STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 0705

ABS SERVICES, INC.

VERSUS

JAMES CONSTRUCTION GROUP, L.L.C.
AND THE CONTINENTAL INSURANCE COMPANY

Consolidated with

NUMBER 2016 CA 0706

LOUISIANA DEPARTMENT OF TRANSPORTATION &
DEVELOPMENT

VERSUS

PROFESSIONAL SERVICES INDUSTRIES, INC.

Judgment Rendered: DEC 21 2018

* * * * * *

On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 541,834 c/w 542,671

Honorable Wilson Fields, Judge Presiding

Holdridge J., dissents w/ reasons
* * * * * *
Crain, J dissents with reasons

Murphy J. Foster, III **John T. Andrishok** **Jacob E. Roussel** **Baton Rouge, Louisiana**	**Counsel for Defendants/Appellants** **James Construction Group, L.L.C., Continental Insurance Company, ABMB Engineers, Inc., Professional Service Industries, Inc., and State of Louisiana, Department of Transportation and Development**
Edward J. Walters, Jr. **Baton Rouge, Louisiana**	**Co-Counsel for Defendants/Appellants** **ABMB Engineers, Inc. and Professional Service Industries, Inc.**

McDonald, J. concurs
Whipple, C.J. concurs in part & dissents in part for reasons assigned.
Welch J. Concurs in result.
Penzato, J. dissents with reasons
Mt. Hemel, J. concurring in part, dissenting in part for reasons assigned by C.J. Whipple.
Chutz, J. Concurs in part, dissents in part for reasons assigned by C.J. Whipple
Dandy, J. concurs and assigns reasons.
Higginbotham, J. concurs in part, dissents in part for reasons assigned by C.J. Whipple
Pettigrew, J. Concurs in Part, dissents in Part for Reasons Assigned by C.J. Whipple

Henry D. H. Olinde, Jr. **Scott E. Mercer** **Douglas S. Smith, Jr.** **Baton Rouge, Louisiana**	**Counsel for Plaintiff/Appellee** **ABS Services, Inc.**
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John M. Madison, III **Charles E. Tabor** **Baton Rouge, Louisiana**	**Counsel for Defendant/Appellee** **Keystone Retaining Wall Systems, Inc.**

* * * * * *

BEFORE: WHIPPLE, C.J., GUIDRY, PETTIGREW, McDONALD, WELCH, HIGGINBOTHAM, CRAIN, THERIOT, HOLDRIDGE, CHUTZ, AND PENZATO, JJ.

PER CURIAM.

This matter is before us on appeal by defendants, James Construction Group, L.L.C. ("JCG"), The Continental Insurance Company ("Continental"), State of Louisiana, Department of Transportation and Development ("DOTD"), ABMB Engineers, Inc. ("ABMB Engineers") and Professional Services Industries, Inc. ("PSI"), from a trial court judgment rendered following a jury trial.

While the appeal was pending, this court *ex proprio motu* set this matter for oral argument before an *en banc* panel of this court, to resolve and determine, *inter alia*, whether or not the award of "reasonable attorney's fees" in an otherwise final judgment renders the judgment, in whole or in part, nonappealable as uncertain or indefinite in nature. The court subsequently granted a "Motion for Limited Remand" filed by appellee, ABS Services, Inc. ("ABS"), for the sole purpose of allowing the trial court to sign an order certifying the December 1, 2015 judgment as a partial judgment that is final and appealable pursuant to LSA-C.C.P. art. 1915(B). The trial court, finding no just reason for delay, signed an order on August 23, 2018, certifying the December 1, 2015 judgment as final and appealable pursuant to LSA-C.C.P. art. 1915(B).

This court, sitting *en banc*, has carefully considered and reviewed the pending motions and exceptions, as well as the merits of the appeal. Due to a recusal, eleven of the twelve judges of this court have participated, and a majority of the *en banc* panel has voted to deny the pending motions and the exception raising the objection of no clause of action filed by JCG and Continental. Also, as will be discussed further herein, a majority concurs in finding that some of the various assignments of error raised by the appellants lack merit. While a majority concludes that the award of $477,569.00 in favor of St. Paul Guardian Insurance Company ("St. Paul-Travelers") and against JCG should be affirmed on appeal and

that JCG's claims against St. Paul-Travelers and ABS, thus should be dismissed, there is no majority consensus on each of the remaining portions of the trial court's judgment. Because there is no majority consensus on the issues raised in the challenges to the remaining portions of the trial court's judgment on the merits, there is no executable majority as to those portions of the judgment. Accordingly, except as set forth below, the remainder of the trial court's judgment stands. Parfait v. Transocean Offshore, Inc., 2007-1915 (La. 3/14/08), 980 So. 2d 634, 639.

FACTS AND PROCEDURAL HISTORY

At the outset, we deem it worth noting that although this court is unable to agree on every issue and claim presented herein, we have carefully considered the matters before us in this voluminous and procedurally complicated litigation.[1] The instant matter arises out of a road construction project on Interstate 10 in East Baton Rouge Parish, which was known as the Picardy Avenue Interchange Project (the "Project"). As the owner of the Project, DOTD contracted with JCG to be the general contractor on the Project. JCG subcontracted a portion of the work to ABS, which work included the installation of approximately 214,000 square feet of Key System 1 mechanically stabilized earth ("MSE") walls and leveling pads. The Project, however, was fraught with numerous complications and problems impacting the MSE walls, including delays in construction and materials, geotechnical problems, and inspection issues, which eventually resulted in the instant litigation.

Before the Project began, Mika McKee Lawson, JCG's project manager, notified all subcontractors that the start date was delayed from March 1, 2004 until

[1]As reflected herein, this litigation involved numerous parties and varying claims. The record is voluminous and contains in excess of 18,000 pages, plus boxes of exhibits. Accordingly, a detailed recitation of the procedural history is deemed necessary for full consideration of the various issues presented on appeal.

mid-April 2004. According to Ms. Lawson, she informed ABS that JCG would be ready for it by June, but she would confirm the start date. According to ABS, ABS was instructed to mobilize on the Project on April 15, 2004, by both Rodney James, who was JCG's division manager, and Chet Chautin, a superintendent for JCG, and ABS mobilized on the Project on April 16, 2004. On April 21, 2004, however, ABS's work was delayed due to the lack of approved shop drawings for the MSE walls and lack of approved materials needed for the construction of the MSE walls, and notice of such was sent to JCG. Pursuant to ABS's Subcontract with JCG, JCG was obligated to provide the approved shop drawings and the necessary materials for the MSE wall construction. Premier Concrete Products, Inc. ("Premier"), a licensee of Keystone Retaining Wall Systems, Inc. ("Keystone"),[2] was responsible for providing JCG with the shop drawings it acquired from Keystone.

In April 2004, following a partial approval, ABS was able to begin installing the leveling pads on the Project, but was ordered by JCG to stop operations. In fact, DOTD issued a letter on April 28, 2004, requiring the construction to stop due to the shop drawings not being fully approved. This was the start of a 45-day delay on the Project, during which ABS was unable to work. ABS requested permission from JCG to demobilize from the site, but the request was denied. Eventually, ABS began losing key employees. By June 9, 2004, ABS had only built about 300 linear feet of leveling pad of the 10,000 feet that were buildable, notwithstanding the Subcontract provision stating that ABS would construct 300 feet per day. Additionally, both JCG and ABS sought compensation from DOTD as a result of this 45-day delay; however, their attempts were unsuccessful.

[2]Keystone was the creator of Key System 1 MSE walls used on the Project.

Unbeknownst to ABS and JCG at the time ABS mobilized, there were foundation issues at the site of the Project, which involved both ABMB Engineers and PSI's engineering work and geotechnical analysis performed at the site. These issues first became known in June 2004, when the DOTD project engineer indicated that new foundation designs for the walls were being proposed. During the course of this litigation, ABS eventually discovered that DOTD was actually considering eliminating the retaining walls on the Project altogether at the same time that ABS was mobilized, but idle on the Project and waiting on approvals. Ultimately, to resolve the issues with the foundation, geopiers were added to the design of the walls as per the request of ABMB Engineers and PSI, which design changes also caused additional delays and out-of-sequence construction.

Throughout the Project, ABS encountered issues with not having the approved materials required for constructing the MSE walls. Further, the addition of the geopiers caused the entire sequence of production of the MSE walls as planned by ABS and JCG to be completely disrupted. The sequence of production of the MSE walls was critically important to ABS's planned work as agreed upon by both ABS and JCG. ABS and JCG both attempted to receive compensation from DOTD for the out-of-sequence work delays, but were unsuccessful.

In addition to the delays and out-of-sequence work, ABS encountered multiple problems related to inspections of its work. One of the inspection issues began in February of 2005, when the inspectors for DOTD utilized what was referred to as "the teeter-test." The inspectors would examine the block units used to build the MSE wall and see if the block teetered or wobbled. If there was movement, the block would be rejected. According to ABS, the use of the teeter-test resulted in numerous blocks being incorrectly rejected by the inspectors, which impeded the progress of ABS's work. Further, the teeter-test being used by the

DOTD inspectors was not an acceptable inspection technique according to Keystone. On April 15, 2005, ABS shut down its operations due to this inspection issue. A meeting was held at the Project site, where Richard Brown, the inventor of the Key System 1 MSE wall system, was in attendance. After having the inspectors demonstrate their inspection procedure, Mr. Brown came up with a compromise inspection method for the inspectors to use. The compromise method involved part of the teeter-test used by the inspectors, but also incorporated a measuring tool. However, the compromise inspection method was only used for a short time. An additional inspection issue arose in April or May of 2005, involving the steel reinforcements installed by ABS around the abutments, but only arose after ABS had completed the MSE walls at four of the six abutments. The last two abutments were about halfway or more than halfway finished. As a result of the inspection issues, ABS was further delayed and incurred financial losses.

Thereafter, the relationship between ABS and JCG deteriorated. ABS's position was that JCG was in material breach and default of its Subcontract with ABS. Accordingly, ABS provided seven days' notice of the breach and default to JCG in a letter dated July 27, 2005, giving JCG an opportunity to cure. ABS set forth that as a result of the material breach and default, it had sustained damages in the estimated amount of $1,680,622.70, for which recovery was sought from JCG. JCG and ABS were unable to resolve their issues, and ABS demobilized from the Project on August 9, 2005, prior to the completion of the MSE walls. JCG maintained that as a result of ABS's demobilization, ABS was in breach of the Subcontract. Thus, JCG sought recovery from St. Paul-Travelers, which had furnished ABS's performance bond on the Project. Ultimately, St. Paul-Travelers paid to JCG the sum of $477,569.00, which payment was characterized as an advance for completion costs on the Project as a result of ABS's demobilization.

However, the payment was made by St. Paul-Travelers with a full reservation of rights.

On March 28, 2006, ABS filed the instant suit against JCG and its surety, Continental, contending that JCG breached the Subcontract and seeking damages, including, but not limited to, increased costs for labor, equipment, overhead, and lost profits, in addition to interest, attorney's fees, court costs, and expenses. More than a year later, on November 13, 2007, ABS added ABMB Engineers and PSI as defendants and supplemented and amended the claims and allegations set forth in the original petition.[3] ABS supplemented and amended its petition for a second time on April 4, 2008, with respect to the claims asserted against ABMB Engineers and PSI only.

Over the following years, numerous reconventional demands, cross claims, and third-party claims were filed. In 2008, JCG filed a reconventional demand against ABS, alleging that ABS was in material breach of the Subcontract. JCG also asserted cross claims against ABMB Engineers and PSI, alleging their fault and responsibility for the damages JCG incurred, as well as a third-party demand against DOTD, alleging its fault and responsibility for JCG's damages. Further, JCG asserted a third-party demand against St. Paul-Travelers, alleging that St. Paul-Travelers had failed to timely and adequately pay JCG for ABS's breach of contract, that St. Paul-Travelers breached the terms of the bond, and that St. Paul-

[3]In the first supplemental and amending petition, ABS referenced the lawsuit entitled "Louisiana Department of Transportation and Development v. Professional Services Industries, Inc." Docket No. 542,671, Section 25, 19th Judicial District Court (the "DOTD Suit"), which was filed on April 25, 2006, and alleged that PSI had notice of the instant lawsuit through the DOTD Suit. Ultimately, DOTD filed a motion to consolidate its DOTD Suit with this suit on March 12, 2009. The motion was granted by an order dated March 25, 2009. The record does not clearly reflect the outcome of the DOTD suit, as none of the pleadings filed after the consolidation have a consolidated docket caption. However, we note that on the same date DOTD filed the motion to consolidate, DOTD also filed a cross claim against PSI (and ABMB Engineers), asserting claims against PSI nearly identical to those asserted in the DOTD Suit. Further, on September 10, 2013, all claims between DOTD and PSI were dismissed with prejudice in this suit.

Travelers was in bad faith. Meanwhile, St. Paul-Travelers filed a reconventional demand against JCG, alleging that JCG was not entitled to the payment it had received from St. Paul-Travelers and that St. Paul-Travelers was entitled to reimbursement plus interest on the amount previously remitted to JCG.

In late 2009, ABMB Engineers asserted cross claims against JCG, ABS, DOTD, and PSI. ABMB Engineers also filed third-party demands against Keystone, Premier (which provided certain component materials used for the Key System 1 MSE walls and was a licensee of Keystone), and Big River Industries, Inc. ("Big River") (which provided other materials for use in the installation of the MSE walls). Soon thereafter, ABS filed a third-party demand against Keystone, alleging that if ABS is liable to JCG or any other party, then ABS is entitled to indemnity from Keystone. After leave was granted by the trial court, JCG amended its cross claim and asserted claims against Premier, Keystone, and Big River. PSI then filed cross claims against ABMB Engineers, DOTD, JCG, and ABS as well as third-party demands against Premier, Keystone, and Big River on October 7, 2009.

In 2010, Premier filed a reconventional demand against JCG, as well as cross claims against ABMB Engineers and PSI. Additionally, Big River asserted reconventional demands against ABMB Engineers, PSI, and JCG, in addition to a third-party demand against DOTD.

On November 5, 2012, ABS filed a motion and order for leave to file its third supplemental and amending petition, which order was signed on November 13, 2012. ABS's supplemental pleading added direct claims against DOTD, Keystone, Big River, and Premier and also added a direct action against PSI's insurer (Lumbermen's), which was later dismissed from the suit due to the insurer's liquidation and insolvency.

On September 10, 2013, the trial court signed an order dismissing with prejudice all claims between and among JCG, PSI, ABMB Engineers, and DOTD. This order also granted leave for JCG, PSI, ABMB Engineers, and DOTD to file certain amended pleadings and to withdraw certain previously filed pleadings. The amended and supplemental pleadings essentially removed all allegations between and among JCG, PSI, ABMB Engineers, and DOTD, and these parties then concentrated their claims against ABS (and its surety when appropriate) and against Keystone, Premier, and Big River.

In early 2015, an order was signed dismissing with prejudice JCG's claims against Keystone, and a subsequent order was signed dismissing with prejudice ABMB Engineers and PSI's claims against Keystone. Later that same year, judgments were signed dismissing ABS's claims against Big River and Premier. A jury trial in this matter was held on August 31-September 11, 2015. According to the pretrial order, the following parties with the following claims were to be tried: ABS's contract claims against JCG; ABS's negligence claims against ABMB Engineers, PSI, DOTD, and Keystone; JCG's breach-of-contract claims against ABS; JCG's claim for recovery against the bond and bad faith claims against St. Paul-Travelers; JCG's indemnity and direct claims against Premier and Big River; ABMB Engineers and PSI's indemnity claims against Premier and Big River; St. Paul-Travelers' claims against JCG for refund of amounts previously paid to JCG; St. Paul-Travelers' indemnity claims against ABMB Engineers and PSI; Premier's payment claims against JCG; Premier's indemnity and negligence claims against ABMB Engineers and PSI; and Big River's damage claims against DOTD, ABMB Engineers, and PSI. However, immediately prior to trial, an order was signed dismissing Big River's incidental demands against JCG, PSI, ABMB Engineers, and DOTD.

At the close of JCG's case, the trial court granted Premier and Big River's motions for directed verdict. JCG, ABMB Engineers, and PSI moved to sever Premier's claims against JCG, ABMB Engineers and PSI, which was granted, but those claims were subsequently dismissed pursuant to joint motion of those parties.

After the presentation of St. Paul-Travelers' case and closing arguments, the case was submitted to the jury for decision. The jury returned a verdict finding that JCG had breached the Subcontract with ABS and that ABS did not breach the Subcontract. The jury further determined that $3,174,160.00 was the amount necessary to fairly compensate ABS for the damages it had incurred as a result of JCG's breach of the Subcontract. JCG was also found to be liable to ABS for penalties and reasonable attorney's fees in addition to the damages awarded, and 5% was awarded for penalties. The jury found that DOTD, ABMB Engineers, and PSI were negligent and apportioned 50% of the fault to DOTD, 25% of the fault to ABMB Engineers, and 25% to PSI. Neither Keystone nor ABS were found to be negligent. The jury determined that ABS was entitled to $3,174,160.00 for the damages it sustained as a result of the total negligence of the parties.[4] The jury further determined that neither ABMB Engineers nor PSI's negligence was the legal cause of damage to St. Paul-Travelers. Lastly, the jury found that $302,000.00 should be refunded to St. Paul-Travelers from JCG.

Due to a lack of agreement among the parties regarding the final written judgment, the trial court simply adopted the jury verdict form as its judgment on September 28, 2015. Thereafter, numerous post-trial motions were filed. JCG, ABMB Engineers, PSI, and DOTD filed a motion for new trial, asserting the

[4]On the jury verdict form, the jurors were instructed that "any amount that you award in response to [this] [q]uestion will not be added to any amount that you previously awarded for breach of contract in response to Question 3 above. If you also made a breach of contract award, the Court will determine which of the two awards applies to this case based on the law." (Italics removed).

various arguments now raised in the instant appeal, among others. ABS filed a motion for new trial to amend the judgment in order to include a provision holding Continental, the surety for JCG, solidarily liable with JCG for all amounts due ABS for JCG's breach of the Subcontract. St. Paul-Travelers filed a motion for judgment notwithstanding the verdict, noting that the jury had only awarded it a refund of $302,000.00, when the uncontroverted evidence established that St. Paul-Travelers paid JCG $477,569.00, which it was not obliged to pay in light of the jury finding no fault by ABS. Accordingly, St. Paul-Travelers argued that it was entitled to a refund of the total amount paid to JCG plus interest. St. Paul-Travelers also filed a motion for new trial for re-argument only, regarding the substance of the judgment, contending that the September 28, 2015 judgment was contrary to law in that it lacked the proper decretal language, did not identify the parties in whose favor the judgment was rendered, and did not plainly identify the amount of judgment or extent of each party's liability.

ABS's motion for new trial to amend the judgment and St. Paul-Travelers' motion for judgment notwithstanding the verdict were granted, and the remaining motions were denied. On December 1, 2015, a final judgment was signed by the trial court reflecting the court's rulings on these motions. The December 1, 2015 judgment also "retract[ed] and replace[d]" the September 28, 2015 judgment, and provided as follows:

- JCG is to pay to ABS $3,174,160.00 plus judicial interest from the date of judicial demand, March 28, 2006, until paid.

- Continental is solidarily liable with JCG to ABS up to the sum of $3,174,160.00 plus judicial interest from the date of judicial demand, March 28, 2006, until paid.

- DOTD is solidarily liable with JCG to ABS for the sum of $1,587,080.00 plus judicial interest from the date of judicial demand, March 28, 2006, until paid.

- PSI is solidarily liable with JCG to ABS for the sum of $793,540.00 plus judicial interest from the date of judicial demand, March 28, 2006, until paid.

- ABMB Engineers is solidarily liable with JCG to ABS for the sum of $793,540.00 plus judicial interest from the date of judicial demand, March 28, 2006, until paid.

- Pursuant to LSA-R.S. 9:2784, JCG shall pay to ABS penalties in the full amount of $158,708.00 plus reasonable attorney's fees, which penalties and attorney's fees shall bear judicial interest from the date of the judgment until paid.

- JCG shall pay to St. Paul-Travelers the sum of $477,569.00 plus judicial interest on that amount from August 7, 2006 until paid.

- All claims of JCG against ABS and St. Paul-Travelers are dismissed with prejudice.

- St. Paul-Travelers' claims against PSI and ABMB ENGINEERS are dismissed with prejudice.

- All claims against Keystone are dismissed with prejudice.

- JCG, Continental, DOTD, PSI, and ABMB ENGINEERS are solidarily liable for all costs of the proceedings, which costs include reasonable expert fees and shall bear judicial interest from the date of the judgment until paid.

Thereafter, JCG, Continental, DOTD, ABMB Engineers, and PSI timely requested a suspensive appeal of the December 1, 2015 judgment and posted the appeal bond as ordered by the trial court.

PRELIMINARY PROCEDURAL ISSUES

During the pendency of the appeal, other procedural issues have developed, which will be addressed first. JCG and Continental filed a peremptory exception raising the objection of no cause of action in this court on July 14, 2016, asserting for the first time that ABS failed to assert a cause of action.[5] DOTD filed peremptory exceptions with this court, arguing that ABS's claim against it was both perempted under LSA-R.S. 48:251.3 and LSA-R.S. 9:2772 and prescribed pursuant to LSA-C.C. art. 3492. JCG, Continental, and DOTD filed a motion to strike certain pleadings filed in response to the exceptions. Additionally, ABS and St. Paul-Travelers filed a motion to supplement the record with the transcripts of the opening and closing arguments, which motion was referred to this panel for consideration.

Motion to Strike Oppositions to Exceptions and Motion for Leave to File Response Thereto

After filing exceptions herein, JCG, Continental, and DOTD filed a motion to strike all forms of opposition to their exceptions filed by ABS, contending that ABS's oppositions were filed late and without first seeking leave of court and that this court should strike ABS's oppositions as untimely or, alternatively, permit JCG, Continental, and DOTD to file replies thereto.

The exceptions were filed on July 14, 2016. On October 3, 2016, ABS filed its appellee brief, which contained arguments relative to the issues raised in the exception filed by DOTD, but no arguments relative to JCG and Continental's exception raising the objection of no cause of action. St. Paul-Travelers filed an opposition to JCG and Continental's exception on October 3, 2016.

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[5]Provided that the exception is pled prior to the submission of the case and proof of the grounds for the exception are in the record, an appellate court has the discretion to consider a peremptory exception filed for the first time at the appellate level. LSA-C.C.P. art. 2163; Adams v. S. Lafourche Levee Dist., 2015-0507 (La. App. 1st Cir. 6/27/16), 199 So. 3d 20, 24; Guitreau v. Juneau, 479 So. 2d 431, 433-34 (La. App. 1st Cir. 1985).

On October 24, 2016, JCG and Continental, and DOTD filed reply briefs, arguing therein that JCG and Continental's exception should be deemed unopposed by ABS. Thereafter, ABS filed an opposition to JCG and Continental's exception of no cause of action on November 4, 2016. On November 16, 2016, JCG, Continental, and DOTD filed a motion to strike as well as reply memoranda in response to the oppositions filed by ABS.

The only reference in the Uniform Rules of the Louisiana Courts of Appeal to peremptory exceptions filed on appeal appears in Rule 2-7.2, which is entitled "Requirements of Other Motions," and merely provides that "[a]ll other motions or pleadings (e.g., peremptory exceptions and answers to appeals) filed originally in a Court of Appeal shall be typewritten and double-spaced ...." Notably, Rule 2-7.2 does not establish a time limit for filing oppositions or reply briefs in response to exceptions. In this matter, all memoranda submitted in connection with JCG, Continental, and DOTD's exceptions were permitted to be filed in this court and were filed prior to the submission of the case to the court. Accordingly, the motion to strike ABS's oppositions is denied, and the motion for leave to file responses thereto is denied as moot.

JCG & Continental's Peremptory Exception of No Cause of Action

JCG and Continental's peremptory exception raising the objection of no cause of action relies on Pierce Foundations, Inc. v. JaRoy Const., Inc., 2015-0785 (La. 5/3/16), 190 So. 3d 298, which was decided during the pendency of this appeal. JCG and Continental assert that the Louisiana Supreme Court's ruling in Pierce is dispositive of all of ABS's claims in this litigation. Specifically, JCG and Continental argue that ABS cannot maintain a cause of action pursuant to LSA-R.S. 48:256.3, *et seq.*, the Public Works Act for the Department of Transportation and Development ("DOTD-PWA"), because ABS failed to comply with the

mandatory requirements of LSA-R.S. 48:256.5(B) to recover amounts claimed to be owed pursuant to a contract on a DOTD project. JCG and Continental allege that they are immune under the DOTD-PWA from the claims brought by ABS because ABS never raised a cause of action pursuant to Title 48, and there is no evidence of ABS's compliance with the DOTD-PWA in the record.

On differing grounds, a majority of the panel concludes that the exception of JCG and Continental raising the objection of no cause of action should be overruled. Accordingly, JCG and Continental's exception raising the objection of no cause of action is hereby overruled.

DOTD's Peremptory Exception of Peremption and Prescription

In its peremptory exception, DOTD argues that ABS's claims against DOTD were both perempted and prescribed.[6] DOTD contends that ABS's claims are perempted pursuant to LSA-R.S. 48:251.3 and LSA-R.S. 9:2772 because ABS did not file suit against DOTD within five years after recordation of the acceptance of the project. According to DOTD, it issued final acceptance of the Project on April 3, 2007, and the acceptance was recorded in the East Baton Rouge Parish mortgage records on May 8, 2007.[7] DOTD argues that ABS's claims against it therefore

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[6]Louisiana Code of Civil Procedure article 2163 provides that the appellate court may consider the peremptory exception filed for the first time on appeal, where the exception is pleaded prior to submission of the case for decision and proof of the ground of the exception appears of record. However, where the exception pleaded in the appellate court is prescription, the plaintiff may demand remand to the trial court for trial of the exception. ABS did not demand that the matter be remanded; therefore, this court has the discretion to consider the peremptory exception of prescription in this matter. LSA-C.C. art. 2163; Southgate Residential Towers, LLC v. Mapp Const., Inc., 2007-0859 (La. App. 1st Cir. 12/21/07) 2007, WL 4465777 (unpublished) (once a plaintiff invokes the right to have the matter remanded to the trial court for the purpose of having the trial court adjudicate the issue of prescription pursuant to LSA-C.C.P. art. 2163, the appellate court is without discretion in remanding the matter for consideration by the trial court).

[7]The final acceptance included in the record on appeal does not include the date the final acceptance was recorded in the mortgage records. Rather, a certified copy of the recorded final acceptance was attached to DOTD's peremptory exception as an exhibit, and DOTD requested that this court take judicial notice of the date the final acceptance was recorded pursuant to LSA-C.E. art. 201(D).

were perempted on May 8, 2012, as ABS did not file suit against DOTD until six months later, namely, in November 2012.

Relative to its argument that ABS's claims are also prescribed, DOTD maintains that the prescriptive period commenced on August 9, 2005, the date that ABS demobilized from the Project site.[8] ABS filed suit against JCG and Continental less than a year later on March 28, 2006. However, DOTD undisputedly was not added to the suit until November 2012, which was over seven years after ABS left the Project. Because ABS asserted only tort claims against DOTD, which have a prescriptive period of one year, ABS's claims against DOTD prescribed on August 9, 2006, unless the prescriptive period was otherwise interrupted or suspended. While ABS alleged that all defendants were solidarily liable unto ABS for all damages, DOTD argues that the suit timely filed against JCG and Continental did not interrupt prescription as to DOTD because the defendants are neither solidary obligors nor joint tortfeasors.[9]

As noted above, DOTD filed a peremptory exception raising objections of both peremption and prescription. Although five judges agree that the claims are prescribed, there is no majority vote to grant the exception on this basis. Further, as to peremption, there is no clear majority consensus that the exception should be granted on this basis. Absent a majority vote to grant the peremptory exception on

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[8]Pursuant to LSA-C.C. art. 3492, actions sounding in tort are subject to a one-year prescriptive period, which commences to run from the date the injury or damage is sustained or when there is sufficient notice to call for inquiry. Campo v. Correa, 2001-2707 (La. 6/21/02), 828 So. 2d 502, 510–11.

[9]As set forth in LSA-C.C. art. 2324(C), "[i]nterruption of prescription against one joint tortfeasor is effective against all joint tortfeasors." Louisiana Civil Code article 3503 provides, in part, that "[w]hen prescription is interrupted against a solidary obligor, the interruption is effective against all solidary obligors and their successors." Also, LSA-C.C. art. 1799 provides that the "interruption of prescription against one solidary obligor is effective against all solidary obligors and their heirs." While not mentioned by the parties, we also note that if an obligation is joint and indivisible for the obligors, the rules governing solidary obligors are applicable, and suit against one obligor would interrupt prescription against other joint obligors. LSA-C.C. arts. 1789, 1799, and 3505. However, there are no allegations that the obligations at issue in this case are joint and indivisible.

either ground, the exception must be overruled. Accordingly, DOTD's peremptory exception raising the objections of peremption and prescription is hereby denied.

Motion to Supplement Record

As a final preliminary matter, ABS and St. Paul-Travelers filed a motion to supplement the record with transcripts of the opening and closing arguments with this court, which was referred to the merits panel for determination. The motion to supplement, however, is denied as moot, in light of our disposition of JCG and Continental's Assignment of Error No. IX.

MERITS OF THE APPEAL

Louisiana Constitution Article V, § 8(B) requires that "[a] majority of the judges sitting in a case must concur to render judgment." As noted above, as to the merits of the appeal in the instant case, a majority consensus has been reached as to only some of the issues raised herein. Although based on differing rationale or reasoning, a majority of the panel concurs in concluding that there was no manifest error in the jury's findings that JCG breached the Subcontract and that ABS did not, and in rejecting as meritless appellants' contention that the pay-if-paid clause in the Subcontract bars any recovery by ABS. Moreover, a majority of the *en banc* panel rejects as meritless appellants' arguments that ABS compromised a portion of its claims through a change order, as well as their contention that a number of trial irregularities caused them such prejudice as to warrant the granting of a new trial herein. However, there is no majority vote or agreement as to whether the amount awarded to ABS in the trial court's judgment should be affirmed or modified.

A majority of the panel does concur that the portions of the judgment rendering a money judgment in favor of St. Paul-Travelers and dismissing all of

JCG's claims against ABS and St. Paul-Travelers should be affirmed, as discussed infra.

As to the remaining portions of the judgment, however, a majority consensus cannot be reached as to whether those portions should be affirmed, reversed, or modified. Accordingly, the remainder of the trial court's judgment stands. Parfait, 980 So. 2d at 639.

Challenges to Jury's Factual Finding of Breach of Subcontract
(JCG and Continental's Assignment of Error No. III)

As stated above, a majority concurs or agrees that there was no manifest error by the jury in its finding that JCG breached the Subcontract and that ABS did not breach the Subcontract.

Pay-if-Paid Clause
(JCG and Continental's Assignment of Error No. IV)

Further, a majority of the *en banc* panel likewise concurs in rejecting JCG's defense premised on the pay-if-paid clause and finds that appellants' fourth assignment of error also lacks merit.

Damages for Delay Due to Soil and Geotechnical Issues
(JCG and Continental's Assignment of Error No. VI)

In this assignment of error, appellants contend that they are entitled to further relief in their favor on the basis that ABS compromised a portion of the claims made in this suit through Change Order No. 4. According to appellants, Change Order No. 4 addressed delays due to soil condition and the installation of geopiers on the Project. ABS signed Change Order No. 4 and received $15,747.67 in additional compensation as a result. Appellants contend that this portion of ABS's damages was compromised and that ABS is not entitled to receive the $216,437.75 in damages it attributed to the soil and geotechnical issues in the July 24, 2005 seven-day notice letter to JCG.

Change Order No. 4, which indisputably altered the Subcontract, was signed by ABS on October 24, 2004, and referenced Plan Change No. 18, which modified the Prime Contract between JCG and DOTD. The stated purpose for Plan Change No. 18 was "to incorporate a design change requested by the original engineering design consultants ABMB Engineers and PSI," as the "original design did not account for soft soils beneath the MSE wall" in certain areas. Accordingly, Plan Change No. 18 provided that "Geopiers will be used as soil reinforcement to increase the soil strength for MSE Wall at Westbound Frontage Road." Plan Change No. 18 further stated that the "pricing for this work includes a lump sum price for the installation of the Geopiers, of which includes pricing for an increase in leveling pad with and the installation of [s]lip joints in the MSE wall needed to account for settlement." Notably, Change Order No. 4 for the Subcontract referenced geopier slip joints and leveling pads, which was the portion of Plan Change No. 18 that affected ABS's Subcontract. Further, the $216,437.75 in total damages claimed in ABS's July 27, 2005 letter to JCG are described as the "[a]dded cost and lost profit due to ABS' operations being [s]hut down as a result of subsoil improvements underlying MSE retaining walls C-2 and West Bound Frontage Road, Geopier installation" for the period of April 2004 through June 30, 2005.

Based on a plain reading of the documents relied upon by appellants in support of the argument that this claim was compromised, we are unable to find merit to their argument that Change Order No. 4, pertaining to geopier slip joints and increased leveling pads, had the effect of compromising the entirety of ABS's delay and shut-down claims related to the subsoil improvements. Pursuant to LSA-C.C. art. 3076, "[a] compromise settles only those differences that the parties clearly intended to settle, including the necessary consequences of what they

express." Moreover, as the parties asserting the existence of a compromise, appellants had "the burden of proof to show that the requirements of a valid compromise are present, including that the parties intended to settle." Suire v. Lafayette City-Par. Consol. Gov't, 2004-1459 (La. 4/12/05), 907 So. 2d 37, 55. Appellants failed to establish that ABS intended to settle the entirety of its delay and shut-down claims related to the subsoil improvements by way of Change Order No. 4. Accordingly, we reject as meritless appellants' sixth assignment of error.

Refund Due by JCG Under Performance Bond
(JCG and Continental's Assignment of Error No. VIII)

Appellants argue that St. Paul-Travelers is not entitled to a refund of the amounts paid to JCG pursuant to the performance bond and that St. Paul-Travelers acted in bad faith pursuant to LSA-R.S. 22:1892 and 1973. However, appellants' assignment of error is premised on a finding that JCG did not breach the Subcontract and ABS did. In light of the fact that a majority of the *en banc* panel concurs in finding no error in the determination that ABS was not in breach of the Subcontract and that JCG was, we find no merit in appellants' eighth assignment of error. Thus, the portions of the judgment ordering JCG to pay St. Paul-Travelers the sum of $477,569.00 with judicial interest from August 7, 2006, until paid and dismissing JCG's claims against ABS and St. Paul-Travelers with prejudice are hereby affirmed.

Procedural Trial Errors Warranting a New Trial
(JCG and Continental's Assignment of Error No. IX)

Appellants argue that a number of irregularities at the trial caused such prejudice to them that a new trial is warranted. Appellants first point out that ABS presented its case through the afternoon of the seventh day of a nine-day jury trial. By comparison, JCG, Continental, DOTD, ABMB Engineers, PSI, and Keystone

had only two and a half days to present their cases. However, we note that while the trial court was insistent that the trial would only last two weeks, the trial court permitted more hours of testimony per day after the close of ABS's case, thereby allowing appellants additional time on those days to present testimony.

Additionally, appellants argue on appeal that they were prejudiced by the order of examination of the witnesses employed by the trial court, which permitted ABS to conduct direct examination, appellants to cross-examine the witness, then allowed St. Paul-Travelers, Premier and/or Big River to conduct a direct examination of ABS's witnesses, and to thereafter conclude with ABS conducting re-direct examination. Notably, when appellants challenged the order in which the parties were allowed to examine the witnesses, which challenge occurred after ABS had called its *second* witness to testify, the trial court stated:

> I'm going to – the order and the normal procedure has kind of been thrown out of wack in this trial. Not purposefully by either party, but its [sic] just the alignment of the case. We're in cross-examination right now and – However, the parties, at least the way it has been presented to the jury and the way it has been in the court's mind is that all of you are aligned with one another on one side of the "V" and everybody on this side is on the other side of the "V". So that being said, although I will allow you to question him – if this would have been brought up... early on, then I probably would have let that side go before you got up to cross. But since I'm in cross now, direct questions.

Accordingly, the trial court permitted the remaining parties to conduct direct examination of ABS's witnesses after JCG was allowed to cross-examine the witnesses.

Louisiana Code of Civil Procedure article 1631(A) provides that the "court has the power to require that the proceedings shall be conducted with dignity and in an orderly and expeditious manner, and to control the proceedings at the trial so that justice is done." Also, LSA-C.C.P. art. 1632 provides for the normal order of trial, but expressly permits the trial court to vary the order "when circumstances so

justify." "It is only upon a showing of a gross abuse of discretion that appellate courts have intervened, as the trial judge has great discretion in conducting a trial. Louisiana Safety Ass'n of Timbermen v. Carlton, 2012-0775 (La. App. 1st Cir. 12/21/12), 111 So. 3d 1076, 1081 (citing Pino v. Gauthier, 633 So. 2d 638, 648 (La. App. 1st Cir. 1993), writs denied, 94-0243, 94-0260 (La. 3/18/94), 634 So. 2d 858, 859). After a review of the record, we are unable to find that the trial court grossly abused its discretion in conducting the order and timing of the trial.

Appellants also argue that the video deposition of an expert witness, Dr. Barry Christopher, was impermissibly allowed when the witness was present in court and that the video constituted hearsay. In response, ABS and St. Paul-Travelers argue that LSA-C.C.P. art. 1450(A)(5) permits any party to use "the deposition of an expert witness for any purpose upon notice to all counsel of record, any one of whom shall have the right within ten days to object to the deposition, thereby requiring the live testimony of an expert."

Further, we note that Article 1450(A)(5) provides that "the court may permit the use of the expert's deposition, notwithstanding the objection of counsel to the use of that deposition, if the court finds that, under the circumstances, justice so requires." Additionally, LSA-C.C.P. art. 1450(C) expressly permits the trial court, in its discretion, to resolve any conflicts between the Article and LSA-C.E. art. 804 regarding the use of depositions. At trial, the video deposition was presented during ABS's case in chief and, thereafter, Dr. Christopher took the stand at trial for cross-examination by appellants.

On review, we find no error or abuse of discretion. "The trial court has much discretion under Article 1450 in determining whether to allow the use of deposition testimony at trial, and its decision will not be disturbed on review in the absence of an abuse ... of that discretion." Sullivan v. City of Baton Rouge, 2014-

0964 (La. App. 1st Cir. 1/27/15), 170 So. 3d 186, 193. A review of the record, including appellants' Motion in Limine seeking to prevent the use of Dr. Christopher's video deposition by ABS at trial and related filings, does not support a finding that the trial court abused its discretion in permitting the video deposition of Dr. Christopher to be shown at trial.

Appellants also argue that the trial court improperly limited the parties to two jury charges. Appellants note that JCG, Continental, DOTD, ABMB Engineers, and PSI were jointly represented by counsel, and collectively were limited to only two charges. Appellants argue that as a result, the jury was only instructed as to a fraction of the legal issues presented in this case.

It is unclear from the record whether appellants objected to the trial court's limits on the jury charges. Further, in this assignment of error, appellants do not provide any argument or indication as to the legal issue upon which the trial court failed to instruct or inadequately instructed the jury. A trial judge has no obligation to give any particular jury instruction provided by a party; rather, the judge is obligated to correctly charge the jury. Adams v. Rhodia, Inc., 2007-2110 (La. 5/21/08), 983 So. 2d 798, 804. As noted by the Supreme Court in Adams:

> Louisiana jurisprudence is well established that an appellate court must exercise great restraint before it reverses a jury verdict because of erroneous jury instructions. Trial courts are given broad discretion in formulating jury instructions and a trial court judgment should not be reversed so long as the charge correctly states the substance of the law. The rule of law requiring an appellate court to exercise great restraint before upsetting a jury verdict is based, in part, on respect for the jury determination rendered by citizens chosen from the community who serve a valuable role in the judicial system. We assume a jury will not disregard its sworn duty and be improperly motivated. We assume a jury will render a decision based on the evidence and the totality of the instructions provided by the judge.

Id. As to this argument, we again find no error or abuse of discretion by the trial court.

Appellants also argue that the trial court erred in failing to advise the jury regarding the effect of the trial court's grant of Premier's directed verdict with respect to JCG's contractual indemnity claims. However, appellants failed to object to the lack of the instruction and they did they request that the trial court give such an instruction after Premier's directed verdict was granted. Appellants waived their objection as to any error predicated upon this failure. Autin's Cajun Joint Venture v. Kroger Co., 93-0320 (La. App. 1st Cir. 2/16/94), 637 So. 2d 538, writ denied, 94-0674 (La. 4/29/94), 638 So. 2d 224.

Lastly, appellants claim that repeated references to JCG's settlements with DOTD, ABMB Engineers, and PSI during the trial were prejudicial, irrelevant, and in violation of LSA-C.E. art. 408. However, we find that the trial court was careful not to have any settlements mentioned when such usage was deemed prejudicial. At one point during trial, the trial court specifically directed counsel for Premier to instruct Anthony Bertas, the owner of ABS, not to mention anything about settlement in his answering of questions, which was done in the presence of all counsel. The first mention of the JCG settlements by counsel for ABS was during the cross-examination of Mrs. Lawson. Mrs. Lawson was asked if both of her depositions were taken prior to JCG settling with PSI, JCG, ABMB Engineers, and Keystone, and she responded affirmatively. No objection was made at this time. Later during the cross-examination of Mrs. Lawson, counsel for ABS referenced "the deposition you gave before you settled with PSI" in counsel's attempt to impeach the witness. Counsel for appellants then made an objection, to which counsel for ABS responded that such reference was permissible under LSA-C.E. 408 to show alignment and bias of the witness. In response, the trial court stated:

> ...in terms of these parties have settled with [JCG] and now [JCG] is representing the parties, I think that is perfectly fine. But not the details of the settlement, what was paid, what was not paid, but those

> parties was [sic] a party of the suit. Now they have settled and [JCG] have [sic] taken over their claims against ABS. I think that is fine.

Accordingly, the trial court overruled the objection.

Counsel for ABS next referred to the settlement of PSI and JCG in his cross-examination of one of appellants' experts, who was first hired by PSI and then retained by JCG. At this instance, counsel stated that "I'm asking you about ... after the settlement and after [JCG] took over the defense and indemnity of PSI is when you issued this March 30, 3015 report, right?" Appellants' counsel objected and argued that the trial court had already ruled that the specifics or terms of the settlements could not be mentioned, which includes defense and indemnity. The trial court overruled the objection. The settlement of JCG and DOTD was mentioned in the cross-examination of a JCG employee, but no objection was lodged.

Louisiana Code of Evidence article 408(A) provides:

> In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, anything of value in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This Article does not require the exclusion of any evidence otherwise admissible merely because it is presented in the course of compromise negotiations. **This Article also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness**, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [Emphasis added.]

Further, this court has stated that "while evidence of compromise is not admissible to prove liability, it may be properly admissible to prove bias of a witness pursuant to LSA-C.E. art. 408." Stockstill v. C.F. Indus., Inc., 94-2072 (La. App. 1st Cir. 12/15/95), 665 So. 2d 802, 812, writ denied, 96-0149 (La. 3/15/96), 669 So. 2d 428. On review, we find the trial court adequately limited the references to JCG's

settlements with other parties and allowed only limited references in accordance with LSA-C.E. art. 408. Accordingly, this assignment of error has no merit.

As to the remaining issues and assignments of error, after careful consideration and deliberation, there is no agreement by a majority to otherwise modify, reverse or affirm; consequently, the remainder of the judgment of the trial court stands. Parfait v. Transocean Offshore, Inc., 2007-1915 (La. 3/14/08), 980 So.2d 634, 639.

CONCLUSION

For the above and foregoing reasons, we deny the motion to strike ABS's opposition to the exceptions and deny as moot the motion for leave to file responses. The motion to supplement the record is also denied as moot. We overrule JCG and Continental's peremptory exception raising the objection of no cause of action and also overrule DOTD's peremptory exception raising the objections of prescription and peremption. Those portions of the December 1, 2015 judgment ordering JCG to pay St. Paul-Travelers $477,569.00 and dismissing all claims of JCG against ABS and St. Paul-Travelers are hereby affirmed. Because we affirm the liability of JCG to ABS for damages herein but cannot reach a majority consensus as to the amount of those damages, the portion of the December 1, 2015 judgment ordering JCG to pay to ABS the sum of $3,174,160.00, plus judicial interest from the date of judicial demand, March 28, 2006, until paid, stands. In all other respects, the trial court's judgment of

December 1, 2015 stands, and the costs of this appeal are assessed to DOTD, JCG, Continental, ABMB Engineers and PSI.

MOTION TO STRIKE DENIED; MOTION FOR LEAVE TO FILE RESPONSES DENIED AS MOOT; MOTION TO SUPPLEMENT RECORD DENIED AS MOOT; JAMES CONSTRUCTION GROUP, L.L.C. AND THE CONTINENTAL INSURANCE COMPANY'S EXCEPTION OF NO CAUSE OF ACTION OVERRULED; STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT'S EXCEPTION OF PEREMPTION AND PRESCRIPTION OVERRULED; TRIAL COURT JUDGMENT AFFIRMED IN PART; IN ALL OTHER RESPECTS, TRIAL COURT JUDGMENT STANDS.

ABS SERVICES, INC.

VERSUS

JAMES CONSTRUCTION GROUP, L.L.C. AND THE CONTINENTAL INSURANCE COMPANY

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 0705

Consolidated with

LOUISIANA DEPARTMENT OF TRANSPORTATION & DEVELOPMENT

VERSUS

PROFESSIONAL SERVICES INDUSTRIES, INC.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 0706

WHIPPLE, C.J., concurring in part and dissenting in part.

I respectfully concur in part and dissent in part from the *per curiam* opinion. I concur in the *per curiam* opinion insofar as the majority concludes that as to all issues before us for which there is no executable majority, the judgment stands. I likewise concur in the denial of JCG and Continental's peremptory exception of no cause of action and DOTD's peremptory exception of **peremption**. I further concur in the *per curiam* opinion's conclusions that there was no manifest error in the jury's finding that JCG breached the subcontract and ABS did not and in the conclusion that JCG and Continental's assignment of error relative to the pay-if-paid clause lacks merit. While I concur in additional respects, which are more fully set forth below, I dissent from the denial of DOTD's peremptory exception of **prescription**. As to the remaining issues for which there is no executable majority, I likewise disagree with the result of the *per curiam* opinion inasmuch as it allows the award of penalties and attorney fees assessed against JCG to stand, it further fails to reduce the amount of damages awarded to ABS, and it fails to dismiss ABS's claims against both ABMB Engineers and PSI as prescribed.

JCG & Continental's Peremptory Exception of No Cause of Action

As observed in the per curiam opinion, JCG and Continental's peremptory exception of no cause of action is predicated on the Supreme Court decision in Pierce Foundations, Inc. v. JaRoy Const., Inc., 2015-0785 (La. 5/3/16), 190 So. 3d 298 and the assertion that ABS failed to comply with the mandatory requirements of the DOTD-PWA, LSA-R.S. 48:256.3, et seq., and that JCG and Continental are immune from ABS's claims under the DOTD-PWA.

At the outset, I note that JCG and Continental make no claim that they were estopped from making such a legal argument prior to the Pierce decision or that they could not have raised this exception prior to the Supreme Court's ruling in Pierce. Second, to the extent that JCG and Continental are now claiming statutory immunity from liability, which is an affirmative defense,[1] I find such immunity claim was waived. JCG and Continental never raised immunity pursuant to LSA-R.S. 48:256.3(B) as an affirmative defense in the trial court. As this case demonstrates, the "general purpose in requiring that certain defenses be affirmatively pleaded is to give fair notice of the nature of the defense, and thereby prevent a last minute surprise to the plaintiff." Stockstill v. C.F. Indus., Inc., 94-2072 (La. App. 1st Cir. 12/15/95), 665 So. 2d 802, 810, writ denied, 96-0149 (La. 3/15/96), 669 So.2d 428. Thus, I find that JCG and Continental failed to preserve their claim of statutory immunity under the DOTD-PWA.

Moreover, to the extent that JCG and Continental rely on Pierce, I do not find that Pierce is dispositive of the claims of ABS in the instant litigation. Pierce involved a public works project governed by the Louisiana Public Works Act,

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[1]Louisiana Code of Civil Procedure article 1005 clearly states that an answer shall set forth any matter constituting an affirmative defense, and "it is clear in Louisiana that immunity is an affirmative defense that must be pleaded by a defendant or that defense is capable of being waived." Boudreaux v. State, Dep't of Transp. & Dev., 2001-1329 (La. 2/26/02), 815 So. 2d 7, 12 n.13 (citing Moresi v. State Through Dept. of Wildlife and Fisheries, 567 So. 2d 1081, 1086 (La. 1990)).

LSA-R.S. 38:2241, et seq. JaRoy Construction, Inc. ("JaRoy") was the general contractor on a project to build a gymnasium for the Jefferson Parish Council. In accordance with LSA-R.S. 38:2241(A)(2), JaRoy obtained a bond with surety from Ohio Casualty Insurance Company ("Ohio Casualty"). JaRoy subcontracted with Pierce Foundations, Inc. ("Pierce") for the installation of pilings. After completing its work and not receiving payment from JaRoy, Pierce instituted a lawsuit against JaRoy within one year of the completion of work. Ohio Casualty was added to the suit a year later. After the bankruptcy of JaRoy, Pierce proceeded solely against Ohio Casualty. Almost two years after suit was filed, the Jefferson Parish Council filed a notice of acceptance of the work into the mortgage records pursuant to LSA-R.S. 38:2241.1(A). However, Pierce never filed a sworn statement of claim in the mortgage records pursuant to LSA-R.S. 38:2242(B). As a result, Ohio Casualty moved for summary judgment and argued that Pierce could not recover from it under LSA-R.S. 38:2247, due to Pierce's failure to file the sworn statement of claim in the mortgage records within 45 days of the filing of the notice of acceptance of the work by the Jefferson Parish Council. Pierce argued that the Public Works Act did not affect its rights to proceed in contract and that the Publics Works Act did not contemplate a situation where suit was filed prior to the filing of the notice of acceptance and events provided for in LSA-R.S. 38:2242. The trial court granted the motion in part, ruling that there was no privilege in favor of Pierce, but otherwise permitted the suit to proceed. After a trial, judgment was rendered in favor of Pierce for amounts owed under the subcontract as well as compensation for idle time. On appeal, the Fifth Circuit Court of Appeal reversed the trial court and held that Pierce's failure to comply with the relevant notice provisions of the Public Works Act deprived it of a right of action against Ohio Casualty.

The Supreme Court "granted the writ application to determine whether, under LSA-R.S. 38:2247, the notice and recordation requirements of LSA-R.S. 38:2242(B) are necessary conditions for a claimant's right of action against a bond furnished pursuant to LSA-R.S. 38:2241." Pierce, 190 So. 3d at 299. In analyzing the legal issue therein, the Supreme Court observed that the plain language of LSA-R.S. 38:2242(B), which provided that a claimant "may" file a sworn statement of claim, and the language of LSA-R.S. 38:2247, which referred to the recordation "requirements" of section 2242(B) in the context of the time limits for claims of subcontractors, were in conflict. The Court then relied on statutory rules of interpretation to determine the meaning of the statute that best conformed to the purpose of the law. The Supreme Court rejected the Fifth Circuit's reasoning implying that the 1985 amendments to the Public Works Act were intended to overrule the Supreme Court's comment in Honeywell, Inc. v. Jimmie B. Ginn, Inc., 462 So. 2d 145, 148 (La. 1985), that an unpaid subcontractor with a direct contractual relationship with the contractor is entitled to sue on the contractor's bond without the need for filing and recording a sworn statement or giving notice to the contractor. In reversing the Fifth Circuit, the Supreme Court stated in Pierce that:

> If the legislature had intended La. R.S. 38:2247 to have the effect ascribed to it by the court of appeal, it would have altered the permissive "may" in [LSA-]R.S. 38:2242 to the mandatory "shall." *Compare, e.g.*, [LSA-]R.S. 48:256.5(B) ("Public Contracts of the Department of Transportation and Development," providing: "Any claimant ***shall***, after the maturity of his claim and within forty-five days after the recordation of final acceptance of the work by the [governing authority] ....").

Id. at 304-05 (emphasis in original; footnote omitted).

This is the only mention of the DOTD-PWA in the entire opinion in Pierce. The language of the DOTD-PWA was only referred to therein to show its contrast with the language of the Public Works Act and to support the Supreme Court's

rejection of the Fifth Circuit's reasoning, which had indicated that a subcontractor on a DOTD project who has not filed a statement of amount due in accordance with the DOTD-PWA may not be able to assert a claim against the general contractor's surety for unpaid amounts due for work performed under the subcontract. The Supreme Court made no further comments or conclusions with respect to the DOTD-PWA.

Finally and most importantly, the subcontractor in Pierce clearly was a "claimant" as that term is defined in LSA-R.S. 38:2242(A). Pierce, 190 So. 3d at 302, fn. 2. The Pierce case involved a suit by a subcontractor to recover sums due for work the subcontractor performed pursuant to the contract against a bond furnished under LSA-R.S. 38:2241 because the sums were not paid by the general contractor. The definition of "claimant" in LSA-R.S. 38:2242(A) is nearly identical to the definition of "claimant" in the DOTD-PWA: both statutes define a claimant as "any person to whom money is due pursuant to a contract with the owner or a contractor or subcontractor for doing work, performing labor, or furnishing materials or supplies for the construction, alteration, or repair of any of any public works ...." LSA-R.S. 48:256.5(A); 38:2242(A). However, in the instant suit, all pay applications submitted by ABS to JCG during the pendency of the contract were paid in full,[2] and ABS was not seeking the recovery of unpaid invoices for work done pursuant to the Subcontract with JCG. Accordingly, ABS is not a "claimant" pursuant to LSA-R.S. 48:256.5(A). Because ABS was not a "claimant" as that term is defined in LSA-R.S. 48:256.5(A), the provisions of

[2]Anthony Bertas, the founder and owner of ABS, testified that JCG had paid ABS for all invoices or pay applications, less the retainage fee pursuant to the Subcontract, which totaled $1,969,772.00, at the time ABS left the Project. Importantly, JCG had never shorted ABS any amounts due for work invoices.

LSA-R.S. 48:256.5(B)[3] and LSA-R.S. 48:256.3(B)[4] are inapplicable, and the exception of JCG and Continental raising the objection of no cause of action lacks merit. Therefore, I concur in the *per curiam*'s denial of this exception.

DOTD's Peremptory Exception of Peremption and Prescription

However, as to DOTD's peremptory exception raising the objections of peremption and prescription, I would find merit in DOTD's peremptory exception of prescription in light of this court's recent decision in BellSouth Telecommunications, L.L.C. d/b/a AT&T Louisiana v. A&A Cable Contractors, Inc. and CSRS, Inc. 2016-0803 (La. App. 1st Cir. 5/11/17), 221 So. 3d 90, and thus would decline to address DOTD's peremption argument as moot.

As noted in the *per curiam* opinion, ABS asserted only **tort** claims against DOTD, who was not added to the suit until after the one-year prescriptive period ran. In order for ABS's claims against DOTD to be considered timely, the prescriptive period must have been interrupted or suspended.

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[3]Louisiana Revised Statute 48:256.5(B) provides:

> Any claimant shall, after the maturity of his claim and within forty-five days after the recordation of final acceptance of the work by the department or of notice of default of the contractor or subcontractor, record the original sworn statement of the amount due him in the office of the recorder of mortgages for the parish in which the work is done and file a certified copy of the recorded sworn statement of the amount due, showing the recordation data, with the undersecretary of the department.

[4]Louisiana Revised Statute 48:256.3 is entitled "Payment Bond" and provides in subsection (B) as follows:

> The payment provisions of all bonds furnished for department contracts described in this Subpart, regardless of form or content, shall be construed as and deemed statutory bond provisions. Any such bond which fails to contain any of the requirements set forth in this Subpart shall be deemed to incorporate all of the requirements set forth in this Section. Language in any such bond containing any obligations beyond the requirements set forth in this Part shall be deemed surplusage and read out of such bond. **Sureties and contractors executing payment bonds for department contracts under this Subpart shall be immune from liability for or payment of any claims not required by this Subpart.**

(Emphasis added). The Pierce court commented that there was no indication that an immunity provision in the Public Works Act (LSA-R.S. 38:2241(C)), which this court notes is nearly identical to the immunity provision in the DOTD-PWA (LSA-R.S. 48:256.3(B)), was intended to replace any of the contractual remedies that a person who also qualifies as a "claimant" under the Public Works Act otherwise possesses. Pierce, 190 So. 3d at 306, fn. 6.

While ABS has alleged that all defendants are solidarily liable,[5] the claims against DOTD sound only in tort.[6] No argument was made by ABS in the memoranda and briefs filed with this court that JCG is a tortfeasor.[7] Moreover, JCG's liability was founded solely on breach of contract in the jury verdict rendered. ABS does not dispute that in this case JCG and DOTD are not joint tortfeasors. Thus, prescription could not be interrupted pursuant to LSA-C.C. art. 2324(C).

Instead, the crucial issue herein is whether JCG and DOTD are solidary obligors, *i.e.*, whether a tortfeasor is a solidary obligor with a contractual obligor under the facts of this case. Louisiana Civil Code article 1794 provides that an "obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee." Moreover, solidarity is never presumed; rather, "[a] solidary obligation arises from a clear expression of the parties' intent or from the law." LSA-C.C. art. 1796. For example, solidarity arises as a matter of law when one conspires with another to commit an intentional or willful act pursuant to LSA-C.C. art. 2324(A), but in this case, there are no allegations of intentional or willful acts by JCG or DOTD.[8] Additionally, there has been no

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[5]See Petition, ¶ 35 (where ABS alleged that Continental is solidarily bound with JCG); Supplemental and Amending Petition, ¶ 53 (where ABS alleged that JCG, Continental, ABMB Engineers, and PSI were solidarily liable); ABS's Second Supplemental and Amending Petition Directed to Defendant's ABMB Engineers and PSI (where ABS alleged that ABMB Engineers, and PSI were solidarily liable with the original defendant, JCG); ABS's Third Supplemental and Amending Petition for Damages, ¶ VIII (where ABS alleged that all defendants, including JCG, Continental, ABMB Engineers, PSI, DOTD, Keystone, Big River, and Premier, were solidarily liable unto ABS).

[6]See ABS's Third Supplemental and Amending Petition for Damages, ¶ III.

[7]In fact, ABS argued that "JCG's liability is, instead, founded on a pure breach of contract," as opposed to redhibition, which has been found to be a hybrid claim sounding both in tort and contract. See Opposition to DOTD's Exceptions of Peremption and Prescription, p. 12.

[8]Notably, in ABS's Supplemental and Amending Petition, ABS alleged that in addition to general acts of negligence, PSI also committed intentional acts that caused harm to ABS. Notwithstanding, there are no allegations that any of the defendants conspired with PSI to commit an intentional or willful act.

demonstration that there was "a clear expression" of intent by JCG and DOTD to be solidary obligors. LSA-C.C. art. 1796.

In support of the position that DOTD and JCG are solidary obligors (an argument made below by both ABS and St. Paul-Travelers), numerous cases have been cited. However, none of the cited cases address the exact issue now before this court. Moreover, the cases cited are factually distinguishable. For example, some of the cases relied upon involve workers' compensation/statutory employer relationships with third party tortfeasors or uninsured/underinsured motorist obligations,[9] both of which involve special statutory schemes specifically aimed at protecting the injured person.[10] Kelley v. Gen. Ins. Co. of Am., 2014-0180 (La. App. 1st Cir. 12/23/14), 168 So. 3d 528, 534–39, writs denied, 2015-0157 (La. 4/10/15), 163 So. 3d 814, and 2015-0165 (La. 4/10/15), 163 So. 3d 816 (Pettigrew, J., dissenting) (Timely filed suit against plaintiff's uninsured/underinsured motorist carrier interrupted prescription against the tortfeasor and her liability insurer because they were determined to be solidary obligors); Glasgow v. PAR Minerals Corp., 2010-2011 (La. 5/10/11), 70 So. 3d 765, 770 (Victory, Guidry, and Clark, JJ., dissenting) (The court held that "whether the source of the obligation was voluntary or not, the fact that an obligation existed to provide workers' compensation benefits meant that for purposes of prescription, the alleged tortfeasor and the employer were solidary obligors," and the timely suit against the statutory employer interrupted prescription against the tortfeasor).

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[9]While the actual solidary nature of the obligations between an uninsured motorist carrier and a tortfeasor were called into question in the dissenting opinions in Hoefly v. Gov't Employees Ins. Co., 418 So. 2d 575 (La. 1982), and the concurrences in Carona v. State Farm Ins. Co., 458 So. 2d 1275, 1279 (La. 1984), the prevailing jurisprudence finds solidary obligations in this context.

[10]See Louisiana Workers' Compensation Law, LSA-R.S. 23:1020.1, *et seq.* and Uninsured Motorist Coverage Law, LSA-R.S. 22:1295 (renumbered from LSA-R.S. 22:680 by Acts 2008, No. 415, § 1, eff. Jan. 1, 2009 and redesignated from LSA-R.S. 22:1406(D) by Acts 2003, No. 456, § 3).

The other cases cited do not address interruption of prescription. Bellard v. Am. Cent. Ins. Co., 2007-1335 (La. 4/18/08), 980 So. 2d 654, 663–67 (An employer's uninsured motorist carrier and the employer and/or the employer's worker's compensation insurer were determined to be solidary obligors for purposes of damages); Standard Roofing Co. of New Orleans v. Elliot Const. Co., 535 So. 2d 870, 881-882 (La. App. 1st Cir. 1988), writs denied, 537 So. 2d 1166 (La. 1989), and 537 So. 2d 1167 (La. 1989). In the Standard Roofing case, the court determined that the original obligations of two defendants were several pursuant to LSA-C.C. art. 1787, as each obligor had separate obligations to perform separate acts. However, in reviewing the record on appeal after the trial on the merits, the court found that both obligors' independent breaches combined and caused the same *exact* item of damage – an unacceptable roof. Each obligor's breach was so severe that, alone, each breach would have required a total replacement of the roof. Thus, the court held the obligation owed was now solidary such that the obligor who paid to replace the roof was entitled to contribution from the other obligor. This case did not involve prescription and was decided before the 1996 amendments to LSA-C.C. arts. 2323 and 2324.

The remaining cited cases were decided before the 1996 amendments to LSA-C.C. arts. 2323 and 2324, which abolished solidary liability for non-intentional joint tortfeasors.[11] Osborne v. Ladner, 96-0863 (La. App. 1st Cir. 2/14/97), 691 So. 2d 1245, 1256–57 (The court found solidary liability for

[11]See BellSouth, 221 So. 3d at 93 (citing Dumas v. State ex rel. Dept. of Culture, Recreation and Tourism, 2002-593 (La. 10/15/02), 828 So. 3d 530, 537). Further, subsection B of LSA-C.C. art. 2324 provides in pertinent part that "[a] joint tortfeasor shall not ... be solidarily liable with **any other person** for damages attributable to the fault of that person." (Emphasis added). The legislature did not state only that "tortfeasors" shall not be solidary liable with each other; rather, the legislature broadened the prohibition against *in solido* liability to provide that a tortfeasor shall not be solidarily liable with **any** other person. It appears that this statutory language has eliminated solidary liability not only between non-intentional joint tortfeasors, but also between a non-intentional tortfeasor and all others, including those whose alleged liability results from contract, absent application of a special statutory provision similar to the provisions for workers' compensation or uninsured/underinsured motorist obligations.

damages between seller of home who was liable for damages as a bad faith seller and termite company providing termite inspection report to buyer who was liable for damages for breach of its duty of reasonable care to buyer; the buyer settled with the termite company, and the seller was found to be a solidary obligor with the termite company who was entitled to have the damages awarded to buyer reduced pursuant to LSA-C.C. art. 1803; the case was decided before the 1996 amendments to LSA-C.C. arts. 2323 and 2324 and did not involve prescription); Lewing v. Sabine Par. Police Jury, 95-630 (La. App. 3d Cir. 11/2/95), 664 So. 2d 598, 600 (In a case decided before the 1996 amendments to LSA-C.C. arts. 2323 and 2324, a contract breacher and tortfeasors were found to be solidary liable for purposes of prescription).

Turning to the instant case, in light of the 1996 amendments to LSA-C.C. art. 2324(B) abolishing solidarity among joint tortfeasors and in the absence of any special statutory provisions similar to the provisions for workers' compensation or uninsured/underinsured motorist obligations that would apply to this case, I find no basis for holding that the timely filed suit against the alleged contract breacher (JCG) interrupted prescription as to the tortfeasor (DOTD) in this case. Instead, I find the cases of Toomer v. A-1 Fence & Patio, Inc., 2008-2197 (La. App. 1st Cir. 10/27/09), 29 So. 3d 609, writ denied, 2009-2564 (La. 2/5/10), 27 So. 3d 302, and BellSouth, 221 So. 3d 90, to be more analogous.

In BellSouth, BellSouth Telecommunications, L.L.C. d/b/a AT&T Louisiana ("BellSouth") contracted with A&A Cable Contractors, Inc. ("A&A") to install underground telephone cables. After discovering that the cables were damaged due to the cables not being installed at the proper depth, BellSouth filed suit against A&A, alleging that A&A breached the contract in failing to install the cables as specified in the contract. In the petition, BellSouth alleged that it

discovered the damage less than a year before it filed suit against A&A. Over a year after filing suit against A&A and over two years from the date it discovered the damaged cables, BellSouth amended its petition to add tort claims against CSRS, Inc. ("CSRS"). In the supplemental petition, BellSouth claimed that the defendants were jointly and/or solidarily liable for its damages. CSRS then filed a peremptory exception asserting the objection of prescription since BellSouth asserted only claims in tort against CSRS and had filed suit over a year after the commencement of the prescriptive period. CSRS further contended that the prescriptive period was not interrupted by BellSouth's suit against A&A since CSRS and A&A were neither joint tortfeasors nor solidarily liable. The trial court found that BellSouth's claims against A&A sounded in contract only and that the claims against CSRS sounded only in tort. Accordingly, the trial court concluded that CSRS and A&A could not be joint tortfeasors. The trial court also found that CSRS and A&A were not solidarily bound, and the court sustained the exception of prescription.

On appeal, this court had to determine whether CSRS and A&A were solidarily liable such that the timely filed suit against a contract breacher interrupted prescription against a tortfeasor. Relying on Dumas v. State ex rel. Dept. of Culture, Recreation & Tourism, 02-563 (La. 10/15/02), 828 So. 2d 530, 537, this court noted that the 1996 amendments to Louisiana Civil Code Articles

2323 and 2324[12] abolished solidary liability among non-intentional tortfeasors and made each non-intentional tortfeasor liable for his share of fault, stating as follows:

> The supreme court in Dumas found the language of Article 2324B to be clear and unambiguous:
>
> > It provides that in non-intentional cases, liability for damages caused by two or more persons *shall* be a joint and divisible obligation. Each joint tortfeasor *shall not* be liable for more than his degree of fault and *shall not* be solidarily liable with any other person for damages attributable to the fault of that other person. This provision abolishes solidarity among non-intentional tortfeasors, and makes each non-intentional tortfeasor liable only for his share of the fault, which must be quantified pursuant to Article 2323.
>
> Dumas, 828 So. 2d at 537 (Emphasis in original) (Footnotes omitted).
>
> Thus, in determining whether liability for damages is a solidary or a joint and divisible obligation, LSA-C.C. art. 2324A provides that "[h]e who conspires with another person to commit an intentional or willful act" is solidarily liable "with that person, for the damage caused by such act." If liability is not solidary, then "liability for damages caused by two or more persons shall be a joint and divisible obligation." LSA-C.C. art. 2324B. See **McKenzie [v. Imperial Fire and Cas. Ins. Co.,** 12-1648 (La. App. 1 Cir. 7/30/13),] 122 So. 3d at 47-48.

BellSouth, 2016-0803, 221 So. 3d at 94. Finding no allegations in the petitions to support a determination that CSRS and A&A were solidarily bound, this court concluded that the trial court had correctly sustained the exception of prescription.

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[12]Louisiana Civil Code article 2324 provides as follows:

> A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.
>
> B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.
>
> C. Interruption of prescription against one joint tortfeasor is effective against all joint tortfeasors.

In Toomer, a fire destroyed commercial property, and the owner of the property and the lessee of the property sued the lessee's insurer alleging that there was coverage under the policy of insurance for the owner's building and the lessee's contents that were destroyed by the fire. This lawsuit was timely filed, but ultimately dismissed because the owner was not an insured under the policy and the policy did not provide an obligation to the lessee for property damage.

Before the first suit was dismissed, however, the owner filed a separate suit against the lessee and the insurer alleging that the owner's damages were caused by the fault of the lessee (the insured). The same damages sought by the owner in the first suit were sought by the owner in the second suit. The insurer and the lessee filed an exception raising the object of prescription in the second suit, which was granted by the trial court. On appeal, this court noted that the "key factor in this case is whether the first suit was filed against a party who was solidarily liable with the party added as a defendant in the second suit." Toomer, 29 So. 3d at 614.

This court observed that in the second suit, the insurer and the lessee were potentially solidarily liable for the negligence claims of the owner.[13] However, in the first suit there was no solidary liability between the insurer and the lessee based on the pure contract claims asserted. In the first suit, the owner asserted that he was an insured under the policy and sought to enforce the insurance contract in that regard, and the lessee also asserted coverage for his losses under the terms of the policy of insurance. As this court noted therein:

> [I]n the first suit, the allegations against [the insurer] were such that its potential obligation could only be in favor of a claimant who was an insured under the policy, whereas in the second suit, the allegations are such that its potential liability is to another claimant and is brought on a completely different legal premise.

[13]The lessee would be obligated to the owner if found to have negligently caused the fire, and the insurer would be obligated to pay sums that its insured (the lessee) was obligated to pay as damages pursuant to the terms of the policy.

Id. Ultimately, this court held that there was no solidarity between a defendant in the first suit sued on contract claims and a defendant in the second suit sued on claims of negligence; therefore, prescription as to the second suit was not interrupted by the first, and the claim was prescribed. Thus, as in BellSouth and Toomer, I would conclude that there is no solidarity between the contractually bound obligor, JCG, and the tortfeasor, DOTD, in this case. Accordingly, I would grant the peremptory exception raising the object of **prescription**, finding that prescription was not interrupted as to DOTD when suit was filed against JCG. For these reasons, I respectfully dissent from the denial of DOTD's peremptory exception raising the objection of prescription.

THE MERITS

Turning to the merits of the appeal raised by the remaining appellants, JCG, Continental, ABMB Engineers and PSI, which are either not addressed or analyzed in this court's *per curiam* opinion, I would render judgment as follows based on the following rationale.

Prescription of Claims Against Other Appellants (ABMB Engineers and PSI's Assignment of Error No. I)

ABMB Engineers and PSI assert in their first assignment of error that ABS's claims against them are prescribed for the same reasons advanced by DOTD in support of its peremptory exception of prescription.[14] The suit against JCG and Continental was filed by on March 28, 2006, which was less than a year after ABS left the Project on August 9, 2005. ABMB Engineers and PSI were not added to the suit until November 13, 2007, which was well over two years after ABS left the

[14]Unlike DOTD, ABMB Engineers previously raised the objection of prescription in the trial court below through peremptory exceptions filed in response to the claims of ABS. Further, ABMB Engineers and PSI filed a joint motion for summary judgment seeking to dismiss the claims of ABS on the basis that the claims were prescribed. The exceptions and motion for summary judgment were denied by the trial court. Accordingly, ABMB Engineers and PSI assigned as error the trial court's failure to dismiss the claims of ABS against them as prescribed.

Project. The claims brought by ABS against ABMB Engineers and PSI are based solely in tort.[15] Unless the one-year prescriptive period for delictual actions pursuant to LSA-C.C. art. 3492 was interrupted or suspended, the claims against ABMB Engineers and PSI are prescribed. ABS counters that ABMB Engineers and PSI are solidary obligors with JCG for the same reasons it argued that DOTD was solidarily bound with JCG and that, accordingly, its claims against these entities are not prescribed.

Similar to the prescription argument raised by DOTD in its exception filed with this court, ABMB Engineers and PSI argue that they are not solidary obligors with JCG such that the timely suit against JCG interrupted prescription as to ABS's claims against them pursuant to LSA-C.C. arts. 1799 and 3503. In light of my dissent from the majority's denial of DOTD's peremptory exception raising the objection of prescription and for the same reasons stated above, I find merit in ABMB Engineers and PSI's first assignment of error,[16] and would dismiss ABS's claims against ABMB Engineers and PSI with prejudice.

Inconsistency of Jury Verdict Form and Judgment
(JCG and Continental's Assignment of Error No. I)

In JCG and Continental's (sometimes hereinafter referred to as "appellants") first assignment of error, they allege that the judgment of the trial court is inconsistent with the jury verdict form. This assignment of error is based on appellants' argument that the trial court's judgment improperly invoked solidary liability among JCG, ABMB Engineers, PSI, and DOTD. Further, appellants

[15]ABS did assert in its Supplemental and Amending Petition and its Second Supplemental and Amending Petition that it was a third party beneficiary to the contracts that ABMB Engineers and PSI had with JCG, DOTD, and others. However, ABS abandoned these third party beneficiary claims prior to trial by not including the claims in the pretrial order and not presenting those claims at trial. Also, the jury did not make any finding with respect to ABS's third party beneficiary status. Further, in the briefs filed with this court, ABS does not contend that it was a third party beneficiary as to either ABMB Engineers or PSI's contracts.

[16]Because I find merit in ABMB Engineers and PSI's first assignment of error, I would not address ABMB Engineers and PSI's remaining assignments of error.

argue that the trial court ignored the jury verdict form's instructions, which indicated that the trial court would determine whether the damages awarded in the contract section or the damages awarded in the negligence section applied. Instead of selecting the applicable award based on the law, the trial court incorporated the damages awarded in **both** sections in its December 1, 2015, judgment by ruling that JCG alone was liable for the whole amount of the damages awarded in the breach of contract section and further ruling that JCG was solidarily liable with each of the tortfeasors (ABMB Engineers, PSI, and DOTD) up to the amount of each tortfeasor's comparative fault. In light of my finding that ABS's tort claims against ABMB Engineers, PSI, and DOTD are prescribed and should be dismissed, I would consider this assignment of error moot.

Other Errors in Jury Verdict Form Precluding Apportionment of Fault
(JCG and Continental's Assignment of Error No. II)

In their second assignment of error, JCG and Continental argue that the trial court erred in refusing to grant a new trial based on irreconcilable errors in the jury verdict form. To the extent that any portion of this assignment of error would not have been rendered moot by my opinion that the claims against ABMB Engineers, PSI, and DOTD are prescribed, I provide the following analysis.

Appellants maintain that the jury should have been allowed to assign fault to all parties involved in the Project regardless of whether the party was previously dismissed by ABS. Appellants further argue that Question 24 on the jury verdict form, which indicated that the trial court would determine which damage section applied, was misleading or confusing.[17] However, there were no objections lodged by appellants with respect to any of the questions in Section III entitled

[17]Question 24 asked what amount of money would compensate ABS for the total negligence of the parties found to be negligent in Question 23, which also told the jury that any amount awarded to ABS in Question 3 (damages for breach of contract) would not be added to the amount listed in Question 24. The jury was told that the court "will determine which of the two awards applies to this case based on the law."

"Negligence" on the jury verdict form, which section included Question 24.[18] Objections to a jury verdict form must be made on the record or else are waived. Autin's Cajun Joint Venture v. Kroger Co., 93-0320 (La. App. 1st Cir. 2/16/94), 637 So. 2d 538, 543, writ denied, 94-0674 (La. 4/29/94), 638 So. 2d 224. Thus, I am constrained to find that appellants waived any objection they may have had to the "Negligence portion" of the jury verdict form or specifically to Question 24, and I would reject appellants' second assignment of error as meritless.

Challenges to Jury's Factual Finding of Breach of Subcontract(JCG and Continental's Assignment of Error No. III)

In their third assignment of error, appellants contend that the jury erred in determining that JCG breached the Subcontract and that ABS did not, essentially challenging the jury's underlying factual findings. For the reasons stated herein, I concur in the *per curiam* opinion in rejecting this assignment of error. In reviewing a jury's findings of fact, an appellate court may not set aside those findings absent manifest error or unless the findings are clearly wrong. Stobart v. State through Department of Transportation & Development, 617 So. 2d 880, 882 (La. 1993). In order to reverse a trial court's findings, an appellate court must determine that there exists no reasonable basis for the trial court's factual finding and the record shows the finding is clearly wrong or manifestly erroneous after a review of the record in its entirety. Id. "Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony." Id. While it is not accurate to state that a trial court's factual findings can never or hardly ever be

[18]Appellants objected to: Question 4, regarding attorney's fees and the lack of instruction to the jury on the application of the prompt payment statute (LSA-R.S. 9:2784); Question 9, regarding whether ABS defaulted on the Subcontract, which appeared to be a duplicate question; and Questions 10, 11 and 13, pertaining to JCG's claims against St. Paul-Travelers.

erroneous, deference should be given to the fact finder. Bonin v. Ferrellgas, Inc., 2003-3024 (La. 7/2/04), 877 So. 2d 89, 95. Accordingly, when the evidence supports two permissible views, a fact finder's choice of one of the views cannot be said to be clearly wrong or manifestly erroneous. Id.

In support of their assignment of error, appellants argue that ABS's breach of contract claims are merely: (1) that JCG failed to pay ABS amounts due under the Subcontract at the time ABS left the Project and (2) that ABS was not able to attain its production rate goals as planned. Appellants argue that the claims of non-payment are not supported because there was no additional money due to ABS at the time it left the Project on August 9, 2005. Therefore, they contend JCG was not in breach of its payment obligations.

The testimony presented at trial does show that all pay applications submitted by ABS to JCG prior to the termination of the Subcontract were paid in full.[19] However, a review of ABS's petitions and the evidence presented at trial reveals that ABS did not seek the recovery of **unpaid invoices** for work done pursuant to the Subcontract with JCG; rather, ABS sought **damages** from JCG occasioned by JCG's material breaches of the Subcontract, which resulted in damages to ABS. Appellants did not address this important distinction at all in this portion of their arguments in support of this assignment of error.

Appellants' arguments focus on their claim that ABS was bound by the Critical Path Method ("CPM") schedule and that JCG was not bound to ABS's proposed timeline in the Subcontract. Appellants argue that the terms of the Subcontract establish that ABS was bound by the CPM schedule, despite any internal production goals ABS might have had, as the Subcontract between JCG and ABS incorporated all documents of the Prime Contract between JCG and

[19]See footnote 2 supra.

DOTD. Appellants also argue that the Subcontract further provided that ABS would be bound to the same extent as JCG is bound by the Prime Contract insofar as the Prime Contract is applicable to the work of ABS. Further, appellants refer to subsection 1.1 of the General Terms and Conditions of the Subcontract, which, by its terms, required ABS to comply with any time schedule specified by JCG.[20] Appellants also note that, according to the Special Provisions of the Prime Contract, the contractor was required to comply with the special provision entitled "CPM for Construction Progress Scheduling," which provision details the requirements for the CPM schedule required to be submitted by JCG to DOTD. Appellants further contend that, pursuant to all of the contract documents, the CPM schedule controlled ABS's work.

Extensive testimony was elicited at trial from Mr. Bertas, the owner and founder of ABS, regarding the production rate and schedule for ABS's performance of the Subcontract. Mr. Bertas testified that prior to ABS's bid submittals to both JCG and the other general contractor who bid for the Project, ABS met with both contractors. Mr. Bertas indicated that in the meeting with JCG on September 9, 2003, **the most important topic discussed** was how quickly ABS could construct the MSE walls. He stated that **JCG** was interested in having the walls built quickly so that JCG could start the bridge work on the Project. Mr. Bertas testified that JCG knew that, if the bridges were built quickly, JCG would

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[20] Section 1.1 of Subcontract Agreement, Subcontract No. 10263.S012 between JCG and ABS is found in the section entitled "Progress and Completion" and provides as follows:

> Unless herein otherwise specially provided, Subcontractor shall commence the Subcontract Work promptly or upon notice from Contractor. Subcontractor shall prosecute the Subcontract Work diligently to avoid delaying progress of Contractor or other contractors on other portions of the project work and to comply with any time schedule specified by Contractor.

This provision does not require that a subcontractor slow down the progress of its work; rather, this provision seems to instruct a subcontractor to work in an expeditious manner so as to move the project along. Appellants' reliance on only part of the last sentence in this provision to imply that ABS was required to follow a substantially slower production schedule appears to be misplaced.

increase its chances of getting a performance bonus pursuant to the Prime Contract. According to Mr. Bertas and the Prime Contract, **JCG** could earn a $10,000.00 per day bonus with a maximum bonus of $900,000.00 if JCG completed the project prior to the expiration of the total contract time.[21]

Also present at the pre-bid meeting with JCG was Richard Brown, the inventor of the Key System 1 MSE wall system used on the Project. Mr. Brown testified that the JCG representatives were very interested in the production rates about which Mr. Bertas spoke to JCG and, further, that **JCG wanted Mr. Brown to verify that ABS could guarantee its proposed production rate** of 1,700 square feet per day.[22]

Ultimately, ABS's proposed production rate was incorporated into and made part of the Subcontract with JCG as Attachment No. 1 to Exhibit A. The production rate for the construction of the MSE walls was 126 working days over a period of 177 consecutive days, which was based on a fifty-hour work week with five days of work per work week. Item 17 of the Special Provisions of the Subcontract echoed ABS's production rate and provided that "Subcontractor will be required to meet or exceed the following production rate: 300' per day on the leveling pad and 1,700 SF per day on the retaining wall." Using a production rate of 1,700 square feet per day, ABS would complete the 214,200 square feet of wall in 126 days. Mr. Bertas testified that the CPM schedule providing 619 days for the construction of the MSE walls was incongruous with the clear agreement between

[21]The initial total contract time in the Prime Contract was 833 days.

[22]Mr. Brown's testimony was that bids of 2,000 square feet of wall per day were routinely made for long walls like those used on this Project.

JCG and ABS to build the MSE walls over a total of 177 days.[23] Using the CPM schedule, ABS's production rate would have been only 346 square feet per day for 214,000 square feet of MSE walls compared with the rate of 1,700 square foot of wall per day actually incorporated into the Subcontract.[24] Mr. Bertas testified that, at the rate used in the CPM schedule, he would have only needed a three-member crew to achieve that production rate as opposed to the twenty-plus crew in ABS's proposal.

JCG's project manager for the Project, Mika McKee Lawson, testified on behalf of JCG regarding the Subcontract. She had a role in negotiating the Subcontract with ABS and also created the CPM schedule. Her testimony was that Mr. Bertas was the one who was insistent on including ABS's proposal in the Subcontract. Mrs. Lawson also testified regarding additional items that were taken into account on the CPM schedule that were not included in ABS's schedule. She testified that JCG had to clear the land in and around the Project and excavate and move dirt in order to prepare the area for the MSE walls. Additionally, there were drainage items that needed to be done and pile driving for a number of pilings needed on the Project.

The testimony of Kenji Hoshino, an expert in CPM analysis and scheduling, was also presented and directly contradicted the testimony of Mrs. Lawson. Mr. Hoshino evaluated and compared JCG's baseline CPM schedule with ABS's schedule for the MSE walls. He opined that the overall sequence of work on the

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[23]Subsection 27.1 of the General Terms and Conditions of the Subcontract provides that the Subcontract and the Prime Contract Documents were intended to complement and supplement each other and were to be interpreted as such when possible. It further provides that "[i]f, however, any provision of this Subcontract conflicts with a provision of the Prime Contract, the provision imposing the greater duty on the Subcontractor shall govern."

[24]Further supporting the importance of ABS's production rate and schedule to JCG, JCG placed a purchase order with Premier for MSE wall materials with an incorporated daily usage rate of 1,000 to 3,000 units (blocks which measured one square foot of wall space each), which corresponded to ABS's production rate in the Subcontract.

MSE wall planned by ABS and the sequence of work planned by JCG in the CPM schedule were identical, with both schedules contemplating continuous performance. Mr. Hoshino further testified that the only difference between the two schedules was that the JCG schedule had longer durations for all activities, which assumed a much lower productivity than the ABS schedule. Mr. Hoshino addressed Mrs. Lawson's contention that there were items that needed to be completed by JCG prior to ABS's work on the MSE walls began. He stated that those activities, including the drainage items, were scheduled to follow right along with the MSE wall progress.

Mr. Bertas testified that multiple JCG representatives, including Ms. Lawson, informed him that the CPM schedule was manipulated to extend the duration for the construction of the MSE walls beyond the time it would take for ABS to complete the MSE walls in order to achieve the $10,000.00 per day early finish bonus set forth in the Prime Contract. Additionally, Mr. Bertas testified that despite the CPM schedule's extended timeline, he understood from JCG representatives when ABS would start, how long ABS was expected to be on the Project, and how quickly ABS's work would be done.

In light of the evidence and testimony presented, I find that a reasonable basis exists for the jury's finding that ABS's schedule of 126 working days over a period of 177 consecutive days was controlling as between ABS and JCG and that, contrary to JCG's assertions, the schedule was more than a mere internal production goal for ABS. Evidence was presented that JCG expected ABS to perform its work in accordance with the schedule and sequence in the Subcontract. While it would be reasonable to have the actual duration of ABS's work extend

beyond the planned 177 consecutive days due to weather or other typical delays,[25] JCG's extension of the duration of ABS's work from 177 to over 600 days in the CPM schedule was far beyond what was agreed upon by ABS and JCG in the Subcontract. Further, the drastic change in the schedule duration that JCG incorporated into the CPM schedule submitted to DOTD had the effect of preventing ABS from obtaining compensation for actual delays experienced while working on the Project.[26] Moreover, from the perspective of DOTD, JCG and ABS were not delayed; rather, they were on schedule. Accordingly, I find there is a reasonable basis in the record to support the jury's conclusion that JCG breached the Subcontract with ABS, and I find no merit in this portion of JCG and Continental's assignment of error.

Additionally, appellants argue that the jury erred in failing to find that ABS breached the Subcontract. Appellants first argue that ABS failed to adhere to the Project plans and specifications by unilaterally modifying the design of the MSE walls. Appellants maintain that, although the drawings required steel reinforcements (KeyStrips) to be connected on both sides of the block units, ABS bent the key strips in some places and only connected one side of the key strips to the blocks in other places. Appellants argue that while ABS attempted to justify the plan modification, ABS was without authority to do so, as the modification was clearly contrary to the Subcontract.

In support, appellants rely upon subsection 1.3 of the General Terms and Conditions of the Subcontract, which required ABS to complete the work in

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[25]Mr. Hoshino testified that if the actual delays associated with weather and other incidental issues were factored into the equation, the duration of ABS's work would have been 210 days.

[26]There was testimony and evidence in the record that DOTD stopped production on portions of the MSE wall and artificially delayed the approval of the shop drawings and materials on the Project in order to allow DOTD time to develop a solution to the soil conditions beneath the MSE wall.

conformity with the plans and specifications. Appellants also rely on Section 104.06 of the Louisiana Standard Specifications for Road and Bridges, 2000 Edition ("Standard Specifications"), which was incorporated into the Prime Contract and, therefore, the Subcontract.[27]

Section 104.06 provides, in pertinent part, as follows:

> During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinary encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing site conditions before they are disturbed and before the affected work is performed.

Appellants maintain that ABS was required to submit written requests in connection with the obstruction details of the shop drawings, which were not adequate to address the pilings in the abutment area. Appellants argue that by failing to follow the process, ABS improperly deviated from the plans and specifications. However, I find that the testimony actually reflects that, as contemplated by Section 104.06, the pilings (obstructions) were not unanticipated conditions, and a plan ambiguity is not a differing site condition.

As noted by ABS, the evidence at trial showed that the shop drawings contained errors concerning how the steel reinforcements were to be installed at the abutments. Mr. Brown testified that the shop drawings prepared by Keystone were deficient with respect to the installation around the obstructions. Further, Mr. Brown testified that MSE walls have been and could be designed for single or double pin connections; however, this particular wall was neither designed for a single pin connection nor did the design provide a way for two pin connections to

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[27]The Subcontract between JCG and ABS incorporated all documents of the Prime Contract between JCG and DOTD and provided that ABS would be bound to the same extent as JCG is bound by the Prime Contract insofar as the Prime Contract is applicable to the work of ABS.

be made around the abutments.[28] Importantly, Mr. Brown testified that, based on his review of ABS's work, he believed that ABS connected the steel reinforcements at the abutments in accordance with the plans or at least as close to the drawings as possible; however, it was simply the plans that were wrong.

Before any issue concerning the steel reinforcements at the abutments was raised in April 2005,[29] ABS had constructed the MSE walls at four of the six abutments. The last two abutments were about halfway or more than halfway finished. Mr. Bertas testified regarding the obstruction detail in the shop drawings and precisely how the detail was interpreted by ABS in order to construct the walls at the abutments. Further, both PSI and DOTD had inspectors on the Project, who inspected the walls at the abutments, all of the connections, and even inspected every piece of steel reinforcement used by ABS. Mr. Bertas testified that ABS built the wall around the abutments to the satisfaction of the inspectors. He stated that "the inspectors would review and look at every connection and make certain that everything was done to their satisfaction before they would allow us to proceed," and that he never received a call from anyone – not JCG nor inspectors from PSI or DOTD – that ABS was building anything incorrectly. Until April 2005, all parties interpreted the shop drawings and plans similarly.[30]

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[28]Dr. Barry Christopher, an expert in MSE walls and geotechnical engineering, candidly testified that the plans ABS was supposed to follow were, essentially, not constructible, which was a design issue not involving ABS.

[29]The issue arose after Dr. Christopher first visited the Project site with a class he was teaching in Baton Rouge in April 2005. After his site visit, Dr. Christopher contacted DOTD about his concerns regarding the MSE wall, including the abutment issue. Ultimately, he was hired by DOTD to fully review the walls and how they were constructed in addition to reviewing the issues with the soil.

[30]Michael Bennett was one of the inspectors for DOTD. By stipulation, JCG called Mr. Bennett as a witness through his deposition testimony, and the trial judge allowed the jury to take the deposition transcript into the jury room. No other testimony was presented from any other inspector on the Project. Mr. Bennett testified that he did not have any special certifications or training for inspections and had never encountered retaining walls like the MSE walls on the Project which used metal strips. His testimony did not contradict Mr. Bertas' testimony.

While Dr. Christopher indicated that a single pin connection should have raised an issue to ABS that the design was compromised, Mr. Brown acknowledged that it was possible to have single pin connections in an MSE wall. In weighing the testimony, the jury could have properly concluded that it was not unreasonable for ABS to interpret the plan to permit the single pin connections especially in light of the fact that ABS's work was inspected and approved by the inspectors on site. Furthermore, the record supports a finding that ABS did not improperly deviate from the plans and specifications and that it was reasonable for the jury to conclude that ABS's interpretation of the plans and shop drawings at the abutments were in accordance with the plans or at least as close to the drawings as possible.

Finally, appellants contend that, by abandoning the Project, ABS was the party in breach of the Subcontract. According to appellants, ABS was paid all amounts due and ABS's work was on track with the CPM schedule. According to appellants, shortly after an issue was raised regarding ABS's work, ABS left the Project, which they argue was in breach of the Subcontract. Appellants rely on Section 15 of the General Terms and Conditions of the Subcontract as well as Subsection 22.5 to support their position that ABS was not entitled to stop work during the pendency of a dispute between ABS and JCG.

Section 15, entitled "Claims relating to Contractor," provides as follows:

> Subcontractor shall give Contractor written notice of all claims not included in Paragraph 14 [pertaining to claims against the owner/DOTD] within five (5) days of the beginning of the event for which claim is made; otherwise, such claim shall be deemed waived. The pendency of a dispute shall not interfere with the progress of the work by Subcontractor nor limit the right of Contractor to proceed, in good faith, to remedy an alleged default by Subcontractor.

Appellants thus maintain that ABS was not permitted to stop work due to any dispute as to ABS's entitlement to additional compensation.

Subsection 22.5 is found under the Section entitled "Default or Breach" and provides as follows:

> Except as limited by this Subcontract, Subcontractor shall have the rights and remedies available at law or in equity for a breach of this Subcontract by Contractor. Any default by Contractor shall be deemed waived unless Subcontractor shall have given Contractor written notice thereof within 7 days after occurrence of such default. Subcontractor shall not be entitled to stop the work or terminate this Subcontract on account of Contractor's failure to pay an amount claimed due hereunder (including changed or extra work) so long as Subcontractor shall not have adequately substantiated the amount due or so long as a good faith dispute exists as to the amount due. Subcontractor shall not be entitled to stop the work on account of a default by Contractor unless such default shall have continued for more than 7 days after the Contractor's receipt of written notice of such default from Subcontractor.

Accordingly, appellants argue that ABS was not entitled to stop its work because JCG failed to pay an amount claimed to be due.

Additionally, appellants contend that ABS agreed that it would not be owed any additional compensation unless the costs were approved and paid by DOTD. I note, however, that appellants have failed to cite to any contract provision in support of this assertion.[31] Appellants also argue that ABS's breach of the Subcontract was not excused by virtue of the fact that ABS could not complete its work as quickly as it had hoped.

ABS counters that Subsection 22.5 of the General Terms and Conditions of the Subcontract permitted ABS to stop work and terminate the contract upon seven days' notice if JCG was in default. ABS notes that it did provide JCG with the requisite notice on July 27, 2005. ABS further points out that, in addition to providing notice of default, the July 27, 2005 letter identified previous notifications sent to JCG for claims which arose during the pendency of the Subcontract as well as previous demands. Thus, on August 5, 2005, ABS demobilized from the site

[31]Appellants appear to be relying on Subsection 2.1 of the General Terms and Conditions of the Subcontract, *i.e.*, the pay-if-paid clause, the applicability of which is addressed in my discussion of appellants' fourth assignment of error.

due to JCG's breach and failure to cure, which it was permitted to do under Subsection 22.5.

Having considered the arguments raised by appellants and appellees and the record, I find the record amply supports the jury's finding that JCG breached the Subcontract and that ABS did not breach the Subcontract. Accordingly, I find no manifest error by the trial court in rendering a judgment finding that JCG breached the Subcontract and that ABS did not breach the Subcontract, and I concur in the *per curiam* opinion in this regard.

Pay-if-Paid Clause
(JCG and Continental's Assignment of Error No. IV)

In their fourth assignment of error, appellants assert that the Subcontract contained a pay-if-paid ("PIP") clause that bars ***any*** recovery by ABS. Appellants argue that because JCG was never paid by DOTD for the amounts claimed to be owed by ABS, JCG cannot be liable to ABS for any of ABS's alleged damages. Subsection 2.1 of the General Terms and Conditions of the Subcontract as modified by the Special Provisions provides as follows:

> Subject to other provisions hereof, Contractor agrees to pay Subcontractor the stated consideration for said Subcontract Work on the basis and quantities performed, and allowed and paid for by the owner, and to make payment within ten (10) days from the time that Contractor receives payment from Owner, ~~less the same percentage retained by owner~~ less 5% retainage, which percentage may be retained until completion of the Prime Contract and final estimate is received from Owner. A condition precedent for any payment to Subcontractor shall be receipt by Contractor of payment from Owner. A subcontract estimate shall be provided for each period in which Subcontractor has earnings.

I agree that the PIP clause states that payment by DOTD to JCG is a condition precedent to payment by JCG to ABS. However, I also note that JCG paid ABS for all invoices and pay applications (less the retainage fee pursuant to the Subcontract) that were due at the time ABS left the Project. Moreover, ABS clearly does not seek recovery of unpaid invoices or pay applications for work

done pursuant to the Subcontract with JCG that would invoke the application of the PIP clause; rather, ABS sought **damages** as a result of JCG's breach of the Subcontract. Specifically, ABS's claim was that it incurred losses and damages as a result of JCG's continued breach of the subcontract. Just as the 5% retainage would not be deducted from the payment of damages and losses incurred by ABS as a result of JCG's breach, JCG's obligation to pay for the losses and damages of ABS incurred by JCG's breach is not legally or contractually contingent on JCG receiving payment from DOTD. I would reject JCG's argument otherwise, as I find that the PIP clause is simply not applicable to the claims asserted by ABS.

Thus, I find that appellants' fourth assignment of error also lacks merit, and concur in the majority's rejection of this assignment of error.

Challenges to the Award of a 5% Penalty and Attorney's Fees
(JCG and Continental's Assignment of Error No. VII)

In their seventh assignment of error, appellants argue that the trial court erred in rendering judgment assessing a penalty of 5% plus attorney's fees against JCG in favor of ABS. Appellants argue that the only basis for this award could have been LSA-R.S. 9:2784, but note the statute was not mentioned in the instructions to the jury nor on the jury verdict form. Additionally, appellants argue that ABS never alleged or proved that JCG failed to comply with the statute.

My review of the record reveals that in the original petition and supplemental and amending petitions, ABS requested attorney's fees and all other general and equitable relief. ABS also identified the issue of whether ABS was entitled to recover penalties and attorney's fees from JCG and Continental pursuant to LSA-R.S. 9:2784 as one of its contested issues of law in the Pretrial Order jointly filed by all parties. Although ABS maintains that appellants waived their objection at trial, I find that appellants adequately preserved for review on appeal

their objection to the jury verdict form as well as the lack of a special jury instruction with respect to penalties and attorney's fees.

Question 4 on the jury verdict form provided as follows: "Do you find that [JCG] is liable to ABS for penalties and reasonable attorneys' fees in addition to damages that have been awarded?" The form instructed that if jurors answered yes to Question 4, the jury was to then proceed to Question 5, which provided as follows: "What penalty percentage should be awarded to ABS? (*Penalty cannot exceed 15%.*)." (Italics in original). At trial, the following objection was made:

> **[Counsel]**: ... The second objection for number four is, it gives no direction whatsoever to the jury on the prompt payment statute. The statute only applies if an owner had paid – has paid amounts to a contractor and the contractor has no reasonable cause to pay those amounts to the subcontractor. That's what the statute says. And leaving this open-ended like this gives no guidance ....

This objection was made prior to the case being submitted to the jury and was timely pursuant to LSA-C.C.P. art. 1793.

Louisiana Revised Statute 9:2784, entitled "Late payment by contractors to subcontractors and suppliers; penalties," provides, in pertinent part, as follows:

> A. When a contractor receives any payment from the owner for improvements to an immovable after the issuance of a certificate of payment by the architect or engineer, ... the contractor shall promptly pay such monies received to each subcontractor and supplier in proportion to the percentage of work completed prior to the issuance of the certificate of payment by such subcontractor and supplier, ...
>
> * * *
>
> C. If the contractor ... without reasonable cause fails to make any payment to his subcontractors and suppliers within fourteen 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, from the expiration of the period allowed herein for payment after the receipt of payment from the owner. The total penalty shall not exceed fifteen percent of the outstanding balance due. In addition, the contractor ... shall be liable for reasonable attorney fees for the collection of the payments due the subcontractors and suppliers. However, any claim which the court finds to be without merit shall

> subject the claimant to all reasonable costs and attorney fees for the defense against such claim.

Appellants argue that LSA-R.S. 9:2784 is inapplicable because ABS was paid all amounts due at the time it left the Project. I agree. However, as stated above, ABS did not bring its claim for the failure of JCG to remit payment received from DOTD for invoices from ABS for work done on the Project. Accordingly, just as I find that the PIP Clause is inapplicable to this particular case, so is LSA-R.S. 9:2784.

Additionally, I fully agree with the appellants that the jury was not adequately instructed on the award of penalties. Travis v. Spitale's Bar, Inc., 2012-1366 (La. App. 1st Cir. 8/14/13), 122 So. 3d 1118, 1125, writs denied, 2013-2409 (La. 1/10/14), 130 So. 3d 327, 2013-2447 (La. 1/10/14), 130 So. 3d 329 (a trial court is obligated to provide adequate jury instructions that properly reflect the applicable law). The jury verdict form interrogatory failed to identify the basis of the award and failed to give any guidance or direction to the jury. A trial court is vested with wide discretion in framing the questions presented as special jury interrogatories; notwithstanding, this court has stated as follows:

> If the trial court submits a verdict form to the jury with misleading or confusing interrogatories, just as when it omits to instruct the jury on an applicable essential legal principle, such interrogatories do not adequately set forth the issues to be decided by the jury and may constitute reversible error. **Bradbury v. Thomas**, 1998–1678, p. 19 (La. App. 1st Cir.9/24/99), 757 So. 2d 666, 679.

Schram v. Chaisson, 2003-2307 (La. App. 1st Cir. 9/17/04), 888 So. 2d 247, 251. Notably, the jury in this case sent the following questions to the trial court regarding Question 5 on the jury verdict form: "What are penalties referring to? How are they calculated?" In response, the trial court instructed the jury to refer to the "jury charges and/or verdict form." However, neither the jury verdict form nor the jury charges provided any information regarding the assessment of penalties.

Accordingly, because I find merit to this assignment of error, I would vacate the portion of the trial court's judgment that ordered JCG to pay substantial and significant penalties to ABS pursuant to LSA-R.S. 9:2784. Therefore, to the extent that the *per curiam* opinion results in this portion of the trial court's judgment standing, I respectfully dissent.

Loss of Profits and Business
(JCG and Continental's Assignment of Error No. V)

Appellants argue that ABS was not contractually entitled to lost profits or loss of business and, further, that such damages were not sufficiently proven at trial. Appellants argue that ABS failed to establish its loss of business claim of $2,000,000.00 with any evidence or corroborating testimony. With respect to the remaining $1,174,000.00 award of damages for excess costs and lost profits, appellants contend that the award should be reduced further because the Subcontract precluded the recovery of lost profits.

Appellants argue that ABS cannot recover any damages for lost profits because the provisions in the Subcontract and the Prime Contract precluded such recovery. In support, appellants first rely upon one sentence of Subsection 13.2 of the General Terms and Conditions of the Subcontract, which provides that the Subcontractor is not entitled to anticipated profits on work not performed. However, when read in whole, Subsection 13.2 applies "[i]f the Prime Contract is terminated." In this case, the Prime Contract between JCG and DOTD was not terminated. Accordingly, I do not find this provision controlling.

Similarly, Section 108.11 of the Standard Specifications, which was incorporated into the Prime Contract and the Subcontract, is not applicable. Section 108.11, entitled "Termination of Contract," provides for the handling of payment to the contractor when DOTD terminates the contract and states, in part, that no claims for loss of anticipated profits will be considered. However, Section

108.11 does not address, mention, or provide for a situation where the **contractor** terminates the contract.

Appellants also rely upon Section 105.18 of the Standard Specifications, which provides for claims for additional compensation. This provision sets forth the procedure for seeking additional compensation when "the contractor deems additional compensation is due for work, material, delays, inefficiencies, disruptions or other additional costs/or expenses not covered in the contract or not ordered as extra work." Section 105.18 further provides that payment of these claims is to be made in accordance with Section 109.04, entitled "Compensation for Alterations of the Contract."

Section 109.04 provides, in pertinent part, that the "[p]ayment for work performed in accordance with Subsection 104.02 [alteration of the contract provision] will be made at the unit prices or agreed prices stipulated in the plan change authorizing the work." In this case, ABS is not seeking additional compensation for work not covered in the contract. Rather, ABS is seeking the payment of damages incurred as a result of JCG's breach of contract, which damages include the excess costs incurred by ABS, lost profits on the Project, and the loss and destruction of its business.

Louisiana Civil Code article 1995 provides that "[d]amages are measured by the loss sustained by the obligee and the profit of which he has been deprived." Accordingly, the cited contract provisions involving how additional compensation should be calculated are not controlling in determining what amount of loss was sustained by ABS as a result of JCG's breach of the Subcontract, and I find that ABS was entitled to seek the profits it was deprived of as a result of JCG's breach of the Subcontract.

Regarding the amount of damages awarded, the jury verdict form only asked, "[h]ow much money would fully and fairly compensate ABS for [JCG's] breach of contract?" The jury's response was the awarding of the lump sum of $3,174,160.00 without any itemization of the elements of damage claimed by ABS (excess costs, lost profits, and loss/destruction of business). The individual elements of a damage award are not required to be itemized on the jury verdict form. See LAD Servs. of Louisiana, L.L.C. v. Superior Derrick Servs., L.L.C., 2013-0163 (La. App. 1st Cir. 11/7/14), 167 So. 3d 746, 762–63, writ not considered, 2015-0086 (La. 4/2/15), 162 So. 3d 392 (a jury verdict form is not legally deficient simply because the elements of special damages are not itemized); Abrams v. Dinh, 471 So. 2d 994, 999–1000 (La. App. 1st Cir. 1985) (the trial court did not abuse its discretion in "submitting a lump sum jury verdict on damages rather than special interrogatories on each element of damages claimed").

Regarding review of lump sum awards:

> A lump sum judgment is normally presumed to award all items of damages claimed, and the appellant's burden of proving that the fact finder abused its much discretion is more difficult than usual because the intention to award a specific amount for any particular item is not readily ascertainable. **Bryan v. City of New Orleans**, 98–1263 (La. 1/20/99), 737 So. 2d 696, 697-98. Each case must be determined on its own facts and circumstances, and we must examine each element of damage claimed to determine if there was an abuse of discretion. See **Reck** [**v. Stevens**], 373 So. 2d [498,] 501.

Johnson v. Henry, 2016-0271 (La. App. 1st Cir. 10/31/16), 206 So. 3d 916, 919. Further, the Fourth Circuit Court of Appeal has noted that "where it is possible to break out from the lump sum one or more specific items of damage, and to do so gives a better picture of the adequacy or inadequacy of the award, then it may be done." Taylor v. Tulane Med. Ctr., 98-1967 (La. App. 4th Cir. 11/24/99), 751 So. 2d 949, 964. (Citations omitted.)

In this case, ABS claimed excess costs, lost profits, and the loss of its business as a result of the breach of the Subcontract by JCG.[32] Appellants argue that ABS failed to establish its claim by failing to establish a valuation for the loss and/or destruction of its business and further argue that ABS's claim for lost profits should be reduced and limited to $436,584.02, the amount of lost profits sought by ABS in its July 27, 2005 claim letter to JCG prior to demobilizing from the Project on August 9, 2005.

At trial, extensive testimony and evidence was presented to substantiate and to challenge the excess costs incurred and the profits lost by ABS as a result of JCG's breach of the Subcontract. After a foundation was laid for Mr. Bertas' familiarity with the accounting of ABS, Mr. Bertas was asked how he would calculate excess cost and lost profits on the Project. Mr. Bertas testified that he would use the total cost approach. This approach adds the total cost of the Project, which includes overhead, to the amount of net profits that should have been earned on the Project. According to Mr. Bertas' testimony and the evidence presented to the jury, the total cost on the Project was $2,574,907.12. Mr. Bertas' testimony was that the net profits should have been $1,135,029.00[33] on this Project, which is

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[32]I note that the initial burden of establishing each and every element of damage claimed rested with ABS. Epps v. City of Baton Rouge, 604 So. 2d 1336, 1347 (La. App. 1st Cir. 1992).

[33]Mr. Bertas testified that the original proposal made by ABS to JCG totaled $8.1 million, which proposal provided that ABS would be providing all of the materials for the Project. The original proposal included all of the costs for the materials, historical costs, and then a markup added for gross profit, which Mr. Bertas testified was approximately $1,555,000.00. According to Mr. Bertas, the net profit on the Project was anticipated to be $1,135,000.00, which amount factored in operating costs of approximately $70,000 per month for the estimated six months that ABS expected to be on the Project. Mr. Bertas further testified that ABS and JCG later agreed to remove nearly all costs for materials from the original proposal, which had the effect of reducing the total Subcontract price as well and, more importantly, reducing the price for the required performance and payment bond. Also, Mr. Bertas stated that while ABS agreed to remove all costs for material from the Subcontract, the anticipated net profit of $1,135,000.00 was not going to change.

supported by the record.[34] Under this approach, the sum of the total cost and the net profits, $3,709,936.12, is then reduced by $1,969,772.00 – the amount actually paid to ABS by JCG on the Project – in order to determine the excess cost and lost profit. Thus, according to Mr. Bertas and the evidence, ABS's excess costs and lost profits totaled approximately $1,740,164.00.[35] Thus, as to these elements of ABS's claims, I find no error in the jury's award for ABS's excess costs and lost profits.

The remaining item of damage claimed by ABS was the loss/destruction of business. Appellants argue that the record does not support such an award, as ABS relied solely on the testimony of Mr. Bertas, who testified that, as the owner and operator of ABS, he would place a "very, very conservative number of $2 million in the loss of the business," in addition to the excess costs and lost profits. Appellants argue that such testimony was insufficient to support this item of damage. On review, I agree.

While ABS cites to facts and testimony showing that its business was "destroyed" and notes that the independent testimony from Mr. Brown confirmed

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[34]As further support for the conclusion that a reasonable basis exists in the record to support the estimate for the $1,135,029.00 in net profits on the Project, Mr. Bertas testified that in 2004, the same year ABS started the Project and should have completed the Project, ABS was projected to have a net profit of $1,282,000.00, which amount was shown on a 2004 Projected Income/Revenue Statement. However, as Mr. Bertas testified and as shown by ABS's 2004 Corporate Tax Return, ABS lost $591,303.00 in 2004, which, when combined with the projected net profit of $1,282,000.00 that did not materialize, resulted in an ultimate loss of over $1.8 million for 2004. ABS's 2005 Corporate Tax Return reflected a loss of $882,187.00, of which Mr. Bertas testified approximately $780,000.00 was attributable to the project, with about $100,000.00 of the loss in 2005 attributable to a separate Project. Moreover, Rodney Tompkins, a construction consultant who was called as a witness for both ABS and St. Paul-Travelers, testified that the value of the inefficiency claim alone was $801,031.12 using the measured-mile approach, which amount did not include lost profits or overhead.

[35]On review of the reasonableness of and support in the record for this award, I note that the testimony and evidence showed that as of July 27, 2005, ABS's damages for its excess costs and lost profits due to the breach of the Subcontract by JCG was, at a minimum, $1,680,622.70. This $1,680,622.70 damage claim was presented to JCG by ABS prior to the demobilization in August of 2005, and Mr. Bertas testified that the damages incurred by ABS were continuing to increase as ABS continued on the Project. Moreover, this was the same damage claim JCG presented to the DOTD on behalf of ABS in its September 28, 2005 claim letter.

that ABS forever lost the unique relationship it had with Keystone, such evidence only supports a finding that ABS's business was destroyed. However, there is no evidence in the record on which the jury could reasonably rely establishing the ***value*** of the loss of ABS's business. While Mr. Bertas's own general valuation of the loss of the business was $2,000,000.00, there was no testimony to support the valuation and no documentary evidence, expert valuation or otherwise, to support Mr. Bertas' "conservative number" of $2,000,000.00.[36]

This court has held that "the loss of value of the business at the time of the destruction" is the appropriate measure of damages for the destruction of a business. Achee v. Natational Tea Co., 95-2556 (La. App. 1st Cir. 12/20/96), 686 So. 2d 121, 125. However, in Achee, the plaintiff presented the expert testimony of a certified public accountant regarding the value of the business at issue. Here, ABS relies on the unsupported testimony of its owner that the business was conservatively worth $2,000,000.00 and provides no further explanation or justification for Mr. Bertas' estimate. In this case, ABS bore the burden of establishing the amount of its damages by a preponderance of the evidence and failed to do so. See Santangelo v. Capitol Home Planners, 424 So. 2d 1214, 1215 (La. App. 1st Cir. 1982). It is not fatal to a plaintiff's burden that he lacks independent, corroborating evidence; however, "the lack of even a minimal degree of detail or [specificity] in his own testimony as to the extent of the loss precludes an award, even under the holding in Jordan v. Travelers Insurance Co., 257 La. 995, 245 So. 2d 151 (1971), relative to the degree of certainty required to support

[36]While ABS attempted to introduce an exhibit which purported to show ABS's annual revenue per year from 1994-2004, appellants objected to the exhibit due to the fact that the document was a summary and none of the supporting documents used to compile the summary were introduced. This objection was sustained. There was also an attempt to have Mr. Bertas testify regarding a possible sale of ABS in 1998; however, appellants objected to the testimony as hearsay and speculation, which objections were also sustained. No proffer of the aforementioned evidence was made, nor was there any further attempt to substantiate the value of ABS's loss of business.

an award of monetary damages." Casadaban v. Bel Chem. & Supply Co., 322 So. 2d 854, 859 (La. App. 1st Cir. 1975). See also Messer v. Dep't of Corr., Louisiana State Penitentiary, 385 So. 2d 376, 378 (La. App. 1st Cir.), writ refused, 386 So. 2d 1379 (La. 1980) ("Although the trial judge has discretion to determine damages in the absence of exact mathematical proof, an absence of a minimal degree of detail or specificity as to the extent of loss precludes an award."); LeBlanc v. Gibbens Pools, Inc., 447 So. 2d 1195, 1197 (La. App. 2d Cir.), writ denied, 450 So. 2d 958 (La. 1984) ("a minimal degree of detail or specificity is required in fixing damages."); Teen Town Prods., L.L.C. v. Scurlock, 2015-454 (La. App. 5th Cir. 12/23/15), 182 So. 3d 1208, 1215–16 (a plaintiff's testimony as to the value of damages can be sufficient when no contradictory evidence is produced, but the testimony must include some amount of detail or specificity regarding value in order to support an award of monetary damages); Platinum City, L.L.C. v. Boudreaux, 2011-559 (La. App. 3d Cir. 11/23/11), 81 So. 3d 780, 786 ("plaintiff must allege damages to a certain degree of specificity").

Accordingly, in the absence of any degree of detail or specificity with respect to the value of the destruction of its business, I conclude that the record does not support this portion of the jury's award of damages to ABS.

Pursuant to Johnson, I have examined the facts and circumstances of this case and reviewed each element of damage claimed. While the precise manner in which the jury arrived at the total lump sum damage award to ABS may not be

wholly discernable from the record,[37] I am able to conclude that not all of the jury's award is supported from the record. Specifically, the record lacks support for the amount awarded to ABS for its loss/destruction of business claim. Accordingly, I would not maintain this portion of the award, which is the practical effect of the majority's *per curiam* opinion. However, as illustrated above, the record more than adequately supports the $1,740,164.00 in damages claimed by ABS for the elements of lost profits and excess costs, and I would maintain this portion of ABS's damages. Finding merit, in part, to appellants' argument in this assignment of error, I would amend the judgment to specifically reduce the total amount of damages to ABS from an award of $3,174,160.00 to award the sum of $1,740,164.00.

For the reasons set forth above, I respectfully concur in part and dissent in part.

[37]In determining the precise basis of the jury's award, I note that Mr. Bertas clearly testified that ABS's excess costs and lost profits on the Project were $1,740,164.00 using the total cost approach. Mr. Bertas then testified that the loss of his business was estimated at $2,000,000.00. Immediately thereafter and at the close of the direct examination of Mr. Bertas, counsel for ABS wrote "$3,174,160" for the jury to see and asked Mr. Bertas if that amount was the total amount of damages ABS was seeking; however, an objection was raised (leading) and sustained. The question was rephrased, and Mr. Bertas was asked his final direct question: "What's the total amount of damages that ABS was asking for in this case?" In response, Bertas stated, "$3,174,000.00," which is the sum the jury awarded ABS.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 0705

ABS SERVICES, INC.

VERSUS

JAMES CONSTRUCTION GROUP, L.L.C. AND
THE CONTINENTAL INSURANCE COMPANY

Consolidated with

NUMBER 2016 CA 0706

LOUISIANA DEPARTMENT OF TRANSPORTATION & DEVELOPMENT

VERSUS

PROFESSIONAL SERVICES INDUSTRIES, INC.

GUIDRY, J., concurs.

I concur in the *per curiam* opinion to the extent that it allows the judgment of the trial court to stand and write separately to set forth reasons why the trial court's judgment, except as to the liability of the Louisiana Department of Transportation and Development ("DOTD") and the award of penalties and attorneys' fees against James Construction Group, L.L.C. ("JCG"), should be affirmed.

As to the liability of JCG and its surety, Continental Insurance Company, I concur in overruling their exception raising the objection of no cause of action filed with this court, which asserted that the plaintiff, ABS Services, Inc. ("ABS"), failed to state a cause of action against them because it failed to assert a cause of action pursuant to La. R.S. 48:256.3, et seq. and "there is no evidence of compliance with the requirements of La. R.S. 48:256.5(B) in the trial record." I note that although JCG did not file this objection of no cause of action with the

trial court, in one of its pretrial motions, JCG asserted that ABS was not pursuing a claim pursuant to the Public Works Act, but rather was proceeding with contractual and negligence claims. Moreover, DOTD, which was represented by the same counsel as JCG and Continental, raised this issue regarding La. R.S. 48:256.3, et seq. in a pretrial motion for summary judgment. To the extent that this objection of no cause of action seeks to raise an issue that, more properly, should have been raised as an affirmative defense and was not so raised by JCG, I concur in overruling their exception.

In addition, La. R.S. 48:250(A) provides that "[t]his Part shall exclusively govern the contracts of the [DOTD]." JCG and Continental alleged that non-compliance with these statutes precluded an action by ABS against them. The contract at issue herein is between JCG, as general contractor, and ABS, as subcontractor. Listed below are the pertinent statutory provisions.

> Louisiana Revised Statutes 48:256.3 provides, in part:
>
> A.(1) Whenever the department enters into a contract in excess of fifty thousand dollars for the construction, maintenance, alteration, or repair of any public works, the department shall require of the contractor a bond with good, solvent, and sufficient surety in a sum not less than fifty percent of the contract price for the payment by the contractor or subcontractor to claimants as defined in R.S. 48:256.5.
>
> * * *
>
> B. The payment provisions of all bonds furnished for department contracts described in this Subpart, regardless of form or content, shall be construed as and deemed statutory bond provisions. . . Sureties and contractors executing payment bonds for department contracts under this Subpart shall be immune from liability for or payment of any claims not required by this Subpart.
>
> Louisiana Revised Statutes 48:256.5 provides, in part:
>
> A. "Claimant", as used in this Chapter, means **any person to whom money is due pursuant to a contract with** the owner or **a contractor** or subcontractor **for doing work, performing labor**, or furnishing materials or supplies **for the construction, alteration, or repair of any public works**, or for transporting and delivering such materials or supplies to the site of the job by a for-hire carrier, or for furnishing oil, gas, electricity, or other materials or supplies for use in machines used in the construction, alteration, or repair of any public works, including persons to whom money is due for

the lease or rental of movable property, used at the site of the immovable and leased to the contractor or subcontractor by written contract, and including registered or certified surveyors or engineers, or licensed architects, or their professional subconsultants, employed by the contractor or subcontractor in connection with the building of any public work. [Emphasis added.]

B. Any claimant shall, after the maturity of his claim and within forty-five days after the recordation of final acceptance of the work by the department or of notice of default of the contractor or subcontractor, record the original sworn statement of the amount due him in the office of the recorder of mortgages for the parish in which the work is done and file a certified copy of the recorded sworn statement of the amount due, showing the recordation data, with the undersecretary of the department.

* * *

D. (1) The department shall withhold from progress payments and the final payment one hundred twenty-five percent of the amount claimed after receipt by the undersecretary of the department at the location specified in the recorded contract of a sworn statement of amount due from a claimant to the extent of payments due and owed the contractor after receipt of said claim.

(2) When the department makes final payment to the contractor without deducting such amounts as required in this Subsection of all outstanding claims so served on it or without obtaining a bond from the contractor to cover the total amount of all outstanding claims, the department shall become liable for the amount of these claims to the extent of its failure to withhold funds as required in this Subsection

Louisiana Revised Statutes 48:256.7 provides, in part:

A. If a statement of claim or privilege is filed, any interested party may deposit with the recorder of mortgages either a bond of a lawful surety company authorized to do business in the state or cash, certified funds, or a federally insured certificate of deposit to guarantee payment of the obligation secured by the privilege or that portion as may be lawfully due together with interest, costs, and attorney fees to which the claimant may be entitled up to a total amount of one hundred twenty-five percent of the principal amount of the claim as asserted in the statement of claim or privilege. . . .

JCG and Continental rely on the Louisiana Supreme Court case of Pierce Foundations, Inc. Jaroy Construction, Inc., 15-0785 (La. 5/3/2016), 190 So. 3d 298. That case dealt with a claim asserted by a subcontractor against the general contractor in which they were in privity of contract and dealt with the provisions of La. R.S. 38:2242, et seq., which is the Public Works Act, but not the DOTD Public

Works Act, which is contained in the statutes cited above and is applicable to DOTD contracts. The Court there held that a claimant's failure to file a sworn statement with the public authority (which was undisputed) did not affect the right of the subcontractor, in contractual privity with the general contractor, to proceed directly against the contractor and its surety, although the subcontractor would lose his privilege against funds in the hands of the public authority. Although at first glance, it may appear that the statutory language at issue herein may mandate that ABS had to record its sworn statement of claim in order to assert a claim herein, the Louisiana Supreme Court, in Pierce, noted:

> [T]he [Public Works] Act creates an ***additional*** remedy to persons contributing to the construction, alteration, or repair of public works—a "privilege against the unexpended fund in the possession of the authorities with whom the original contract ha[d] been entered into." . . . The Act is not intended to—and does not—affect rights between parties proceeding directly in contract and is, in fact, silent on the question of parties that are in contract and, as here, file suit well before the notice of acceptance or default is filed.

Pierce, 15-0785 at pp. 10-11, 190 So. 3d at 305 (citations omitted; emphasis in original).

I find that Pierce is not dispositive of this case because it dealt with La. R.S. 38:2242 et seq. and only briefly mentioned La. R.S. 48:256.5 for comparison purposes. Even if La. R.S. 48:256.3, et seq. is applicable herein, ABS asserted a breach of contract claim against JCG pursuant to the contract between the parties, which is not prohibited by these statutory provisions. Moreover, the trial exhibits include a copy of ABS' recorded statement of claim.[1] Accordingly, even if this court were to find that compliance with La. R.S. 48:256.5 was required, there is evidence in the record that such statement was recorded, and jurisprudence provides an exception to the general rule that no evidence should be considered to support an objection of no cause of action when evidence is introduced at trial,

[1] I also note that the record (although not the trial exhibits) includes a Bond for Release of Lien, whereby JCG secured the release of ABS' liens by posting a bond to obtain such release pursuant to La. R.S. 48:256.7.

which would deem the pleadings to have been enlarged. Snearl v. Mercer, 99-1738, p. 8 (La. App. 1st Cir. 2/16/01), 780 So. 2d 563, 572, writs denied, 01-1319, 01-1320 (La. 6/22/01), 794 So. 2d 800, 801.

With regard to the liability of JCG, I concur with the *per curiam* opinion that there was no manifest error by the jury in its findings that JCG breached its contract with ABS and that ABS did not breach the contract. With regard to JCG's assigned error of the applicability of the "pay-if-paid" clause, while I find that there was conflicting evidence as to whether ABS was paid for all invoices and pay applications (less the retainage), I also find that the jury heard the testimony, had the contract before it, and made the factual determination that JCG breached the contract, thereby rejecting this defense. Accordingly, I find no merit to the assigned error regarding the "pay-if-paid" clause.

With regard to the DOTD, it filed, with this court, an exception raising the combined objections of prescription and/or peremption. In addition, two other defendants, ABMB Engineers, Inc. ("ABMB") and Professional Service Industries, Inc. ("PSI"), asserted similar errors regarding prescription. I would overrule the objection of prescription filed by DOTD and reject the assigned error by ABMB and PSI as to prescription, but would sustain the objection of peremption as to DOTD and dismiss ABS' claims against DOTD on that basis.

Both DOTD and ABS agree that the prescriptive period commenced on August 9, 2005, the date ABS demobilized from the Project. ABS filed suit against JCG and Continental Insurance Company less than one year later, on March 28, 2006. However, as DOTD was not added to the suit until November 2012, DOTD asserted that prescription against it was not interrupted by the initial suit against JCG. This dispute centers around whether DOTD and JCG were solidary obligors, as the interruption of prescription against one solidary obligor is

effective against all solidary obligors. La. C.C. art. 1799. ABS' claim against JCG sounded in contract, while its claim against DOTD sounded in tort. Louisiana Civil Code article 1797 provides that an obligation may be solidary though it derives from a different source for each obligor. Moreover, this court has previously recognized that solidary liability can exist among defendants whose obligations arise from different sources.

In Osborne v. Ladner, 96-0863 (La. App. 1st Cir. 2/14/97), 691 So. 2d 1245, the purchasers of a home sued the seller and the extermination company that inspected the home after finding termite damage. Citing La. C.C. art. 1797, this court found that an obligation may be solidary even though the obligations arise from separate acts or by differing reasons. It is the co-extensiveness of the obligations for the same debt, not the source of liability, that determines the solidarity of the obligation. Osborne, 96-0863 at p. 14, 691 So. 2d at 1256. This court consequently found the seller, whose obligations arose out of a contract or quasi-contract, and the exterminating company, whose duty arose from an offense or quasi-offense, were solidarily liable for the termite damage. Osborne, 96-0863 at p. 16, 691 So. 2d at 1257.

In Bellard v. American Central Insurance Co., 07-1335 (La. 4/18/08), 980 So. 2d 654, plaintiff was injured in an automobile accident while in the course and scope of his employment and sued his employer's UM insurer. The case did not concern a prescription issue, but rather it concerned whether the UM insurer was entitled to a credit for workers' compensation benefits paid to plaintiff. In determining that question, the Court discussed the issues and principles governing solidary liability. Bellard, 07-1335 at pp. 10-14, 980 So. 2d at 663-66. In finding the UM and workers' compensation insurers were solidarily liable, the Court recognized that "parties may be solidarily liable although their liability is in

different amounts," noting that it was error for the court of appeal to require that each obligor must be liable for the entirety of the debt. Bellard, 07-1335 at p. 15, 980 So. 2d at 666. The Court held there was an in solido obligation as to every item for which plaintiff could compel payment from either obligor. Bellard, 07-1335 at p. 16, 980 So. 2d at 667.

In Glasgow v. PAR Minerals Corporation, 10-2011 (La. 5/10/11), 70 So. 3d 765, an injured worker timely sued his statutory employer (subsequently found immune from tort liability), then later amended his action to name other defendants after the prescriptive period. The Court affirmed the principle that, for purposes of prescription, parties are "solidarily liable to the extent that they share coextensive liability to repair certain elements of the same damage." Glasgow, 10-2011 at pp. 12-13, 70 So. 3d at 772.

In this case, ABS sought damages that it alleged resulted from the delays in the Project from each of the defendants. Accordingly, I find that solidary liability did exist among each of the tort defendants, DOTD, ABMB and PSI, and the contract defendant, JCG, and the timely filing of the action against JCG interrupted prescription against the other defendants; hence, I find the arguments regarding prescription are without merit.

Nevertheless, La. R.S. 48:251.3, governing contracts of DOTD, provides, in pertinent part:

> **Any action** arising out of or **related to a department contract** or on the bond furnished by a contractor shall prescribe five years from recordation of the acceptance of such contract or of notice of default of the contractor or other termination of the contract, whichever occurs first.... [Emphasis added.]

The first issue is whether this statute is applicable to ABS' tort claim against DOTD. Although ABS was a subcontractor that contracted directly with JCG, the general contractor, JCG directly contracted with DOTD. I also note that the ABS

subcontract specifically incorporated as part of the contract documents for the subcontract "all documents of the Prime Contract." Certainly, the ABS subcontract made it clear that the work was being performed on the Project owned by DOTD and subject to the provisions of the Prime Contract. Accordingly, I find that the tort claim by ABS against DOTD constituted an action related to a DOTD contract.

The question then turns to whether La. R.S. 48:251.3 is prescriptive or peremptive in nature. In the event this statute is prescriptive, DOTD's argument fails for the reasons addressed above, i.e. that prescription was interrupted by the timely filing of the action against JCG. No Louisiana court has addressed whether this statute is prescriptive or peremptive in nature. If found to be peremptive in nature, then the action against DOTD may be perempted, as the final acceptance was issued on April 3, 2007. However, the statute references the date of recordation of the final acceptance, and the copies in the record do not reflect the date of recordation. DOTD argues that this court can take judicial notice of the date of recordation, pursuant to the certified copy of the recorded final acceptance attached to its exception filed with this court.[2] According to that recordation

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[2] Louisiana Code of Evidence article 201(B) provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Subsection (D) provides that a court shall take judicial notice upon request if supplied with the information necessary for the court to determine that there is no reasonable dispute as to the fact. Subsection (F) provides that a party may request judicial notice at any stage of the proceeding.

ABS filed an opposition to the DOTD's exception raising the objections of prescription and peremption, but did not object or contest therein to consideration of the date the final acceptance was recorded, which is a matter of public record. This court has held that matters of public record may be the subject of judicial notice. See Louisiana Public Facilities Authority v. All Taxpayers, Property Owners, Citizens of State of Louisiana and Nonresidents Owning Property or Subject to Taxation Therein, 03-2738, p. 10 (La. App. 1st Cir. 12/23/03), 868 So. 2d 124, 131, writ denied, 04-0213 (La. 3/11/04), 869 So. 2d 801 (holding that "[i]n examining the intent of the legislature, a court may take judicial notice of the journals of the houses of the state legislature, as well as records of legislative committee proceedings, where preserved, as they are a matter of public record"). Accordingly, I find this court can take judicial notice of the date that the final acceptance was recorded in the public records.

information, the final acceptance was recorded on May 8, 2007. The "Third Supplemental and Amending Petition" filed by ABS, which added the claims against DOTD, was filed on November 5, 2012, more than five years after recordation of the final acceptance.

Although the statute itself uses the term "prescribe," and therefore, some weight should be given to the use of that term, it is not determinative. Rather, it is the legislative purpose sought to be achieved by a particular limitation that is the most significant and determinative factor in distinguishing a peremptive statute from a prescriptive one. State Board of Ethics v. Ourso, 02-1978, p. 7 (La. 4/9/03), 842 So. 2d 346, 351. Some weight has been placed on terms that indicate the extinguishment of a cause of action upon the running of a period of time. State Through Division of Administration v. McInnis Brothers Construction, 97-0742, p. 7 (La. 10/21/97), 701 So. 2d 937, 942. Another characteristic of a statutorily-created peremptive period is the existence of an underlying public interest that a right exist only for a limited period of time. McInnis Brothers Construction, 97-0742 at p. 6, 701 So. 2d at 942. I note that the second sentence of this statute uses the term "extinguished," an indicator of peremption. I further note that this is a matter of public interest. Accordingly, I find that ABS' claims against DOTD are perempted and would grant DOTD's exception based on the objection of peremption, to dismiss ABS' claims against DOTD, with prejudice.

With regard to the award of penalties and attorneys' fees, I find that La. R.S. 9:2784 is not applicable to ABS' claims for damages for delay and/or loss of profits/business, but it may be applicable to the extent there is conflicting testimony as to whether ABS was paid all amounts due for its invoices and pay applications at the time it left the Project. The jury may have reasonably believed the testimony of the owner of ABS, Anthony Bertas, that the final invoice owed to

ABS was not paid by JCG. Nevertheless, the jury was clearly not properly instructed as to the applicable law concerning penalties and attorneys' fees, and for this reason, I would vacate this portion of the judgment and remand for a new trial on this issue.

With regard to the amount of damages awarded ABS, considering the totality of the evidence, I cannot find that the jury was clearly wrong in its award of damages herein. The testimony of Mr. Bertas was corroborated, at least in part, which created a permissible view of the damages and provided more than a minimal degree of detail or specificity as to the extent of ABS' damages, which was apparently found reasonable by the jury.

Mr. Bertas testified that prior to this Project, ABS had built over 1,000,000 square feet of Keystone walls and received two "project of the year" awards with the Keystone system. After this Project, Keystone never invited ABS to do another project with Keystone again. This testimony was confirmed by Richard Brown, who was retired from Keystone, but held the patent for the wall system. Mr. Brown testified that Keystone refused to use ABS to quote a job after this Project, and ABS was never invited to be part of the team again. Mr. Brown also testified that ABS was probably Keystone's number one contractor in the country for installing the Key wall system, that ABS was the single most experienced contractor for installing the Key system, and that Keystone promoted ABS and frequently contacted ABS to bid jobs.

Mr. Bertas also testified that before this Project, ABS had a very good growth rate with increasing revenues (although with a few dips). ABS was doing business in 21 states, but at the time of trial, it was working in just one state. Mr. Bertas also testified that he had to lay off employees and sell equipment, and the IRS filed a lien against ABS in the amount of $326,000. ABS introduced into

evidence its 2004 and 2005 tax returns. The 2005 (the year ABS left this Project) tax return corroborated Mr. Bertas' testimony regarding the sale of certain assets, including a Ford F250 truck, Dodge 3500 truck, two dozers, a skid loader, a Link Belt and rock drills. Accordingly, I would affirm the jury's award of damages to ABS.

With regard to the allocation of fault on the jury form, while I recognize that La. C.C. art. 2323(B), which states that the provisions of subsection (A) of that article, providing for the determination of the degree of fault of all persons causing or contributing to the injury, death, or loss sued upon, shall apply to any claim for recovery of damages asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability, I would find that such principles are not applicable to JCG, which was held liable herein for breach of contract.

While this court in Petroleum Rental Tools, Inc. v. Hal Oil & Gas Company, Inc., 95-1820, p. 7 (La. App. 1st Cir. 8/22/97), 701 So. 2d 213, 217-18, writ dismissed, 97-3088 (La. 2/10/98), 706 So. 2d 982, held that a defendant's liability in redhibition qualified as fault under La. C.C. art. 2323, subsequently, this court held differently. In Hoffman v. B & G, Inc., 16-1001, pp. 12-13 (La. App. 1st Cir. 2/21/17), 215 So. 3d 273, 282, this court held that a redhibition suit is a contractual action and further held that comparative fault may not be asserted as a defense in an action for redhibition. In addition, the Third Circuit likewise recently found that comparative fault is not applicable to contracts. Justiss Oil Company, Inc. v. Oil Country Tubular Corporation, 15-1148 (La. App. 3d Cir. 4/5/17), 216 So. 3d 346, writ denied, 17-0747 (La. 10/9/17), 227 So. 3d 830. That case recognized a split in the circuits and that the Louisiana Supreme Court has not ruled squarely on this question. Justiss Oil Company, 15-1148 at p. 14, 216 So. 3d at 355. The Third Circuit relied on opinions of Louisiana federal courts, finding the federal courts

provided a thorough and well-reasoned analysis of this issue. Justiss Oil Company, 15-1148 at pp. 14, 216 So. 3d at 356. See Hanover Insurance Company v. Plaquemines Parish Government, 2015 WL 4167745 (E.D. La. 7/9/15).

In Hanover Insurance Company, the court generally categorized the claims among the approximately thirty parties as: (1) breach of contract claims between the Parish and the parties with which it contracted directly; (2) the Parish's claims against the subcontractors for both negligence and breach of contract; and (3) contribution and indemnity claims between various parties. Hanover Insurance Company, 2015 WL 4167745, at * 1. One of the issues before the court was whether comparative fault was available as a defense to a breach of contract claim. The contractors argued that the provisions of La. C.C. art. 2323(B) meant that comparative fault principles applied to all claims, including breach of contract, and the Parish argued that comparative fault was a tort doctrine incompatible with other causes of action. Hanover Insurance Company, 2015 WL 4167745, at * 3. The federal court recognized that the Louisiana Supreme Court has long held that civil code articles should be construed with regard to their subject matter. The court noted that La. C.C. art. 2323 is found in Title V of Book III of the Civil Code, dealing with obligations without agreement, and contract law is found in Title IV of Book III, suggesting that Article 2323 was intended to apply to tort law only. . Hanover Insurance Company, 2015 WL 4167745, at * 5. The court further noted that Title IV contained specific rules governing calculation of damages in contract cases, and specifically La. C.C. art. 1804, which provides for different allocations of an obligation depending on whether it arises from a contract or an offense or quasi-offense. Hence, the court concluded that the Louisiana Supreme Court would likely hold that La. C.C. art. 2323 applies to tort claims only. Hanover Insurance Company, 2015 WL 4167745, at * 6.

Therefore, I would find, at a minimum, that the law in this area is not settled, and accordingly, would be inadequate to support plain and fundamental error sufficient to relax the contemporaneous objection requirement when no party objected to the portions of the jury verdict form pertaining to allocation of fault and damages herein. See Wegener v. Lafayette Insurance Company, 10-0810, p. 14 n.10 (La. 3/15/11), 60 So. 3d 1220, 1230 n.10. Additionally, based upon the failure of the parties to object to these portions of the jury verdict form regarding the allocation of fault, I would find this error was waived by the parties.

Accordingly, for the reasons set forth above, I respectfully concur in the *per curiam* opinion in this matter.

ABS SERVICES, INC.

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LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

VERSUS

PROFESSIONAL SERVICES INDUSTRIES, INC.

STATE OF LOUISIANA

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NO. 2016 CA 0706

CRAIN, J., dissenting.

I dissent because this court does not have appellate jurisdiction to consider the merits of this appeal. The judgment before us contains an indefinite award of "reasonable attorney's fees," which renders **the entire judgment** non-appealable. *Advanced Leveling & Concrete Solutions v. The Lathan Co., Inc.*, 17-1250 (La. App. 1 Cir. 12/20/18), ___ So. 3d ___, ___ (*en banc*). Certification pursuant to Louisiana Code of Civil Procedure article 1915 does not cure the defect in the judgment, as this would allow the trial court the authority to do what this court has determined it cannot – disregard the uncertain and indefinite portion of the judgment and confer appellate jurisdiction over the remaining portions. *See Advanced Leveling*, ___ So. 3d at ___. Without a valid final judgment, this court lacks jurisdiction and the appeal should be dismissed. *Advanced Leveling*, ___ So. 3d at ___; *see also Harrison v. Nature's Way Safety Solutions, LLC*, 17-1744 (La. App. 1 Cir. 6/4/18), 251 So. 3d 1148, 1151; *Rosewood Enterprises, Inc. v.*

Rosewood Development, LLC, 16-0352, 2017WL90041 (La. App. 1 Cir. 3/6/17); *In re Interdiction of Metzler*, 15-0982 (La. App. 1 Cir. 2/22/16), 189 So. 3d 467, 469; *Gaten v. Tangipahoa Parish School System*, 11-1133 (La. App. 1 Cir. 3/23/12), 91 So. 3d 1073, 1074; *Laird v. St. Tammany Parish Safe Harbor*, 02-0045 (La. App. 1 Cir. 12/20/02), 836 So. 2d 364, 366.

I also dissent from the decision that allows the subject judgment to stand. The jury verdict form contains a plain and fundamental error, as it did not allow the jury to apportion fault among all parties as required by Louisiana Civil Code articles 2323 and 2324, regardless of the legal theory of liability. Since that error prevented the jury from dispensing justice, the judgment based on the jury's verdict cannot stand. I would vacate the trial court's judgment and, to prevent a miscarriage of justice, remand this matter for a new trial to allow the proper allocation of fault. *See Wegener v. Lafayette Ins. Co.*, 10-0810 (La. 3/15/11), 60 So. 3d 1220, 1233-34 (recognizing that upon finding a legal error has interdicted the fact-finding process, *de novo* review is neither required nor always appropriate; rather, "[t]he appellate court must itself decide whether the record is such that the court can fairly find a preponderance of the evidence from the cold record"). I would pretermit consideration of the exceptions filed with this court and order that they be considered by the trial court on remand.

Holdridge J. dissents for the reasons assigned by Judge Penzato. I further write to state that in an en banc setting, if a large majority of the court finds that the trial court's judgment is in error and should be reversed, the proper action would be for the court to either reach a majority to render a judgment that is legally correct or to remand the matter for a new trial. It is totally illogical for this court to issue a per curiam opinion upholding the trial court's judgment when a large majority of the court has found that the trial court's judgment is legally incorrect.

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LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

VERSUS

PROFESSIONAL SERVICES INDUSTRIES, INC.

PENZATO, J., dissents.

I respectfully dissent from the *per curiam* opinion. Louisiana Civil Code article 2323 requires the percentage of fault be allocated among all parties regardless of the basis of liability. The jury verdict form prevented the jury from determining each party's liability as required by La. C.C. arts. 2323 and 2324. I believe that this error prevented the jury from dispensing justice such that the verdict cannot stand. See *Wegener v. Lafayette Ins. Co.*, 60 So. 3d 1220 (La. 3/15/11). I would, therefore, vacate the trial court's judgment and remand the case for a new trial.

I also find merit in the argument raised on appeal by defendants and in their motions for new trial concerning the time allocations afforded by the trial court for the presentation of evidence. This case was set for trial beginning on August 31 through September 11, 2015 (which included the Labor Day weekend). The defendants did not have the opportunity to begin presentation of their witnesses

until the afternoon of the seventh day of the nine day trial. The issues encountered as a result of this condensed presentation are reflected in the trial court record. I recognize the difficulties in time management involved in the trial of a civil case of this complexity and magnitude, and the discretion afforded a trial court pursuant to La. C.C.P. art. 1631 to control its docket and place reasonable time limits on litigants. However, that limit must allow a party to present evidence to support the litigant's case. *Plaia v. Stewart Enterprises, Inc.*, 2014-0159 (La. App. 4 Cir. 10/26/16), 229 So. 3d 480, 490, writs denied, 2016-2264 (La. 2/3/17), 215 So. 3d 692, 2016-2261 (La. 2/3/17), 215 So. 3d 698, and 2016-2258 (La. 2/3/17), 215 So. 3d 699.

In *Goodwin v. Goodwin*, 618 So. 2d 579, 583-84 (La. App. 2 Cir.), writ denied, 623 So. 2d 1340 (La. 1993), the court set forth the following guidelines that trial courts should follow in imposing time limits on litigants: (1) before imposing time limitations in a case, the trial judge should be thoroughly familiar, through pretrial proceedings, with the claims of the parties, the proposed testimony and number of witnesses, and the documentary evidence to be presented; (2) if they are used, time limits should be imposed on all parties, before any party presents any evidence, and sufficiently in advance of trial for the litigants to prepare for trial within the limits imposed; (3) the trial judge should inform the parties before the trial begins that reasonable extensions of the time limits will be granted for good cause shown; (4) the trial judge should develop an equitable method of charging time against each litigant's time limits; and (5) the trial judge should put all of his rulings regarding time limits and the reasons for the rulings on the record.[1]

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[1] This court adopted the five factor analysis utilized by the *Goodwin* court in *Kinney v. Bourgeois,* 2006-2384 (La. App. 1 Cir. 9/14/07), (unpublished), writ denied, 2007-2026 (La. 1/7/08), 973 So. 2d 730. See *Chauvin v. Chauvin*, 2010-1055 (La. App. 1 Cir. 10/29/10), 49 So. 3d 565, 570 n.3.

After considering the above factors, I find that the limitations placed by the trial court on the defendants' presentation of evidence were arbitrary and unreasonable in this case, and further mandate remand for a new trial. See *Plaia*, 229 So. 3d at 493.

Finally, I would remand the exceptions to be heard prior to the new trial in this matter.