BALDWIN HASPEL BURKE & MAYER LLC
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Louisiana Construction Law Update

The ***Construction Law Update*** is published by Baldwin Haspel Burke & Mayer, LLC for the benefit of its clients and others having interest in the construction industry. It includes discussions on Louisiana state and federal court decisions, legislative developments, and tax issues concerning construction-related matters. For further information on the decisions and legislative developments, contact **John A. Stewart, Jr.** at (504) 585-7846 - jstewart@bhbmlaw.com.

At the end of this newsletter, you'll find a section titled *Tax Law*. It contains a snippet from Baldwin Haspel Burke & Mayer's ***Tax Law Alert***, which provides information on updates and changes in tax law on both the state and federal level. For information on tax-related issues, please contact **Jason Alley** at (504) 585-7819 - jalley@bhbmlaw.com, or Matt Miller at (504) 585-7867 - mmiller@bhbmlaw.com.

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ANTI-INDEMNITY STATUTE FOR CONSTRUCTION AND TRANSPORTATION CONTRACTS

During its 2012 session, the Louisiana legislature passed two acts amending L.R.S. 9:2780.1. The statute prohibits the enforcement of agreements in transportation and construction contracts requiring a party to indemnify, defend or hold harmless another from any liability or loss or damage resulting from the negligence or intentional acts or omissions of that party, or a third party over whom the party providing the indemnitor has no control.

One act amends the term "construction contract" to remove from the definition agreements for design and repair or maintenance. The definition now encompasses agreements for construction, alteration or renovation of a building, structure, highway, road, bridge, water line, sewer line, oil line, gas line, appurtenance or other improvement to real property. Interestingly, although repair and maintenance contracts are now generally excluded from the definition, the definition includes repair or maintenance of a highway, road or bridge. Additionally, the definition of the term "third party" has been amended to exclude any party who has otherwise contracted with the indemnitor or is at the indemnitee's facility at the invitation or direction of the indemnitor.

The act, further, provides that the statute does not invalidate or prohibit the enforcement of any

clause in a construction contract containing the indemnitor's promise to indemnify, defend or hold harmless the indemnitee or an agent or employee of the indemnitee if the contract also requires the indemnitor to obtain insurance to insure the obligation to indemnify, defend or hold harmless, and there is evidence that the indemnitor recovered the cost of the required insurance in the contract price. However, the indemnitor's liability under such clause shall be limited to the amount of the proceeds that were available under the insurance policy or policies that the indemnitor was required to obtain. Still further, the statute does not invalidate or prohibit the enforcement of any clause in a construction contract that requires the indemnitor to procure insurance or name the indemnitee as an additional insured on the indemnitor's policy of insurance, but only to the extent that such additional insurance coverage provides coverage for liability due to an obligation to indemnify, defend or hold harmless otherwise authorized, provided that such insurance coverage is furnished only when the indemnitor is at least partially at fault or otherwise liable for damages ex delicto or quasi ex delicto. Acts 2012, No. 684.

The second act amends the term "construction contract" to include the repair or maintenance of a highway, road or bridge. It also includes provisions stating the statute shall not prohibit a motor vehicle operator from securing uninsured motorist coverage or prohibit any employee from recovering damages, compensation, or benefits under workers' compensation laws or any other claim or cause of action. Acts 2012, No. 780.

Both acts were signed by the governor. Act No. 684, by its terms, became effective upon the signature of the governor. Act No. 780 becomes effective on August 1, 2012. It states that Act, and Act No. 684, shall have prospective application only, and its provisions shall supersede and control to the extent of conflict with the provisions of any other act of the 2012 session, i.e., Act 684. Thus, to the extent Act No. 780 conflicts with Act No. 684, the provisions of Act No. 780 will prevail.

AMENDMENT TO THE STATUTE PROVIDING A PEREMPTIVE PERIOD FOR CLAIMS AGAINST CONTRACTORS

The Louisiana legislature during its 2012 session amended L.R.S. 9:2772, the statute providing a peremptive period of five years for claims against contractors and others arising out of construction, to provide that if, within 90 days of the expiration of the five-year peremptive period, a claim is brought against any person or entity included within the provisions of the statute, such person or entity shall have 90 days from the date of service of the main demand or, in the case of a third party defendant, within 90 days from service of process of the third party demand, to file a claim for contribution, indemnity or a third party claim against any other party. Although the statute states it applies to those providing design services, claims against those parties are governed by another statute. The new law is effective August 1, 2012. Acts 2012, No. 762.

AMENDMENT TO THE PRIVATE WORKS LIEN LAW CONCERNING THE TIME WHEN AN ACTION TO ENFORCE A LIEN MUST BE FILED

The Louisiana legislature during its 2012 session amended the private works lien law to provide that an action against an owner to enforce a lien must be filed within one year of the date the lien was filed. Previously, the statute provided such an action must be filed within one year after the expiration of the time given for the filing of the lien. Acts 2012, No. 394.

VERIFICATION OF EMPLOYEES INVOLVED IN PUBLIC CONTRACT WORK

The Louisiana legislature during its 2012 session amended L.R.S. 38:2212.10 to provide that its requirement that private employers bidding on public work or contracting with a public entity verify that all employees in Louisiana are legal citizens or are legal aliens applies only to contracts for public works.

For purposes of the statute, public works are defined to mean the erection, construction, alteration, improvement or repair of any public facility or immovable property owned, used, or leased by a public entity. Acts 2012, No. 142. The act was signed by the governor and becomes effective on August 1, 2012.

TIME FOR EXECUTION OF A PUBLIC CONTRACT

The Louisiana legislature during its 2012 session amended L.R.S. 38:2215 with respect to public contracts to provide that if the contractor has furnished all necessary documents to the public entity within 10 days of the opening of bids and no bid challenge has been submitted to the public entity, the contractor and the public entity shall execute the contract not later than 45 days from the public entity's acceptance of the lowest responsible bid. Acts 2012, No. 647. The new law becomes effective August 1, 2012.

ATTESTATION FOR PUBLIC WORKS CONTRACTS

L.R.S. 38:2227 currently provides that each bidder for a public works contract shall attest that he has not been convicted of, or has not entered a plea of guilty or nolo contendere to certain crimes, and that no individual partner, incorporator, director, manager, officer, organizer or member, who has a minimum of 10% ownership in the bidding entity has been convicted of, or has entered a plea of guilty or nolo contendere to any such crimes. The statute was amended by the Louisiana legislature during its 2012 session to state that it applies only to the lowest bidder. Acts 2012, No. 598. The new law becomes effective August 1, 2012.

ISSUANCE OF ADDENDA FOR DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT CONSTRUCTION CONTRACTS

L.R.S. 48:252 was amended by the Louisiana legislature during its 2012 session to provide that the Department of Transportation and Development shall not issue any addenda materially modifying plans and specifications within 72 hours prior to the advertised time for opening of bids. If such addenda are issued within the 72-hour period, the opening of bids shall be extended. The statute previously specified a time period of 96 hours. Acts 2012, No. 195. The new law becomes effective August 1, 2012.

COVERAGE FOR AN ADDITIONAL INSURED

The Fourth Circuit Court of Appeal considered the extent of coverage afforded an additional insured under an excess policy. The Sewerage & Water Board of New Orleans was made an additional insured under the excess policy issued to Capitol Enterprise, Inc. Capitol was the general contractor for a project to sandblast and paint a large, elevated water tower in Algiers, Louisiana. The additional insured endorsement provided that any person or organization the insured (Capitol) was required by written contract, agreement or permit to name as an additional insured was an insured, but only with respect to liability arising out of work performed by the insured (Capitol) for the additional insured. The issue was whether there was coverage for the Sewerage & Water Board only for its liability for the work of Capitol, or also for the Sewerage & Water Board's independent fault. The court held the Sewerage & Water Board was an additional insured for its own negligence. Jones v. Capitol Enterprises, Inc., 2011-0956 (La.App. 4 Cir. 5/9/12), 2012 WL 1638278.

PENALTIES FOR FAILURE TO PAY A MATERIAL SUPPLIER

Favalora Constructors, Inc. contracted with RC Corporation to renovate a building on Magazine Street in New Orleans. Favalora then contracted with South Texas Pioneer Millwork to fabricate and furnish cabinets, counter tops, shelving and a reception desk at a cost of $24,245.00. The materials were to be

installed by Favalora. Pioneer submitted an invoice to Favalora for the work. Favalora, in turn, submitted the invoice to RC Corporation for the amount due Pioneer. RC Corporation paid Favalora for the materials, but Favalora failed to remit payment to Pioneer. Pioneer filed a lien on the Magazine Street property. The owner paid Pioneer $19,905.00 to release the lien, reserving all of its rights against Favalora. The trial court rendered judgment against Favalora and in favor of Pioneer as follows: 1) payment of the balance of the debt, $4,340.00; 2) payment of a penalty under L.R.S. 9:4814 of $500.00 per $1,000.00 that were knowingly misapplied, for a total of $12,000.00; 3) payment of a penalty pursuant to L.R.S. 9:2784 for the failure to timely pay Pioneer, which was capped at 15% for a total of $3,000.00; 4) payment of attorney's fees of $29,201.50; 5) payment of costs of $1,387.58. Favalora appealed.

Favalora argued penalties could not be awarded on the amount that was paid by the owner, $19,905.00, and the maximum amount of the claim which was subject to penalties was $4,340.00. The court of appeal found the settlement with the property owner of Pioneer's lien did not reduce the amount of the statutorily mandated penalty that Pioneer could claim. A total of $24,245.00 was misapplied. The court of appeal refused to interpret the statute to provide that the amount of a penalty specified is reduced when the supplier is able to secure payment from the property owner through the lien process.

L.R.S. 9:4814 provides that no contractor or subcontractor, who has received money on account of a contract for the construction, erection or repair of a building, structure, or other improvement, shall knowingly fail to apply the money received as necessary to settle claims to sellers of movables or laborers due for the construction or under the contract. Any seller of movables or labor whose claims have not been settled may file an action for the amount due, including reasonable attorney's fees and court costs, and for civil penalties as provided. When the amount misapplied is greater than $1,000.00, the penalties shall not be less than $500.00 or more than $1,000.00 for each $1,000.00 in misapplied funds. Reasonable attorney's fees and costs shall also be assessed.

L.R.S. 9:2784 provides that if a contractor or subcontractor without reasonable cause fails to make any payment to his subcontractors and suppliers within 14 consecutive days of the receipt of payment from the owner for improvements to an immovable, the contractor or subcontractor shall pay to the subcontractors and suppliers, in addition to the payment, a penalty in the amount of one-half of one percent of the amount due, per day. The total penalty shall not exceed 15%. Reasonable attorney's fees are required to be awarded. However, any claim which the court finds to be without merit shall subject the claimant to all reasonable costs and attorney's fees for the defense against such claim.

The court of appeal affirmed the award of penalties under both statutes, together with an award of attorney's fees and costs. The court of appeal awarded an additional $3,000.00 to Pioneer for attorney's fees for work on the appeal. South Texas Pioneer Millwork v. Favalora Contractors, Inc., 11-722 (La.App. 5 Cir. 3/13/12), 2012 WL 833315.

USE OF A DEPOSIT CONSTRUED AS UNAUTHORIZED USE OF A MOVABLE

Karen Blanks contracted with Grady N. Greene to repair her home after it was damaged by Hurricane Katrina. Greene represented himself as a licensed contractor in Louisiana doing business as Grady Greene Construction, LLC. Greene represented he was licensed as a home improvement contractor, but he was not. Blanks made an initial payment of $25,200.00 to Greene. Little work was performed. Blanks discharged Greene, terminated the contract and demanded to be repaid the outstanding deposit balance within 24 hours. Two weeks later, Blanks filed a formal complaint with the Economic Crimes Department of the Orleans Parish District Attorney's Office.

Greene acknowledged he owed Blanks the deposit less $4,800.00 for work already performed, and submitted a written proposal offering to pay Blanks $20,000.00 at the rate of $5,000.00 per month. Blanks rejected the proposal. Greene was arrested and charged with theft. At trial, Greene conceded that even after Blanks had fired him, he continued to draw $1,500.00 a week against the deposit as his own salary for two months. He also testified he was working on another project at the time, used funds from Blanks' deposit for the other project, and contended the matter was a good faith civil dispute. The

trial court rejected the defense and found Greene guilty of the lesser offense of unauthorized use of a movable. Greene was sentenced to five years imprisonment at hard labor, the maximum term for the offense. The court of appeal reversed. A majority found the evidence failed to exclude the reasonable possibility that Greene and Blanks had a legitimate business dispute as to how to proceed, but acknowledged Greene's actions of applying funds advanced by Blanks to another job or drawing on the money to pay himself, viewed in the light most favorable to the State, could constitute evidence of fraudulent and/or criminal conduct.

The unauthorized use of a movable is the intentional taking or use of a movable which belongs to another, either without the other's consent, or by means of fraudulent conduct, practices or representations, but without any intention to deprive the other of the movable permanently. It is a lesser and included offense of theft. Money is a corporeal movable, capable of being taken or used in an unauthorized manner.

The Supreme Court found the evidence at trial left no question Greene misrepresented himself at the outset of his relationship with Blanks by holding himself out as a licensed contractor in Louisiana when, in fact, he was not licensed as a home improvement contractor and never applied for a license. Louisiana law prohibited Greene from entering into the contract in the first place. It provides that no person shall undertake, offer to undertake, or agree to perform home improvement contracting services unless registered with and approved by the Residential Building Contractors' Subcommittee of the State Licensing Board for Contractors as a home improvement contractor. Greene was also precluded from operating without a certificate of registration issued by the subcommittee, and from making any material misrepresentation in the procurement of the contract, or making any false promise likely to influence, persuade, or induce the procurement of the contract, or making a false representation that he was a state licensed general contractor.

The Supreme Court, given Greene's initial representations to Blanks, did not address his claim industry practice did not preclude him from co-mingling funds from several ongoing projects in a single bank account, thereby permitting him to use funds from one project on another project with or without the knowledge or consent of the owners. The court noted similar claims had been made in other cases in other jurisdictions against the argument the cash flow realities of the construction business frequently mandate that a contractor engaged in numerous projects use funds advanced for one job to pay subcontractors or suppliers on another, it being common practice for a contractor to use incoming funds to discharge his most pressing obligations and replace them later with the proceeds of other jobs. Further, the jurisprudence has distinguished between a contractor's conversion to his own use of unrestricted advance payments, and the conversion of an advanced payment earmarked for a specific construction purpose.

The court held, whatever the common practice in the industry, it could not include misrepresentations with regard to state licensing requirements. On the evidence presented at trial, any rational trier of fact could find Greene took the advance payments on the contract from Blanks by fraudulently misrepresenting himself as a licensed general contractor in Louisiana, and, by that act alone, committed the offense of unauthorized use of a movable when he took the deposit. Moreover, nothing that transpired later undercut the inference of fraudulent intent arising from Greene's initial misrepresentations, and by Greene's own accounting, he continued to draw on Blanks' advance money in November and December, depending on what his personal needs were, until he had completely depleted the advance, although he had performed relatively little work. The decision of the court of appeal was reversed and Greene's conviction and sentence reinstated. State of Louisiana v. Greene, 2009-2723 (La. 1/19/11), 55 So.3d 775.

INDEPENDENT CONTRACTOR STATUS AND NEGLIGENT HIRING

Earl Doucet hired Gammon Enterprises, LLC to perform roofing repairs on a building in Metairie, Louisiana. While performing the work, Gammon accidentally started a fire causing damage to the

building. Several claims were filed as a result of the fire. The trial court found Gammon caused the fire and was liable for damages, and also found Gammon was an employee of Doucet, and not an independent contractor. As an employee, Doucet was vicariously liable for Gammon's negligence. Doucet and his insurer appealed.

Vicarious liability does not apply when an independent contractor relationship exists. In determining whether there is such a relationship, the courts consider the following factors: (1) whether there is a valid contract between the parties; (2) whether the work being done is of an independent nature, such that the contractor may employ non-exclusive means in accomplishing it; (3) whether the contract calls for specific piecework as a unit to be done according to the independent contractor's own methods, without being subject to control and direction of the principal, except as to the result of the services rendered; (4) whether there is a specific price for the overall undertaking agreed upon; and (5) whether the duration of the work is for a specific time and not subject to termination or discontinuance at the will of either party without a corresponding liability for its breach. The single most important factor is the right of an employer to control the work of the employee.

The trial court found no contract existed between Gammon and Doucet for the work, Doucet ultimately had the right of control over the project, and Gammon would have had to perform as requested if Doucet had exerted his authority. Further, it found work on the roof was not set for a specific time and could be terminated at will by Doucet.

The court of appeal held a valid and enforceable contract requires capacity, consent, a certain object, and a lawful cause. There must be a meeting of the minds of the parties to constitute the requirement of consent. Although there was apparently no written contract, the court found a valid contract, nevertheless, existed between Gammon and Doucet for the work.

Noting that a principal can give direction regarding the result of services to be rendered without changing the relationship from that of an independent contractor to an employee, the court of appeal found Doucet did not control Gammon's work. Gammon testified he received no instruction from Doucet regarding how to perform the roof repairs; no one told him or his workers what to do and he alone instructed his workers. Gammon provided the tools and trucks to do the job, and provided a trash trailer at the site. The court of appeal concluded Gammon performed the work without input from Doucet, and Doucet exercised no control over the methods Gammon used. Gammon was an independent contractor.

Even though an independent contractor relationship exists, a principal may be responsible for offenses committed by an independent contractor when: (1) the work undertaken by the independent contractor is inherently or intrinsically dangerous, or (2) the person for whom the work is performed gives express or implied authorization for an unsafe practice or has the right to or exercises operational control over the method and means of performing the work. There was nothing in the record to support either exception. The court of appeal held the trial court erred in finding Doucet vicariously liable for Gammon's negligence.

It was also contended Doucet was liable for Gammon's fault under a theory of negligent hiring. The trial court found Doucet was independently liable for his failure to act reasonably as a property owner when he hired Gammon. One who hires an irresponsible independent contractor may be independently negligent. The court must consider the principal's knowledge at the time of the hiring. There was no evidence of negligent hiring, and the trial court was manifestly erroneous in determining Doucet was independently liable. Doucet had used Gammon on prior roofing projects, and there was no indication of any problems with the prior work. Gammon obtained a temporary contractor's license after Hurricane Katrina, but did not subsequently obtain a license. Gammon was insured at the time the project was bid, but the insurance subsequently lapsed. The mere fact Gammon did not possess a contractor's license at the time of the incident, according to the court of appeal, was not, in and of itself, sufficient to find Doucet independently negligent in hiring Gammon. Further, there was no indication Doucet knew or should have known Gammon was not insured when hired. The judgment of the trial court finding Doucet was vicariously liable for Gammons acts, and was independently liable for negligent hiring was reversed. *Certified Cleaning & Restoration, Inc. v. Lafayette Insurance Company*, 10-948 (La.App. 5 Cir. 6/14/11), 67 So.3d 1277.

DISQUALIFICATION OF A BIDDER FOR A DOTD PROJECT BECAUSE OF ITS RELATIONSHIP TO A PREVIOUSLY DISQUALIFIED BIDDER

The Louisiana Department of Transportation and Development (DOTD) advertised for bids for bridge joint repairs and replacements on Interstates 10 and 110 in East Baton Rouge and Iberville Parishes. Because the project was a federal aid project, compliance with the contract provisions for Disadvantaged Business Enterprises (DBE) required by federal law was mandatory. The Construction Proposal included contract provisions for DBE participation and provided that a specific form as to assurance of participation be timely submitted to the DOTD. The apparent low bidder's failure to submit the form would constitute just cause for rejection of the bid.

TOPCOR Services, Inc. was the apparent low bidder. It was notified that its completed form must be submitted within ten days of the bid date. TOPCOR did not timely submit the form. It was disqualified, and barred from rebidding on the project if it was re-advertised. Gibson & Associates, Inc. was the second low bidder. DOTD did not accept Gibson's bid, but instead, rejected all other bids and re-advertised the project. Lamplighter Construction, LLC was the apparent low bidder when the project was re-advertised. Lamplighter's bid was initially rejected by the DOTD. DOTD determined Lamplighter was ineligible to bid the project under the Louisiana Standard Specifications for Road and Bridges since a principal officer or owner was also a principal officer or owner of TOPCOR Services which was previously disqualified from bidding. Sec. 102.08(g) of the Standard Specifications provides a bid may be considered irregular if an owner or principal officer of the bidding entity is an owner or principal of a contracting entity which has been declared to be ineligible to bid by DOTD. Gibson was the second low bidder when the project was re-advertised, and became the apparent low bidder when Lamplighter's bid was rejected.

Lamplighter protested DOTD's determination, asserting it was a distinct and separate contracting entity from TOPCOR Services. After a hearing, the DOTD chief engineer determined Lamplighter should be reinstated as the low bidder and awarded the contract. Gibson protested the decision. Following a hearing on the protest, the chief engineer reaffirmed his prior decision to reinstate Lamplighter. The next day, the DOTD notified Lamplighter it had been awarded the contract.

Gibson filed a petition for a temporary restraining order, preliminary injunction, permanent injunction, declaratory judgment and mandamus. Gibson sought to enjoin the DOTD from awarding and executing the construction contract to any bidder other than Gibson. It further sought a declaratory judgment, declaring: 1) the bid submitted by Lamplighter was irregular pursuant to the Louisiana Standard Specifications for Roads and Bridges; 2) Lamplighter's bid must be rejected; 3) any contract entered into by the DOTD with Lamplighter was null and void; and 4) Gibson was the low responsible bidder according to the contract, plans and specifications and, as such, was entitled to be awarded the project. Gibson also sought a writ of mandamus ordering the DOTD to accept Gibson's bid and execute the contract with Gibson.

The trial court found TOPCOR Services and Lamplighter had a principal officer and/or owner in common, and, thus, the plain language of the Standard Specifications mandated a finding Lamplighter was ineligible to bid. It rendered judgment: 1) issuing a preliminary injunction prohibiting the DOTD from awarding the construction contract to any bidder other than Gibson or, in the event the contract had been awarded, from performing or executing the terms thereof; and 2) issuing a writ of mandamus directing the DOTD to award the contract to Gibson as the low responsible bidder and to execute a contract with Gibson in accordance with the bid proposal and the contract plans and specifications. DOTD appealed.

The court of appeal found TOPCOR Services and Lamplighter not only shared a common owner, TOPCOR Companies, LLC, but also shared a common principal officer. DOTD violated the Public Bid Law when it reinstated Lamplighter's bid, contrary to the Standard Specifications. It also held, however, the trial court went beyond simply prohibiting the DOTD from awarding the contract to Lamplighter by issuing an order pursuant to the application for a writ of mandamus that the contract be awarded to

Gibson and finding the DOTD was prohibited from awarding the contract to any entity other than Gibson. A writ of mandamus may only issue to compel the performance of a ministerial duty required by law. Since Gibson's bid was higher than the pre-construction estimate for the project, DOTD had discretion in deciding whether to award the contract to Gibson or reject all bids, and the writ of mandamus did not involve the performance of a ministerial duty and was not legally warranted and was reversed. *Gibson & Associates, Inc. v. State of Louisiana, Department of Transportation & Development,* 2010-1696 (La.App. 1 Cir. 5/18/11), 68 So.3d 1128.

CLAIM FOR DAMAGES FOR DEFECTIVE WORK

Dr. John and Christine Taylor contracted with Randy Rivera to prepare plans for the construction of a new home in Crowley, Louisiana. Leger Construction, LLC was the general contractor. Post-Tension Slabs, Inc. built the foundation. Roy Carubba, an engineer, contracted with Post-Tension to design the foundation. Defects were discovered, and the Talyors sued Rivera, Leger, Carubba and Post-Tension. Carubba filed exceptions of no cause of action and no right of action, and Leger a motion for summary judgment. The trial court granted Carubba's exception of no right of action and Leger's motion for summary judgment based on its finding the Taylors could not carry their burden to prove fault on the part of Leger at trial. The Taylors appealed.

Carubba argued the Taylors could not recover under the Civil Code article concerning negligence because it was preempted by the New Home Warranty Act and the action against him was prescribed. The court of appeal held the essential function of the exception of no right action is to provide a threshold device for terminating a suit brought by one with no legitimate interest to assert it, that is, to challenge the plaintiff's interest in the subject matter of the suit or his lack of capacity to proceed with it. The exception is not available to urge a defense the plaintiff is without interest simply because the defendant has a defense to the action, nor can the exception be invoked to determine whether a particular defendant can stand in judgment in a particular case. Any such defense must go to the merits.

Both arguments raised by Carubba urged a defense the Taylors are without interest simply because he had a defense to the claims and must go to the merits. The court of appeal held the trial court erred in granting Carubba's exception, and reversed that part of the trial court's judgment.

The Taylors alleged Leger, as the general contractor, failed to properly oversee the work performed by its subcontractors, laborers, or any other entity providing services in the construction of their home. Leger based his motion on the assertion the Taylors could not maintain their burden of proof at trial. The court of appeal found there was no evidence the damages were due to a defect created by Leger or any of its employees, agents or subcontractors. The testimony of the experts at trial showed the damage to the home was caused by uneven heaving in the soil beneath the foundation. The experts agreed the decision to use a post-tension slab versus a traditional slab was not the cause of the problem. Even if the court were to find that Leger influenced Dr. Taylor to choose a post-tension slab, it was ultimately up to the designer of the slab to make sure it was adequate given the information available. The problem with the foundation was either the inadequate depth of the post-tension slab or the lack of other support structures. The foundation was designed by Carubba who contracted with Post-Tension to create the design. Post-Tension was hired and paid by the Taylors. Neither Carubba nor Post-Tension were the agent, subcontractor or employee of Leger, and there was no evidence Carubba based his design on anything done or recommended by Leger. *Taylor v. Leger Construction, LLC*, 2009-1263 (La.App. 3 Cir. 4/7/10), 34 So.3d 1033.

In the same proceeding, Post-Tension filed an exception of no cause of action, representing the New Home Warranty Act precluded any claims against it. Post-Tension argued the Act provides it is the exclusive remedy of the owner, and since it was not the builder, and only constructed the foundation, the Taylors had no cause of action against it. The trial court granted Post-Tension's exception of no cause of action. The Taylors appealed.

The court of appeal held the exclusive remedy provisions of the Act were between the owner and the builder who constructed the home, and did not restrict any claims by a homeowner against a

subcontractor such as Post-Tension. The judgment granting the exception of no cause of action in favor of Post-Tension was reversed and set aside. *Taylor v. Leger Construction, LLC*, 2010-749 (La.App. 3 Cir. 12/8/10), 52 So.3d 1098.

LIQUIDATED DAMAGES AWARDED

Robert and Jeanne Sutherland signed a contract with Coffman Homes, LLC to construct a house in Kenner. The contract provided the contractor would build a single or two-story single family residence in accordance with drawings and specifications prepared or to be prepared by the owner's architect, who was unidentified, and to be dated and signed by the parties. The residence was to be built on certain described property. The contract contained a liquidated damages clause which stated that if the owner cancelled the contract at any time and for any reason, the owner agreed and stipulated that liquidated damages in the amount of $20,000.00 would be paid to the contractor, together with costs and attorney's fees of 25%.

After the contract was signed, the Sutherlands met with an architect in an attempt to have plans drafted for construction of the house. They were not satisfied with any of the proposed house plans; those that had all of the features they desired would not fit on the lot because of its odd shape. The Sutherlands informed the contractor they were not going to build a house. Coffman sued to recover the stipulated damages, costs and attorney's fees. The trial court rendered judgment in favor of Coffman. The Sutherlands appealed.

The Sutherlands first contended there was no meeting of the minds as to the object of the contract and no agreement as to the price. The court of appeal rejected the argument, finding the contract clearly set forth the object of the contract: Coffman was to build a single family residence as shown on plans to be obtained. Under the contract, the exact specifications for the residence were to be determined by drawings prepared by the owner's architect. The fact there were no drawings or specifications submitted at the time the agreement was confected was specifically contemplated in the agreement which stated: "specifications prepared or to be prepared by the owner's architect." That provision did not make the object of the contract uncertain. The object was determinable and susceptible of being made definite by timely action. Further, the court of appeal found the trial court did not err in finding the work was to be done on a cost plus basis and that was an agreed price certain.

The Sutherlands next argued the contract contained a suspensive condition that was not fulfilled through no fault on their part so that the contract was unenforceable based on the failure of the condition. The court of appeal found the obligation of the Sutherlands was to provide the plans to Coffman which was not a condition to the Sutherlands' performance, but rather to Coffman's performance. The Sutherlands could not, by their actions, transform their own obligation to provide plans and specifications into a condition that cancels the obligation itself.

The Sutherlands contended the trial court erred in failing to rescind the contract based on a vice of error or consent. The court of appeal held any defect in consent was created entirely by the Sutherlands and was entirely within their control to cure. The argument was rejected.

Finally, the Sutherlands argued even if there was a valid and enforceable contract between the parties, the stipulated damages were unconscionable and therefore unenforceable. Stipulated damages may not be modified by the court unless they are so manifestly unreasonable as to be contrary to public policy. There was no testimony, discussion, or objection to the stated damages prior to the institution of the lawsuit. The Sutherlands agreed to the stipulated damages. The trial court found the stipulated damages conservatively approximated Coffman's lost profit, and there was no error in that holding. The judgment of the trial court was affirmed. *Coffman Homes, LLC v. Sutherland*, 10-178 (La.App. 5 Cir. 2/15/11), 60 So.3d 52, *writ denied,* 2011-10111 (La. 6/24/11), 64 So.3d 223.

DAMAGES FOR DELAY IN AWARDING A CONTRACT AND ISSUING A NOTICE TO PROCEED

The City of New Orleans advertised for bids for street and utility renovation for certain streets. On February 26, 2002, the City informed Wallace C. Drennan, Inc. it was the lowest responsible bidder for two of the projects. The City and Drennan signed a contract for one of the projects on April 12, 2002. On April 19, 2002, the Sewerage and Water Board notified the City that it did not approve the projects and withheld its matching funds. On July 1, 2002, Drennan filed a petition for mandamus against the City. On August 1, 2002, the City issued a notice to proceed on the project for which the contract was signed. A contract for the second project was signed on August 13, 2002, and a notice to proceed was issued on September 30, 2002. Drennan sued the City for damages as a result of its delay in awarding the contracts and issuing notices to proceed. The trial court granted partial summary judgment in favor of Drennan on the issue of liability alone. The City appealed.

Drennan claimed it suffered damages as a result of the City's failure to perform its obligations under L.R.S. 38:2215A which provides that upon receipt of bids for an undertaking of any public works contract, a political subdivision shall act within 45 calendar days of such receipt to award said contract to the lowest responsible bidder or reject all bids. Upon execution of the contract, L.R.S. 38:2215C provides the public entity, within 30 days thereafter, shall issue to the contractor a notice to proceed with the work. The statute specifically states its provisions shall not be subject to waiver. L.R.S. 38:2215D.

The City contended the deadlines did not apply as a result of the statutory exemption for contracts which are financed in whole or in part by federal or other funds which are not readily available at the time bids are received. L.R.S. 38:2215B. The exemption requires, however, that in the event the time limit stipulated is not applicable because of one of the exceptions outlined therein, that fact shall be mentioned in the specifications for the project and in the official advertisement for bids. The City's advertisement for bids stated any contracts awarded for sewer related work were "expected" to be funded in part by a grant from the United States Environmental Protection Agency with matching funds from the Sewerage and Water Board.

The court of appeal concluded the content of the City's advertisement did not satisfy the requirements of the statute and the deadlines included therein applied. There was nothing in the advertisement which compelled the bidders to understand that the City's expectation of the sources of the funding means that the funding would not be readily available when the bids are received. As a matter of fact, matching funds of the EPA were always available, and, when the Sewerage and Water Board balked at contributing to the funding of the projects, the City expended its own funds. More importantly, the advertisement failed to mention the fact the time limitations, or statutory deadlines, would not apply. The City argued Drennan waived any complaint concerning its notice. The court of appeal disagreed. The statute specifically provided its provisions would not be subject to waiver.

The City was liable to Drennan for damages occasioned by the delay in executing the contracts and issuing the notices to proceed. The matter was remanded to the district court for a trial limited to the assessment and award of damages. *Wallace C. Drennan, Inc. v. City of New Orleans*, 2010-1301 (La.App. 4th Cir. 4/27/11), 65 So.3d 705.

ASSIGNMENTS

Conerly Corporation contracted with Beechgrove Redevelopment Phase II, LLC for the renovation of certain apartment units in Westwego, Louisiana. Beechgrove obtained a secured loan from AmSouth Bank, predecessor to Regions Bank. A representative of AmSouth/Regions threatened to replace Conerly if work was not completed faster. The representative also allegedly promised that all of the work done for Beechgrove that was approved by the architect would be paid in full. Allegedly relying on the representative's word that AmSouth/Regions would compensate Conerly for further construction, Conerly continued to work and incur expenses. Certain payments from Beechgrove and AmSouth/Regions were not forthcoming. Conerly was required to seek financial assistance from its bonding company, the Insurance Company of Pennsylvania, in order to meet its obligations to subcontractors and continue work on the Beechgrove project.

The financial arrangement between Conerly and the bonding company included an assignment which was part of a financing agreement entered into on October 12, 2004. Despite the bonding company's financial assistance and Conerly's continued work on the project, the representative of AmSouth/Regions in March 2007 allegedly informed Conerly that it would receive no further payments for work completed. Conerly and the bonding company then brought an action in federal district court against AmSouth/Regions and its representative. Following several motions and other events, the district court addressed the motion of AmSouth/Regions to dismiss Conerly's claims, averring they were assigned to the surety.

The court found there was no impediment to Conerly's assignment of its contractual right to collect payment for services. Since its claim for bad faith breach of contract for failure to pay for the services sounded in contract and not tort, that action arose from the contractual relationship and was assignable along with other contract rights. The question of whether it could assign its tort claims was more complicated. The court held in Louisiana a tort claim may be assigned only if it is specifically identified and is in existence at the time of the assignment. Since the assignment was made prior to the date the lawsuit was filed, the tort claims could not be assigned. *Conerly Corporation v. Regions Bank*, 668 F.Supp.2d 816 (E.D. La. 2009).

CONTRACTOR ENTITLED TO AWARD FOR DIRECT AND OVERHEAD EXPENSES RESULTING FROM WORK STOPPAGE BY OWNER

The Board of Supervisors of Louisiana State University and Agriculture and Mechanical College (LSU) awarded a contract to Harbor Construction Company, Inc. to replace acid basin tanks at the LSU Clinical Sciences Research Building in New Orleans. On July 22, 2004, LSU instructed Harbor to stop work on the project after Harbor severed a sewer pipe located six feet below the work site. Harbor was allowed to resume the work on November 11, 2004. Harbor sued LSU to recover its direct and overhead expenses. The trial court awarded direct expenses of $17,225.07 and overhead expenses of $33,828.90. LSU appealed.

Harbor played no part in the preparation of the bid documents, plans and specifications. It was clear the site plan did not show the pipe that was ultimately severed. In reviewing the contract documents, the court of appeal was convinced they did not place an obligation on the contractor to discover hidden conditions, although they did require the contractor to become familiar with the facilities, difficulties and restrictions involved in executing the contract, verify all dimensions and site conditions that may affect the cost of the project, and verify site conditions that may affect the cost of the project. There was an LSU internal memorandum referring to a change order for an excavation to reveal hidden conditions, but the memorandum was never provided to the contractor, and the request for proposal and Harbor's proposal and final change orders did not mention hidden conditions. There was conflicting testimony as to the reason why LSU shut the job down. Harbor's representatives testified it was shut down not because of the broken sewer pipe, but because of the poor condition of the soil at the bottom of the pit. An LSU representative testified to the contrary. It was apparent the trial court was of the opinion the severance of the pipe did not cause the soil condition that led to LSU's decision to stop work.

Except for a minor error in the calculation of direct expenses, the court of appeal affirmed their award. The court of appeal also affirmed the award for home office overhead. It cited, with approval, the *Eichleay* formula for their computation. The *Eichleay* formula determines home office overhead by computing the daily amount of overhead the contractor would have charged to the contract had there been no delay, and gives the contractor this amount of overhead for each day of delay that has occurred during the work. The court of appeal specifically held a contractor is entitled to recover for wasted overhead expenses as an element of damages. They are recoverable where, as a result of the defendant's conduct, the contractor may have suffered a work stoppage and wasted overhead expenses because labor and equipment were idle during a stoppage. Overhead or indirect expenses consist generally of expenses of a business enterprise for salaries of executives, central office staff personnel, rent, communications, vehicles, utilities, interest on borrowed capital and numerous other expenses which

are necessary for the operation of the business, but which are not directly attributable to a particular construction job or project. They are, in fact, an expense and a true cost of doing business. The expenses need not be proved item by item. *Harbor Construction Company, Inc. v. The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 2010-1663 (La.App. 4th Cir. 5/12/11), 69 So.3d 498.

L.R.S. 9:2771 AND THE STANDARD OF CARE OF AN ARCHITECT

Shamrock Construction Co., Inc. was the general contractor for a Hibernia Bank in New Orleans. The architect was Sizeler Architects and the landscape architect was Daly-Sublette Landscape Design & Development, Inc. Shamrock subcontracted the landscaping work to Paradise Gardens Landscaping, Inc. The plans and specifications required sprinkler heads were to be installed at least four inches from the sidewalk pavement. A few years after completion of the work, Mrs. Lingoni was injured when she tripped over a pop-up sprinkler head. She sued Hibernia, Sizeler, Daly-Sablette, Shamrock and Paradise Gardens. Shamrock and Paradise Gardens, along with Sizeler and Daly-Sublette, moved for summary judgment. The district court granted the motions. Mrs. Lingoni appealed.

The primary focus of the motion of Shamrock and Paradise Gardens was L.R.S. 9:2771. The statute provides that a contractor shall not be liable for destruction or deterioration of or defects in any work constructed, or under construction, by him if he constructed, or is constructing, 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. Mrs. Lingoni contended her liability expert established the sprinkler head was actually positioned less than one inch from the paved walkway, and was not positioned correctly. The affidavits and deposition testimony provided by Shamrock and Paradise Gardens established the sprinkler heads, when installed, were placed according to the plans. They contended Mrs. Lingoni did not offer any evidence to refute that which established they complied with the plans and specifications. The court of appeal found the evidence submitted by Shamrock and Paradise Gardens was credible and well documented, and Mrs. Lingoni failed to produce factual support sufficient to establish she would be able to satisfy her evidentiary burden at trial. The countervailing affidavit of her expert did not create a genuine issue of fact for trial. The judgment in favor of Shamrock and Paradise Gardens was affirmed.

As to the motion of the architects, Sizeler and Daly-Sublette, the court of appeal found there was no evidence presented indicating there was any design standard that should have been followed, and a layperson could not infer, applying a common sense standard, the design was faulty. Mrs. Lingoni's liability expert was not an architect, and offered no testimony on the standard of care which was owed by the architects. Additionally, her liability expert testified the sprinkler head apparently malfunctioned since it was in the up position when she tripped. There was nothing in the record to indicate the cause of the accident was related to design negligence or the architects breached any duty to Mrs. Lingoni. Judgment in favor of the architects was affirmed. *Lingoni v. Hibernia National Bank*, 2009-0737 (La. App. 4 Cir. 3/3/10), 33 So.3d 372, *writ denied*, 2010-0714 (La. 5/28/10), 36 So.3d 255.

Tax Law Alert

CURRENT STATUS OF HEALTH CARE LAWS

3.8% Medicare Surtax

On Thursday, June 28, 2012, the Supreme Court upheld the constitutionality of the *Patient Protection and Affordable Care Act* (PPACA) by a 5-4 decision. The PPACA and the *accompanying Health Care and Education Reconciliation Act of 2010* (HCERA) impose a new 3.8% Medicare surtax on net investment income of certain individuals, estates and trusts under IRC §1411. The new surtax applies to: (i) married

taxpayers filing a joint return with greater than $250,000 of income; (ii) individuals with greater than $200,000 of income; and, (iii) married taxpayers filing a separate return with greater than $125,000 of income.

For individuals, the new 3.8% tax applies to the lesser of: (i) the net investment income of the individual for such taxable year, or (ii) the excess of (x) the individual's modified gross income for such taxable year, over (y) the threshold amount. For trusts and estates, the new 3.8% surtax applies to the lesser of: (i) the undistributed net investment income for such taxable year; or (ii) the excess of (x) the adjusted gross income for such taxable year, over (y) the dollar amount at which the highest tax bracket in section 1(e) begins for such taxable year.

For purposes of IRC §1411, net investment income includes capital gains (other than from disposition of property held in a trade or business), interest, dividends, annuities, royalties and rents (other than rents received in the ordinary course of business). There are certain other applicable exclusions contained in IRC §1411.

0.9% in Employment Taxes

In addition to the new 3.8% Medicare surtax mentioned above, the PPACA and the HCERA includes a 0.9% increase in employment taxes for certain wage earners. Beginning in 2013, individual taxpayers earning more than $200,000 (married filing jointly-more than $250,000; married filing separately-more than $125,000) will be required to pay an additional 0.9% for the employee portion of the Medicare hospital insurance payroll tax rate. Currently, the rate is 1.45%, and this will increase to 2.35%.The employer portion of the Medicare hospital tax will remain at 1.45%. Self-employed individuals will also be subject to the 0.9% increase on earnings from self-employment that exceed the threshold based on the above thresholds.

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