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## WAIVER OF CONSEQUENTIAL DAMAGES

The United States District Court for the Eastern District of Louisiana held that a contractual mutual waiver of consequential damages which did not define the term was ambiguous and refused to grant summary judgment to dismiss a claim for lost profits. The court contrasted the contractual clause at issue with the waiver of consequential damages provision contained in AIA A201-2007, which defines consequential damages as including profit, among other things. The court found the AIA document clearly defined consequential damages.

The court held that in construing the contract provision at issue, which did not define consequential damages, it would have to look to the intent of the parties which is a question of fact. Since neither party submitted evidence to prove contractual intent, there was a dispute as to a material fact preventing summary judgment. *Team Contractors, LLC v. Waypoint NOLA, L.L.C.*, (E.D. La. 9/29/17), 2017 WL 4366855.

## DAMAGES FOR HOME OFFICE OVERHEAD

The United States District Court for the Middle District of Louisiana held recently, in the context of a claim by a subcontractor against the general contractor for a public works project, that in order to recover damages for home office overhead as a result of defendant's conduct, a claimant must establish, among other things, there was a stoppage of work and it was required to remain on standby for the duration of the delay. A contractor is on standby only if the delay caused by the defendant was not only substantial, but was for an indefinite duration, and the contractor during the delay was required to return to work at full speed and immediately. The contractor must show a suspension of most, if not all, of the contract work. In this instance, the contractor failed to establish that it was on standby and able to return to work at full speed and immediately. *Roland A. Alonso v. Westcoast Corporation*, (M.D. La. 9/21/17), 2017 WL 4176973.

The United States District Court for the Eastern District of Louisiana held similarly in a claim by a general contractor against an architect and MEP engineer for extended home office overhead with respect to a private works project. The court held a contractor's performance of minor tasks during a suspension of work does not prevent it from recovering for extended home office overhead and it is sufficient for purposes of establishing standby if a contractor can demonstrate that work has stopped or significantly slowed. A work slowdown sufficient to entitle the contractor to recovery is a factual question which, in this instance, was disputed by the parties. Since there was a genuine issue of material fact, summary judgment dismissing the claim was denied. *Team Contractors, L.L.C. v. Waypoint NOLA, L.L.C.*, (E.D. La. 10/2/17), 2017 WL 4368084.

## DUTY OF CONSTRUCTION MANAGER

The Louisiana Department of Education Recovery School District (RSD) contracted with Jacobs Project Management Company/CRS Consortium as the construction manager for the renovation of the William Frantz School in New Orleans. The RSD contracted with The Lathan Company, Inc. as the contractor for the work. Lathan sued Jacobs and others for damages concerning the project. Lathan averred Jacobs, as the construction manager, owed duties to Lathan to perform its work responsibly and within the standard of care of others performing similar work, and failed to comply with the required standard of care causing Lathan to suffer damages. Jacobs moved for summary judgment representing it had no duty to Lathan since Lathan was not a party to the contract between Jacobs and the RSD. The district court granted the motion. Lathan appealed.

The court of appeal drew an analogy of any duty Jacobs allegedly owed to the duty owed by architects and engineers to others, even though there is no contractual relationship between them. According to the court of appeal, it was foreseeable that if Jacobs failed to exercise the required standard of care in performing its work, Lathan could suffer economic harm. The court saw no reason why the rationale and jurisprudence with respect to the duties of architects and engineers should not likewise apply to a project management professional and held that a duty would be owed by Jacobs to Lathan. The court held the trial court erred as a matter of law in granting summary judgment and dismissing the claims against Jacobs, and reversed the trial court's decision. *The Lathan Company, Inc. v. State of Louisiana, Department of Education, Recovery School District*, 2016-0914 (La.App. 1 Cir. 12/6/17), 2017 WL 6032333.

### **L.R.S. 9:2772 APPLIES TO REPAIR WORK**

The United States District Court for the Eastern District of Louisiana held, in the context of a contract dispute between a homeowner and a roofing contractor, that the preemptive requirements of L.R.S. 9:2772 apply to repair work performed by the roofing contractor as well as the initial work which was alleged to be defective. L.R.S. 9:2772 establishes a five-year preemptive period for claims arising from construction work. *Koerner v. Vigilant Insurance Company*, 16-13319 (E.D. La. 10/18/17), 2017 WL 4682295.

### **INDEMNITY**

Mathes Brierre Architects was the architect for the Boomtown Casino in Harvey, Louisiana. Broadmoor, LLC was the general contractor and AFC, Inc. a subcontractor. Construction defects were alleged, leading to an arbitration between AFC and Broadmoor. The arbitration was settled. The settlement required AFC to make payments to Broadmoor. AFC then alleged the construction defects were the sole fault of Mathes Brierre and sought indemnity from Mathes Brierre for the payments it made. Mathes Brierre moved for summary judgment.

The settlement agreement between AFC and Broadmoor required that AFC would forfeit its final payment from Broadmoor. The first issue the court dealt with was whether AFC could recover that payment. The court held that legal indemnity is an equitable doctrine that entitles plaintiffs to compensation for an entire damages award occasioned by another's fault. The court saw little reason to adopt a rule that required AFC to go through the process of receiving the last payment from the contractor only to then immediately return it as part of

the settlement. If AFC could show that Mathes Brierre was entirely at fault for the construction defects, AFC could recover the forfeited amount in indemnity.

Mathes Brierre claimed the amounts paid by AFC's insurer were not recoverable because they did not constitute actual losses to it. The court found the argument was inconsistent with the Louisiana collateral source rule, which provides that any payments received by a plaintiff from an independent source are not deducted from the award the injured party would otherwise receive from the wrongdoer. A wrongdoer may not benefit from a victim's foresight in purchasing insurance and other benefits.

### **CLAIMS AGAINST AN ARCHITECT AND HIS FIRM DISMISSED**

Martha Hohensee sought the services of Raymond Bergeron, an architect, to design a new home. Bergeron informed Hohensee that he did not do residential designs and referred her to Sean Turner, an architectural designer, but not an architect and contractor. Turner, through his business, Turner Design Collaborative, L.L.C., prepared the plans. Since Turner was not a licensed architect, he asked Bergeron, with Hohensee's knowledge, to stamp the design plans so that Hohensee could obtain a building permit from the City of New Orleans. Bergeron stamped the plans as a favor to Turner.

Hohensee sued Bergeron individually and his firm, Raymond C. Bergeron, Jr., Architects, L.L.C., among others. Bergeron and his firm moved for partial summary judgment. The motion of the firm was limited to its liability for construction related issues. The trial court granted the motions. Hohensee appealed.

The court of appeal held there was an absence of factual support for Hohensee's contention Turner and Bergeron or his company entered into a design/build agreement. There was no proof they participated in the actual construction of the house or that Turner and Bergeron had a partnership or corporation created to offer a combination of design and construction services. The court of appeal held summary judgment was appropriate as to the construction-related issues concerning Bergeron's firm.

As to Hohensee's claim for personal liability on the part of Bergeron for professional acts, the court of appeal found Hohensee offered no proof Bergeron owed her a personal duty. Although Bergeron stamped the plans, there was no evidence he breached any professional duty as an architect. Bergeron's act in affixing his seal to the plans was in furtherance of Hohensee's contract with Turner, a contract to which Bergeron was not a party. Conduct

taken in furtherance of the legitimate goals of that contract did not subject Bergeron to professional liability, which could arise under an exception to the rule limiting liability of members of an LLC. According to the court of appeal, for Hohensee to succeed in holding Bergeron personally liable, she must prove that either he perpetrated a fraud against her or that he breached his professional duty by negligence or some other wrongful conduct. Here, there was no such evidence.

Summary judgment dismissing the claims against Bergeron in his individual capacity and dismissing the claims against his firm with respect to construction-related issues was affirmed. *Hohensee v. Turner*, 2014-0796 (La.App. 4 Cir. 4/22/15), 216 So.3d 883.

## **PEREMPTION OF CLAIMS AGAINST A CONTRACTOR**

Jaco Roofing and Construction, Inc. contracted for work on a building owned by Celebration Church, Inc. Celebration Church sued Jaco for breach of contract and negligence. Jaco excepted to the claims on the basis they were perempted under L.R.S. 9:2772, which provides a five-year preemptive period for claims against contractors. The trial court granted the exception. Celebration Church appealed.

L.R.S. 9:2772 provides two time periods during which a lawsuit must be filed: (1) five years after the date of registry in the mortgage office of acceptance of the work by the owner, or, (2) if no such acceptance is recorded within six months from the date the owner has occupied or taken possession of the improvement, in whole or in part, five years after the improvement has been occupied by the owner. An acceptance of the work was not recorded in the mortgage office. Accordingly, the second rule was at issue. The court of appeal found a tenant occupied part of the premises more than five years before the lawsuit was filed and Celebration Church took possession of the work, in part, when it allowed the tenant to occupy the property. The claims against Jaco were perempted. The fact that other work performed by entities other than Jaco continued on other portions of the property after some tenants moved in did not prevent the running of the preemptive period. The judgment of the trial court was affirmed. *Celebration Church, Inc. v. Church Mutual Insurance Company*, 16-245 (La.App. 5 Cir. 12/14/16), 216 So.3d 1059.

## **PEREMPTION AND RELATION BACK**

An owner sued a contractor with respect to damages concerning the construction of a pool. More than five years later, the owner amended his petition to include other defects resulting

from differential settlement and asserted additional theories of recovery. The contractor contended the new claims were barred pursuant to L.R.S. 9:2772, which establishes a five-year preemptive period for actions against contractors. The district court allowed the new claims. The contractor appealed.

The court of appeal distinguished prior jurisprudence and found that since the amended petition did not add a new party defendant allegedly liable for the damages, and a viable claim was set forth in the original petition, and the amended petition did not involve a different or new cause of action, the amended petition related back to the original petition and was not preempted. As to relation back, the court of appeal held an amended petition relates back to the original petition if the original pleading gave fair notice of the general fact situation out of which the amended claim arises. The Code of Civil Procedure article governing relation back requires only that the amended petition's thrust factually relate to the conduct, transaction or occurrence originally alleged. In this instance, the court of appeal held the allegations of sinking and cracking set forth in the original petition gave fair notice of the general problems with the foundation of the pool and the amended petition related back to the original petition. *Duvio v. Specialty Pools Co., LLC*, 2015-0423 (La.App. 4 Cir. 6/16/16), 216 So.3d 999.

## **INDEMNITY UNDER THE OVERHEAD POWER LINE SAFETY ACT**

Brendan Sharp, an employee of RedIron Construction, LLC, was injured when a steel panel he was handling came into contact with, or in close proximity to, an overhead power line owned and operated by The City of Morgan City. RedIron was a subcontractor of Legacy Construction Services. Sharp sued Morgan City for damages resulting from his injuries. Morgan City filed a third party demand against Legacy and RedIron seeking complete indemnity for their alleged failure to comply with the requirements of the Overhead Power Line Safety Act (OPLSA). Legacy and RedIron moved for summary judgment arguing all provisions of the OPLSA were complied with and Morgan City was not entitled to indemnity. The trial court granted the motion and dismissed Morgan City's claims against Legacy and RedIron. Morgan City appealed.

The OPLSA, L.R.S. 45:142, prohibits anyone from working within ten feet of any high voltage overhead line. L.R.S. 45:143 provides an exception to the prohibition when a person desires to temporarily carry on any prohibited function, activity or work or operation. In that event, the persons responsible for the work to be done shall promptly notify the owner or operator of the high voltage overhead line prior to the scheduled commencement of the work.

The work shall be performed only after satisfactory mutual arrangements have been negotiated between the person responsible for the work and the owner or operator. The owner or operator of the lines shall initiate the agreed upon safety arrangements within three working days and shall complete the work promptly. L.R.S. 45:144A provides that if a violation of these requirements results in physical or electrical contact with any high voltage overhead line, the person violating the requirements shall be liable to the owner or operator of the high voltage overhead line for all damages, costs or expenses incurred by the owner or operator as a result of the contact.

Morgan City contended the statute, L.R.S. 45:143, does not state that arrangements must be satisfactory only to the power line owner and argued the OPLSA contemplates a bilateral, collaborative process between contractors and power line owners. Morgan City further contended that neither Legacy nor RedIron took any steps whatsoever to ensure that the safety requirements offered by Morgan City were satisfactory.

The court found Morgan City was timely notified about the project prior to any work being done within ten feet of the high voltage overhead line and sent its senior lineman to work out arrangements with Legacy and RedIron. The senior lineman decided to use guy guards. Although the representatives of Legacy and RedIron questioned the use of guy guards as deemed appropriate by the Morgan City senior lineman, they agreed to the arrangement. Morgan City installed the guy guards, the work proceeded and the accident occurred. The court held the evidence presented by Morgan City failed to create a genuine issue of material fact as to whether an OPLSA violation occurred and Legacy and RedIron were entitled to summary judgment. The claims against Legacy and RedIron were dismissed. *Sharp v. Morgan City*, 2016-1673 (La.App. 1 Cir. 8/16/17), 226 So.3d 545., writ denied, 2017-1557 (La. 11/17/17), 2017 WL 5988957.

## **FEDERAL OFFICER JURISDICTION AND GOVERNMENT CONTRACTOR DEFENSE**

A class action proceeding was filed with respect to the “Geaux Wider” project to widen sections of Interstate 12 in East Baton Rouge and Livingston Parishes. Plaintiffs alleged that a concrete median barrier installed as part of the project acted as an artificial flood wall, which unnaturally impounded rainwater resulting in the flooding of additional areas. The lawsuit was filed in state court. One of the defendants, James Construction Group, LLC, removed it to the United States District Court for the Middle District of Louisiana. The district court remanded the matter to state court. The defendants appealed.

The primary holding of interest was the decision of the Fifth Circuit Court of Appeals with respect to James' argument it was acting under a federal officer entitling it to federal court jurisdiction and the government contractor defense. James claimed the project's design was subject to inspection and approval by federal regulators. The government contractor defense provides immunity to contractors for conduct that complies with the specifications of a federal contract.

The court of appeals held the defendants failed to show that James' work was undertaken pursuant to a federal contract. Although they described the project as federally funded, they did not claim that James ever entered into a contract with the federal government. Instead, its work was undertaken pursuant to a design/build agreement with the Louisiana DOTD. Nothing about the contract suggested James was operating as a federal government contractor or subcontractor. Rather, the arrangement appeared to be consistent with the federal government's usual approach to highway construction: it approves the project and provides most of the funding, but states build and own the highways. Under the arrangement between the Louisiana DOTD and Federal Highway Administration, the Administration provided oversight and monitored the effective and efficient use of funds. This arrangement was not the procurement relationship that has allowed a private firm to enjoy the benefit of federal officer removal.

The court held that despite asserting the government contractor defense, the defendants did not provide evidence suggesting James was operating as a federal contractor or had a similar relationship with a federal supervisor. Absent this relationship between the federal government and a private firm, prior jurisprudence of the Supreme Court instructed that even onerous and specifically enforced regulations do not suffice to show the firm was acting under a federal officer. The decision of the district court remanding the matter to state court was affirmed. *City of Walker v. State of Louisiana Through the Department of Transportation and Development*, 17-30768 (5th Cir. 2017), 2017 WL 5953511.

## **POST-BID MODIFICATION OF A PUBLIC BID CONTRACT AND FORMATION OF A CONTRACT**

The New Orleans City Park Improvement Association, Inc. advertised for bids for the renovation and improvement of the City Park Tennis Center. Pete Vicari General Contractor, Inc. was the low bidder. Prior to the opening of the bids, the architect notified Vicari its bid would be accepted, but provided Vicari with proposed contract documents which varied from those upon which Vicari submitted its bid. Vicari refused to enter into the contract based on

the new set of documents. City Park awarded the contract to the next low bidder and sued the surety which provided Vicari's bid bond for the difference in the two bids. The surety claimed no contract was formed because City Park varied its terms. City Park and the surety both moved for summary judgment.

The court held that acceptance of a bid may contain some modifications without obstructing the formation of a contract, unless the terms of the acceptance vary significantly from the substance of the original contract requirements. The court found there was a material issue of fact as to whether the differences in the two sets of documents amounted to a material change so as to obstruct the formation of a contract between the parties. Both motions for summary judgment were denied. *New Orleans City Park Improvement Association v. Employers Mutual Casualty Co.*, (E.D. La. 3/1/11), 2011 WL 13213821.

### **CLAIM FOR PERSONAL INJURIES AGAINST A CONTRACTOR FOR A TRIP AND FALL NOT ALLOWED**

Donna Lahare contracted with Valentine Mechanical Services, LLC to install a generator on her property. Lahare advised Valentine she wanted the generator installed on the side of her property, not in the backyard. The Valentine representative assured Lahare the generator could be installed there. The permit authorized the installation in the backyard, but Valentine installed the generator on the side of the property. The Jefferson Parish gas and plumbing inspector rejected the installation on the basis it violated code requirements. Lahare applied for a zoning variance which required her to obtain the approval of her neighbors. While walking from house to house to obtain consent from her neighbors, Lahare tripped on an alleged defect in the sidewalk and injured her shoulder. Lahare sued Valentine for the costs incurred for bringing the generator into compliance with the code and for personal injuries. Valentine filed a motion for partial summary judgment with respect to the claim for personal injuries. The district court denied the motion. Valentine appealed.

The court of appeal held that the same acts or omissions may constitute breaches of both general duties and contractual duties, and may give rise to actions in both tort and contract. The classical distinction between damages in contract and damages in tort is that the former flow from the breach of a special obligation contractually assumed by the obligor, whereas the latter flow from the violation of a general duty owed to all persons. When a person neglects to do what he is obligated to do under a contract, he has committed a passive breach of the contract. If he negligently performs a contractual obligation, he has committed an act of negligence and an active breach of contract. A passive breach of contract warrants only an

action for breach of contract. An active breach of contract, on the other hand, may also support an action in tort. The court of appeal found Lahare, according to her claims set forth in the petition, alleged a passive breach of contract which did not support a tort claim. She did not claim her injuries were caused by Valentine's negligent performance of the contract, but by Valentine's nonperformance, i.e., its failure to obtain the proper permit and failure to assist in the variance process.

The court of appeal also held that even if assuming Valentine's failure to obtain the proper permit or failure to assist in the variance process constituted active negligence, the requirements for an action in negligence were not satisfied. The court held the claims were not the cause-in-fact of Lahare's injuries. While it might be true Lahare would not have walked from door to door but for Valentine's actions, the alleged defect in the sidewalk was an intervening and superseding cause of her injuries and not the cause-in-fact. Further, the alleged fault of Valentine was not the legal cause of her injuries. The injury could not have been reasonably foreseen or anticipated; there was no ease of association between the risk and any legal duty owed by Valentine.

The decision of the trial court was vacated. Judgment was issued granting the motion for partial summary judgment dismissing with prejudice Lahare's claims against Valentine for her personal injuries. *Lahare v. Valentine Mechanical Services, LLC*, 17-289 (La.App. 5 Cir. 6/29/17), 223 So.3d 773.

## **RECOVERY PURSUANT TO RELEASE BONDS NOT ALLOWED**

F.H. Paschen, S.N. Nielsen & Associates, LLC contracted to build two schools. It subcontracted a portion of both projects to J & A Construction Management Resources Company, Inc., which in turn subcontracted a portion of its work for the projects to 84 Lumber Company. 84 Lumber alleged Paschen and J & A failed to compensate it for its work and filed statements of claim under the Louisiana Public Works Act (LPWA). Paschen deposited surety bonds as security for the statements of claim. The bonds guarantee payment of the obligations secured by a privilege and cancel the statements of claim in the mortgage records. 84 Lumber sued Paschen and the surety to recover under the release bonds. Paschen and the surety moved for summary judgment.

The release bonds provide security for the privilege created in favor of the claimant who properly files a statement of claim under the LPWA. The filing of a release bond does not enlarge the substantive rights of a subcontractor. 84 Lumber's claim against Paschen and the

surety depended upon statements of claim that satisfy the filing and notice requirements of the LPWA.

84 Lumber was not in privity with the general contractor, and, thus, could not maintain a direct action against Paschen and the surety. 84 Lumber failed to give proper notice under L.R.S. 38:2247 of the LPWA, which requires that a subcontractor having a direct contractual relationship with a subcontractor but no contractual relationship to the contractor may assert a right of action against the general contractor or the surety on the bond, provided it gives notice to the contractor of the amount claimed and the name of the party to whom material was furnished or for whom work was performed. 84 Lumber had no right of action under the LPWA and could not recover under the release bonds for the claims. *84 Lumber Company v. F.H. Paschen, S.N. Nielsen & Associates, LLC*, (E.D. La. 9/14/17), 2017 WL 4076027.

## **GOVERNMENT CONTRACTOR IMMUNITY**

The U.S. Fifth Circuit Court of Appeals affirmed the decision of the district court granting motions for summary judgment of three general contractors involved in SELA drainage projects in the Uptown New Orleans area finding they were entitled to government contractor immunity and dismissing the third party claims of the Sewerage and Water Board of New Orleans (“SWB”) against them. The SWB argued its due process rights were violated by the brevity of the pre-trial discovery process with respect to motions for summary judgment and it should have been afforded more time to conduct discovery.

The SWB declined to participate in an initial discovery conference with the plaintiffs, contending the conference was premature. A series of discovery scheduling and status conferences were held later eventually extending the deadline for the contractor’s motions for summary judgment and the district court granted the SWB additional time to conduct discovery. From the time the matter was removed to federal court, the SWB had fourteen (14) months to conduct discovery relating to the contractor’s government contractor immunity defense. The Fifth Circuit held the district court did not abuse its discretion in setting discovery deadlines, nor did it rule prematurely.

On the issue of government contractor immunity, the SWB meaningfully challenged only the first consideration in determining whether the defense applies. It requires that the government approve reasonably precise specifications. The requirement that the specifications be precise means that discretion over significant details and all critical design choices will be exercised by the government. While the government need not prepare the

specifications to be considered to have approved them, government approval requires more than a “rubber stamp.” It requires substantive review or evaluation of the design specification by the government. The crux of the requirement is that the contractor cannot have been delegated all discretionary design decisions and reap the benefit of the immunity defense.

The Fifth Circuit held the district court did not err in determining the plans and specifications for each construction feature implicated by the claims were reasonably precise and approved by the government. The Corps of Engineers considered each offending feature and had in place specifications that effectively removed all critical design choices from the contractor’s discretion. The involvement of the Corps of Engineers was such that the district court was convinced the Corps was the agent of decision for all critical features of the work. Summary judgment was affirmed. *Elizabeth Sewell v. Sewerage and Water Board of New Orleans*, 697 Fed.Appx. 228, (5th Cir. 2017).

## **PUBLIC WORKS ACT PAYMENT BOND AND INTEREST AND ATTORNEY FEES**

The joint venture of McDonnell Group, LLC and Archer Western Contractors, LLC contracted with the Law Enforcement District of the Parish of Orleans to build an administrative building. It provided a Public Works Act payment bond underwritten by Travelers Casualty and Surety Company of America and Liberty Mutual Insurance Company. The joint venture subcontracted the steel fabrication to H&H Steel Fabricators. H&H purchased steel from Service Steel Warehouse Company. H&H and Service Steel entered into an agreement providing that all past due amounts would bear simple interest at the rate of 18% per year and that H&H would pay Service Steel’s reasonable attorney fees incurred for collection. Travelers and Liberty executed a rider to the payment bond recognizing Service Steel as a claimant under the bond. H&H failed to pay for the steel. Service Steel sued the joint venture and the insurers and contended it was entitled to recover 18% interest and attorney fees under the bond. The joint venture and the insurers argued that the agreement with respect to interest and attorney fees did not apply to obligations under the bond.

The district court on cross motions for summary judgment held the phrase “for such sums as may be justly due claimant” as used in the bond was ambiguous and would be construed against the joint venture and the insurers as the drafters. Service Steel was entitled to some type of remedy under the bond, but the Public Works Act precluded interest and restricted attorney fees to 10% of the amount recovered. Service Steel appealed.

The Fifth Circuit Court of Appeal agreed with the district court that the language of the bond was ambiguous and should be construed against the drafters, the joint venture and the insurers. It concluded Service Steel was entitled to some type of remedy under the bond, but there was no basis in law or the record for looking beyond the terms of the bond for the obligation to pay interest and attorney fees. The claim for 18% interest and attorney fees pursuant to the agreement between H&H and Service Steel was rejected. Nevertheless, the court allowed the recovery of attorney fees of 10% of the amount recovered as allowed by the Public Works Act. *Service Steel Warehouse Company, L.P. v. McDonnell Group, LLC*, 690 Fed.Appx. 869, (5th Cir. 2017).

### **INDEMNITY OF A PUBLIC BODY UNDER THE PUBLIC WORKS ACT**

The Orleans Parish School Board contracted with Woodrow Wilson Construction Company, Inc. for work subject to the Public Works Act. During the course of the work, a tire blew out on a dump truck at the construction site. The force of the blowout expelled debris, which struck and injured Leonard Johnson, Sr. Johnson and his wife sued the School Board, Wilson and others involved in the project. The School Board filed a cross-claim against Wilson for indemnity pursuant to the contract between the parties. Wilson moved for summary judgment on the claim for indemnity contending indemnity was prohibited under L.R.S. 38:2216(G)(1). The statute is part of the Public Works Act. The district court granted the motion and dismissed the School Board's cross-claim for indemnity. The School Board appealed.

The contract between the School Board and Wilson required that Wilson indemnify and hold the School Board harmless from and against claims, including attorney' fees, attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself), but only to the extent caused by the negligent acts or omissions of the contractor or a subcontractor, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified thereunder. The statute states that any provision contained in a public contract, other than a contract of insurance, providing for a hold harmless or indemnity agreement, or both, from the contractor to the public body for damages arising out of injuries or property damage to third parties caused by the negligence of the public body, its employees or agents, is contrary to public policy and is null and void. The court of appeal held, although the indemnity provision does not state the School Board could be indemnified for its own negligence, the provision stating that the School Board was entitled to indemnification regardless of whether the claims, damages, losses or expenses

were caused in part by a party indemnified was tantamount to allowing the School Board to be indemnified for its own negligence.

Relying on prior jurisprudence, the court of appeal found that if the public body was not found to be negligent, it was entitled to seek indemnification for defense costs. A contractor should not be relieved of its contractual obligation to indemnify a party ultimately found not to be negligent simply because a plaintiff alleges the public body was negligent. A plaintiff's allegation of negligence should not be the determining factor in applying the contractual provision. It is a finding of negligence that should be dispositive. The negligence or non-negligence of the School Board had not yet been determined. The judgment granting summary judgment was reversed and the matter remanded for further proceedings. *Johnson v. Hamp's Construction, LLC*, 2017-0033 (La.App. 4 Cir. 6/7/17), 221 So.3d 222, writ denied, (La. 10/27/17), 228 So.3d 1229.

## DELAY CLAIMS, DAMAGES FOR COMPLETION AND SUBSTANTIAL COMPLETION

The Housing Authority of New Orleans contracted with Parkcrest Builders, LLC to construct the Florida Avenue: New Affordable Housing Units. Liberty Mutual Insurance Company provided performance and payment bonds for Parkcrest. HANO terminated Parkcrest's contract prior to completion and called upon Liberty to perform its obligations as surety. HANO and Liberty entered into a Takeover Agreement to complete the project. Liberty retained Parkcrest as its completion contractor. Both HANO and Liberty claim the other violated the terms of the Takeover Agreement. Liberty informed HANO it considered the project substantially complete, but the architect advised it was unable to grant substantial completion. Liberty informed HANO that it would only maintain its insurance and security for the worksite through a certain date. HANO then obtained its own insurance and entered into a contract with Colmex Construction, LLC to complete the project.

Parkcrest sued HANO for breach of contract. HANO filed a counterclaim against Parkcrest alleging delays. Liberty intervened, alleging breach of the Takeover Agreement, bad faith breach of contract and wrongful termination claims against HANO. HANO filed a counterclaim against Liberty alleging it breached the terms of the Takeover Agreement in bad faith and that it induced HANO to sign the Takeover Agreement through fraudulent misrepresentation. Several motions for summary judgment followed.

HANO moved for partial summary judgment to dismiss the delay claims alleged by Liberty and Parkcrest. The general conditions for the project required that the contractor notify the Contracting Officer in writing of any cause for delay within 10 days from the beginning of the delay. HANO contended since notification was not given within the 10-day period, Liberty and Parkcrest were not entitled to delay damages. Parkcrest had sent only one written notification of delay shortly before the project was to have been completed, but the court found Liberty and Parkcrest provided sufficient evidence to demonstrate that HANO was aware of the delays and their cause, and had the opportunity to ascertain the facts surrounding the delays. The written notice requirement of a contract may be waived when the consistent actions of the two parties lead to such a conclusion. The court held the facts suggested a waiver of the written notice requirement occurred and HANO was not entitled to stipulated damages and to the dismissal of all delay claims based on notice. HANO's motion was denied.

Liberty and Parkcrest moved for partial summary judgment on the issue of HANO's claims for damages arising out of the work completed by Colmex. They argued the contract between HANO and Colmex violated the Public Bid Law and that any damages to which HANO may be entitled should be limited to *quantum meruit* and not according to what HANO agreed to pay Colmex. The court found there was no genuine dispute that HANO violated the Public Bid Law when it accepted Colmex's bid to complete the project. The Public Bid Law requires a public entity, such as HANO, to advertise and let work to the lowest responsible and responsive bidder who bid according to the bidding documents as advertised. The statute requires that a bid be in strict compliance with the advertisement for the bid and no provision stated in the advertisement for bid may be waived by a public entity.

The bid invitation for Colmex's work instructed all bidders to break down the pricing of their bids into separate unit prices using a specific Unit Price Form. An addendum included a Revised Unit Price Form and instructed all bidders to use the revised form rather than the original form. Despite this directive, Colmex used the original unit price form resulting in the inclusion of a price for three items that were not listed in the revised form. Use of the original form accounted for an increase of \$160,450.00 in the contract ultimately signed by HANO and Colmex.

HANO argued the claim by Liberty and Parkcrest that the contract between HANO and Colmex violated the Public Bid Law was not timely under L.R.S. 38:2220(B), which provides that interested parties may seek an injunction or other relief to prevent the award of a contract. The statute does not provide a specific time limit for such an action and courts

generally look to the diligence of the party challenging a bid and the extent to which the contract under attack has been completed. Neither Liberty nor Parkcrest claimed that they were unaware or could not have determined that Colmex had been awarded the contract or that the bid should have been rejected. The work had been completed. The motions of Liberty and Parkcrest were denied.

HANO moved for partial summary judgment seeking a declaration that Parkcrest and Liberty failed to achieve substantial completion of the contract. HANO argued the architect's refusal to grant substantial completion was final and foreclosed any further debate on the issue, and the facts demonstrated substantial completion had not been achieved. The court found HANO had the authority to determine whether the project had reached substantial completion and that HANO made this determination in compliance with the procedures set forth in the general conditions. Nevertheless, the court held substantial completion is to be determined by the trial court. The courts look to several factors when determining whether there has been substantial completion: (1) the extent of any defect or non-performance; (2) the degree to which the purpose of the contract is defeated; (3) the ease of correction; and (4) the use or benefit to the owner of the work performed. The court found there was a genuine issue of material fact as to when and whether substantial completion was achieved. The motion for partial summary judgment of HANO was denied. *Parkcrest Builders, LLC v. Housing Authority of New Orleans*, (E.D. La. 8/8/17), 2017 WL 3394033.

## PRIVATE WORKS ACT LIEN

The Fourth Circuit Court of Appeal held that although a subcontractor did not properly preserve its claim and privilege, but did give notice to the owner of the claim, it could maintain an action against the owner under L.R.S. 9:4822L for all costs and attorney fees for establishment and enforcement of a claim or privilege, since the owner failed to notify the subcontractor within ten days of commencement of the period for preservation of claims and privileges. *Buck Town Contractors & Co. v. K-Belle Consultants, LLC*, 2015-1124 (La.App. 4 Cir. 4/6/16), 216 So.3d 981, *writ denied*, 2016-0831 (La. 9/6/16), 205 So.3d 915.

## INTEREST

The United States District Court for the Eastern District of Louisiana held that a successful litigant in a contract dispute was entitled to pre-judgment interest from the date the debt became due, not the date of judicial demand. Interest should be calculated only on the net

amount of damages. *LaShip, LLC v. Hayward Baker, Inc.*, 11-546 (E.D. La. 12/11/15), 2015 WL 13306348.

### **BREACH OF CONTRACT CLAIM AND IMMUNITY UNDER L.R.S. 9:2771**

The U.S. Fifth Circuit Court of Appeals, in affirming the decision of the United States District Court for the Eastern District of Louisiana, held a contractor did not breach its contract with respect to the construction of soil-mixed columns for a foundation system which settled. The specifications required that 90% of the Phase I columns and 100% of the Phase II and III columns demonstrate an unconfined compressive strength of 100 psi. That requirement was satisfied. Nevertheless, the owner contended the specification was merely a component of a contractor's overreaching obligation to properly install the columns, and the contractor, in failing to do so, breached its contract. The court held, since the express specifications were met and because the owner could not identify a specific provision in the contract as a point of breach, the district court did not err in determining the contractor did not breach its contract.

The owner also alleged the contractor had a duty to warn of alleged defects in the columns. L.R.S. 9:2771 provides that no contractor shall be liable for destruction or deterioration of or defects in any work constructed if he constructed the work according to plans and specifications furnished to him which he did not make or cause to be made, and if the destruction, deterioration or defect was due to any fault or insufficiency of the plans or specifications. The court held the statute shielded the contractor from liability for any defects that may arise as a result of the contractor's adherence to the plans and specifications.

The immunity provided by the statute is subject to the exception that a contractor cannot escape liability if he has a justifiable reason to believe adherence to plans and specifications would create a hazardous condition. In this instance, the court found the contractor was given performance specifications which it did not make or cause to be made and settlement of the columns stemmed from a design defect in the length of the columns. The owner was unable to point to specific evidence indicating the contractor had a justifiable reason to believe that adherence to the plans and specifications would create a hazardous condition.

The owner contended the contractor's geotechnical expertise constituted evidence it knew or should have known that the design was allegedly defective, and, thus, had an affirmative duty to warn. The court declined to broaden the scope of the affirmative duty of contractors under Louisiana law to the extent urged by the owner, and held the contractor was immune

from liability. *LaShip, L.L.C. v. Hayward Baker, Incorporated*, 680 Fed.Appx. 317 (5th Cir. 2017).

### **WAIVER OF RIGHT TO OBJECT TO APPOINTMENT OF AN ARBITRATOR**

The First Circuit Court of Appeal found a party, who received an adverse judgment in an arbitration proceeding and who had adequate notice concerning the relationship between a client of the arbitrator and the claimant before the award, waived any right to object to the appointment of the arbitrator on that basis after the award was made. L.R.S. 9:4210 provides that an arbitration award may be vacated, among other things, where there was evident partiality or corruption on the part of the arbitrator. The court of appeal noted that the appellate court's function in determining whether an arbitration award should be vacated is to determine if the proceedings were fundamentally fair. Since the complaining party against whom the award had been made had adequate notice of the alleged conflict prior to the award, the court of appeal held that party could not carry its burden of proving the arbitration proceeding was fundamentally unfair, and waived its right to object later. *Joseph Bergeron D/B/A Design/Build Associates v. Neal Patel D/B/A Louisiana Party Company*, 2016-0600 (La.App. 1 Cir. 5/17/17), 2017 WL 2170142, writ denied, (La. 10/27/17), 228 So.3d. 1226.

### **INDEMNIFICATION FOR PAYMENT OF A PRIVATE WORKS ACT LIEN AND COMPENSATION OR SETOFF**

Honeywell International, Inc. contracted with Vector Electric & Controls, Inc. to perform general construction work at Honeywell's chemical production facility in Baton Rouge, Louisiana. Wholesale Electric Supply Company furnished electrical supplies and materials to Vector. Wholesale claimed it had not been paid by Vector and filed a lien under the Private Works Act. It sued Honeywell to enforce the lien. Honeywell filed a third party demand against Vector for statutory and contractual indemnity. Vector alleged Honeywell was liable to it for damages for breach of contract.

Wholesale filed a motion for summary judgment against Honeywell. It and Honeywell reached a settlement. The trial court entered judgment on the motion for summary judgment, according to the settlement, awarding Wholesale \$1,213,321.30 plus judicial interest of \$38,427.38 for a total of \$1,251,748.68, and additional judicial interest until the judgment was paid. Honeywell paid the judgment and filed a motion for summary judgment against

Vector on its indemnification claim. The trial court granted Honeywell's motion and awarded judgment in its favor in the amount of \$1,262,531.73 plus judicial interest in the sum of \$93,613.53 for a total amount of \$1,356,145.26 with judicial interest continuing to accrue until the judgment was paid. Vector appealed.

Vector contended it was entitled to compensation or setoff against any debt it owed to Honeywell for its breach of contract damages claim in the amount of \$2,491,295.85. The court of appeal rejected the argument, finding the discrete question raised by Honeywell was its right to indemnification from Vector. Honeywell averred it was entitled to statutory and contractual indemnification. The court found Honeywell was entitled to statutory indemnification under L.R.S. 9:4802(F). That statute, a part of the Private Works Act, requires that a contractor shall indemnify the owner for claims against the owner arising from the work performed under the contract. Since Vector was liable for indemnification under the statute, the court of appeal found it did not need to consider whether Honeywell was also entitled to contractual indemnification. The issue of any debt claimed by Vector owed by Honeywell was not germane to the issue of indemnification under the Private Works Act.

Further, the court of appeal held the doctrine of compensation or setoff would not apply since it takes place only by operation of law when two persons owe to each other sums which are liquidated and presently due. A claim is liquidated when the debt is for an amount capable of ascertainment by mere calculation in accordance with accepted legal standards. A disputed debt is not liquidated and is not susceptible of compensation unless the person who asserts compensation has in hand proof of the debt and is in a position to prove it promptly. Any sums purportedly due Vector by Honeywell were disputed and not liquidated, and Vector was not, therefore, entitled to compensation. *Wholesale Electric Supply Company v. Honeywell International, Inc.*, 2016-1180 (La.App. 1 Cir. 5/11/17), 221 So.3d 98, *writ denied*, (La. 10/9/17), 227 So.3d 834.

## **RESPONSIVENESS OF A PUBLIC BID**

The Port of Iberia advertised for bids for a public construction contract. Two addenda were issued. Both required that the bidders acknowledge the addendum by inserting the number and date for each in the space provided in the Louisiana Uniform Public Work Bid Form. The lowest responsible bidder, in acknowledging the receipt of both addenda on the form, did not include the date. The Louisiana Attorney General, in an opinion issued to the Port of Iberia, concluded the requirement that bidders acknowledge the receipt of both addenda by inserting not only the addendum's number, but also the date on the space provided in the Bid

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Form went beyond the scope of what was required of bidders by the Louisiana Bid Law. Thus, the failure of the lowest responsible bidder to include the date of each addendum on the form did not render its bid non-responsive. Opinion, Louisiana Attorney General, No. 17-0175 (12/1/17).

### **LOUISIANA PUBLIC BID LAW**

An invitation to bid, as well as instructions to the bidders, required that each bidder include its contractor's license number on the outside of the sealed bid envelope. The Louisiana Public Bid Law, L.R.S. 37:2163(A)(1), contains a similar requirement. Additionally, the statute provides that if the bid does not display the contractor's license number on the bid envelope, the bid shall be automatically rejected and returned to the bidder marked "rejected," and not read aloud. The Louisiana Attorney General issued an opinion that where the apparent low bidder failed to comply with the requirements, its bid must be considered non-responsive and warrants a mandatory rejection. Louisiana Attorney General Opinion 17-0105 (7/31/17).

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