



LOUISIANA GENERAL LIABILITY UPDATE

CONSTRUCTION CONTRACTS

FIVE-YEAR PEREMPTIVE PERIOD APPLIES TO CLAIMS AGAINST SUBCONTRACTOR FOR INDEMNIFICATION

The Louisiana Supreme Court held that a general contractor’s third-party action for indemnification against a subcontractor was time-barred under Louisiana law, La. R.S. 9:2772. In *Ebinger*, plaintiffs originally contracted with the general contractor in 1995 to build their home. Plaintiffs then moved into the home in the spring of 1997 and filed a Certificate of Occupancy in April 1997. Around six years later, plaintiffs filed suit against the general contractor, alleging defects in the foundation caused damage throughout their home. In response, the general contractor filed a third-party demand seeking indemnification against the subcontractor that supplied the foundation.

Louisiana law currently provides a five-year preemptive period for claims against contractors, which precludes any action brought after the period has passed. The period was originally ten years, but it was shortened twice by subsequent amendments to the statute. In *Ebinger*, the Supreme Court first held that the preemptive period commenced in 1997, when the plaintiffs were issued the certificate of occupancy. Accordingly, the issue in this case was whether the five-year period or the ten-year period applies to the general contractor’s indemnification claim against the subcontractor.

The Supreme Court, reversing the Third Circuit, held that the five-year preemptive period applies because the general contractor’s cause of action for indemnification did not become “vested” until after the amendment was passed. In general, an indemnification right against a third-party defendant is conditional and incomplete until the third-party plaintiff is cast in judgment and can discharge liability for reimbursement. In other words, the general contractor’s cause of action was not “vested,” for purposes of determining the applicable preemptive period, until damages were awarded against it in the main demand. Since the preemptive period commenced in 1997, the general contractor’s claim was preempted even before its cause of action for indemnification arose.

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Ebinger v. Venus Construction Corporation, 2011 WL 2693138 (La. 2011).

Our firm was recently involved in a matter similar to this case. In *Sinnett*, the plaintiff was injured on July 4, 2008 when a foldable, handicapped shower seat broke away from the wall of her hotel bathroom, causing her to fall to the ground. Plaintiff initially filed suit against the Hotel. The Hotel then filed a third-party demand for

indemnification against the subcontractors who originally installed the shower seat on December 8, 2009. In a joint Motion for Summary Judgment, the U.S. District Court, Eastern District, held that the five-year preemptive period applied to the claims against the subcontractors. The Hotel argued that the seven-year peremptive period applied because at the time the indemnity agreement was formed, La. R.S. 9:2772 provided for a seven-year period. The Hotel relied upon the Third Circuit's holding in *Ebinger* (prior to the Louisiana Supreme Court ruling), which held that the right to indemnity must have vested when the owner possessed the work from which the later cause of action arose. The Hotel argued that because the right to indemnity was "vested" in November of 2003, when the Hotel filed a Certificate of Substantial Completion, the Hotel had until November 2010 to file indemnity claims against the subcontractors.

The court held that the Hotel's cause of action against the subcontractors vested at the time of plaintiff's injury, July 2008. The court cited *In re Katrina Canal Breaches Consolidated Litigation*, No. 05-4182, 2006 WL 3627749, at *5 (E.D. La. Dec. 8, 2006), which held that "a cause of action for property damages does not arise until damages are incurred. It is only at that point in time, the cause of action would be considered to have 'vested'". Accordingly, the court held the amended La. R.S. 9:2772, which provides for a five-year preemptive period for all claims against contractors, applied. The court further held that the preemptive period commenced in November of 2003, when the Hotel filed a Certificate of Substantial Completion with the Mortgage Records Office. Therefore, the Hotel's claims against the subcontractors were time-barred under the five-year preemptive period for claims against contractors. The Eastern District granted summary judgment and dismissed all claims against the subcontractors.

Sinnett, et al. v. Hilton Riverside, et al., 2011 WL 1703719 (E.D. La. 05/03/11).

PREMISE LIABILITY

SUMMARY JUDGMENT UPHELD AS ARMORED TRUCK PARKED IN FRONT OF CLOTHING STORE WAS OPEN AND OBVIOUS CONDITION

The Louisiana First Circuit recently held that an armored truck company owed no duty to protect the plaintiff against the open and obvious condition of its parked vehicle. In *Simon*, the driver of the armored truck parked it in front of a pedestrian ramp near the entrance of a clothing store. While attempting to walk around the truck, plaintiff tripped over the curb and fell to the ground, injuring her ankle. The trial court granted the truck company's Motion for Summary Judgment holding that no duty was breached by the truck company.

In upholding the trial court's ruling, the First Circuit noted that plaintiff was aware of the presence of the truck and she could have easily avoided any risk presented by the parked truck by using additional care as she stepped from the curb. In addition, since she was not handicapped, plaintiff could have avoided any risk by choosing to take a different path to the parking lot. Even though the truck driver owed a duty of reasonable care to pedestrians, the First Circuit held that "the scope of that duty did not extend to protect against [plaintiff's] conduct of 'tripp[ing] and/or misstepp[ing]' on the curb and falling into the parking lot."

Simon v. Loomis Armored US, Inc., et. al, 2010 CA 1909 (La. App. 1st Cir. 07/22/11).

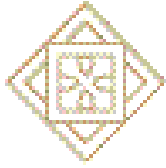
INTENTIONAL TORTS

A DAMAGE AWARD CANNOT BE REDUCED BY THE PLAINTIFF'S COMPARATIVE FAULT WHEN THE CAUSE OF PLAINTIFF'S DAMAGES WAS A RESULT OF AN INTENTIONAL TORT OF DEFENDANT

The Louisiana Third Circuit recently held that a plaintiff's damage award may not be reduced by his percentage of comparative fault where the defendant was found liable for an intentional tort. A plaintiff will also not be assessed court costs and fees in proportion to his attributed negligence. In *Le*, two plaintiffs were injured as a result of excessive force used by a nightclub's bouncers. The jury found that the bouncers committed the intentional tort of battery but also found that one of the plaintiffs was partially negligent in causing his own injuries. The trial court reduced the amount of damages awarded to plaintiffs by the percentage of negligence that the jury allocated to the negligent plaintiff. The trial court also assessed a percentage of court costs and fees to plaintiffs based on the jury's allocation of fault.

The Third Circuit reversed the trial court, holding that the Louisiana Civil Code specifically provides that the recovery of an injured person *shall not be reduced* because of his own negligence where all or part of the damage is a result of an intentional tortfeasor. Article 2323, in general, calls for a determination of the fault of all participants in an incident, whether a party or non-party. However, subsection (C) of the article specifically prohibits a reduction of the plaintiff's damages in intentional tort scenarios. The purpose is to "further public policy by preventing an intentional tortfeasor from using the comparative fault regime to reduce his own obligation to compensate a less culpable victim." Similarly, even though the trial court has broad discretion to assess court costs and fees, it is improper to assess part of the costs to a plaintiff to coincide with his percentage of comparative fault. Therefore, the Third Circuit held that the trial court erred in reducing the plaintiffs' damage award and assessing court costs and fees, despite the finding that one of the plaintiffs was negligent in causing his own injuries.

Le v. Nitetown, Inc., 2011 WL 2848152 (La. App. 3rd Cir. 7/20/11).



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