

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA  
COURT OF APPEAL  
FIRST CIRCUIT

2014 CA 0334

ADVANCED QUALITY CONSTRUCTION, INC.

VERSUS

AMTEK OF LOUISIANA, INC. AND AEGIS SECURITY  
INSURANCE COMPANY

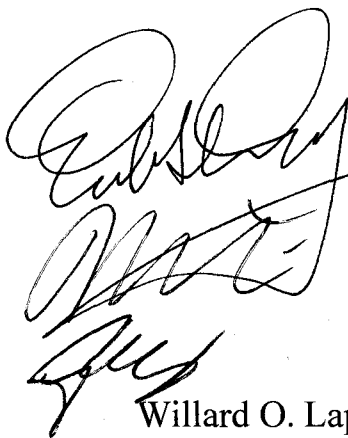
Judgment Rendered: DEC 23 2014

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On Appeal from the  
22<sup>nd</sup> Judicial District Court  
In and for the Parish of St. Tammany  
State of Louisiana  
No. 2011-12280, Div. B

The Honorable August J. Hand, Judge Presiding

\* \* \* \* \*

  
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\* \* \* \* \*

BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

**DRAKE, J.**

A contractor appeals a trial court judgment following a trial on the merits, which awarded a subcontractor \$106,811.73 in damages and statutory attorney's fees in the amount of ten percent of the damages award equaling \$10,681.17, pursuant to La. R.S. 38:2246. For the reasons that follow, we affirm in part, amend the trial court's judgment to reflect that the subcontractor is entitled to a damages award of \$77,064.01, reverse the award of statutory attorney's fees, and remand to the trial court for further proceedings.

**FACTS AND PROCEDURAL HISTORY**

In 2010, St. Tammany Parish ("the Parish") entered into a contract with Amtek to construct the Covington Bypass, a road extension from Ochsner Boulevard to Bootlegger Road (La. Hwy. 1085) ("the project").<sup>1</sup> Advanced Quality Construction, Inc. ("AQC") president Corie Herberger contacted Amtek to submit a bid to perform the concrete work on the project. Mr. Herberger visited the project site and received a set of Plans and Specifications for which he submitted a bid to Amtek. Amtek ultimately accepted AQC's bid and entered into a subcontract with AQC on November 12, 2010, for the concrete work on the project. The total estimated cost of the subcontract was \$350,780.85. AQC's subcontract incorporated the Plans and Specifications for the project.

AQC hired Cletus B. (C.B.) King, an unlicensed contractor, to provide laborers to perform the concrete pours while Mr. King acted as job-site superintendent for AQC.<sup>2</sup> AQC had previously hired Mr. King on a number of jobs prior to this project for his experience with building roads throughout St.

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<sup>1</sup> The contract was recorded on April 20, 2010, in the land records of St. Tammany Parish as instrument no. 1765079.

<sup>2</sup> The issue of whether Mr. King was an employee hired by AQC or a sub-subcontractor of AQC is an assignment of error urged by the appellant, Amtek, and will be discussed in this opinion.

Tammany Parish. AQC and Mr. King verbally agreed that Mr. King would be paid \$69,007.79 by AQC for his work on the project.

Following several disputes regarding AQC's performance and its obligations under its subcontract, Amtek terminated AQC for breach of contract. Amtek hired other subcontractors to perform AQC's scope of the work, in addition to purchasing equipment and supplies to complete the project. Amtek's work on the project was accepted by the Parish. Amtek received payment for its work under its general contract; however, the Parish withheld \$32,591.41 in payment for the concrete work on the project. The Parish used an adjustment formula contained in the State of Louisiana's Department of Transportation and Development (DOTD) "Standard Specifications for Roads and Bridges" to calculate the average actual thickness and compressive strength of the road and paid Amtek for the actual concrete poured in accordance with the terms of Amtek's general contract.<sup>3</sup>

Following the termination of its subcontract, AQC sued Amtek and Aegis Security Insurance Company, the issuer of the surety bond guaranteeing Amtek's performance, for payment of compensation allegedly due to AQC. Amtek answered and raised various defenses to the claim, including a reconventional demand.<sup>4</sup> Mr. King filed an intervention, claiming the unpaid amounts due to him from AQC for his work.<sup>5</sup>

A two-day bench trial was held on April 9-10, 2013. Following the trial on the merits, the trial court rendered judgment on July 18, 2013, in favor of AQC and against Amtek and Aegis in the amount of \$106,811.73. The court also issued written reasons for ruling. The trial court awarded AQC attorney's fees pursuant

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<sup>3</sup> This issue will be discussed in Amtek's assignments of error two and three.

<sup>4</sup> Amtek claimed damages for AQC's alleged breach of contract, including credits and offsets for Amtek having to complete AQC's scope of the subcontract.

<sup>5</sup> Mr. King has no issue with the trial court's ruling, but claims he is due the amount stipulated to by him and AQC, if and when AQC recovers from Amtek.

to La. R.S. 38:2246, in the amount of \$10,681.17, which represents ten percent of the amount awarded. The trial court denied Amtek's reconventional demand and rendered judgment in favor of Mr. King and against AQC in the stipulated amount of \$69,007.79.<sup>6</sup>

Amtek now appeals.

## LAW AND DISCUSSION

### Assignment of Error 1: Contractor License Requirement

In its first assignment of error, Amtek argues that the trial court erred in granting judgment in favor of AQC based on AQC's alleged verbal "sub-subcontract" with Mr. King. Amtek alleges that its subcontractor, AQC, entered into a subcontract with Mr. King, an unlicensed contractor. Amtek contends that this "sub-subcontract" is in violation of the Louisiana State Contractor's Licensing Law, which requires that a contractor performing work in excess of \$50,000.00 must be licensed. See La. R.S. 37:2150-2175.6. Amtek also argues that the "sub-subcontract" is a violation of AQC's subcontract with Amtek, which terms forbid AQC from assigning its subcontract to other subcontractors, absent written consent from Amtek. Amtek argues that because AQC verbally subcontracted with Mr. King, an unlicensed contractor, AQC's subcontract with Amtek is an absolute nullity pursuant to La. C.C. art. 2030.<sup>7</sup>

In response, AQC argues that Mr. King was not required to be licensed to work on the project pursuant to the State Contractor's Licensing Law, because he

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<sup>6</sup> Mr. King filed a motion for new trial in which he did not dispute the judgment of the trial court, but sought to confirm that he is entitled to the verbally-stipulated payment amount, since AQC was granted recovery from Amtek. Following a hearing on Mr. King's motion, the trial court signed a second judgment on October 3, 2013, in which it clarified that the court did award attorney's fees to AQC, in the amount of ten percent of the judgment awarded, which is attorney's fees in the amount of \$10,681.17, but did not award any other penalty. The trial court did not modify the July 18, 2013 judgment.

<sup>7</sup> Louisiana Civil Code article 2030 states, in pertinent part, that "[a] contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed."

was not functioning as a contractor on the project, but was employed to serve as AQC's job-site superintendent, under the direct control and supervision of AQC.

The purpose of the State Contractor's Licensing Law is to protect "the health, safety, and general welfare of all those persons dealing with persons engaged in the contracting vocation, and the ... effective and practical protection against the incompetent, inexperienced, unlawful, and fraudulent acts of contractors with whom they contract." La. R.S. 37:2150. To facilitate this purpose, the statute creates the State Licensing Board for Contractors to "monitor construction projects to ensure compliance with the licensure requirements" of the State Contractor's Licensing Law. *Id.* The Board also has the authority to pursue certain remedies against any party in degradation of the law, including fines, sanctions, and injunctive relief. La. R.S. 37:2150-2151; 2153; and 2160-2162.

Pursuant to La. R.S. 37:2150.1(4)(a):

"Contractor" means any person who undertakes to, attempts to, or submits a price or bid or offers to construct, supervise, superintend, oversee, direct, or in any manner assume charge of the construction, alteration, repair, improvement, movement, demolition, putting up, tearing down, or furnishing labor, or furnishing labor together with material or equipment, or installing the same for any building, highway, road, railroad, sewer, grading, excavation, pipeline, public utility structure, project development, housing, or housing development, improvement, or any other construction undertaking for which the entire cost of same is fifty thousand dollars or more when such property is to be used for commercial purposes other than a single residential duplex, a single residential triplex, or a single residential fourplex. A construction project which consists of construction of more than two single residential homes, or more than one single residential duplex, triplex, or fourplex, shall be deemed to be a commercial undertaking.

Thus, if an entity submits a bid or offer to perform any of the above-named acts on any structure other than residential property for which the cost exceeds \$50,000.00, that entity is defined as a contractor under the State Contractor's Licensing Law.

See *State Licensing Bd. for Contractors v. Louisiana State Dept. of Agriculture*

*and Forestry*, 588 So. 2d 1268, 1271 (La. App. 1 Cir. 1991), *writ denied*, 590 So. 2d 598 (La. 1992).

Furthermore, the State Contractor's Licensing Law defines "contractor" to include "general contractors, subcontractors, architects, and engineers who receive an additional fee for the employment or direction of labor, or any other work beyond the normal architectural or engineering services." La. R.S. 37:2150.1(4)(b). A "general contractor" means a "person who contracts directly with the owner." The term "general contractor" shall include the term "primary contractor." La. R.S. 37:2150.1(6)(a). Here, the record shows that the owner of the project is St. Tammany Parish, and the general contractor of the project is Amtek.

A "subcontract" means the "entire cost of that part of the contract which is performed by the subcontractor." La. R.S. 37:2150.1(12). A "subcontractor" means a "person who contracts directly with the primary contractor for the performance of a part of the principal contract or with another contractor for the performance of a part of the principal contract." La. R.S. 37:2150.1(13)(a). Accordingly, because AQC contracted directly with Amtek, the general contractor, AQC is a subcontractor on the project. We note that the record shows that at no point during the project did Mr. King directly contract with Amtek.

To summarize, Amtek's position is that Mr. King is an unlicensed subcontractor, who contracted with AQC to perform AQC's scope of work. AQC's position is that Mr. King was an employee, hired by AQC and under its direct control and supervision at all times, to serve as job-site superintendent over the pouring of the concrete. Following the bench trial of this matter, the trial court, in its reasons for ruling, stated:

Based on the evidence presented at the trial, the Court finds that the lack of state licensure of C.B. King did not affect the work product of AQC. The evidence proved that C.B. King, and the laborers he had

perform the work, were competent and experienced concrete pourers and finishers. Mr. King had previously built roads in the Parish. Mr. King acted as job-site superintendent. Mr. King was under the direct control and supervision of AQC. AQC was the sub-contractor, managed the job, and was responsible for the work product. Further at some point, Mr. King was directly employed by AQC to act as daily superintendent of the project.

Throughout the project, the Parish [as "owner"] never raised any concern or issue concerning the quality of workmanship of Mr. King. There was no fraud perpetrated upon the owner. There was no damage resulting from the work performed by Mr. King. The general contractor Amtek was paid by the owner [the Parish of St. Tammany] for the work performed pursuant to the contract, including that work performed by AQC ....

After ... Amtek first argued, as a basis for failure to pay AQC, the non-licensure of C.B. King. AQC responded by assurance that AQC would perform the remaining work itself, as well as providing to Amtek proof that C.B. King was covered under general liability and worker's compensation insurances issued to him as the insured. Amtek acknowledged that C.B. King was an employee of AQC for work being performed on the project.

The trial court, after hearing all of the evidence presented at trial, concluded that Mr. King was an employee of AQC and not a subcontractor, subject to the State Contractor's Licensing Law.

The issue of whether or not Mr. King was a subcontractor or an employee of AQC is a question of fact. It is well settled that a court of appeal may not set aside a trial court's finding of fact in the absence of "manifest error" or unless it is "clearly wrong," and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989); *Landry v. Leonard J. Chabert Medical Center*, 02-1559 (La. App. 1 Cir. 5/14/03), 858 So. 2d 454, 463, *writs denied*, 03-1748, 03-1752 (La. 10/17/03), 855 So. 2d 761. Moreover, a trial court's credibility determinations are entitled to great deference; thus, if the factfinder's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the

evidence differently. *Riverside Recycling, LLC v. BWI Companies, Inc. of Texas*, 12-0588 (La. App. 1 Cir. 12/28/12), 112 So. 3d 869, 872. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Rosell*, 549 So. 2d at 844. From our review of the record, and giving deference to the trial court's credibility determination and factual findings, we find that the trial court could have reasonably concluded that Mr. King was an employee under the direct control and supervision of AQC, and thus, was not required to be licensed as a contractor in this instance. Based on the foregoing discussion, this assignment of error is without merit.

#### Assignments of Error 2 and 3

Amtek's second and third assignments of error are interrelated; therefore, we will address them concurrently as both errors involve the interpretation of two provisions of AQC's subcontract: (i) the manner in which the concrete joints were to be cut; and (ii) the thickness of the concrete to be poured.

In its second assignment of error, Amtek argues it had cause to terminate AQC for breach of contract.<sup>8</sup> Amtek alleges that the manner in which AQC cut the joints – a wet cut (using a bull float with a T joint tool attached to the bottom) rather than a saw cut – and the thickness of the concrete poured by AQC are the two areas in which AQC's performance was defective and incomplete, and thus, constituted a breach of its subcontract. Amtek argues that the evidence presented at trial supports its position that it had cause to terminate AQC for these breaches. Thus, Amtek alleges the trial court erred in awarding damages to AQC (its principal demand) based on AQC's breach and failure to prove any damages to which it is actually entitled.

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<sup>8</sup> These causes, which will be discussed in this section, are in addition to Amtek's assertion that AQC breached its subcontract due to the alleged lack of licensure of Mr. King, which we addressed in the first assignment of error.



Similarly, in its third assignment of error, Amtek contends that, based on AQC's breach of contract regarding the joint cuts and thickness of the concrete, Amtek is entitled to offsets or credits against the principal demand claimed by AQC.

Standard of Review: Contracts

We are obligated to give legal effect to contracts according to the true intent of the parties. See La. C.C. art. 2045. The true intent of the parties to a contract is to be determined by the words of the contract when they are clear, explicit, and lead to no absurd consequences. See La. C.C. art. 2046. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. *Id.* In such cases, the meaning and intent of the parties to the written contract must be sought within the four corners of the instrument and cannot be explained or contradicted by parol evidence. See La. C.C. art. 1848. Contracts, subject to interpretation from the instrument's four corners without the necessity of extrinsic evidence, are to be interpreted as a matter of law, and the use of extrinsic evidence is proper only where a contract is ambiguous after an examination of the four corners of the agreement. In cases in which the contract is ambiguous, the agreement shall be construed according to the intent of the parties. Intent is an issue of fact which is to be inferred from all of the surrounding circumstances. A doubtful provision must be determined in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and other contracts of a like nature between the same parties. La. C.C. art. 2053. Interpretation of ambiguous terms in a contract requires construction against the contract's drafter. La. C.C. art. 2056.

Thus, our first inquiry, looking within the four corners of AQC's subcontract with Amtek, is whether the contract is ambiguous. Whether a contract is

ambiguous or not is a question of law and subject to the *de novo* standard of review on appeal. Where factual findings are pertinent to the interpretation of a contract, those factual findings are not to be disturbed absent manifest error. *Amitech U.S.A., Ltd. v. Nottingham Const. Co.*, 09-2048 (La. App. 1 Cir. 10/29/10), 57 So. 3d 1043, 1058, *writs denied*, 11-0866, 11-0953 (La. 6/17/11), 63 So. 3d 1036, 1043. A contract is considered ambiguous on the issue of intent when it lacks a provision bearing on the issue, its written terms are susceptible to more than one interpretation, there is uncertainty as to its provisions, or the parties' intent cannot be ascertained from the language used. *Campbell v. Melton*, 01-2578 (La. 5/14/02), 817 So. 2d 69, 75.

#### Joint Cuts

Amtek argued that one reason it terminated AQC for breach of contract was AQC's failure to cut and seal joints as required by the subcontract. Amtek argues that the project plans and the subcontract required AQC to "saw cut" joints. AQC argues, however, that its subcontract required the concrete joints to be "wet cut." Regarding the cutting and sealing of the joints, AQC's subcontract with Amtek contained the following provision:

**SUBCONTRACTOR WILL PROVIDE ALL LABOR & EQUIPMENT TO WET CUT THE REQUIRED JOINTS, INSTALL ALL BASKETS, CURB BARS, CURING AGENTS, KEYWAYS, AND INTERNAL COMPONENTS. SUBCONTRACTOR WILL ALSO CLEAN AND SEAL THE REQUIRED JOINTS, WITH SEALING MATERIALS PROVIDED BY CONTRACTOR, AND PERFORM ALL NECESSARY CLEAN-UP OF HIS WORK.**  
[Emphasis added.]

Prior to beginning the scope of the work under its subcontract, Mr. Herberger, president of AQC, testified that he did not review the Parish's project plans or see anything in writing that required AQC to saw cut the joints. Amtek's chief operations manager, Steve Price, testified at trial that Mr. Herberger approached Amtek with a subcontractor bid to do the cement work on the project.

Mr. Price also testified that Mr. Herberger in fact *did* receive a set of plans from Mona Pittman, who worked under Lloyd Luton, when Mr. Herberger visited the project site office.<sup>9</sup>

Examining the four corners of the subcontract, contained within AQC's subcontract is the following provision:

**IT IS RECOGNIZED BY THE PARTIES HEREIN THAT THE CONSTRUCTION DOCUMENTS, PLANS & SPECIFICATIONS, THE GENERAL CONDITIONS, SUPPLEMENTARY GENERAL CONDITIONS, AND ADDENDA THERETO, THE DRAWINGS OF THE OWNER, ST. TAMMANY PARISH, IMPOSE DUTIES AND OBLIGATIONS UPON THE PARTIES HEREIN, AND SAID PARTIES THEREBY AGREE THAT THEY SHALL BE BOUND BY THE DUTIES AND OBLIGATIONS CONTAINED IN SAID CONTRACTUAL AGREEMENT. FOR THESE PURPOSES, ALL OF THE PROVISIONS CONTAINED IN THE AFORE MENTIONED CONSTRUCTION DOCUMENTS AS THEY PERTAIN TO THE CONSTRUCTION ACTIVITIES [ASSOCIATED] WITH THE INSTALLATION OF THE PORTLAND CEMENT CONCRETE PAVEMENT, 8"INCH THICKNESS ARE INCORPORATED HEREIN BY REFERENCE WITH THE SAME FORCE AND EFFECT AS THOUGH SAID CONSTRUCTION DOCUMENTS WERE HEREIN SET OUT IN FULL. OFFICIAL COPIES OF THE AFORE MENTIONED CONSTRUCTION DOCUMENTS ARE FULLY IN THE POSSESSION OF THE SUBCONTRACTOR, AND THE CONTRACTOR FOR FULL REFERENCE AND KNOWLEDGE. [Emphasis added.]**

This provision incorporates the general contract and the Parish's project plans and drawings into AQC's subcontract. AQC signed the subcontract, agreed that it had received the general contract and project plans, and agreed to be bound by those documents. Thus, any discrepancy with the manner by which AQC was to cut the joints or the meaning of the term "wet cut" is resolved by referencing the incorporated project plans and general contract.

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<sup>9</sup> Ms. Pittman and Mr. Luton worked for Richard C. Lambert Consultants, a company that provides consulting engineering services. Richard C. Lambert Consultants was hired by St. Tammany Parish to design the project at issue. Mr. Luton acted as construction manager on the project on behalf of Richard C. Lambert consultants, and Ms. Pittman was the inspector on the project who worked under Mr. Luton.

The record shows that the Parish's project plans expressly require that the joints on this roadway be saw cut. Not only do the plans expressly use the words "saw cut" and contain diagrams indicating how and where saw cuts on the roadway joints should be made, Mr. Luton testified that he informed Amtek at a November 18, 2010 pre-pour meeting, as well as on-site during the first pour by AQC, that the project plans required the joints to be saw cut. In fact, Mr. Herberger testified that Mr. Luton stopped AQC from using a bull float to wet cut the joints during AQC's first pour on-site.

Mr. Herberger and Mr. King both testified that they heard Mr. Luton state to Mr. Price, at the pre-pour meeting, as well as on-site, that the project plans required the joints to be saw cut. AQC further asserts that Mr. Price indicated to Mr. Luton at the pre-pour conference that the "joints would be done correctly." On-site, Mr. Herberger testified that Mr. Price told AQC that Amtek would "take care of [saw cutting the joints]." Mr. Herberger testified that no one with Amtek told him or any of his employees to saw cut the joints. AQC continued to pour concrete, without cutting or sealing any joints. Mr. Herberger testified that he would have actually performed the saw cutting of the joints, under protest, had he known that Amtek would back charge AQC for the amount representing Amtek's hiring of other subcontractors to perform AQC's scope of work. Mr. Herberger also testified that AQC did not refuse to seal the joints, but was merely waiting to hear from Amtek as to when AQC could perform the seals.

Mr. King testified that he had seen the Parish's project plans one time, but he primarily relied upon the instructions of Mr. Herberger. Mr. King testified that no one ever told him to saw cut the concrete joints. At the first concrete pour by AQC, Mr. King testified that he began to wet cut the joints with a bull float jointer. As he was performing this work, Mr. King heard Mr. Luton tell Mr. Price to stop making wet cuts in the concrete with a bull float because the joints had to be saw

cut. Mr. King testified that Mr. Price told him to smooth out the concrete and that Mr. Price would “take care of [saw cutting the joints].” Mr. King further testified that he made no other cuts to the concrete.

The trial court held, after reviewing the evidence and testimony presented at trial, that AQC’s subcontract called for the joints to be wet cut. The trial court determined, despite the testimony of Mr. Price, that AQC and Amtek agreed that to wet cut a joint encompasses using a bull float tool with a T joint attached to the bottom. However, a contract between the parties is the law between them, and the courts are obligated to give legal effect to such contracts according to the true intent of the parties. La. C.C. art. 2045; *Martin Exploration Company v. Amoco Production Company*, 93-0349 (La. App. 1 Cir. 5/20/94), 637 So. 2d 1202, 1205, writ denied, 94-2003 (La. 11/4/94), 644 So. 2d 1048. Clearly the project owner, the Parish, intended for the joints to be saw cut. The Parish used the term saw cut on its plans, and on at least two different occasions, in the presence of Amtek and AQC, the Parish expressed what it understood the joint cutting obligation on this project to be. Although AQC’s subcontract uses the term “wet cut,” the provision incorporating all of the project plans and general conditions binds AQC to the obligations in those documents, including the requirement that the joints be saw cut. Therefore, we hold that Amtek is entitled to an offset in the amount of \$30,747.72, which represents Amtek’s cost of saw cutting and sealing the concrete roadway joints.<sup>10</sup>

Based on the foregoing, to the extent the trial court ruled that the parties contracted to cut the concrete joints using a bull-float tool, the trial court committed error. The use of the bull-float tool cut method was a breach of contract. We note, however, that this is not a basis for total non-payment by Amtek. While the owner and general contractor did instruct AQC to desist from

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<sup>10</sup> Amtek hired two third-party subcontractors to perform the saw cuts.

wet cutting the joints with a bull float tool on the first pour, neither the Parish nor Amtek told AQC to saw cut the joints. It is not clear from the record why Amtek did not request that AQC perform its scope of the work instead of subbing out the joint cutting to other subcontractors. AQC never refused to saw cut the joints. Mr. Herberger testified that AQC would have performed the saw cuts under protest, had the company known Amtek would "back charge" it for work performed by other subcontractors; however, Mr. Price had previously indicated to AQC that Amtek would take care of the saw cutting.

### Thickness of Concrete

Amtek also argues that another reason it terminated AQC for breach of contract was AQC's failure to pour the concrete to an 8-inch thickness as required by the subcontract. Regarding cutting and sealing the roadway joints, AQC's subcontract with Amtek contained the following provision:

**AFTER HAVING PREPARED THE EXISTING EARTHEN SUB-BASE TO WITHIN ½" INCH ABOVE REQUIRED 8"INCH DEPTH, SUBCONTRACTOR IS TO PROVIDE ALL LABOR AND EQUIPMENT NECESSARY TO POUR AND FINISH THE PORTLAND CEMENT CONCRETE AS WELL AS PROVIDING NECESSARY SCREED MACHINES AND STEEL FORMS TO POUR AND FINISH THIS CONCRETE. [Emphasis added.]**

Amtek contends that the subcontract and concrete plans specifically call for 8-inch thick concrete and that AQC failed to pour concrete to a thickness of 8-inches. Amtek states that the Parish withheld \$32,591.41 in payment for the concrete work on the project because the roadway was not 8-inches thick.

AQC agreed that the subcontract and project plans called for 8-inch thick concrete; however, AQC contends that the subcontract allows for a grade of one-half inch above the required 8-inch thickness, meaning that the concrete could be poured at a thickness of 7 ½ inches. Thus, the main contention between the parties on this issue is the language in the subcontract that requires AQC to pour the concrete "to within ½" inch above required 8"inch depth."

At trial, Mr. Luton testified that while it was a subcontractor on the concrete, AQC made the first eleven concrete pours (which constitutes Lots 1-4 on the project; the project contains a total of ten lots). After the concrete is poured, pursuant to the DOTD "Standard Specifications for Roads and Bridges," the State adjusts the final payment to the general contractor on a pro-rated basis based on an average concrete pavement thickness and compressive strength of a group of random core samples from the paved road. Mr. Luton testified that these pay adjustments are stringent. Here, the Parish adjusted the payment based on the 8-inch thickness requirement contained in the subcontract.

Pursuant to its contract with the Parish, Amtek employed a third-party testing lab to obtain random samples of concrete cores for the purpose of determining the concrete pavement thickness. In the lab's first report of concrete thickness, the average thickness of Lots 1, 2, 3, and 4 is represented. Within each lot, five random core concrete samples were taken. AQC made all of the pours on Lots 1-3, but only made pours on two of the five cores that constitute Lot 4 (Core C16 and C17). Mr. Luton testified, and the record shows, that on Lots 1-3, all of the pours made by AQC came within a half-inch grade of 8-inches. Lot 4 was the only lot that came in under a half-inch grade of 8-inches (average thickness was 7.41); however, AQC only poured two of the five cores in Lot 4 – Amtek poured the other three cores because it had by that time terminated AQC.<sup>11</sup> Thus, the alleged breach argued by Amtek is based on deficient concrete thickness for work not even fully performed by AQC. With regard to the thickness of the concrete, the trial court held:

The Court does not find that this issue of thickness of the pour supports Amtek's claim that AQC should not be paid for the work it performed on the project.

The agreement of AQC with Amtek was to grade one-half inch above grade ...

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<sup>11</sup> AQC only poured Core C16 and C17 in Lot 4.

Prior to final payment, the Parish reduced the payment due to Amtek by a pro-rated amount, which was a proportionate reduction in compensation, based upon a formula which compared the actual depth or thickness of the concrete surface actually poured to that thickness recited in the contract specifications. [See Exhibit 85] AQC made eleven pours of concrete on this project. The testimony of Corie Herberger and L[loyd] Luton indicate that all AQC pours were to a depth of 7.5 inches or greater. The only instance of a pour with a depth of less than 7.5 inches was a pour made after AQC was terminated from the project. Though Amtek argued, as a basis for termination of the contract with AQC, the failure of AQC to pour concrete to a minimum depth of eight inches, the Court notes that the evidence proved that, after the termination of AQC by Amtek on 2/18/2011, pours continued at a depth of less than eight inches. Thus the Court finds that Amtek's argument was inconsistent, and that AQC did not fail to comply with the contract.

Based on the foregoing, we agree with the interpretation of the subcontract by the trial court. The plans and subcontract call for concrete that is 8-inches thick; however, due to the nature of concrete, after it is poured, it shrinks. To memorialize this phenomena, the language of AQC's subcontract uses the term "to within 1/2" inch above required 8"inch depth" to indicate how thick the concrete must be poured. Additionally, the standard pro-rated pay adjustment scale used by the DOTD supports this interpretation.

After a thorough review of the record and exhibits in evidence before us, we are unable to determine what portion of the reduced payment calculation that was withheld from Amtek's final payment is attributable to AQC's failure to pour the concrete to a thickness of 8-inches on Lots 1-3 and Cores C16 and C17 of Lot 4. As discussed, the state adjusts the final payment to the general contractor on a pro-rated basis based on the average concrete pavement thickness and compressive strength of a group of random core samples from the paved road. At the trial on the merits, no party introduced evidence or demonstrated how the evidence that was introduced supported the proposition that Amtek was entitled to an offset of \$32,591.41 recoverable from AQC. Amtek failed to show the exact dollar amount of the \$32,591.41 reduced payment that represented (i) the work done by AQC on



Lots 1-3 and Cores C16 and C17 on Lot 4; (ii) the portion of the reduced payment that represented the compressive strength readings (which were not at issue); or (iii) the portion of the reduced payment that represented the work done by Amtek on the three cores in Lot 4.

Therefore, we hold that AQC did not breach its contract by pouring concrete that was less than the required thickness pursuant to the subcontract. Amtek is not entitled to an offset for \$32,591.41, the amount withheld by the Parish for the actual thickness of the concrete based on the pro-rated pay adjustment scale, due to Amtek's failure to specify those thickness deficiencies performed by AQC and to correlate those deficiencies to the pro-rated reduction in the amounts Amtek received from the work. Accordingly, we amend, and affirm as amended, the portion of the trial court's judgment awarding AQC its principal demand under the contract, less an offset of \$30,747.72 due to Amtek, which represents Amtek's cost of saw cutting and sealing the concrete roadway joints.

#### Assignment of Error 4

In its fourth assignment of error, Amtek argues that it is entitled to damages for having to complete the scope of the work of AQC's subcontract since Amtek terminated AQC for breach of contract. Specifically, the subcontract provides that Amtek is entitled to recover all damages from AQC that Amtek suffers as a result of AQC's breach of the subcontract, performance of defective work, and Amtek's completion of AQC's scope of work. Based on AQC's alleged breaches, Amtek requests \$31,572.31 for concrete forms and \$14,000.00 for two concrete screed machines, which Amtek alleges it was required to purchase to complete AQC's scope of the work. Additionally, Amtek contends that it is entitled to liquidated damages based on a provision contained in AQC's subcontract that permits Amtek to recover \$600.00 per day for delays caused by AQC on the project.

We first note that AQC's concrete work was accepted by the Parish and that Amtek received payment (though at a reduced sum due to the thickness) for the work done by AQC. There were only two issues with the eleven concrete pours made by AQC, which it remedied. AQC's work was accepted by the Parish.<sup>12</sup> Furthermore, as discussed in assignments of error 1-3, we award Amtek an offset in the amount of \$30,747.72, which represents Amtek's cost of saw cutting and sealing the concrete roadway joints. Additionally, we affirm the award of an offset of \$1,100.00 that the trial court originally awarded Amtek for AQC not sealing the joints in the eleven pours, as Amtek had fired AQC from the job, and did not allow AQC to perform this work.

Regarding the liquidated delay damages requested by Amtek, the subcontract contains the following provision:

Provided that if the work called for herein or any part thereof is not completed within the time allowed or with any extension of time granted as described herein, SUBCONTRACTOR shall be deemed to be in default without the necessity of any demand or putting in default, there shall be withheld from the consideration due SUBCONTRACTOR as fixed, agreed and liquidated damages, the sum of SIX HUNDRED DOLLARS (\$600.00) PER DAY, for each calendar day completion of the work is delayed, reserving unto CONTRACTOR all other rights.

Amtek argues that from January 4-28, 2011, and January 30-February 24, 2011, there were no concrete pours on the project. Amtek alleges that this delay is based on AQC's breaches of the subcontract and constitutes a forty-seven day delay, which Amtek argues entitles the company to \$28,200.00 in liquidated delay damages.

The party bringing suit has the burden of proving any damages suffered by him as a result of a breach of contract. *L & A Contracting Co., Inc. v. Ram Indus. Coatings, Inc.*, 99-0354 (La. App. 1 Cir. 6/8/12), 762 So. 2d 1223, 1235, writ

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<sup>12</sup> The first issue the Parish had with work done by AQC were two expansion joints in its first pour that had to be ground. AQC ground the joints. The Parish accepted the work. The second issue the Parish observed with AQC's work was a 75-square foot area (at Station 36+20) that had to be replaced due to cracking. AQC made the repairs; the Parish accepted the work.

*denied*, 00-2232 (La. 11/13/00), 775 So. 2d 438. Amtek's main argument for delay damages is that the lack of days on which concrete pours occurred is evidence that AQC caused delays in the performance of the contract. There is no evidence in the record, or that was introduced at the trial on the merits, that demonstratively indicates that Amtek suffered any damages as a result of AQC failing to pour concrete during the forty-seven "delay" days at issue. Evidence presented at trial indicated that a number of factors affected construction on the project on any given day: meetings, work on other projects, inclement weather, availability of construction, and so forth.

In fact, the record indicates that it was the general contractor, Amtek, that was consistently behind schedule on this project. Evidence was introduced at trial that demonstrated Amtek delayed paying its subcontractors to the extent that some subcontractors were reporting to the Parish their consistent lack of payment and were freezing performance under their contracts until receipt of payment was had. Due to the lack of a detailed showing of how any alleged breach by AQC caused Amtek to incur forty-seven days of delay, this assignment of error is without merit.

#### Assignment of Error 5

In its fifth assignment of error, Amtek contends that the trial court committed error when it awarded AQC attorney's fees pursuant to La. R.S. 38:2246.

Louisiana Revised Statutes 38:2246(A) provides:

After amicable demand for payment has been made on the principal and surety and thirty days have elapsed without payment being made, any claimant recovering the full amount of his timely and properly recorded or sworn claim, whether by concursus proceeding or separate suit, shall be allowed ten percent attorney's fees which shall be taxed in the judgment on the amount recovered.

Amtek argues that AQC filed a lien in the amount of \$107,911.73. The trial court awarded AQC \$106,811.73, after reducing AQC's claim by \$1,100.00 for

work that AQC admitted that it did not perform (which we likewise reduce and award to Amtek as an offset). Pursuant to Section 2246, the trial court then awarded AQC attorney's fees in the amount of ten percent of its damage claim, fees which totaled \$10,681.17.<sup>13</sup> Amtek argues that because AQC failed to recover the full amount of its lien, \$107,911.73, it is not entitled to attorney's fees and the trial court's judgment awarding attorney's fees to AQC should be denied and dismissed. We agree. As the trial court did not award AQC the full amount of its lien under the Public Works Act, La. R.S. 38:1, *et seq.*, which reduction we affirm, it was error for the trial court to award AQC attorney's fee pursuant to La. R.S. 38:2246. Accordingly, we reverse that award.

However, we note that AQC's subcontract with Amtek contains the following provision which provides a contractual basis for an award of "reasonable attorney's fees":

If either party to this subcontract files suit in a court of competent jurisdiction to enforce the terms of this subcontract, the prevailing party shall be entitled to recover its reasonable attorney's fees in addition to any other damages.

After the trial court's award to AQC of \$10,681.17 in attorney's fees pursuant to the Public Works Act, counsel for AQC indicated that it would be seeking additional attorney's fees and would bring a motion to tax/motion to fix. AQC argued in its appellee brief that the trial court disregarded AQC's stipulation to submit a separate motion to fix attorney's fees. AQC contends that because the district court heard no evidence regarding a potential award of attorney's fees pursuant to the contract, there is the potential that "reasonable" attorney's fees will likely be far greater than the ten percent awarded under La. R.S. 38:2246.

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<sup>13</sup> After the bench trial, the trial court issued reasons for ruling on June 28, 2013, and signed the final judgment on July 18, 2013. Mr. King thereafter filed a motion for new trial. During the hearing on Mr. King's motion, the parties requested that the trial court issue a new judgment to clarify whether the attorney's fees awarded to AQC were a penalty. In a judgment with reasons signed on October 23, 2013, the trial court clarified that the July 18, 2013 judgment, which awarded AQC attorney's fees, in the amount of \$10,681.17, was not a penalty. The trial court also denied Mr. King's motion for new trial.

Based on the foregoing, we reverse the trial court's award of attorney's fees under La. R.S. 38:2246 (attorney's fees in the amount of ten percent of its damage claim) which totaled \$10,681.17, and remand this matter to the trial court for further proceedings consistent herewith.

**DECREE**

Considering the foregoing, the July 18, 2013 judgment of the trial court which awarded Advanced Quality Construction, Inc. \$106,811.73 in damages is hereby amended to reduce the award of \$106,811.73 to Advanced Quality Construction, Inc. to \$76,064.01. The trial court's award of \$10,681.17 in attorney's fees to Advanced Quality Construction, Inc. pursuant to La. R.S. 38:2246 is hereby reversed, and the matter is remanded to the trial court for a hearing to determine how much, if any, attorney's fees are due either party pursuant to the contractual provision providing for reasonable attorney's fees. All costs of this appeal are equally cast to the parties.

**JUDGMENT REVERSED IN PART, AMENDED IN PART, AND AS AMENDED, AFFIRMED AND REMANDED.**