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

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AMENDMENTS TO THE PUBLIC WORKS ACT CONCERNING WHEN A PUBLIC CONTRACT MUST BE AWARDED

The Louisiana Legislature in its 2021 Session adopted changes to the Public Works Act. The current law, L.R.S. 38:2215(A), provides that a public entity shall act not later than forty-five calendar days after the date of opening of bids to award a public works contract to the lowest responsible and responsive bidder or to reject all bids. The amendments to that statute state that if an interested party or bidder files for an injunction or writ of mandamus, they shall receive a trial on the requested relief in the district court within thirty calendar days of the filing of the suit. The district court shall render a final judgment not more than fifteen calendar days after the conclusion of the trial. The public entity shall award the contract in accordance with the judgment of the court no later than forty-five days after the judgment unless a timely suspensive appeal is filed. The legislation, House Bill 220, has been passed by both the House of Representatives and Senate, and was sent to the Governor.

AMENDMENTS TO THE PUBLIC WORKS ACT ON PAYMENT OF CHANGE ORDERS

The Louisiana Legislature during its 2021 Session adopted legislation amending the Public Works Act concerning changes to a bid. Pursuant to the amendments, any timely change by a bidder to its bid prior to the submission of the bid shall be scratched through and initiated by the bidder or the person who submits the bid. The change, as initialed, shall be binding. Additionally, the legislation provides change orders shall be processed and issued by a public entity no later than forty days following the final execution of the change order.

Further, the legislation requires that when contractors record acceptance of work for a specified area, the acceptance shall not be executed except upon the recommendation of the design professional hired by the public entity whose recommendations shall be made not later than thirty calendar days after the date of completion or substantial completion. A public entity shall not take, use, or occupy a public work or use or occupy the specified area of the public work for which it was intended until the substantial completion has been filed, unless an approved agreement of partial occupancy is executed between the public entity, the design professional of record and the contractor. A public entity's failure to comply with the provisions shall be subject to a writ of mandamus.

The legislation, Senate Bill No. 111, was passed by both the Senate and House of Representatives and was sent to the Governor.

CLAIM FOR NEGLIGENCE IN HIRING AN INDEPENDENT CONTRACTOR

A claimant sued the Harrah's Casino in New Orleans for personal injuries. Among other things, the claimant alleged the Casino was negligent in hiring an independent contractor who was responsible for her injuries. The United States Court of Appeals for the Fifth Circuit found there was no Louisiana Supreme Court decision on the question of whether constructive, as opposed to actual, knowledge is sufficient to support a claim for negligent hiring of an independent contractor. The court in deciding the issue was required to predict what the outcome would be under Louisiana law.

Finding some support for constructive knowledge in Louisiana jurisprudence, the court concluded Louisiana law assesses the reasonableness of a principal's actions based not only what the principal actually knew when it hired an independent contractor, but also relevant is what was reasonable, i.e., what it should have known. An "F" rating by the Better Business Bureau, the certificate of insurance submitted by the contractor showing its insurance policy was expired, and the contractor's lack of equipment together were more than a scintilla of evidence to support a finding that the Casino was negligent in hiring the contractor. The evidence was sufficient to support the negligent-hiring claim. Echeverry v. Jazz Casino Company, LLC, (5th Cir. 2021) 988 F.3d 221.

REFUSAL OF THE TRIAL COURT TO GRANT INJUNCTIVE RELIEF FOR THE AWARD OF PUBLIC CONTRACT REVERSED

The Parish of Jefferson advertised for bids for the construction of U-turn lanes over new drainage box culverts on West Esplanade Avenue. Addendum No. 2 required that each of the pages of the bidding documents for a revised Louisiana Public Work Bid Form and a revised Unit Price Form contain a header and a footer identifying the addendum. Boh Bros. Construction Co., LLC submitted the lowest numerical bid. The Uniform Bid Form contained the header and footer specified by Addendum 2 but the Unit Price Form did not. Boh's bid was rejected as non-responsive by Jefferson Parish. Command Construction, LLC was the next lowest bidder and was awarded the project.

Boh protested the award. The protest was rejected by Jefferson Parish. Boh then filed a petition for a temporary restraining order, preliminary injunction, permanent injunction and mandamus, or in the alternative, for damages. Boh sought relief that would enjoin the Parish from awarding the project to any other bidder, and to compel the Parish to award the contract to it as the lowest responsible bidder. The trial court denied Boh's petition, and upheld the Parish's rejection of its bid. The trial court further found that Command was the lowest responsive bidder. Boh appealed.

The court of appeal reversed the ruling of the trial court finding Jefferson Parish violated the Louisiana Public Bid Law when it imposed the requirement in Addendum No. 2 that the Uniform Bid Form and the Unit Price Form contain a header and footer on each page. The

headers and footers were not treated as simple labeling indicators by the Parish, but rather, they were requirements that could disqualify a bidder if they were not included on the bidding documents. The Public Bid Law provides that only the information and documentation specified therein shall be required to be submitted, and the headers and footers for the Bid Form and the Unit Price Form required by Jefferson Parish were not specifically listed. The bid of Boh Bros. was improperly rejected. The court of appeal enjoined the Parish from awarding the contract to Command and ordered that Boh be declared the lowest responsive and responsible bidder for the work. Boh Bros. Construction Co., LLC v. Parish of Jefferson, 20-472 (La.App. 5 Cir. 6/2/21), ___ So.3d ___, 2021 WL 2217467.

SUBSEQUENT PURCHASER RULE

The United States District Court for the Eastern District of Louisiana examined the subsequent purchaser rule. It concluded that where damage is inflicted before a subsequent purchaser had any legal interest in the property, she did not sustain the injury, and, therefore, has no personal right of action against the tortfeasor. The doctrine applies regardless of whether the damage is apparent or not. In the case of apparent property damage, the purchaser is presumed to have had knowledge of the condition and negotiated a reduced sale price accordingly. In contrast, when the damage is not apparent, a cause of action against the seller exists for recision of the sale or reduction of the sale price.

Under the subsequent purchaser rule, a property owner's personal right is not transferrable without an express assignment or subrogation. An assignment is effective against the debtor only from the time the debtor has actual knowledge, or has been given notice of the assignment. An assignee requires no greater rights than his assignor. Language in an act of sale which merely subrogates a purchaser to all rights and actions of warranty against previous owners does not constitute an express assignment or subrogation, and is directed to rights and actions of warranty. A personal right to sue may be assigned after an act of sale is executed. In Re: Chinese-Manufactured Drywall Products Liability Litigation, 04127 (E.D. La. 5/27/21), 2021 WL 2165249.

WAIVER OF ATTORNEY CLIENT PRIVILEGE

In a construction dispute over a component compatibility conflict for a St. Bernard Parish Government (SBPG) drainage project pending in federal court, the contractor's surety contended the conflict was caused by the engineer, and the contractor did not have a duty to finish the project and refused to complete it. The contractor was terminated by SBPG, and sued the engineer. The contractor also sued its surety for bad-faith breach of the General Agreement of Indemnity under which the indemnitors, both corporate and individual, were ordered to provide the surety with collateral security.

The engineer contended that during the corporate deposition of the contractor, the contractor raised an advice-of-counsel defense to claims that it failed to mitigate its own damages and exacerbated those of the SBPG. The contractor, during the deposition, refused to respond to certain questions raising the advice-of-counsel defense. The engineer filed a motion to compel the contractor to respond to discovery related to the defense. The magistrate judge ordered the contractor to submit to another deposition and produce documents relevant to communications between it and its counsel. The contractor objected to the magistrate's ruling.

The federal district judge found that a client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication, whether oral, written, or otherwise, made for the purpose of facilitating the rendition of professional legal services to the client, as well as the perceptions, observations and the like, of the mental, emotional, or physical condition of the client in connection with such a communication, when the communication is between the client and the client's lawyer. An individual can waive this privilege when he voluntarily discloses or consents to the disclosure of any significant part of the privileged matter. Placing privileged communications at issue by an affirmative pleading of a claim or defense that inevitably requires the introduction of privileged communications constitutes a waiver. A waiver does not open the door to all attorney-client communications. The client's offer of his own or the attorney's testimony as to a specific communication to the attorney is a waiver as to all other communications to the attorney on the same matter. Where a party asserts as an essential element of his defense reliance upon

the advice of counsel, the party waives the attorney-client privilege with respect to all communications, whether written or oral, to or from counsel concerning the transactions for which counsel's advice was sought.

The district judge held the contractor during the deposition expressly raised advice of counsel, and thus waived its attorney-client privilege in relation to the questions asked. The court ordered the contractor to submit to another deposition and produce communications concerning the limited subject areas at issue. Fucich Contracting, Inc. v. Shread-Kuyrkendall, 18-2885 (E.D. La. 5/12/21), 2021 WL 1904859.

BUSINESS ENTITIES ENTITLED TO DAMAGES FOR LOSS OF USE OF PROPERTY

The Fourth Circuit Court of Appeal held that while business entities are not entitled to seek damages for mental anguish as a result of property damage, they are entitled to seek damages for inconvenience. Levy v. Hard Rock Construction of Louisiana, LLC, 2020-0459 (La.App. 4 Cir. 12/9/20), 312 So.3d 641.

TIMELY NOTICE OF NONPAYMENT OF THE SALE OF MOVABLES AND ITEMIZATION OF MATERIALS FOR A PRIVATE WORKS ACT LIEN

The Private Works Act provides that a seller of movables in order to have a valid lien must deliver notice of nonpayment to the owner at least ten days before filing a statement of the claim. The Third Circuit Court of Appeal held that a letter dated August 14, 2019 for a lien which was filed on September 4, 2019 was timely even though the address was insufficient and the letter was not delivered until September 6, 2019.

The lien was, nevertheless, invalid since it did not itemize the materials sold. The invoices submitted with the lien did not provide any information except the date and amount due, and the evidence showed that the material supplier applied payments from the contractor to its oldest invoices, rather than to invoices associated with specific projects. Thus, when the contractor paid the supplier, payments were not necessarily applied to payments due for the project at issue. The invoices submitted by the supplier with its lien did not reasonably

itemize the amounts due, and the lien was invalid. Belgard v. Lumber Investors, LLC, 2020-535 (La.App. 3 Cir. 5/5/21), 2021 WL 1783542.

BREACH OF CONTRACT FOR FAILURE TO PROVIDE CONTRACTUALLY REQUIRED INSURANCE COVERAGE AND INSURED AND INSURER NOT RESPONSIBLE FOR THE DEDUCTIBLE

Sealand Mechanical, LLC contracted with Wal-Mart Louisiana, LLC to perform work. Sealand, pursuant to the Master Services Agreement (MSA), was required to protect, defend, hold harmless an indemnify Wal-Mart against any and all lawsuits and claims arising out of its work. Further, it was required to provide commercial general liability insurance coverage in the amount of $1,000,000 per occurrence. Wal-Mart was an additional insured under the policy.

Sealand provided Wal-Mart with a certificate of insurance showing the insurance coverage as required by the MSA. The certificate, however, failed to disclose that the policy had a $900,000 deductible. Unbeknownst to Wal-Mart, Sealand negotiated and contracted with the insurer for the deductible. Sealand, in a personal injury action against Wal-Mart, argued the claims against Wal-Mart under the policy were subject to the deductible. The United States District Court for the Western District of Louisiana disagreed and found Sealand failed to provide the required insurance coverage of $1,000,000. Based on the clear language of the MSA, Sealand was responsible for the deductible, not Wal-Mart. Sealand breached its agreement to provide $1,000,000 in liability insurance coverage.

A provision in the insurance policy provided that, among other things, damages, including defense costs, applied only to amounts in excess of the deductible. The language of the insurance policy provided that the certificate stated it was for informational purposes only, and was subject to all of the terms and conditions of the policy, one of which was the $900,000 deductible. The certificate did not alter or amend the terms, conditions or limits of the policy. The insurer was responsible only for amounts in excess of the deductible, including all defense costs. Otherwise, Sealand was responsible for defending Wal-Mart. Paige Portier McGehee, O/B/O Minor Children, CJM & RJM, IV v. Wal-Mart Louisiana LLC, 17-01372 (W.D. La. 4/20/2021), ___ F.3d ____, 2021 WL 1555973.

NON-LICENSED CONTRACTOR NOT ENTITLED TO LIEN PRIVILEGES

An owner of two tracts of land entered into an oral contract with an unlicensed contractor to perform clearing and dirt work preparatory to the development of residential lots on the two properties. The contractor claimed he was not fully paid and filed a materialman's lien. The trial court dismissed the liens. The contractor appealed. The court of appeal affirmed the dismissal, finding that even if the trial court erred in its reasoning, the liens were nevertheless fatally defective since the contractor was not licensed.

The contract, since the contractor was unlicensed, was an absolute nullity. The court of appeal held the Private Works Act, in granting lien privileges to contractors and subcontractors, requires that there be a contractual relationship for the work. The contract between the owner and the contractor was null and void, and no contract, therefore, existed. In the absence of a valid and enforceable contract, a contractor or subcontractor cannot assert a valid lien under the Act.

Further, the lien was defective since the contractor claimed a privilege on two separate tracts of immovable property without specifying what amount of the total alleged debt claimed was due for work performed on the first tract of property, and what amount of the total claimed was due for work performed on the second tract of property. The contractor's lien was improper in that it imposed a lien in the full amount claimed for the work performed on both tracts of immovable property without limiting the lien on each tract of property to the amount due for the work performed on that particular property. Ilgen Construction, LLC v. Raw Materials, LLC, 2020-0862 (La.App. 1 Cir. 4/16/21), 2021 WL 1438726.

CHALLENGE TO THE AWARD OF A PUBLIC PROJECT

The City of Bossier rejected as non-responsive the bid of GeoSport Lighting Systems, LLC, the lowest numerical bidder, for a lighting project at a sports facility, and awarded the contract to the next lowest bidder, Musco Sports Lighting, LLC. GeoSport sued for preliminary and permanent injunctive and declaratory relief and damages. GeoSport claimed, among other things, the bid specifications requiring the Musco product and requiring an identical product to Musco's, not one that was functionally equivalent, and requiring preapproval of the

product violated the public bid law. The trial court dismissed the claim. The issue addressed by the Second Circuit Court of Appeal was whether the lawsuit was timely.

The court of appeal relied upon the decision of the Louisiana Supreme Court in Airline Const. Co., Inc. v. Ascension Par. Sch. Bd., 568 So.2d 1029 (La.1990), in analyzing the issue. The Supreme Court in Airline held that an unsuccessful bidder on a public contract who fails to resort to the relief granted by statute by attempting to enjoin timely the execution or performance of the contract when the facts necessary for injunctive relief are known or readily ascertainable by a bidder, is precluded from recovering damages against the public body. An unsuccessful bidder on a public contract who wishes to obtain relief because of the rejection of its bid must seek injunctive relief at a time when the grounds for attacking the wrongful award of the contract were known or knowable to the bidder, and when corrective action as a practical matter can be taken by the public body. According to the Supreme Court, if an aggrieved bidder does not timely file a suit for injunction, it waives any right it may have to claim damages against the public body or the successful bidder. The timeliness of a suit depends on the facts and circumstances of the particular case.

The court of appeal concluded GeoSport's suit for injunctive relief was timely. After the bid was rejected on August 27, 2019, GeoSport became aware that the City would not accept the use of anything other than a Musco product. GeoSport notified the City of its intent to protest the rejection of its bid within two working days of the rejection of the bid. On September 10, 2019, before the contract was fully executed or recorded, and before Musco began work on the project, GeoSport filed its lawsuit and requested a hearing at the court's next available date. Although the hearing was continued numerous times, these factors showed that GeoSport did not delay in objecting to the rejection of its bid. As soon as it knew that its bid had been rejected, before the City became indebted to Musco, and before the work was commenced by Musco, GeoSport protested the rejection of its bid and sought injunctive relief. It did so when the grounds for attacking the contract between the City and Musco were knowable and when corrective action could have been taken by the City.

Whether the City wrongfully rejected GeoSport's product and ultimately rejected its bid on that basis, or whether the City and Musco engaged in wrongful conduct under the public bid

law are issues to be resolved in court at a later date. The court of appeal did not express any opinion on the merits of GeoSport's claims, and did not find that the public bid law was violated, that GeoSport's bid was wrongfully rejected, or that GeoSport was entitled to an informal hearing. It simply found that GeoSport's petition for injunctive relief was timely, and its cause of action had not been waived. GeoSport Lighting Systems, LLC v. City of Bossier City, Louisiana, 53,869 (La.App. 2 Cir. 4/14/21), ___ So.3d ___, 2021 WL 1396581.

The Second Circuit Court of Appeal on the same date that it decided the matter discussed above, also decided, with a different result, whether another challenge to the award of a public project was timely. There, the Webster Parish School Board advertised an asbestos abatement/demolition project. The advertisement provided that bids would be accepted from contractors who are licensed under L.R.S. 37:2150-2192. Asbestos abatement was to be completed by a licensed asbestos abatement contractor with the appropriate classification and licensing for asbestos removal by the State of Louisiana.

Lathan Construction, LLC submitted the lowest bid. Gill Industries, Ltd. submitted the next lowest bid. On June 3, 2019 the School Board rejected Lathan's bid as non-responsive because Lathan did not possess the required asbestos-abatement license, and awarded the contract instead to Gill. On June 4, 2019, the School Board notified Lathan that its bid had been rejected. On June 10, 2019, Lathan submitted a letter to the School Board objecting to the rejection of its bid and requesting a hearing. On June 14, 2019, the School Board's counsel wrote a letter to Lathan, detailing the reasons for the rejection of the bid and explained that no hearing was required because Lathan's bid was rejected as non-responsive. On July 1, 2019, the School Board and Gill executed a contract for the project. On July 11, 2019, thirty-seven days after notice of its rejected bid, Lathan filed its petition with the trial court seeking injunctive relief to prevent the award of the contract to Gill, declaratory relief to name Lathan as the lowest bidder, and a writ of mandamus ordering the School Board to issue the contract to Lathan. By the time Lathan filed the petition, Gill had completed Phase I of the project and had begun Phase II.

A hearing was held in the district court on February 18, 2020 after three requests for a continuance by Lathan were granted. By the date of the hearing, the work on the project had

been fully completed. After the hearing, the district court held that Lathan's bid was non-responsive because it did not have the required asbestos abatement license. The court further stated that even in the event the bid was compliant, Lathan's claim was untimely because Lathan failed to seek injunctive relief until approximately 37 days subsequent to having actual notice of the rejection of its bid and 10 days after the execution of the contract by the School Board with Gill. The judgment was signed on August 5, 2020.

The Second Circuit again relied upon the decision of the Louisiana Supreme Court in Airline Const. Co., Inc. v. Ascension Par. Sch. Bd. in analyzing the issue. It found, under the facts recited above, there was no error in the trial court's determination that Lathan was untimely in seeking injunctive relief.

Lathan also contended it was entitled to injunctive relief and damages because it was denied the hearing it requested which was a violation of its due process rights. The trial court determined that Lathan's bid was non-responsive because it did not have the appropriate asbestos abatement license required by the bidding documents. Lathan did not challenge that finding. A non-responsive bidder does not have a protected interest in a contract. As such, Lathan's argument that it had a due process right to a hearing was without merit. Lathan Construction, LLC v. Webster Parish School Board, 53,873 (La.App. 2 Cir. 4/14/21), ___ So.3d ___, 2021 WL 1396591.

DISMISSAL OF A CLAIM FOR INDEMNITY AS AN ADDITIONAL INSURED

Steele Solutions, Inc. sued Cincinnati Insurance Company, the insurer of Makar Insulations, Inc., claiming it was entitled to indemnity from Cincinnati pursuant to the contract between Makar and Steele which provided Steele was an additional insured under the policy. The additional insured endorsement of the Cincinnati policy provided for coverage for liability arising out of Makar's work performed for Steele by Makar or on Makar's behalf. The court subsequently granted a motion for summary judgment dismissing the plaintiffs' claims against Makar. The court held that when it granted Makar's motion for summary judgment, and dismissed the claims against Makar with prejudice, it became clear that any liability owing to Steele could not arise in whole or in part out of Makar's work. Consequently, any

coverage for Steele under the policy was unambiguously excluded and Cincinnati's duty to defend Steele was terminated upon the dismissal of Makar. Donahue v. Republic National Distributing Company, LLC, 489 F.Supp.3d 455 (E.D. La. 2020).

CLAIM BY A GENERAL CONTRACTOR FOR A COMPLETION BONUS FEE

A general contractor claimed it substantially completed its work prior to the date specified in its contract entitling it to a completion bonus fee. The contractor sued the entity with which the owner contracted to serve as its designated representative for the project alleging negligence in a professional undertaking. The contractor contended, among other things, the representative refused or failed to advise the owner to certify substantial completion before the deadline date to avoid the owner having to pay the bonus fee. The owner's representative moved for summary judgment.

The owner's representative contended the claim for negligent professional undertaking was subject to the one-year prescriptive period for delictual actions under Louisiana Civil Code Article 3492. The general contractor contended it did not incur any damages, and could not possibly know of any damages until after the owner's final payment and later rejections of its pay applications. The court held a tort action begins to accrue when the plaintiff has suffered some, but not all of his damages even though he may thereafter come to a more precise realization of the damages he has already incurred or incur further damage as a result of the completed tortious act. The contractor filed a lien on the project on October 10, 2017 because of the owner's alleged breach of contract. The contractor, therefore, became aware of some but not all of the damages by that date which was more than one year prior to the date the lawsuit against the defendant owner's representative was filed in February 2019. The negligent professional undertaking claim was prescribed unless the contractor could show an exception to the prescriptive period was applicable.

The contractor claimed the doctrine of continuing tort presented an exception to the one-year prescriptive period. The doctrine requires both continuous tortious conduct and resulting damages. Three requirements must be met: 1) a continuing duty owed to plaintiff, 2) a continuing breach of that duty by defendants, and 3) a continuing injury or damages

arising day to day. The defendant owner's representative produced evidence its contract with the owner was terminated as of February 9, 2018, more than one year prior to the date the lawsuit was filed on February 15, 2019, and there was, therefore, no continuing duty on the part of the owner's representative after February 9, 2018. The continuing tort doctrine, according to the representative, did not apply to interrupt prescription.

The contractor next contended the owner and its representative were solidarily liable to it, and that the lawsuit filed by the contractor against the owner on June 28, 2018 interrupted prescription as to the claim against the owner's representative. The Louisiana Civil Code provides that interruption of prescription against one solidary obligor is effective against all solidary obligors. The court held that the 1996 amendments to Louisiana Civil Code Article 2323 abolished solidarity among non-intentional tortfeasors, and made each non-intentional tortfeasor liable only for his own share of fault. There was no claim that the owner and the defendant owner's representative committed an intentional tort. Absent a clear expression of the parties' intent for the owner and defendant owner's representative to be held solidarily liable, there could be no solidary liability. The contractor had not presented any such evidence, but the court allowed the contractor additional time to conduct further discovery, and dismissed the lawsuit without prejudice to allow the additional time. McDonnel Group, LLC v. DFC Group, Inc., 19-9391 (E.D. La. 2/8/21), 2021 WL 1088126.

CLAIM FOR TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS DISMISSED

D.H. Griffin Wrecking Company, Inc. filed a declaratory judgment action against 1031 Canal Development, Inc. seeking a determination of the validity and enforceability of a memorandum of understanding, and 1031 Canal's entitlement to claim damages for breach of contract. 1031 Canal raised several counterclaims against Griffin, including a claim for tortious interference with business relations. The project at issue was to demolish two tower cranes that were damaged during the structural collapse of the Hard Rock Hotel. 1031 Canal contended Griffin prevented it from dealing with the City in obtaining a permit and Kolb in moving forward with the demolition. 1031 Canal contracted with Kolb for the work. Griffin moved to dismiss the claim for tortious interference with business relations.

The court found that to demonstrate a claim for tortious interference with business relations, a plaintiff must prove by a preponderance of the evidence that the defendant: (1) acted with actual malice; (2) actually prevented the plaintiff from dealing with a third party; (3) acted improperly, i.e., not to protect legitimate interests; and (4) caused damage to the plaintiff. The court found 1031 Canal could not claim it was actually prevented from dealing with a third party, Kolb, and could not set forth a plausible claim that Griffin's alleged actions were motivated by malice, rather than profit. Griffin's motion to dismiss the claims for tortious interference with business relations was granted. D.H. Griffin Wrecking Company, Inc. v. 1031 Canal Development, LLC, 20-1051 (E.D. La. 3/10/21), 2021 WL 917335.

ENTITLEMENT TO DELAY DAMAGES

L.R.S. 38:2216(H) provides that any requirement contained in a public contract which purports to waive, release, or extinguish the rights of a contractor to recover costs of damages, or obtain other equitable adjustment, for delays in performing such contract, if the delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void or unenforceable. Any such provision in a public contract which is void and unenforceable shall be severed from the other provisions of the contract, and shall not affect the other provisions of the contract. The Louisiana Fourth Circuit Court of Appeal found that even though the contract did not include a delay or liquidated damages provision in favor of a contractor, the statute provides for recovery as a result of delays. TKTMJ, Inc. v. The Sewerage and Water Board of New Orleans, 2020-0154 (La.App. 4 Cir. 12/16/20), ___ So.3d ___, 2020 WL 8455537, writ denied, 21-00241 (La. 4/7/21), 313 So.3d 979.

CONSTRUCTION VERSUS SALES CONTRACTS AND INDEMNIFICATION

Finding the record did not suggest that a party provide a valuable sum of materials for repair, service and maintenance, the court held a contract to repair, service and maintain a garage door was, using the "value" test, a construction contract. Under the "value" test, if the principal value of the contract is the materials, then it is a contract of sale, but if the principal value is labor and skill, then it is a contract to build.

Since the contract was a construction contract, it was subject to the Louisiana Anti-Indemnification Act, L.R.S. 9:2780.1. The indemnification clause in the contract provided for indemnification even though the indemnified party might be negligent. The court found this was contrary to the Act, and unenforceable. A motion for summary judgment seeking to dismiss claims for indemnification was granted. Clark v. Driven Brands Shared Services, LLC, 19-727 (W.D. La. 2/24/21), 2021 WL 729247.

INVALID LIEN

Pursuant to a contract with Dominion, Siboney hauled excess fill material from a project to a nearby site owned by the Johnsons and leased by BLF. Siboney claimed it was not fully paid for the work and filed a lien under the Private Works Act, L.R.S. 9:4801, et seq., against the property on which the fill material was placed. Siboney then filed a lawsuit to enforce the lien. The Johnsons and BLF moved for summary judgment.

The court held that both before and after the recent amendments, the lien statute requires that notice of contract and notice of termination provide a legal description of the property or identify the immovable and the work to which it relates. Otherwise, the notice has no effect against third parties. The improper or insufficient description of the immovable shall be prima facie proof of actual prejudice. Here, the notices made no reference to the property and were inadequate, and there was nothing to justify why the Johnsons or BLF should have had adequate notice of the work on their land or its completion. Further, there was no showing that BLF or the Johnsons agreed in writing to the price and work of the contract as required to hold them liable as non-contracting owners. Siboney Contracting Co. v. Dominion Group, LLC, 01461 (W.D. La. 2/5/21), 2021 WL 415840.

DAMAGE TO PROPERTY AS A RESULT OF CONSTRUCTION ACTIVITIES

In the continuing saga of property damages claimed as a result of the SELA drainage project in New Orleans, the Fourth Circuit Court of Appeal issued a decision on claims involving a group of property owners along Napoleon Avenue between Carondelet Street and S. Claiborne Avenue. The property owners sued the Sewerage and Water Board of New Orleans (S&WB). This group of plaintiffs was designated Group B. A significant issue was the location

and relative distance of these properties from the construction site. Only two of the six properties were within the area designated as the Area of Potential Effect (APE). The trial court entered judgment in favor the Group B plaintiffs for a total of $483,779.00 in damages and $193,511.00 for attorneys' fees. The S&WB appealed. The S&WB emphasized in its appeal what it considered a key factual distinction from earlier decisions dealing with the SELA project, i.e., the distance of the Group B properties from the project construction site differed from those decisions.

The S&WB contended the trial court erred in finding it liable under a theory of custodial liability. Custodial liability requires that a plaintiff prove four elements: 1) the thing which caused damage was owned or in the custody of the public entity; 2) the thing was defective due to a condition creating an unreasonable risk of harm; 3) the public entity had actual or constructive notice of the defective condition yet failed to take corrective action within a reasonable period of time; and 4) the defect was the cause of the plaintiff's harm. The court of appeal found the first element had been decided in prior litigation when it determined the S&WB exercised custody over the SELA project. As to the second element, the court of appeal found there was a reasonable basis for the trial court to find the construction activity related to the SELA project created an unreasonable risk of harm of which the S&WB was aware. In reviewing the third element, the court found the S&WB had notice the construction activity was causing damage as demonstrated by the complaints it received. With respect to the fourth element, the court of appeal found all of the Group B plaintiffs testified to having, at most, only minor issues with their properties prior to the start of the SELA project.

The plaintiffs testified to experiencing vibrations of such intensity that the houses shook from either the timber pile driving or the constant operation of other heavy equipment and construction traffic. The damage manifested itself in a variety of common forms, including significant cracking of walls, separation of molding, separation of baseboards, separation of porches and steps, and unaligned doors and window frames. The trial court made a factual determination that the construction activity related to the SELA project was the cause of the damages, and rejected the hypothesis of defense experts that differential settlement was the cause of the damages. The court held the trial court did not err in finding the commonality of

damages indicates that the Group B plaintiffs' properties were adversely affected by the SELA project construction activity.

The S&WB contended the trial court erred in finding strict liability for ultra-hazardous timber pile driving. The Group B plaintiffs, according to the S&WB, failed to meet their burden of proof that their damages resulted from this activity. Among other things, the trial court's reasons for judgment did not delineate an award for damages to two of the plaintiffs based on timber pile driving. Plaintiff experts acknowledged that timber pile driving could not have caused damage to those two properties, but opined the damage related to other construction activity such as the movement of loaded trucks and heavy equipment. In light of the evidence the court of appeal rejected the argument of the S&WB.

In examining the issue of damages awarded for inverse condemnation, the court of appeal explained that inverse condemnation provides a procedural remedy to a property owner seeking compensation when they are subject to such a taking. The Louisiana Constitution provides a property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. A constitutional taking is any substantial interference with the free use and enjoyment of the property. A finding of inverse condemnation requires that a plaintiff meet a three-prong test: 1) whether a recognized species of property right has been affected; 2) whether the property has been taken or damaged in a constitutional sense; and 3) whether the taking or damaging has been for a public purpose. The first and third prongs were determined to be satisfied in prior SELA litigation. The second prong was satisfied as well.

The S&WB appealed the award of attorneys' fees. The plaintiffs requested in the trial court that attorneys' fees be awarded in excess of the 40% contingency fee arrangement between them and their counsel. The trial court, however, awarded fees based on that arrangement. The court of appeal in declining to disturb the award found the trial court did not abuse its discretion in setting the fees. Sewell v. Sewerage and Water Board of New Orleans, 2019-0268 (La.App. 4 Cir. 1/20/21), 313 So.3d 333.

SELA PROJECTS AND S&WB LIABILITY FOR FUTURE FLIGHT CLAIMS

In a recent decision involving a SELA project, the trial court granted a motion for partial summary judgment finding the S&WB liable for all future flights' claims against it under theories of inverse condemnation, custodial liability and strict liability caused by timber pile driving. In granting the motion, the trial court stated that there would be a judicial determination of causation and damages for each of the plaintiffs' claims against the S&WB. The S&WB appealed. The question was whether contested issues of material fact remained as to the S&WB's liability for the claims of future flights.

As to inverse condemnation claims, the court of appeal found the trial court erred in granting partial summary judgment as to the S&WB's liability. There remained questions of whether plaintiffs' property had been "taken" or damaged as contemplated by the Louisiana Constitution. Those issues turn on situation-specific factual inquiries given the infinite variety of ways in which government actions can affect property interests. These litigation-specific inquiries will lead to contested issues of material fact for trial.

For the custodial liability claims, the court of appeal found that one of the elements which must be proved was whether the thing causing damage was defective due to a condition creating an unreasonable risk of harm. This involves facts which must be determined in light of the surrounding circumstances of each case. Further, proving whether the S&WB had actual or constructive notice of any particular group of plaintiffs' damages would require evidence specific to that group. Because contested issues of material fact remain as to those elements of custodial liability, partial summary judgment was not appropriate.

The next issue was strict liability claims with respect to ultra-hazardous activities such as pile driving. If pile driving occurred during the project, the court held the S&WB, as the project's proprietor, is liable for damages resulting therefrom to a plaintiff's property. The only requirement is that a plaintiff prove damage and causation by a preponderance of the evidence. Since the trial court reserved for judicial determination questions of causation and damages, the court of appeal found the trial court did not err in granting partial summary judgment. Sewell v. Sewerage and Water Board of New Orleans, 2020-0381 (La.App. 4 Cir. 2/24/21), ___ So.3d ___, 2021 WL 717990.

CLAIMS FOR BREACH OF CONTRACT AND INDEMNITY AGAINST AN UNLICENSED CONTRACTOR AND ADDITIONAL INSURED STATUS

An owner filed a claim for breach of contract and contractual indemnity against its contractor in a personal injury matter. The contractor sought dismissal of the claims on the basis it was unlicensed in Louisiana and its contract with the owner was null and void. Usually, it is the owner who takes this position in response to a claim by an unlicensed contractor for payment under its contract with the owner. A construction agreement made with an unlicensed contractor is null and void. The district court denied the contractor's motion for summary judgment.

On appeal, the owner argued the work on the project was performed by another contractor who was licensed in Louisiana as part of a joint venture-like endeavor with the unlicensed contractor. The court of appeal held a joint venture is properly licensed when each of its members holds a valid license. The joint venture alleged by the owner would have complied with this requirement only if both of the contractors involved in the joint venture were properly licensed, which they were not. The court of appeal held the unlicensed contractor was entitled to summary judgment as a matter of law. The owner's claims against it were unenforceable. Maroulis v. Entergy Louisiana, LLC, 20-226 (La.App. 5 Cir. 2/10/21), 314 So.3d 1002.

The Louisiana Supreme Court reversed. It held since the contractor was unlicensed, the contract between it and the owner was null and void. A party who knew or should have known at the time the contract was entered into of a defect that made the contract absolutely null may not avail himself of the nullity when the purpose of the illegal contract has been accomplished. The district court could not be said to have erred in denying the contractor's motion for summary judgment. The judgment of the court of appeal was reversed, and the judgment of the trial court reinstated. Maroulis v. Entergy Louisiana, LLC, 21-00384 (La. 6/8/21), __ So.3d ___, 2021 WL 2328592.

The owner claimed it was an additional insured under the contractor's liability policy which provided that an additional insured is any person or entity to whom the contractor was obligated by a valid written contract to provide such coverage. Here, as discussed above, the

contract between the owner and the contractor was null and void, and there was no valid written contract that obligated the contractor to provide additional insurance to the owner. Therefore, the owner had no coverage as an additional insured under the contractor's liability policy. Maroulis v. Entergy Louisiana, LLC, 20-298 (La.App. 5 Cir. 2/10/21), ___ So.3d ____, 2021 WL 484341.

GOVERNMENT CONTRACTOR IMMUNITY AND NEGLIGENCE

Boh Bros. Construction Co., LLC contracted with the United States Army Corps of Engineers to build a concrete canal under Louisiana Avenue as part of a flood control project in New Orleans. Daniel Harris, who is completely blind, was found inside the fenced in construction site at the bottom of the culvert. He could not recall how he ended up inside the construction site, and there were no witnesses to testify as to how his fall occurred. Harris sued Boh for his injuries. Boh claimed government contractor immunity.

The requirements for government contractor immunity for federal projects were established by the U.S. Supreme Court in Boyle v. United Techs. Corp. in 1988. The decision requires, in order for government contractor immunity to apply, that the government approve reasonably precise specifications, the contractor's work conformed to the specifications, and the contractor warned the government of any dangers known to the contractor, but not to the government. The trial court granted summary judgment to Boh finding immunity. The court of appeal reversed finding Boh failed to meet the first requirement of the Boyle test. Specifically, the court pointed to defendant's failure to submit a copy of the plans and specifications approved by the Army Corps of Engineers.

The Louisiana Supreme Court reversed finding a filing in the trial court proceeding indicated the plaintiff did not dispute the first prong of the test. There was no need, therefore, to discuss that issue as clearly the government approved the specifications. An admission by a party in a judicial proceeding is a judicial confession and is full proof against the party making it. The admission removed the first requirement of the test from issue.

The Supreme Court found the court of appeal after erroneously analyzing the first element pretermitted consideration of the remaining elements. The matter was remanded to the

court of appeal to complete its review of the government contractor immunity claim. Harris v. Boh Bros. Construction Co., LLC March 19, 2021, 2021-00084 (La. 3/16/21), 312 So.3d 565.

On remand, the court of appeal found although the first element for establishing government contractor immunity for federal projects, i.e., the government must have approved reasonably precise specifications, was, according to the Louisiana Supreme Court, satisfied, the second element which requires the work must have conformed to the specifications was not. Genuine issues of material fact remained.

In addition to the government contractor immunity defense, Boh contended Harris could not show it breached any duty to him with respect to a claim of negligence. Harris argued Boh breached a duty of care to him by failing to secure the fencing surrounding the construction site. Boh maintained a defendant generally does not have a duty to protect against an open and obvious hazard. The court of appeal, relying on prior jurisprudence requiring an examination of case-specific factual issues, held a blind person cannot be held to the open and obvious legal concept because he is completely blind and can neither see nor discern an open and obvious hazard. Further, Boh failed to present evidence based on personal knowledge that the fence was properly maintained and secured when the incident occurred. Issues of material fact existed. The district court's judgment granting the motion for summary judgment of Boh was reversed. Harris v. Boh Bros. Construction Co., LLC, 2020-0248 (La.App. 4 Cir. 5/26/21), ___ So.3d ___, 2021 WL 2134754.

WRAP UP COVERAGE DENIED

Woodward Design + Build, LLC obtained a Contractor Controlled Insurance Program from Houston Casualty Company for the purpose of providing coverage to its subcontractors for a condominium project. Litigation arose after the plaintiff was injured when an elevator hoist fell at the construction site. The hoist was provided by Eagle Access, LLC, a subcontractor of Woodward. The plaintiff sued Woodward, Eagle and Houston Casualty. Woodward and Houston Casualty filed cross-motions for summary judgment seeking to determine whether the subcontractor was insured under HCC's policy. The district court granted the general

contractor's motion, and denied the insurer's motion finding the subcontractor was insured under the policy. The insurer sought supervisory review.

The insurance policy obtained from Houston Casualty required that Woodward contract with an approved provider to perform Contractor Enrollment. Woodward retained Wrap Up Insurance Solutions, Inc. as the administrator for the program. Wrap Up sent an email to Eagle specifically advising that the insurance coverage was not automatic, and sent to it the required enrollment form. Eagle declined to submit the form, stating it would not participate in paying any wrap insurance premium since it had its own insurance. Wrap Up advised Woodward the subcontractor was unwilling to enroll. After commencing work on the project, Eagle sent an enrollment form to Wrap Up with a copy to Woodward. Woodward replied stating a decision had been made earlier to exclude Eagle from coverage. Wrap Up sent a letter advising Eagle it was not covered under the General Liability Contractor Controlled Insurance Program for its work. Three months later, the injury occurred.

The Houston Casualty policy provided enrolled contractors mean those who prior to the commencement of the work on the project completed the appropriate enrollment documents. The Wrap Up manual stated that subcontractors were defined as those who enrolled in the program by submitting a completed and signed enrollment form. Further, enrollment was considered complete when a certificate of insurance was issued to the enrolled contractor. The Louisiana Supreme Court found it was undisputed that the foregoing procedure was not followed by the subcontractor. As a result, Wrap Up never issued a certificate to the subcontractor, and instead sent a letter to the subcontractor advising it was not covered under the program for its work.

The court found the district court erred in granting summary judgment in favor of Woodward and denying the insurer's motion. That judgment was reversed. The motion for summary judgment of Houston Casualty was granted. Soule v. Woodward Design+Build, LLCS, 2021-00322 (La. 5/11/21), ___ So.3d ___, 2021 WL 1884628.

TRIGGER OF COVERAGE FOR CLAIMS AND FAILURE OF A CLAIMANT TO ADEQUATELY OPPOSE A MOTION FOR SUMMARY JUDGMENT

In a lawsuit involving claims against an insurer for damages to property adjacent to a construction project, the Louisiana First Circuit Court of Appeal held that for third party claims for construction defects under commercial general liability policies, Louisiana courts have generally applied the manifestation trigger theory. Additionally, courts have applied that theory to claims for emotional distress damage as a result of construction defects. Under the manifestation trigger theory, coverage is triggered when the damage manifests itself and is discovered during the policy period, not when the causative negligence took place. Anderson v. Laborde Construction Industries, LLC, 2019-0356 (La.App. 1 Cir. 3/12/20), 311 So.3d 1072, writ denied, 2020-00924 (La.10/20/20), 303 So.3d 307.

In a subsequent decision involving the same project, the First Circuit held a general contractor was entitled to summary judgment dismissing the claims against it for damages allegedly caused by pile driving activities of a subcontractor. The general contractor alleged the subcontractor was an independent contractor, and submitted sufficient evidence to support that proposition. Further, there was no evidence introduced by the plaintiffs that the general contractor had a duty to respond to any complaints during construction. The court held the affidavit of one of the plaintiffs was insufficient in that respect to establish that plaintiffs would be able to carry their burden of proof. It simply contained conclusory allegations that the general contractor was obligated not to allow its subcontractors to take certain actions. Affidavits with conclusory allegations of fact are not sufficient to defeat summary judgment. Anderson v. Laborde Construction Industries, LLC, 2019-1469 (La.App. 1 Cir. 12/30/20), 2020 WL 7770235.

HOMEOWNER'S REPAIR CLAIM INVALID FOR FAILURE TO PROVIDE THE CONTRACTOR WITH NOTICE

In reversing the denial of a motion for summary judgment of a contractor in a lawsuit which was subject to the New Home Warranty Act, the Louisiana First Circuit Court of Appeal found that an owner was precluded from recovery against the contractor by beginning repairs prior to providing notice to the contractor and a reasonable opportunity to remedy the

damages as required by the NHWA. Once owners hire a new contractor to make repairs, the defendant builder loses the opportunity to remedy any defects in accordance with the NHWA. Thus, an owner's failure to properly notify the builder of the construction defects is fatal to his NHWA claims. Since the NHWA is the exclusive remedy between builders and owners relative to home construction, plaintiffs who failed to comply with the notice requirements are also precluded from any other theory of recovery. William Trent Massengale v. Aimee R. McPherson, 2020-1306 (La.App. 1 Cir. 4/21/21), 2021 WL 1561355.

ADMISSIBILITY OF EVIDENCE OF SETTLEMENTS WITH OTHERS

PCL Civil Constructors, Inc. claimed F.J. Burnell, Inc. was liable to it for damages as a result of delays caused by Burnell. Burnell contended it was not solely responsible for the delays, and in support of its defense sought to offer evidence that PCL reached settlements with the LADOTD and another entity. The court found evidence of the settlements was clearly relevant to Burnell's defense and was admissible. Further, PCL had been put on notice that Burnell was asserting the defense. PCL Civil Constructors, Inc. v. F.J. Burnell, Inc., 19-00195 (W.D. La. 6/11/20), 2020 WL 9076587.

CAN A FEDERAL COURT ENFORCE THE FEDERAL ARBITRATION ACT AND WAS ARBITRATION WAIVED

A settlement agreement between parties included a clause requiring arbitration of any dispute arising out of the agreement. One of the parties moved in federal court to enforce the arbitration clause. The trial court denied the motion to compel without analysis. The United States Court of Appeals for the Fifth Circuit noted the Federal Arbitration Act established a national policy favoring arbitration of claims, and created the means to enforce an arbitration demand in the federal courts. The Act, however, does not bestow jurisdiction on the federal courts, but rather requires an independent jurisdictional basis over the dispute for access to a federal forum. If the claims involved in the underlying dispute show the dispute itself could have been brought in federal court, then there is federal court jurisdiction. The Fifth Circuit found there was federal question jurisdiction. It also found the

language of the arbitration agreement was broad and capable of expansive reach. The claims were arbitable under the agreement.

The next question was whether the court or the arbitrator should address defenses to arbitration. The Fifth Circuit found the court must examine whether the allegations of the party resisting arbitration challenge the making of the agreement to arbitrate itself as opposed to allegations regarding the contract as a whole. A defense that does not specifically relate to the arbitration agreement must be submitted to the arbitrator as part of the underlying dispute. The party seeking to avoid arbitration contended, among other things, the party who sought it waived arbitration. Waiver is a question of law. Courts will not find a party waived its right to enforce an arbitration clause merely by taking part in litigation unless it has substantially invoked the litigation process to its opponent's detriment.

The court found the bulk of the arguments against arbitration were for the arbitrator and not for the court to decide. The court did, however, find the party seeking arbitration did not waive its right to the process. Its primary bid for relief was an order compelling arbitration. It amended its complaint to include substantive claims only as an alternative to the extent the court found any of the affirmative causes of action should not be sent to arbitration. It did not engage in any action that was inconsistent with its right to arbitrate. Polyflow, L.L.C. v. Specialty RTP, L.L.C., 993 F.3d 295 (5 Cir. 2021).

CLAIM FOR INDEMNITY AND THE LOUISIANA CONSTRUCTION ANTI-INDEMNITY ACT

Aptim Maintenance, LLC brought a claim for indemnity against Stupp Bros., Inc. pursuant to conditions contained in a Maintenance Server Master Agreement (MSMA). Stupp moved to dismiss the claim contending it violated the Louisiana Anti-Indemnity Act, L.R.S. 9:2780.1. Aptim argued it performed only administrative, managerial and supervisory work overseeing Stupp's personnel, and did not construct, design, alter or renovate any machinery beyond routine maintenance and repair. As a result, according to Aptim, it did not perform any construction work which would be subject to the Anti-Indemnity Act.

The MSMA defined Aptim's services as maintenance, repair, and/or renovation, new construction, engineering or other professional services. The Anti-Indemnity Act, according to the court, provided that a construction contract means any agreement for the construction, renovation, repair or maintenance of a building, structure, gas line, appurtenance, or other improvement to real property. While Aptim attempted to make distinctions based on the alleged actual work it performed rather than the work it agreed to perform in the MSMA, the court looked to the agreement to determine whether it was a construction contract, and concluded it was such a contract within the meaning of the Anti-Indemnity Act.

The MSMA did not require Stupp to indemnify Aptim for Aptim's negligence. Aptim argued the indemnity provisions were, therefore, not voidable under the Anti-Indemnity Act. The court agreed. Stupp contended that even if the Anti-Indemnity Act did not apply, the third party demand against it was premature and should be dismissed without prejudice. The court agreed, concluding the indemnity obligations could not be determined at the time under a motion to dismiss for failure to state a plausible claim for relief. The indemnity provisions of the contract required a finding that Aptim was not negligent. The court deferred determination of Stupp's indemnification obligations to Aptim following a determination of liability. Taylor Deggs, 19-00406 (M.D. La. 3/30/2021), 2021 WL 1206592.

LOUISIANA UNFAIR TRADE PRACTICES ACT

The United States District Court for the Western District of Louisiana, following Louisiana Supreme Court jurisprudence, held the protections of the Louisiana Unfair Trade Practices Act are not restricted to business competitors and consumers. Others have a right of action under the law.

The Act prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Because of the broad sweep of this language, Louisiana courts determine what is a violation of the Act on a case-by-case basis. To establish a claim, a plaintiff must show that the alleged conduct offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious. The statute

prohibits only fraud, misrepresentation, and similar conduct, and not mere negligence. A critical factor in determining whether conduct was unfair or deceptive is the motivation and intent of the defendant. The courts are reluctant to find liability under the law when the evidence reveals a normal business relationship. The statute does not forbid a business to do what everyone knows a business must do: make money. Even conduct that offends established public policy and is unethical is not necessarily a violation of the law.

In the matter at issue, plaintiffs had not directed the court to evidence that would indicate defendants engaged in fraud, misrepresentation, deception or other unethical conduct. The allegations were consistent with a claim based in negligence, and were insufficient to support a claim under the Act. Robert Lee Boudreaux v. Axiall Corporation, 18-0956 (W.D. La. 3/23/21), 2021 WL 1141671.

OBJECTION TO THE SCOPE OR VALIDITY OF AN ARBITRATION CLAUSE TO BE DETERMINED BY THE ARBITRATOR

An agreement between parties contained an arbitration agreement wherein they adopted the Construction Industry Arbitration Rules of the American Arbitration Association. Rule R-9 provides that the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement. The court of appeal held the trial court erred in addressing plaintiffs' objections to the existence, scope or validity of the arbitration clause. The exception of prematurity filed by the defendants was granted, and plaintiffs' claims against the defendants were dismissed without prejudice. Barattini v. Northlake Construction & Development, LLC, 2020-1058 (La.App. 1 Cir. 3/29/21), 2021 WL 1172165.

ATTORNEYS' FEES NOT ALLOWED

The United States District Court for the Eastern District of Louisiana in evaluating a claim for attorneys' fees under a contract found the fees were allowed under the Louisiana open account law, L.R.S. 9:2781. The project at issue involved the relocation of a hydraulic steel flood control gate along the Mississippi River. In reconsidering that finding, the court

concluded the contract at issue was a maritime contract, and in interpreting maritime contracts, federal admiralty law, rather than state law, applies.

Maritime disputes generally are governed by the American Rule pursuant to which each party bears its own costs. The court concluded general maritime law precludes the application of state attorneys' fees statutes to maritime contract disputes. In the absence of a federal statute or a provision or attorney's fees in an enforceable contract, litigants must pay their own attorneys' fees. The court, contrary to its original decision, concluded the claimant was not entitled to attorneys' fees under the Louisiana open account statute. Couvillion Group, LLC v. Quality First Construction, LLC, 19-676 (E.D. La. 3/8/21), 2021 WL 860241.

MANDAMUS PROCEEDING FOR PAYMENTS UNDER CONTRACT

A contractor filed a mandamus proceeding to obtain payments it alleged it was due under its contract. The payments had been withheld on advice of the architect. The owner had terminated the contractor. A writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law. A ministerial duty is a simple, definite duty, arising under conditions admitted or proved to exist and imposed by law. The critical element necessary for the issuance of mandamus is that the public official to whom the writ is directed may exercise no element of discretion when complying. If a public officer is vested with any element of discretion, mandamus will not lie.

The contractor claimed it was entitled to mandamus relief under L.R.S. 38:2191 which provides for two circumstances where mandamus relief is available against public entities for payments under contract: 1) when a public entity has failed to make progressive stage payments arbitrarily or without reasonable cause under a contract; and 2) when a public entity has failed to tender a final payment when due under the contract. The contractor has the burden of proving each.

The court found the construction contract did not mandate payment under the circumstances presented. The contract allowed for discretion in payment when its provisions are not met. The court held in each instance when funds were withheld from the

contractor the architect listed the provision of the contract it was considering to recommend that the payment not be made in whole or in part. The court found the owner was not arbitrary or without reasonable cause in not making progressive stage payments under the contract, and did not fail to tender final payment when due under the contract. Stevens Construction & Design, L.L.C. v. St. Tammany Fire Protection District No. 1, 2019-0955 (La.App. 1 Cir. 7/8/20), 308 So.3d 724, writ denied, 2020-00990 (La. 11/4/20), 303 So.3d 652.

PAYMENT UPON TERMINATION OF CONTRACT BY THE OWNER

Juniper Specialty Products, LLC, the owner, contracted with APTIM Maintenance, LLC as the general contractor for a project in Westlake, Louisiana. APTIM contracted with various subcontractors, including Excel Contractors, LLC. The work commenced and continued for a time, until Juniper abruptly locked the parties out of the construction site. Juniper informed APTIM that it was stopping construction because it could not pay APTIM's invoices, and sought bankruptcy protection. APTIM had not paid Excel. Excel sued APTIM for payment.

Section 45.6 of the subcontract between APTIM and Excel provided that in the event of client termination, the liability of APTIM to Excel would be limited to the extent of the company's recovery on the subcontractor's behalf. The parties argued whether the contract provision was a suspensive condition as opposed to a term for performance. If it was a suspensive condition, it would be interpreted as a pay-if-paid clause, and if it was a term for performance, payment would have to be made within a reasonable time if the length of the term is uncertain.

The United States District Court for the Middle District of Louisiana held the clause at issue was not a payment provision, but a contingency plan in the event of the owner's termination which was unexpected. Section 45.6 would be considered a risk-sharing provision. Excel assumed the risk that the limitation of liability would come into play in the event Juniper might terminate the contract for any reason, including insolvency. Excel's motion for summary judgment was denied insofar as it requested payment under the subcontract.

Excel also contended it was entitled to payment for costs of demobilization. The court denied that claim based on its earlier conclusion the scope of the limitation of liability of Section 45.6 embraced all of Excel's potential claims against APTIM. Excel Contractors, LLC v. APTIM Maintenance, LLC, 19-580 (M.D. La. 1/4/21), 2021 WL 26790.

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