

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2011 CA 0649**

**DARYN SPENCE AND DARCY SPENCE**

**VERSUS**

**CHRISTOPHER CASSANO, TROY D. CASSANO, AND  
CASSANO CONSTRUCTION, LLC**

Judgment Rendered: **NOV - 9 2011**

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On Appeal from the 21st Judicial District Court  
In and for the Parish of Livingston  
Docket No. 106,879, Section "C"

Honorable Robert H. Morrison, III, Judge Presiding

\*\*\*\*\*

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**BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.**



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**BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.**

## **HUGHES, J.**

This is an appeal from a judgment of the 21st Judicial District Court that sustained an exception raising the objection of peremption and dismissed the indemnity claim of defendant/third-party plaintiff/appellant, Cassano Construction, LLC (Cassano), against third-party defendant/appellee, Post-Tension Slabs, Inc. (Post-Tension). For the reasons that follow, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

In 2003 Daryn and Darcy Spence entered into a contract with Cassano wherein Cassano would design and manage the construction of their home located at 21750 Scivicque Road in Denham Springs, Louisiana. A Certificate of Occupancy was issued to the Spences on February 18, 2004. Thereafter, on February 9, 2005, the Spences filed a petition for damages against Cassano alleging “numerous defects in the construction of their home that rendered it unacceptable.” Cassano then, on December 29, 2009 (over five years after the Spences took occupancy of the home), brought third-party demands against several of the sub-contractors of the Spence home, including Post-Tension. Cassano sought indemnity from the sub-contractors in the event that it was found liable to the Spences for damages. In response, Post-Tension filed an exception raising the objection of peremption. After a hearing, the district court maintained the exception and dismissed Cassano’s indemnity action as to Post-Tension, citing LSA-R.S. 9:2772 as the applicable authority. Cassano appeals and argues that:

- 1) its claim is governed by the NHWA, as opposed to LSA-R.S. 9:2772, and
- 2) its right to indemnification from Post-Tension vested at the time that the Spences first experienced defects in the home.

Based on those assertions, Cassano concludes that its third-party indemnity demand against Post-Tension was not preempted at the time it was filed, because the preemptive period contained in the NHTA in February of 2004, when the Spences took occupancy of their home and first began experiencing problems, was seven years, plus thirty days.<sup>1</sup>

## LAW AND ANALYSIS

### **I. Standard of Review**

Preemption is the period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the preemptive period. LSA-C.C. art. 3458. A preemptive period cannot be interrupted or suspended. **Naghi v. Brener**, 08-2527 (La. 6/26/09), 17 So.3d 919, 926.

A judgment sustaining a preemptory exception is reviewed *de novo*, because the exception raises a legal question. **Metairie III v. Poche' Construction, Inc.**, 10-0353 (La. App. 4 Cir. 9/29/10), 49 So.3d 446, 449, writ denied, 10-2436 (La. 9/16/11), \_\_\_ So.3d \_\_\_. An appellate court is to determine whether, in the light most favorable to the plaintiff, and with every doubt resolved in the plaintiff's favor, the petition states any valid cause of action for relief. **Metairie III v. Poche' Construction, Inc.**, 49 So.3d at 449.

### **II. The Applicable Statute**

Cassano argues that the court applied the wrong preemptive period to its indemnification claim against Post-Tension, asserting that its third-party demand is governed by the NHTA, as opposed to LSA-R.S. 9:2772. For a determination of which statute properly applies, we must look to the language of the statutes.

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<sup>1</sup> In 2004, the NHTA was amended and the preemptive period for "major structural defects" was

The fundamental rule of statutory construction is to give the statute its intended meaning. **McLane Southern, Inc. v. Bridges**, 10-1259 (La. App. 1 Cir. 5/6/11), 64 So.3d 886, 892. Legislation is the solemn expression of the legislative will and, therefore, the interpretation of a law primarily involves the search for the legislature's intent. The starting point in ascertaining that legislative intent is the language of the statute itself. **Moss v. State**, 05-1963 (La. 4/4/06), 925 So.2d 1185, 1197. In examining that language, words and phrases are to be read in their context and to be accorded their generally prevailing meaning. LSA-C.C. art. 11; LSA-R.S. 1:3. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written, and no further interpretation may be made in search of the intent of the legislature. See LSA-C.C. art. 9; see also **Ciliberti v. Mistretta**, 03-1559 (La. App. 1 Cir. 5/14/04), 879 So.2d 789. Under those principles, we look to the language of both the NHWA and LSA-R.S. 9:2772 to determine which statute provides the proper preemptive period for an indemnification demand brought by a builder against a sub-contractor.

**A. The New Home Warranty Act, LSA-R.S. 9:3142, et seq.**

The NHWA was enacted in 1986 and codified in LSA-R.S. 9:3142, *et seq.* Section 3141 of the Act, entitled "Purpose" states that:

The legislature finds a need to promote commerce in Louisiana by providing clear, concise, and mandatory warranties for the purchasers and occupants of new homes in Louisiana and by providing for the use of homeowners' insurance as additional protection for the public against defects in the construction of new homes. This need can be met by providing a warranty for a new home purchaser defining the responsibility of the builder to that purchaser and

subsequent purchasers during the warranty periods provided herein. The warranty, which is mandatory in most cases, shall apply whether or not the building code regulations are in effect in the location of the structure, thereby promoting uniformity of defined building standards. Additionally, all provisions of this Chapter shall apply to any defect although there is no building standard directly regulating the defective workmanship or materials.

Section 3144 of the Act provides that “every builder warrants the following to the owner:...Five years following the warranty commencement date, the home will be free from major structural defects.” The Act further provides that in the event that a “builder violates this Chapter by failing to perform as required by the warranties provided in this Chapter, any affected owner shall have a cause of action against the builder for actual damages, including attorney fees and court costs, arising out of the violation.” LSA-R.S. 9:3149(A). “Any action to enforce any warranty provided in this Chapter shall be subject to a preemptive period of thirty days after the expiration of the appropriate time period provided in R.S. 9:3144.” LSA-R.S. 9:3146. The NHWA contains the “exclusive remedies, warranties, and preemptive periods **as between builder and owner** relative to home construction and no other provisions of law relative to warranties and redhibitory vices and defects shall apply.” LSA-R.S. 9:3150.

An “owner”, as defined under the NHWA, is “the initial purchaser of a home and any of his successors in title...” LSA-R.S. 9:3143(6). A “builder” is defined as “any person, corporation, partnership, limited liability company, joint venture, or other entity which constructs a home, or addition thereto...” LSA-R.S. 9:3143(1).

The legislative intent behind the NHWA could not be more certain: to provide “clear, concise, and mandatory warranties **for the purchasers and**

occupants of new homes.” LSA-R.S. 9:3141 (Emphasis added.) There is no provision therein that provides additional warranties or remedies in favor of a builder against a sub-contractor. And while a builder’s indemnification claim may arise out of its liability to an owner under the NHWA, its claim for reimbursement from a sub-contractor is a separate and distinct cause of action. We conclude that the preemptive period stated herein is applicable only to claims of new home purchasers and owners against builders.

**B. LSA-R.S. 9:2772**

Enacted in 1964, LSA-R.S. 9:2772 is entitled “Preemptive period for actions involving deficiencies in surveying, design, supervision, or construction of immovables or improvements thereon” and states, in pertinent part, that:

A. **No action**, whether ex contractu, ex delicto, or otherwise, including but not limited to an action for failure to warn, to recover on a contract, or to recover damages, or otherwise arising out of an engagement of planning, construction, design, or building immovable or movable property which may include, without limitation, consultation, planning, designs, drawings, specification, investigation, evaluation, measuring, or administration related to any building, construction, demolition, or work, **shall be brought against any person** performing or furnishing land surveying services, as such term is defined in R.S. 37:682, including but not limited to those services preparatory to construction, or against any person performing or furnishing the design, planning, supervision, inspection, or observation of construction or the construction of immovables, or improvement to immovable property, **including but not limited to a residential building contractor** as defined in R.S. 37:2150.1(9):

(1)(a) More than five years after the date of registry in the mortgage office of acceptance of the work by owner.

(b) If no such acceptance is recorded within six months from the date the owner has occupied or taken possession of the improvement, in whole or in part, **more than five years after the improvement has been thus occupied by the owner.**

\* \* \* \*

B. (1) The causes which are preempted within the time described above include any action:

(a) For any deficiency in the performing or furnishing of land surveying services, as such term is defined in R.S. 37:682, including but not limited to those preparatory to construction or in the design, planning, inspection, or observation of construction, or in the construction of any improvement to immovable property, including but not limited to any services provided by a residential building contractor as defined in R.S. 37:2150.1(9).

\* \* \* \*

**(3) This preemptive period shall extend to every demand, whether brought by direct action or for contribution or indemnity or by third-party practice, and whether brought by the owner or by any other person. (Emphasis added.)**

We conclude that Cassano's third-party claim against Post-Tension clearly falls within the purview of this statute. Moreover, it is settled in the jurisprudence, and the parties do not dispute, that the preemptive period commenced at the time the Certificate of Occupancy was issued, on February 18, 2004. Cassano's indemnity claim against Post-Tension, brought by third-party demand, had therefore been preempted prior to December 18, 2009, the date it was filed. See Ebinger v. Venus Construction Corporation, et al., 10-2516 (La. 7/1/11), 65 So.3d 1279. Because we conclude that LSA-R.S. 9:2772 is the proper authority that governs Cassano's demand as to Post-Tension, we find no error in the trial court's judgment maintaining the exception raising the objection of preemption.

### **III. The "Vested" Right Argument**

Cassano's remaining assignment of error, that its right to indemnification "vested" as soon as the Spences experienced defects in their new home, is reliant on a favorable conclusion regarding their argument that



the NHTA applies to their claim. As determined above, the applicable statutory preemptive period is contained in Section 2772.

However, we note that Cassano's argument regarding the time when its right to indemnification vested was recently discussed by the supreme court in **Ebinger v. Venus**, 65 So.3d 1279. Therein, the court, in its very detailed analysis, explained that "[a] vested right must be absolute, complete and unconditional, independent of a contingency." **Ebinger**, 65 So.3d at 1287. Indemnity, in its most basic sense, means reimbursement and is a separate substantive cause of action that is independent of the underlying wrong and is dependant on the actions of another. **Ebinger**, 65 So.3d at 1286, *citing Nassif v. Sunrise Homes*, 98-3193 (La. 6/29/99), 739 So.2d 183, 185-186. For instance, while the Spences right to sue Cassano accrued at the time they suffered damages, any right that Cassano may later acquire against Post-Tension depends both on whether it is sued by the Spences, and whether it is determined to be liable to the Spences. Because liability on a third-party demand for reimbursement is contingent upon the result of the main demand, indemnification therefore cannot meet the requisites for a vested right: absolute, complete, and unconditional. To the contrary, a right to indemnity is conditional and incomplete until liability is established and the party seeking indemnity is *actually* cast in judgment. The **Ebinger** court thus held that prior to being cast in judgment, a contractor's third-party claim for reimbursement against a sub-contractor is "merely an unvested inchoate right." *citing Metairie III v. Poche' Construction, Inc.*, 49 So.3d at 454.

Consequently, Cassano's argument that the right had vested before the Spences even filed the main demand against it must fail. The jurisprudence is clear that until Cassano is *actually* cast in judgment, there exists no vested

right to indemnification from Post-Tension. Thus, even if Cassano's claim was governed by the NHTA, its prior version containing a seven-year preemptive period would still not apply. Because Section 3144 was amended to reduce the preemptive period from seven years to five before Cassano's right to indemnification vested, even under the NHTA a five year preemptive period would apply. Thus, under either statutory preemptive period, Cassano's claim is time-barred.

### **CONCLUSION**

For the reasons assigned herein, the judgment of the 21<sup>st</sup> Judicial District Court is affirmed. All costs of this appeal are assessed to defendant/third-party plaintiff/appellant, Cassano Construction, LLC.

**AFFIRMED.**