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ALABAMA CONSTRUCTION LAW NEWSLETTER

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The following are summaries of recent court decisions affecting the construction industry in Alabama. If you have any questions, please contact Larry Logsdon or Oscar Price at 205-870-0555 or at ll@wallacejordan.com.

Contractor May Have to Pay Twice for Materials from Subcontractor Supplier

Valley Joists, Inc. v. CVS Corp., -- So.2d ----, 2006 WL 2193662 (Ala. Civ. App. Aug 04, 2006)

A supplier filed a lien claiming that they had not been paid by a subcontractor. The owner asked the court to dismiss the lien arguing that since the contractor already paid amounts owed to the subcontractor the lien was not proper. The court found, however, that since amounts were owed by the owner to the contractor when the lien was filed, then the supplier would could have a valid "unpaid balance" lien. The result

of this opinion is that a contractor may pay a subcontractor for materials supplied by a supplier and if the subcontractor does not pay the supplier, then the supplier can file a lien and possibly collect from the owner. As a practical matter the owner may require the contractor to satisfy the lien resulting in the contractor having to pay the supplier twice. This case shows the importance of contractors and owners obtaining lien waivers not only from subcontractors but also from the suppliers of the subcontractors. The Contractor

has asked the Alabama Supreme Court to review the case.

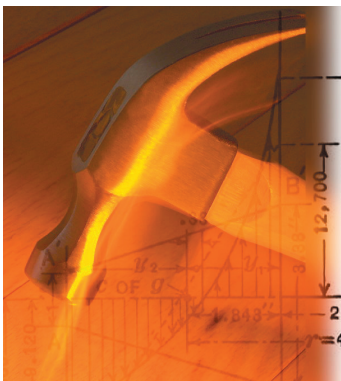


Subcontractor Allowed to Collect Against Bonding Company Despite Signing Lien Waiver

Hartford Acc. & Indem. Co. v. Cochran Plastering Co., Inc., 2006 WL 73735 (Ala. Civ. App. 2006)

This case allowed a subcontractor to recover in a claim against the contractor's bonding company. The court first rejected the bonding company argument that a "pay if paid" clause in the contractor/subcontractor agreement precluded payment by the contractor to the subcontractor. The court found that the clause was only a timing mechanism and not a condition precedent. Next, the court disagreed with the bonding company's argument that lien waivers and lien releases signed by the subcontractor barred payment of amounts more than what was in the lien waiver. The court found that the lien waiver language was only a release if payment was made and the payment was not made until after suit was filed. Finally, the court allowed an attorneys' fees award of almost double the amount awarded under the contract.

Definition of "Contractor" in Determining Statute of Limitations



Burkes Mech., Inc. v. Ft. James-Pennington, Inc., 2004 WL 3017016 (Ala. 2004)

In this case a contractor was hired to install hardwood screening at a pulp and paper mill. An employee of the contractor that was injured on the project sued the owner, and the owner asserted that the contractor should indemnify the owner and defend the suit. The contractor refused, and the owner

subsequently sued the contractor for breach of contract. The contractor alleged the suit was barred by the applicable statute of limitations. The court found that there was no evidence that the contractor was a licensed general contractor and as such the contractor was not protected by the two year statute of limitations.

Home Builder Cannot Recover for Amounts Owed If it Was Not Properly Licensed

Hooks v. Pickens Home Repair, 2040569 (Ala. Civ. App. April 21, 2006).

The court found that a home builder that was doing remodeling and neither properly licensed nor otherwise exempt from the licensing requirements of home builder's licensure statute could not recover amounts owed by a home owner.

Contractor Unable to Collect Amounts that Board Agreed to Pay for Additional Work at Preconstruction Meeting

Board of School Commissioners of Mobile County V. Coastal Builders, Inc., No. 2040560 (Ala. Civ. App. Dec. 16, 2005).

In this case, a contractor bid a job with the Board of School Commissioners of Mobile County and was selected as the contractor for the construction of an Elementary School. Later, at the preconstruction meeting, the Board pointed out to the contractor that their bid

did not appear to include amounts for a "control package" that was necessary for the work. The evidence showed that the Board told the contractor at the preconstruction meeting that a change order would be issued to cover this additional cost. Some time after the preconstruction meeting a contract was signed but it did not include provisions to cover for the additional amounts connected with the

control package. The contractor ultimately was not paid the additional amounts by the Board and sued. The court found that since the oral agreement to pay the additional amounts at the preconstruction conference did not comply with the competitive bid laws, then that agreement was void and the Board did not have to pay the contractor.

Appraiser not Liable to Home Purchasers for Representations in the Appraisal Report

Johnny F. Nesbitt and Jan Nesbitt V. Charlie Frederick, Jr., et al., No. 1040060 (Ala. May 5, 2006).

The court found that an appraiser was not liable to purchasers of a house for representations made in an appraisal report. The court reasoned that the appraisal report was for the bank financing the sale, not the purchaser, and that the purchaser of the house could not have reasonably relied on the appraisal.

Road Contractor Not Allowed Additional Compensation for Work Allegedly Not Covered by Contract or for Delay Damages; Contractor Cannot Rely on Pre-Bid Representations

Racon, Inc. v. Tuscaloosa County, Burk-Kleinpeter, Inc., 2006 WL 2089892 (Ala. July 28, 2006).

In this case a contractor attempted to receive additional compensation for providing rock buttresses that it claimed was extra work. The contractor based its extra work claim on wording in the ALDOT standard specifications. Also, the contractor argued that representations were made at a pre-bid meeting that the costly rock buttresses were only to be used to prevent slope failures and used as a last resort if less costly methods were not possible.



The court denied the additional compensation. They relied first on a provision contrary to contractor's argument in the specifications and found that another contract clause

stated that if there was a conflict between the ALDOT standard specifications and the contract's specifications, the contract's specifications would control. Next, the court found that the contractor could not rely on pre-bid representations as a "merger" clause in the contract stated that all previous statements that were not incorporated into the contract would not be a part of the agreement. Finally, the court found that a "no damage for delay" clause precluded the contractor's recovery for delay damages.

Attorney's Fee Award Allowed for Non Payment to Subcontractor Even Though Contractor Had a Good Faith Reason Not to Pay

Kean Electric Company, Inc. v. Tolar Construction, LLC, Nos. 1041448 and 1041510 (Ala. May 19, 2006). The court upheld a jury award in favor of a subcontractor against a contractor that had terminated the subcontractor from a project. In interpreting Alabama's Prompt Pay Act, the court allowed the subcontractor attorneys' fees even though the contractor had a good faith reason for not paying the subcontractor. The court also indicated that had the contractor been awarded amounts in the suit that they may have been able to recover attorneys' fees against the subcontractor.

Owner Not Allowed to Bring Claim Against Subcontractor

Cincinnati Insurance Companies, as Subrogee of Sarah Fain and James Clyde Fain, Jr. v. Barber Insulation, Inc., and Framco, No. 1050485 (Ala. June 9, 2006).

The court found that an owner of a house was not allowed to bring a claim against a subcontractor. The court reasoned that based on the

particular facts of the case and the language of the subcontract that the owner was not an intended beneficiary of the subcontractor's contract with the contractor.



Owner's Claims against Contractor Must be Brought in Arbitration

Mckay Building Company, Inc., V. Juliano, No. 1041720 (Ala. July 21, 2006).

The court evaluated whether a homeowner's claim against a remodeling contractor had a sufficient connection with interstate commerce (or states other than Alabama) in order to trigger the Federal Arbitration Act. The court found that the transaction was sufficiently connected to interstate commerce for federal arbitration law to trump Alabama's prohibition against arbitration.

Court Upheld Law Disallowing Testimony of Unlicensed Engineer

Board of Water and Sewer Commissioners of the City of Mobile v. James Hunter et al., No. 1050067 (Ala. July 28, 2006).

The court considered and upheld a law in Alabama stating that it was the practice of engineering to "testify" in court and prohibiting that unless the engineer has an Alabama license.



If you have any questions or comments about these recent decisions or other matters, please contact Larry Logsdon or Oscar Price via phone at (205) 870-0555 or via e-mail at ll@wallacejordan.com.

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