

From The Bench

legal news of interest

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The Scope of Indemnity Agreements

by Gary J. Delahoussaye

In *Berry v. Orleans Parish School Board*,¹ the Louisiana Supreme Court considered a case involving interpretation of an indemnity clause contained in a contract between the Lighthouse of the Blind (“Lighthouse”) and the Orleans Parish School Board (“OPSB”). The contract required Lighthouse to provide mobility training services to Orleans Parish public school students. Pursuant to the contract, Lighthouse agreed to indemnify OPSB for damages arising from the performance of the contract through the following language:

To the fullest extent permitted by law, the Contractor [Lighthouse] shall indemnify, hold harmless and defend the School Board, its employees and agents from and against all claims, demands, suits, damages, judgments of sums of money, losses and expenses, including but not limited to attorney’s fees and costs (“Claims”) arising out of the performance of any of the services to be performed pursuant to the terms of this Agreement . . . and is caused in whole or in part by any act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder. . . .

Q Does a party to a contract, containing a provision requiring it to indemnify another party for losses “arising out of” the performance of the contract, owe indemnity for losses arising from the other party’s own negligence?

a. Yes, but only if the contract clearly expressed the parties’ mutual and unambiguous intent to extend indemnity to include losses arising from that party’s negligence.

Subsequent to the execution of the contract, two New Orleans public school students were allegedly sexually molested by Francis O’Gara, an employee of Lighthouse. It was not disputed that O’Gara’s acts were committed in connection with Lighthouse’s performance of its obligations under the contract with OPSB.

Parents of the two students filed separate suits against Lighthouse and the OPSB. Acts of negligence were alleged on the part of the Lighthouse and OPSB. The school board’s alleged negligence included failing to properly supervise the handling of school children, negligent hiring, failing to properly investigate prior acts of molestation, and other general acts of negligence.

The Lighthouse filed a *Motion for Summary Judgment*, contending it was not required to indemnify OPSB for the board’s independent negligence. The Lighthouse did not dispute it was required to indemnify OPSB for O’Gara’s acts. However, the Lighthouse took the position the indemnity language did not unequivocally state it was required to indemnify OPSB for its own independent acts of negligence and the indemnity provisions should be strictly construed.



After a hearing, the trial court granted summary judgment in favor of the Lighthouse and denied OPSB's *Cross Motion for Summary Judgment* on the indemnity clause.

The Louisiana Fourth Circuit Court of Appeal reversed the trial court's ruling, finding the contractual language was sufficiently broad to require the Lighthouse to indemnify OPSB for the OPSB's independent negligence. The appellate court rendered summary judgment in favor of OPSB, requiring the Lighthouse to defend and indemnify the board.

The Louisiana Supreme Court upheld the Fourth Circuit's ruling. The court rejected the Lighthouse's argument that claims made by both plaintiffs contained allegations, which applied solely to OPSB, and that the Lighthouse was not responsible to indemnify the board for its failure to comply with certain duties and safeguards. OPSB argued all claims made by both plaintiffs were dependent solely upon the conduct of O'Gara. The court agreed. "Under the uncontested facts of this case, we can see no scenario as a matter of law in which the OPSB's negligence could be viewed as the sole cause of the injuries to these plaintiffs."

The court also looked to the terms of the contract, specifically the phrase "arising out of . . ." The court found this phrase sufficiently broad to include complete indemnity of the school board. In interpreting this phrase, in light of the overall terms of the contract, the court asked whether "the particular injury would have occurred but for the work under the contract." The court found but for the Lighthouse's employment of O'Gara to perform the Lighthouse's services under the contract, O'Gara would not have had access to the children and the molestation would not have occurred.

Accordingly, the court concluded the plaintiffs' injuries arose out of the performance of the contract between the Lighthouse and OPSB, thereby finding the school board was entitled to indemnification from Lighthouse.

¹ 2001-3283 (La. 6/21/02); 2002 WL 1354227.



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Recent Decision on Interruption of Prescription

In *Jonise v. Bologna Brothers*,¹ the Louisiana Supreme Court considered a case involving an allegedly prescribed claim. The court found a claims adjuster's letter merely requesting the plaintiff execute medical authorization forms and suggesting the defendants were investigating the facts of the claim, which did not make an offer to settle or suggest defendants were waiving prescription, did not constitute an interruption of prescription by "lulling" the plaintiff into a false sense of security.

¹ 2001-3230 (La. 6/21/02); 2002 WL 1352436.



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