestos case, the plaintiff alleged the tortious conduct undertaken by Avondale was not specifically approved by the government and Avondale's alleged misconduct was discretionary, and therefore, the government contractor defense did not apply to plaintiffs' claims for failure to warn, prevent the spread of asbestos and protect workers from exposure to asbestos. The United States District Court for the Eastern District of Louisiana held the government contractor defense for design defect claims required: 1) the government must have approved reasonably precise specifications; 2) the equipment must have conformed to those specifications; and 3) the supplier/contractor must have warned of those equipment dangers that were known to the supplier/contractor, but not the government. The United States Fifth Circuit Court of Appeals later modified that test with respect to a claim for failure to warn to provide government contractors are immune for liability for failure to warn only when: 1) the United States exercises discretion and approved the warnings; 2) the contractor provided a warning that conformed to the approved warnings; and 3) the contractor warned about dangers it knew but the government did not, the *Boyle* test.

Plaintiffs contended they were entitled to dismissal of the defense because Avondale had identified no evidence indicating the government was involved in the decision of whether to issue asbestos-related warnings. The record showed Avondale had discretion to warn its employees about the dangers of asbestos and workplace safety was Avondale's responsibility, not the government's. Avondale argued it was entitled to immunity under the *Boyle* test because the government exercised discretion when it considered the safety risks that employees faced and issued only those warnings it thought were necessary. Plaintiffs contended the existence of these minimum safety requirements did not give rise to immunity under the *Boyle* test because there was no evidence or language in the contracts which constrained Avondale in any way from issuing warnings to its employees. Plaintiffs argued because the government did not prevent Avondale from issuing warnings to employees, it could not claim immunity. The court held the evidence indicated, contrary to Avondale's assertions otherwise, the government did not exercise meaningful discretion in the area of asbestos warnings.

The court also did not accept Avondale's conclusion the government's decision to work with Avondale, even though Avondale did not issue warnings to workers about asbestos, gives rise to immunity under the *Boyle* test. The jurisprudence with respect to contractor immunity made clear if the government merely "rubber-stamps" the contractor's decision, this was not enough to entitle a contractor to immunity under the *Boyle* test. Accordingly, the court found Avondale had not met its burden of identifying evidence creating a genuine issue of material fact as to whether the federal government had a hand in the decision of whether to issue warnings related to asbestos. Rather, the record indicated no government discretion was exercised.

The court held Avondale was not entitled to immunity for plaintiffs' failure-to-warn claims. The court also found the same was true for plaintiffs' claims premised on Avondale's failure to implement additional safety measures to prevent the spread of asbestos. The safety and health standards of the Walsh-Healey Act provide no employee shall be exposed to asbestos in excess of a specified limit, unless he is protected therefrom with respiratory equipment approved by the United States Bureau of Mines, the United States Department of the Interior, and operated in accordance with the recommendations of its manufacturer.

The court held Avondale could not claim immunity under the jurisprudence for its alleged negligent failure to warn of the dangers of asbestos and failure to prevent the spread of asbestos. Plaintiffs' motion for partial summary judgment regarding Avondale's government contractor defense was granted. *Erica Dandry Constanza v. Sparta Insurance Company*, 24-871 (ED.La. 11/19/25), 2025 WL 3227783.

PRESCRIPTION FOR INVERSE CONDEMNATION

Oscar Poydras sued the City of New Orleans and its contractor, Wallace C. Drennan, Inc., for damages to property owned by Poydras known as the Broadway Bar which was adjacent to a construction project undertaken by Drennan for the City of New Orleans. The project included repairing sewerage, water and drainage lines, as well as rebuilding streets, sidewalks and curbs throughout the City.

Poydras claimed work on the project rendered the streets and sidewalks in front of his establishment impassible and physically prevented patrons from accessing the property. As a result, from November 24, 2020 until approximately September 30, 2023, he was unable to open, operate or engage in his business. Poydras claimed the City, through Drennan, commandeered his parking lot when it parked vehicles and heavy equipment on the lot and stored its construction supplies and debris there without his permission and without providing just compensation. Poydras contended the City thus trespassed on his property. Further, Poydras asserted the construction work and trespass caused

physical damage to his establishment and parking lot, and sought damages for just compensation for the taking of his property.

The City argued Poydras asserted a cause of action for inverse condemnation and, pursuant to L.R.S. 13:5111, the claims were prescribed. The prescriptive period under the statute is three years for uncompensated takings or inverse condemnation. The City did not dispute the property was taken or Poydras' claim lacked merit for an inverse condemnation action. Rather, the City argued, if, as alleged, property was taken for a public purpose, the action should be governed by the three-year prescriptive period of L.R.S. 13:5111.

The Louisiana Constitution provides property shall not be taken or damaged by the State or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. The Constitution requires compensation even though the State has not initiated expropriation proceedings in accordance with the statutory scheme established for that purpose. An inverse condemnation action provides a procedural remedy to a property owner seeking compensation for land taken or damaged against a governmental or private entity having the powers of eminent domain when no expropriation has commenced.

L.R.S. 9:5624 provides for damages to private property. It states, "When private property is damaged for public purposes, any and all actions for such damages are prescribed by the prescription of two years, which shall begin to run after completion and acceptance of the public works." Thus, L.R.S. 13:5111 provides a three-year prescriptive period for takings and L.R.S. 9:5624 provides a two-year prescriptive period for damages to property.

The court of appeal found Poydras alleged an inverse condemnation and taking of his property and parking lot for a public purpose without just compensation with respect to which L.R.S. 13:5111 applied. Because the taking of the property commenced on October 1, 2020, Poydras had until October 1, 2023 to institute an action against the City. Poydras filed his petition on May 22, 2024. The claim was, therefore, prescribed.

Poydras argued, even if the inverse condemnation or takings claim was prescribed under L.R.S. 13:5111, he should still be granted relief under L.R.S. 9:5624. Poydras contended the continuing tort doctrine applied which would prolong the prescriptive period. If Poydras' position was accepted, the continuous taking and continuous trespass would not end until the taking ceased.

The court of appeal found since the dispute was between Poydras and the City as the "taker" of the land used for the project, his claim for compensation was governed by the prescriptive period in L.R.S. 13:5111. Further, his application of the continuing tort doctrine, as opposed to L.R.S. 13:5111, contravened the general rule under Louisiana law when conflicting statutes are as applicable, the one more specifically directed to the matter applies. Poydras became aware of the City's construction no later than November, 2020, but filed a petition on May 22, 2024, more than three years from the date he became aware of the facts which gave rise to lawsuit. The court found the continuing tort doctrine did not apply to the claim for inverse condemnation, and the claim was prescribed under L.R.S. 13:5111. *Poydras v. The City of New Orleans*, 2025-0206 (La.App. 4 Cir. 9/25/25), ____ So.3d ____, 2025 WL 2736611.

CLAIMS OF AN UNLICENSED CONTRACTOR

The United States District Court for the Western District of Louisiana considered claims by an unlicensed contractor against an owner. The owner entered into multiple work authorization contracts with the contractor to perform emergency mitigation, cleaning, extraction, repairs, renovations and other construction services to its hurricane damaged structures between August 29 and September 4,

2020. The contractor did not, however, obtain a license in Louisiana until July, 2022. Accordingly, it was unlicensed at the time the contracts were entered into and the contracts were absolute nullities under Louisiana law.

The contractor argued the work qualified as “dewatering” which was an exemption to the licensing requirement for work covering dewatering or water mitigation which was adopted in August, 2022. The court found, even if the exemption was in effect in August and September 2020, the agreements included not only water extraction/mitigation, but also such things as lighting, plumbing and electrical repairs, structural framing, sheetrock, paint and HVAC repair/maintenance. There could be no dispute the contracts were for the repair/construction of the properties, and the value of the work exceeded \$50,000.00. Thus, the work did not fall within the scope of the exemption.

The contractor also argued it complied with the statute by having a licensed supervising general contractor for the projects but it cited no statute or case law in support of this position. The argument was rejected.

Additionally, the contractor argued the licensing law targets unqualified individuals masquerading as contractors and the owner should not be allowed to abuse the statute to evade its debts to the contractor, an established commercial contractor known for providing large scale disaster mitigation and repair services across the entire Gulf Coast region. The court held, however, the legislature has not seen fit to create exemptions based on the size, longevity, or reputation of a contractor.

Finally, the contractor maintained the owner was estopped from raising issues with its licensure or the quality of its work because it paid for some of the contractor’s services without objection. The court could find no support in the case law for the idea a client waives issues with a contractor’s license if he pays for some of the work invoiced. The work authorizations forming the agreements between the owner and the contractor were held to be a nullity.

The contractor contended its claim for a breach of the covenant of good faith and fair dealing under Louisiana law entitled it to damages. The court held Louisiana law also requires an underlying valid contractual relationship between the parties. Here, the agreements were nullities.

The contractor maintained it was entitled to sue the owner under the Open Account statute. The court held, to prevail on suit for open account, the creditor must prove the debtor contracted for the services on the open account. The contractor could not recover on open account based on any agreement made before it obtained a contractor’s license; those agreements were still a nullity under Louisiana law. But, the contractor may be able to plead a claim on open account based on any revisions issued after it obtained the appropriate license. It was granted leave to amend its pleadings to support such a contention if possible.

The contractor argued it was entitled to recovery under the theory of *quantum meruit*. The court held *quantum meruit* is not a recognized cause of action under Louisiana law and the claim must be instead analyzed under the theory of unjust enrichment which requires the claimant to show: 1) an enrichment, 2) an impoverishment, 3) a connection between the enrichment and impoverishment, 4) an absence of justification for the enrichment and impoverishment, and 5) the unavailability of any other remedy at law to the claimant. Unlicensed contractors may use the theory of unjust enrichment to recover the actual cost of their materials, services and labor in the absence of contract or in the case of a null contract, with no allowance for profit or overhead. The motion to dismiss was granted in part and denied in part. Claremont was given thirty days to amend its counterclaim. *Billy Navarre Certified Used Car Imports LLC v. Claremont Property Co.*, 22-00085 (WD.La. 2025), 2025 WL 2463812.

THE MOTION FOR LEAVE TO AMEND

Claremont moved for leave to amend its complaint. Navarre opposed the motion.

The court found the denial of a motion to amend is not an abuse of discretion if allowing the amendment would be futile. The court's task is not to evaluate the plaintiff's likelihood of success, but instead to determine whether the claim is both legally cognizable and plausible. The court considered the "interest of justice" exception under Louisiana Civil Code art. 2033. The court found there was no basis for reconsidering pursuant to that article. Accordingly, any amendment seeking to add the claims was futile. Further, a party who knew or should have known at the time of contracting a defect that made the contract absolutely null may not avail himself of the nullity when the purpose of the illegal contract has been accomplished. Claremont alleged that at all relevant times Navarre knew and was aware of Claremont's Louisiana licensing status, which was a matter of public record with the Louisiana State Licensing Board for Contractors. The other party's knowledge prevented it from recouping funds previously paid to the contractor but does not allow the contractor to pursue recovery of unpaid overhead and profit. The alleged knowledge did not serve to revive Claremont's claims for breach of contract, etc., or to enlarge its unjust enrichment claim to include overhead and profit.

Navarre also challenged Claremont's attempt to add a Louisiana Unfair Trade Practice Act (LUTPA). The LUTPA prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. The court should only find a practice unfair under the statute when it offends established public policy and is immoral, unethical, oppressive or unscrupulous. The LUTPA does not prohibit sound business practices, the exercise of permissible business judgment, or free enterprise transactions. Navarre challenged the reasonableness of Claremont's invoices, despite using those invoices to obtain a settlement on its hurricane claim from its insurers. There were no representations by Navarre that Claremont would be reimbursed whatever an insurer paid on Navarre's claim. Instead, Navarre alleged the work was substandard and it had incurred substantial expense in completing the project and/or finishing and/or remediating Claremont's work on the property. Whether or not that allegation faired out, the court faced regularly with such construction cases could not find a dispute over invoices on a multimillion-dollar project either offended public policy, arose to the level of immoral, unethical, oppressive or unscrupulous conduct. The Louisiana legislature provided for the nullification of construction contracts with unlicensed contractors. Navarre's attempt to take advantage of the legislature's nullifications provisions which may be raised even by parties who "knew or should have known" of the defect at the time the contract was made fell short of the high bar set by LUTPA.

Finally, Claremont attempted to bring a challenge under the Commerce Clause which provides Congress shall have the power to regulate commerce among the several states. From this language a judicial creation known as the dormant Commerce Clause arises which provides states lack the power to impede interstate commerce with their own regulations. Under the clause, the court asks whether the law facially discriminates between in-state and out-of-state economic interests. In this context, discrimination simply means different treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Laws that discriminate in this manner are almost *per se* invalid unless the state can show that it has no other means to advance a legitimate local purpose. A law that does not overly discriminate between in-state and out-of-state economic interests may still violate the dormant Commerce Clause if it unduly burdens interstate commerce. The applicable balancing test will only invalidate the law if its incident burdens on interstate commerce are clearly excessive in relation to the putative local benefits.

The statutes which were being challenged were L.R.S. 37:2158 and 37:2160. L.R.S. 37:2158, provides no person may engage in the business of contracting or act as a contractor unless properly licensed. L.R.S. 37:2160 prohibits the issuance of local building permits to contractors who are not

licensed for the scope of work for which the permit is sought. Claremont conceded the statutes serve a legitimate public purpose but maintained they were overly burdensome, particularly because they do not contain an exception for large out-of-state companies like Claremont, to have their projects managed or supervised by local licensed contractors.

The court held Claremont could not show any burden on interstate commerce was clearly excessive in relation to the state's needs. The licensing provisions were specifically enacted so that unqualified individuals operating in professional fields could not injure or mislead the state's citizens. Review of the licensing requirements showed they are targeted to the goal by ensuring that persons or entities acting as contractors within the state have the appropriate insurance and/or qualifications and have provided sufficient information to enable a background check. Partnering with a "supervising" local contractor would not serve all of those interests if it allowed an on-site contractor with a poor history to begin bidding and working on local projects without any verification.

The motion for leave to amend was denied. *Billy Navarre Certified Used Car Imports, LLC v. Claremont Property Co.*, 24-00085 (WD.La. 12/3/25), 2025 WL 347299.

REQUEST FOR ADMISSION

The Louisiana Fourth Circuit Court of Appeal considered a request to withdraw matters deemed admitted as a result of the failure of the respondent to timely provide responses to the requests. Code of Civil Procedure art. 1467 provides a matter is deemed admitted if the party to whom the request is directed does not respond within thirty days after service of the request. C.C.P. art. 1468 provides any matter deemed admitted pursuant to art. 1467 is conclusively established unless the court, on motion, permits withdrawal or amendment of the admission. Permission to withdraw or amend, according to art. 1468, is permitted when the presentation of the merits of the action would be subserved thereby and the party who obtained the admission fails to satisfy the court the withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

In the matter presented, the party seeking responses to the request for admission sent the request via email to respondent's former counsel. Having received no reply, the party who sent the request moved for summary judgment on June 7, 2023. On September 13, 2023, two days before the hearing on the motion for summary judgment, the respondent filed a motion to withdraw matters deemed admitted by virtue of its failure to timely respond to the request. The trial court denied the motion. While the party who was required to respond to the request for admissions argued the party who sent them failed to confirm they received the request for admissions, the record reflected otherwise. The party who addressed the request for admissions provided confirmation that discovery requests were sent to the respondent's former counsel. Further, the respondent to the request failed to provide an explanation as to why withdrawal of the admissions was sought only two days before the hearing on the motion for summary judgment. Given the dilatory manner in which the respondent replied to the request for admission, over five months after they were propounded and only two days prior to the hearing on the motion for summary judgment, the court of appeal did not find the trial court abused its discretion in denying the motion to withdraw admissions.

The court of appeal, earlier in its decision, reviewed the jurisprudence tempering the harsh penalty of requests for admission by automatically being deemed admitted by holding a matter will not be deemed admitted if the party as to whom the admission controverts the matter in some other manner such as by exception or answer. Thus, when the record reflects a party against whom an admission is sought is controverting a matter, he or she should not be deemed to admit it merely because of a failure to respond within the prescribed time frame. The court of appeal, in a prior decision, held the granting of summary judgment based solely on deemed admissions in the face of plain assertions disputing the alleged fact is too drastic a sanction to impose for failure to respond to a requested admission. *Coastal*

CLAIM A PUBLIC BID WAS NON-RESPONSIVE

The City of Baton Rouge and the Parish of East Baton Rouge (City/Parish) advertised a project for the Old Hammond Highway. Richard Price Contracting Co., LLC was the apparent low-bidder, and Command Construction Industries, LLC, the second. Price was awarded the contract. Command protested the award contending Price's bid was non-responsive in failing to include the Bidder's Organization form and by submitting a defective corporate resolution that misidentified its business structure. The City/Parish determined Price's bid was non-responsive for its failure to include the Business Organization form and the second issue raised by Command was moot.

Price filed a petition for preliminary, permanent and mandatory injunctions and a writ of mandamus or, in the alternative, damages. Price alleged it was entitled to injunctive relief enjoining, prohibiting and restraining the City/Parish from rescinding the acceptance of its bid. It contended it was entitled to a writ of mandamus directing the City/Parish to issue and execute the contract naming Price as the lowest responsible bidder. The trial court held the alleged deficiencies in the bid documents fell outside of the state and federal requirements and Price's bid was responsive. The trial court granted injunctive relief and a writ of mandamus in favor of Price. Command appealed.

The court of appeal held any public entity advertising for public work shall, according to L.R.S. 38:2212(B)(2), use only the Louisiana Uniform Bid Form as promulgated in accordance with the Administrative Procedure Act by the Division of Administration. The statute contains an exclusive listing of twelve items of information and/or documentation that a public entity may require at the time of bidding. The forms provided in the Code consist of the Louisiana Uniform Public Work Bid Form and the Louisiana Uniform Public Works Bid Form Unit Price Form. The Bidder's Organization form and the Corporate Resolution form are not included in the Administrative Code.

Price did not submit the Bidder's Organization form with its bid. Command asserted the omission of the form made Price's bid non-responsive. Further, Price contended the Bidder's Organization form is not contained in the list of items under L.R.S. 38:2212(B)(2) that can be mandated at the time of the bid, so it was a void requirement and should not be considered in the award of a contract.

The Bidder's Organization form states if the bid is by a joint venture, all parties to the bid must complete the form. Here, Price's bid did not involve a joint venture so Price was not required to fill out the form pursuant to the instructions provided on the form itself. While the form elicited some information that a public entity may require at the time of bidding under L.R.S. 38:2212(B)(2), the exact same information was requested by the City/Parish and provided by Price on the Louisiana Uniform Public Work Bid Form. Accordingly, the court of appeal found the City/Parish's demand for the Bidder's Organization form is a void requirement and may not be considered in the award of the contract.

The Corporate Resolution form was included within the bid documents provided by the City/Parish. The bottom of the Louisiana Uniform Public Work Bid Form stated: "If someone other than a corporate officer signs for the Bidder/Contractor, a copy of a corporate resolution or other signature authorization shall be required for submission of bid." The court found what is required for a corporation to enter into a contract differs from what is required from a limited liability company. The court found Price's bid complied with the statutory requirements under L.R.S. 38:2212(B)(5)(a) in that Price's authority as a manager of RPC was firmly established in spite of the use of the ill-fitting form provided in the City/Parish's bid materials. RPC was a limited liability company and Richard

Price was the manager. The court of appeal found RPC's bid was responsive and the trial court did not err in granting its request for a preliminary injunction, permanent injunction and writ of mandamus directing the City/Parish to issue, enter into, and execute a contract with RPC with respect to the project.

The judgment of the trial court was affirmed. *Richard Price Contracting Co., LLC v. The City of Baton Rouge and the Parish of East Baton Rouge*, 2025-0915 (La.App. 1 Cir. 10/20/25), ____ So.3d ____, 2025 WL 2952420.

INSURANCE COVERAGE DENIED

Plaintiffs contracted with Lisa-Raye Investments Company, LLC and other entities (the Lisa-Raye Defendants) to renovate a residential structure located on Washington Avenue in New Orleans, Louisiana. The written agreement called for two phases of construction: 1) semi-demolition of the existing structure and bracing the structure to prepare for remodeling, and 2) roughing in electrical, plumbing, insulation, drywall and finishes throughout the structure. The Lisa-Raye Defendants were to brace the structure, supervise contractors and ensure jobsite safety. They contracted with OAM Construction, LLC to complete Phase 1. While working on Phase 1, the existing structure collapsed. Plaintiffs filed a petition for damages for breach of contract naming several defendants including the Lisa-Raye Defendants and Maxum, a Lisa-Raye Defendants' insurer.

Maxum had issued a commercial general liability policy which contained breach of contract and damage to property exclusions. Maxum filed a motion for summary judgement asserting due to the policy exclusion there was no coverage. The district court denied the motion. Maxum filed an application for a supervisory writ to the court of appeal.

The exclusion for breach of contract provided the insurance did not apply to any claim or suit for breach of contract, whether express or oral, nor claims for breach of an implied in law or implied in fact contract, whether bodily injury, property damage, personal and advertising injury or an occurrence was alleged and the insurer would not have an obligation to indemnify or defend any insured for bodily injury, property damage, personal and advertising injury or an occurrence directly or indirectly arising out of, or caused by, or resulting from breach of contract. The plaintiffs contended the claims were for negligence and not breach of contract. The Lisa-Raye Defendants maintained the exclusion did not preclude coverage for negligence claims. The court of appeal disagreed.

The plaintiffs' allegations made clear their negligence claims were interconnected to the contractual obligations set forth in the contract. Plaintiffs' negligence claims reflected these contractual duties alleging failures in bracing, supervision and jobsite safety, all of which were assumed under the contract. There were no allegations the Lisa-Raye Defendants breached a duty owed separate from the contract or to the public at large, and there were no claims separate and distinct from the alleged breach of contract. The court found the breach of contract exclusion precluded coverage of plaintiffs' breach of contract and negligence claims against the defendants. *2301-11 Washington Avenue Trust v. Lisa-Raye Investments, LLC*, 2025-0550 (La.App. 4 Cir. 10/30/25), ____ So.3d ____, 2025 WL 3033745.

DUTIES OF AN INSURANCE AGENT

The United States District Court for the Eastern District of Louisiana recently reviewed Louisiana law with respect to the duties of an insurance agent. The observations of the court are worth keeping in mind.

The court found to recover under Louisiana law for an agent's failure to obtain insurance coverage, a plaintiff must show: 1) an undertaking or agreement by the insurance agency to procure

insurance; 2) failure of the agent to use reasonable diligence in attempting to place the insurance and failure to notify the client properly if he has failed to obtain the insurance; and 3) actions by the agent warranting the client's assumption that the client was properly insured. An insurance agent fulfills his duty of reasonable diligence to his customer when he procures the insurance requested. The agent's duty, however, has not been expanded to include the obligation to advise whether the client has procured the correct amount or type of insurance coverage. It is the insured's responsibility to request the type of insurance coverage needed and it is not the agent's obligation to spontaneously or affirmatively identify the scope or amount of insurance coverage the client needs.

The court noted the decision of the U.S. Fifth Circuit Court of Appeals, which initiated a narrow line of cases holding an insurance agent's fiduciary duty to the insured may be heightened under circumstances giving rise to a special relationship between the agent and the insured. Where an agent is familiar with the insured's business, has reason to know the risks against which an insured wants protection, and has experience with the types of coverage available in a particular market, an insurance agent acts as more than a mere order taker for the insured, and the agent's expanded fiduciary duties include advising the client with regard to recommended coverage, investigating and ascertaining the financial condition of perspective companies and notifying the insured of policy cancellations or terminations. That law was established by the United States Fifth Circuit Court of Appeals in its *Offshore Production* decision. In the wake of the *Adler* and *Isidore Newman* decisions, the courts have counseled the holding of offshore production should be closely confined by the facts of the case.

In its *Adler* decision, the Fifth Circuit explained the Offshore Production decision does not stand for the broad and murky proposition that a client's close relationship with an insurance agent or broker creates a heightened duty to anticipate the client's insurance needs or to recommend specific coverage. Instead, the facts of the decision are narrower in that the insured there told his insurance agents about its specific coverage needs, but the agent produced a policy that excluded the exact coverage the insured wanted. *Kostmayer Construction, LLC v. Zurich American Insurance Company*, 24-408 (ED.La. 2025), 2025 WL 1411995.

MOTION TO COMPEL ARBITRATION DENIED

MAPP, LLC contracted with Floor & Décor of America, Inc. (F&D) whereby MAPP agreed to construct a Floor & Décor retail store in Metairie, LA. A dispute developed between the two parties stemming from the early termination of the construction contract. MAPP filed a complaint in the United States District Court for the Middle District of Louisiana against F&D. F&D filed a motion to compel arbitration. F&D contended the contract contained a binding arbitration clause and express steps for the resolution of disputes between the parties, MAPP's claims should be compelled to arbitration and the case should be dismissed with prejudice or, alternatively, stayed pending the outcome of the arbitration.

One of the issues considered by the court was whether the arbitration clause lacked mutuality. The arbitration clause gave F&D the sole discretion to decide whether a claim would be submitted to arbitration. Other Louisiana federal district courts had addressed the issue of mutuality and have consistently held an agreement does not lack mutuality when the arbitration clause requires both parties to submit their claims to binding arbitration. In contrast, the arbitration clause at issue did not require MAPP and F&D to submit their claims to binding arbitration. Instead, it required MAPP to submit its claims to arbitration at F&D's request. While the arbitration clause did not prohibit MAPP from requesting arbitration, it gave F&D the unfettered discretion to litigate claims. The court did not, however, reach a conclusion on this issue. Even if the arbitration clause was valid under Louisiana law, the court agreed with MAPP F&D failed to show MAPP's claims fall within the scope of the arbitration clause.

According to the dispute resolution procedure, a review and in person discussion of the disputed claim by a senior level executive of each party was required. Even if there was an unsuccessful negotiation, F&D failed to show that either party had submitted the claim to non-binding mediation by third-party mediator as required by the dispute resolution process. The arbitration clause specified F&D could only request arbitration of any disputed claims that could not be decided by confidential negotiation or mediation. MAPP was not required to submit its claim to confidential negotiation without which the parties were not required to submit MAPPs claims to mediation. F&D could not compel arbitration of MAPP's claims unless the claim could not be decided by confidential negotiation or mediation. The court concluded F&D failed to carry its burden of proving MAPP may be compelled to arbitrate its claims. F&D failed to show the dispute fell within the scope of the arbitration clause. *MAPP, LLC v. Floor and Décor Outlets of America, Inc.*, 24-444 (ED.La. 2025), 2025 WL 2732375.

WRIT OF MANDAMUS DENIED

In a class action brought by homeowners in the Penn Mills Lakes subdivision in St. Tammany Parish against a St. Tammany Parish councilman, the St. Tammany Parish Director of Engineering and Parish Engineer (the STPG Defendants), the plaintiff homeowners contended the STPG Defendants knew the subdivision would flood unless certain regulations and ordinances were complied with, and further alleged they knew the developer did not comply. The Homeowners' Association (HOA) was included as a plaintiff. The court previously found the HOA was the owner of the green space in the subdivision, including the ponds and lakes. It concluded, however, regardless of ownership, genuine issues of material fact precluded summary judgment in favor of either the plaintiffs or STPG regarding responsibility for operating and/or maintaining the ponds and lakes, whether the ponds and lakes are an integral part of the subdivision's drainage system, and whether there was a pre-existing drainage servitude in favor of STPG with respect to the ponds and lakes.

The plaintiff's moved for partial summary judgment declaring the Parish was responsible for the upkeep, maintenance and operation of the ponds and lakes. STPG responded with a cross motion for partial summary judgment seeking a declaration the HOA, as opposed to the STPG, was the owner of and solely responsible for the operation and maintenance of the drainage retention ponds and lakes in the subdivision. The trial court granted the motion of STPG. The plaintiffs appealed the judgment. The court of appeal found it was undisputed the HOA was the owner of the green space in the subdivision, including the ponds and lakes. It concluded, however, regardless of ownership, genuine issues of material fact precluded summary judgment in favor of either the plaintiffs or STPG regarding the responsibility for operating and/or maintaining the ponds and lakes, whether the ponds and lakes are an integral part of the subdivision's drainage system, and whether there was a pre-existing servitude in favor of STPG with respect to the ponds and lakes.

The HOA filed a petition for an alternative writ of mandamus naming STPG as a defendant. The HOA prayed for a judgment in its favor holding STPG had a ministerial duty to assume full responsibility and expense for the perpetual upkeep, maintenance and operation of the subdivision's retention ponds and lakes and drainage system. The trial court denied mandamus relief. The HOA appealed.

A writ of mandamus is directed to a public officer to compel the performance of a ministerial duty required by law. The remedy of mandamus is not available to command performance of an act that contains any element of discretion, however slight. A ministerial duty is one that is so clear and specific that no element of discretion can be exercised in its performance. If a duty requires the existence of judgment and discretion by the public officer, it is not ministerial for purposes of a cause of action for mandamus. The HOA sought an order directing STPG to assume full responsibility and expense of the perpetual upkeep, maintenance and operation of the subdivision's retention ponds and lakes, as well as the entire subdivision's drainage system.

The court of appeal concluded the HOA had not established STPG owed a specific ministerial duty to the HOA that is subject to mandamus relief. The HOA had not established the performance of tasks suggested by an expert would obviate an evaluation of the scope of necessary work and decisions regarding the manner and/or order in which the work should be done. The court of appeal held it could not compel performance of any act that would entitle any such elements of discretion. Based on the evidence before the court, it could not identify with the requisite specificity the acts required in order to grant the writ. If the evidence proved an obligation on the part of STPG, it did not identify, with the required specificity, how STPG was to satisfy its obligation. The court did not say the HOA could not, or did not, prove STPG had a legal responsibility to operate/maintain the ponds, lakes and/or drainage system. Such a finding was not necessary considering the denial of the writ.

The court of appeal affirmed the trial court's judgment dismissing the petition for an alternative writ of mandamus against STPG. *April Markiewicz v. Sun Construction, LLC*, 2025-0149 (La.App. 1 Cir. 9/19/25), ____ So.3d ____, 2025 WL 2735907.

GOVERNMENT CONTRACTOR DEFENSE NOT ACCEPTED

In an asbestos exposure lawsuit filed in state court, the plaintiff claimed his wife developed and died from mesothelioma as a result of her exposure to asbestos dust from plaintiff's work clothes and his personal vehicle. Avondale removed the action to federal court asserting federal officer jurisdiction and the federal defense of derivative sovereign immunity. Avondale argued it was entitled to such defenses because it was a federal government contractor required to install and/or use asbestos-containing products by contractual provisions and design specifications mandated by the federal government. Federal officer removal only requires a mere colorable defense. Avondale argued the court should follow its prior decision in *Thompson v. Huntington-Ingalls, Inc.* Plaintiff moved for partial summary judgment on Avondale's claim for immunity under the doctrine of derivative sovereign immunity. Avondale contended plaintiff's claim went beyond a mere failure-to-warn claim, and included allegations of general negligence and were thus distinguishable from other decisions.

The federal officer statute makes removal of a civil action commenced in a state court against the United States or any state agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office. Unlike the general removal statute, the federal officer removal statute includes cases that ordinarily federal question removal would not reach. For federal officer removal, the defendant must show: 1) it has asserted a colorable defense, 2) it is a person within the meaning of the statute, 3) it has acted pursuant to a federal officer's directions, and 4) the charged conduct is connected or associated with an act pursuant to a federal officer's direction.

The court held Avondale was entitled to removal under the federal officer statute. It asserted a colorable federal defense under the jurisprudence and its failure to warn of the dangers of asbestos and prevent exposure was connected to the installation of asbestos in naval ships pursuant to the directions of governmental entities. Avondale argued plausibly: 1) the federal government reasonably approved precise specifications for the construction of ships on which plaintiff worked; 2) Avondale complied with those specifications; and 3) the government knew more than it about asbestos-related hazards and safety measures. It is easier to present a colorable defense than a defense that can withstand summary judgment. A colorable defense need not be clearly sustainable, and the bar is not as high as what is necessary to survive summary judgment.

Avondale qualified as a person for purposes of removal under the federal removal statute. Its federal contracts to build and refurbish ships containing the alleged asbestos-containing products for the Navy indicate it was acting pursuant to a federal officer's directions. Finally, the alleged negligence in failing to warn plaintiff, his co-workers, or decedent about the harmful effects of asbestos exposure

is negligence connected to the installation of asbestos during the construction and refurbishment of Navy ships. The allegations satisfied the federal officer removal statute.

The court then considered plaintiff's motion for partial summary judgment relative to the immunity claims. The court found Avondale could not invoke an immunity defense for alleged negligence in the case presented. The party seeking summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact and all reasonable inferences are drawn in favor of the removing party. The United States Fifth Circuit has held a defendant may assert a government contractor defense in a design-defect case if: 1) the government must have approved reasonable precise specifications; 2) the equipment must have conformed to those specifications; and 3) the supplier/contractor must have warned of those equipment dangers that were known to the suppliers/contractor, but not the government. Government contractors are immune from liability for the failure to warn only when: 1) the United States exercised discretion and approved the warnings; 2) the contractor provided a warning that conformed to the approved warnings; and 3) the contractor warned about dangers it knew but the government did not. The defense shields government contractors from liability for executing the governments will if the contractor's work was: 1) authorized and directed by the government of the United States, and 2) performed pursuant to an Act of Congress. The court found courts have nevertheless noted it is unclear whether the defense even applies in cases of military contractors because the application of the contractor defense and the context of military-equipment manufacturers is an area of law that has been arguably distinguished from the general defense.

This was not far from the first time Avondale tried to assert the defense. No case holds Avondale can support either defense for failure-to-warn claims at summary judgment. Therefore, the court found Avondale cannot invoke an immunity defense. In the numerous asbestos cases involving Avondale, the record indicates the government did not have a hand in the decision of whether to issue warnings related to asbestos dust exposure. No governmental discussion was exercised. The plaintiff's negligence claim against Avondale was limited to the failure-to-warn and adopt adequate safety measures. Insofar as plaintiff attempted to expand the petition to include other conduct such as harm for the use of and storage of hazardous materials, he was not entitled to summary judgment. The government was not involved in asbestos warnings at the Avondale shipyards.

The plaintiff's motion to remand was denied and his motion for partial summary judgment concerning the government immunity defenses was granted. *Steib v. Huntington-Ingalls, Inc.*, 24-2486 (ED.La. 2025), 2025 WL 2532696.

CLAIMS OF AN UNLICENSED CONTRACTOR ALLOWED

Patriot Disaster Specialist LLC entered into contracts with Shelley Hacker for hurricane damage repairs. Patriot was not licensed. Patriot sued Hacker and her property insurer, Allstate, to recover payments due for the work performed. Hacker and Allstate filed Motions for Summary Judgment.

The court first considered whether Patriot had standing to sue Allstate. Patriot contended Hacker assigned claims against Allstate to it. The court determined the contract language relied upon by Patriot merely authorized Allstate to make direct payments to Patriot for services. It did not assign any benefits under the Allstate policy to Patriot. Accordingly, Patriot had no standing to bring such claims against Allstate.

Louisiana law requires contractors performing mold remediation work and those in the business of contracting are required to hold a license. Contracts with individuals or entities for such work who are not properly licensed are absolute nullities. The court, with respect to the mold remediation work, found the work performed was more indicative of water remediation, despite preventative measures such as applying plant-based anti-microbial agents.

As to the requirement that those conducting the business of contracting hold a license as a contractor, the court found the statute requiring such a license did not require it for de-watering and mitigation work. The services performed by Patriot included tearing out drywall, insulation, trim, baseboards, carpet, carpet pad, tackless strips, floating floors, door and window trim, crown trim, detachment and resetting light fixtures, heat/AC register and ceiling fans. The court, relying upon earlier jurisprudence, found every water/mitigation service will inherently include tearing down drywall, and some type of demolition. Such work, if a license is required, would make every water/mitigation contract subject to Louisiana's construction contractor's licensing requirements which would directly contravene Louisiana's law that exempts water/mitigation services from the licensing requirement. The court held the work performed by Patriot was water mitigation, and not a construction-based job.

The court denied the motions for summary judgment which contended the contract was a nullity based on the assertion Patriot was unlicensed. *Patriot Disaster Specialist LLC v. Shelley Hacker*, 22-06016 (WD.La. 2025), 2025 WL 2177825.

ENFORCEMENT OF FORUM SELECTION CLAUSES

The Louisiana Fourth Circuit Court of Appeal, in a matter which did not involve construction issues, held Louisiana courts should generally enforce forum selection clauses unless the resisting party can clearly show enforcement would be unreasonable and unjust, or the clause was invalid for such reasons as fraud or overreaching or enforcement would contravene a strong public policy of the forum in which the suit is brought. *Murray v. Universal Parking and Transportation, LLC*, 2024-0787 (La.App. 4 Cir. 7/8/25), 420 So.3d. 132.

MOTIONS FOR SUMMARY JUDGMENT

The Louisiana First Circuit Court of Appeal recently reviewed the law with respect to motions for summary judgment. While not new, the requirements are worth keeping in mind.

As reviewed by the First Circuit, after an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show there is no genuine issue as to material fact and the mover is entitled to judgment as a matter of law. Burden of proof rests with the mover; nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action or defense.

At that point, the burden shifts to the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. An adverse party may not rest on the mere allegations or denials of her pleading, but her response, by affidavits or as otherwise provided in C.C.P. art. 967(A), must set forth specific facts showing there is a genuine issue for trial. A fact is material if it potentially insures or precludes recovery, affects a litigant's success, or determines the outcome of a legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for a trial on that issue and summary judgment is appropriate. Because it is applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applied to the case. Although factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, mere conclusory allegations, improbable inferences and unsupported speculation would not support a finding of a genuine issue of material fact. *Hebert v. Louisiana State University System Board of*

Supervisors through Louisiana State University, 25-0246 (La.App. 1 Cir. 11/7/25), _____ So.3d. _____, 2025 WL 3124826.