

# **Is Comparative Fault Available in a Construction Contract Claim?**

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# Introduction

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When parties come at odds in a construction project—i.e., owner versus general contractor/general contractor versus subcontractor—litigation claims often arise that sound in both contract and in tort/negligence. The question then becomes whether a defendant in a breach of contract suit can assert the comparative fault of the plaintiff suing it (or the contributory fault of others) to lessen its exposure. We will examine the state of the law on this issue.

# What is the State of the Law?

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- Uncertain.
- There is a circuit split over whether comparative fault applies to non-tort claims, and the Louisiana Supreme Court has never directly addressed the issue.
- U.S. Eastern District of Louisiana Judge Jane Triche-Milazzo recently examined the state of the law on this issue in a construction and design defect case and found that “the law is far from clear.” Hanover Ins. Co. v. Plaquemines Parish Gov’t, No. 12-1680, 2015 WL 4167745 (E.D. La. July 9, 2015).

# Hanover vs. Plaquemines Parish

## Overview of Facts

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- Plaquemines Parish hired a general contractor to construct a community center in Boothville, Louisiana. Due to several disputes regarding the quality of the work, the Parish decided not to tender final payment on the construction contract to the general contractor, which in turn refused to pay certain subcontractors. Those subcontractors filed claims with the insurer who issued the performance and payment bond.
- An “avalanche of litigation” (Judge Milazzo’s words) resulted. There are more than 90 pleadings and 30 parties. There are several layers of claims: (1) claims between the Parish and its direct contractors (general contractor, architect, and project manager); (2) Parish's claims against subcontractors; (3) claims for contribution or indemnity among various contractors and subcontractors; and (4) (of course) claims against and among insurers.

# Hanover vs. Plaquemines Parish

## Overview of Facts (continued)

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- The Parish alleges numerous design and construction defects, structural defects, and moisture intrusion.
- Problems include a leaking roof, improperly attached stucco, omission of waterproof membrane to exterior, structurally unsound walls and slabs, leaking windows, incorrectly sloped balconies, faulty pile caps, omission of structural steel, removal of concrete columns, standing water and mold everywhere ...just to name a few.

# Hanover vs. Plaquemines Parish

## The Comparative Fault Issue

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- The Parish alleges both tort and breach of contract claims. The Parish contends that the contractors are solidarily liable with each other.
- Various defendants asserted comparative fault as a defense to both the Parish's tort and breach of contract claims.
- The Parish moved for partial summary judgment holding, as a matter of law, that comparative fault is not available as a defense to breach of contract claims.

# Hanover vs. Plaquemines Parish

## Judge Milazzo's Analysis

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- Started by quoting the comparative fault statute – Civil Code article 2323:
    - A. In **any action** for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined . . . .
    - B. The provisions of Paragraph A shall apply to **any claim** for recovery of damages for injury, death, or loss asserted **under any law or legal doctrine or theory of liability, regardless of the basis of liability.**
    - C. Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.
- (emphasis added)
- The defendants argued that the broad emphasized language means that comparative fault applies to all claims governed by Louisiana law, including claims for breach of contract.

# Hanover vs. Plaquemines Parish

## Circuit Split

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- The court found there is a split among state and federal courts.

### Applying comparative fault to (arguably) non-tort claims:

- **First Circuit:** Held that liability in redhibition was “fault” under Article 2323. Court relied on the broad language of Article 2323. Petroleum Rental Tools, Inc. v. Hal Oil & Gas Co.
- **Third Circuit:** Held that liability under Civil Article 667 for the legal servitude of a property owner’s obligation to his neighbors not to create a nuisance is subject to comparative fault. Pelt v. City of DeRidder. The court applied comparative because pre-1996 Article 667 liability was strict liability. The Court appeared to treat Article 667 liability as tort-based (delictual) liability.
- **Fifth Circuit:** Recently cited Third Circuit’s decision in Pelt to hold that Article 667 liability is subject to comparative fault. Kenner Plumbing Supply, Inc. v. Rusich Detailing, Inc.
- Judge Milazzo cited the First Circuit’s decision in Petroleum Rental Tools as a case applying comparative fault to non-tort claims.



# Hanover vs. Plaquemines Parish

## Circuit Split (continued)

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### **NOT** applying comparative fault to (arguably) non-tort claims:

- **Second Circuit:** Held “[c]omparative negligence is not a defense in a redhibition suit” because “[a] redhibition suit is a contractual action.” Hostetler v. W. Gray & Co.
- **Third Circuit:** Rejected argument that 1996 tort reform abolished solidary liability between manufacturers and sellers in redhibition cases. Court stated (arguably in dicta) that the doctrine of comparative fault is limited to delictual liability because it is codified in “a code article located in Title V of Book 3 ‘Obligations Arising Without Agreement’ dealing with tortious conduct.” Aucoin v. Southern Quality Homes, LLC. **Does Aucoin overrule Pelt, which applied comparative fault to Article 667 liability? Also, Judge Milazzo recognized that the Supreme Court had the opportunity to resolve the circuit split in Aucoin but declined to do so.**

# Hanover vs. Plaquemines Parish

## Circuit Split (continued)

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### **NOT applying comparative fault to (arguably) non-tort claims:**

- **Fourth Circuit:** Held comparative fault does not apply to redhibition claims: “La. Civil Code Art. 2323 applies only to actions based in tort” because “comparative fault is a tort based concept, and is thus governed by the laws under the title ‘Offenses and Quasi Offenses’ in the Civil Code.” Touro Infirmary v. Sizeler Architects.
- **Fifth Circuit:** Held that comparative fault does not apply to redhibition claims because “[c]omparative negligence may only be asserted in a tort action.” Merlin v. Fuselier Construction, Inc. **Has Merlin been overruled by Kenner Plumbing, which applied comparative fault to Article 667 liability?**
- Judge Milazzo cited Fourth Circuit in Touro Infirmary and Fifth Circuit in Merlin as cases not applying comparative fault to non-tort claims.

# Hanover vs. Plaquemines Parish

## Judge Milazzo's Analysis (continued)

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- Court recognized that since 2008, three federal cases (not including Plaquemines Parish) reached differing decisions.
- Chevron U.S.A. Inc. v. Aker Maritime, Inc.: Judge Beer (E.D. La.) held comparative fault applies to breach of contract claims.
- Dual Construction, Inc. v. City of Alexandria: Judge Trimble (W.D. La.) held comparative fault applies only to tort claims.
- Hollybrook Cottonseed Processing, LLC v. Carver, Inc.: Judge Foote (W.D. La.) held comparative fault does not apply to redhibition claims.
- In Hanover Ins. Co. v. Plaquemines Par. Gov't, Judge Milazzo noted: “Based on these cases, the Parish and the Contractors insist that Louisiana law clearly prohibits or requires, respectively, the application of comparative fault to contract claims. In the Court's view, the law is far from clear.”

# Hanover vs. Plaquemines Parish

## Judge Milazzo's Analysis (continued)

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- Making an “Erie guess,” court held comparative fault applies to tort claims only and not to breach of contract claims. To briefly summarize the court’s reasons:
- Supreme Court jurisprudence discussing Article 2323 is “rife with references to tort law.”
- “[A]s far as the Court can tell, no Louisiana court has applied comparative fault principles to a breach of contract claim.”
- Article 2323 is located in section of the Civil Code regarding torts, and law of contracts is in a different part of the Code.
- “The fact that the contracts section of the Code contains its own set of rules regarding damages also counsels against importing a tort article into contract cases.”
- Civil Code article 1804, providing for liability of solidary obligors among themselves, defines a “virile portion” differently for contractual liability and tort liability—suggesting “separate legal regimes governing the allocation of damages in contract and tort actions.”

# What does Hanover vs. Plaquemines Parish tell us?

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- Could be a very significant decision. Examined a number of arguments for and against applying comparative fault to breach of contract claims—specifically in a construction and design defect case.
- Still, the court noted it was making an “Erie guess.” The Supreme Court has not spoken on the issue.
- Let’s survey some of the leading arguments for and against applying comparative fault to breach of construction contract claims, some of which Judge Milazzo discussed in her opinion.

# Arguments for Applying Comparative Fault: Plain Language of Article 2323

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- The language of Article 2323(B) provides the strongest reason for applying comparative fault to all claims for damages under Louisiana law: literally read, that is what the statute says.
- Subsection “A” states that in “**any action for damages**,” the “degree of percentage of all persons causing or contributing” to the damage must be determined (emphasis added). Percentages of fault allocated to persons other than the plaintiff reduce the plaintiff’s recovery by those percentages.
- Subsection “B” then states that the comparative fault rule of Subsection “A” applies to “any claim” for damages asserted “**under any law or legal doctrine or theory of liability**” – “**regardless of the basis of liability**.” (emphasis added)
- A breach of contract action is an “action for damages.” A claim under the law of contract is a claim “under any law or legal doctrine or theory of liability.”

# Arguments for Applying Comparative Fault: Plain Language of Article 2323 – Dumas

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- In Dumas v. State ex rel. Dep't of Culture, Recreation & Tourism, Louisiana Supreme Court held that the defendant was entitled to put on evidence of the fault of non-party healthcare providers whose negligence allegedly contributed to the victim's death. Dumas was a tort case, so it did not address the application of comparative fault to non-tort liability. But it has some interesting language.
- The Court noted that Article 2323 “makes no exceptions for liability based on medical malpractice; on the contrary, **it clearly applies to any claim asserted under any theory of liability, regardless of the basis of liability.** There is no conflict between either Article 2323 or Article 2324(B) and the Medical Malpractice Act that could be fairly classified as ‘absurd.’ Accordingly, we find the clear language of Articles 2323 and 2324(B), applied as written, leads to the inescapable conclusion that the State in this case must be allowed to put on evidence related to the health care provider's alleged fault as part of its defense.” (emphasis added)
- Was the Court suggesting that comparative fault applies to non-tort liability, or just that comparative fault applies to medical malpractice liability because it is based in tort? More on how to read Dumas later.

# Arguments for Applying Comparative Fault: “Fault” May Be Contractual

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- The Supreme Court has described “fault” as a “dynamic, all-encompassing civilian concept.” Veazey v. Elmwood Plantation Associates, Ltd. “[F]ault is a broad concept embracing all conduct falling below a proper standard.”
- “Contractual fault is that which is committed on the occasion of the execution of a contract. It consists in violating a contractual obligation.” State ex rel. Guste v. Simoni, Heck & Associates (quoting Planiol).
- The First Circuit, in Petroleum Rental Tools, held that “fault” under Article 2323 extends beyond tort to redhibition claims: The court concluded that “liability for the redhibitory defect qualifies as ‘fault’ under Article 2323 A. To hold otherwise would be to fail to give effect to the phrase in Article 2323 B, ‘regardless of the basis of liability.’”



# Arguments for Applying Comparative Fault: Jurisprudence

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- Nicholson & Loup, Inc. v. Carl E. Woodward, Inc.: Louisiana Fourth Circuit characterized action as “quasi-offensive” because claim was “tortious breach of contract” based on duty to perform contract in workmanlike manner. Court applied comparative fault to liability of geotechnical engineer and architect.
- Stonecipher v. Mitchell: Louisiana Second Circuit characterized breach of duty to perform contract in workmanlike manner as “ex delicto” and “quasi offense,” requiring allocation of fault between contractor and architect.

# Arguments for **Not** Applying Comparative Fault: Structure of the Civil Code

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- Considering where a law resides in the Civil Code, i.e., its context, is an argument pro subjecta materia. LA. CIV. CODE arts. 12-13.
- **Article 2323** is located in Civil Code Book III, “Of the Different Modes of Acquiring the Ownership of Things”; **Title V**, “Obligations Arising Without Agreement”; Chapter 3, “Of Offenses and Quasi Offenses.” Statutes governing recovery for **breach of contract** are in a separate title of the Code—**Title IV**, “Conventional Obligations or Contracts.”

# Arguments for *Not* Applying Comparative Fault: Structure of the Civil Code

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- **Argument:** Importing a rule of apparent tort liability from the tort section of the Code into the contracts section of the Code would apply the tort doctrine of comparative fault out of context.
- **Query:** Don't principles of tort and contractual fault overlap? See cases applying contract articles in Book III, Title IV of the Code to tort liability, e.g., tort cases citing Article 1999 regarding assessment of damages for breach of contract. See Mosing v. Domas, 2002-0012 (La. 10/15/02), 830 So. 2d 967, 974; Cone v. Nat'l Emergency Servs., Inc., 99-0934 (La. 10/29/99), 747 So. 2d 1085, 1090 n.6.

# Arguments for Not Applying Comparative Fault: Structure of Code: Touro Infirmary

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- Fourth Circuit struck a comparative fault defense asserted in a contractual (redhibition) action.
- Touro sued, among others, an architect and the manufacturer of a vinyl wall covering, upon discovering that significant water leakage was occurring during inclement weather, with attendant mold and mildew.
- Plaintiff asserted claims for breach of contract, negligence, redhibition, warranty, and products liability.
- Fourth Circuit affirmed trial court decision striking manufacturer's affirmative defense of comparative fault because "La. Civil Code Art. 2323 is found among the code articles related to 'Offenses and Quasi Offenses,' which do not govern sales and contract."

# Arguments for *Not* Applying Comparative Fault: Different Liability/Damage Schemes

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- Tort law and contract law each has its own rules governing liability. Contract law has specific rules for awarding damages to the plaintiff obligee. LA. CIV. CODE arts. 1986, 1989, 1994. Tort law has its own rules regarding awarding damages, including Article 2323's comparative fault provisions.
- The law of contract has its own analogue to the tort-based comparative fault rules. Under the contract rules, the good or bad faith of the obligor and/or the obligee expands or contracts the obligee's recovery against the obligor. LA. CIV. CODE art. 1996, 1997, 2003.

# Arguments for *Not* Applying Comparative Fault: Different Liability/Damage Schemes

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- Argument: Importing comparative fault in the tort section of the Code into the contracts section of the Code does violence to the existent scheme for allocating contractual liability.
- Would disturb the “law between the parties,” *i.e.*, how parties structure obligations to each other. For example, indemnity obligations—who is liable and in what percentages. Applying comparative fault would negate freedom of contract. That would create an absurd consequences that supports a non-literal interpretation of Article 2323. LA. CIV. CODE art. 9.

# Arguments for *Not* Applying Comparative Fault: Statutory Language

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- There is terminology in Article 2323 suggesting that comparative fault is a creature of tort.
- The statute is entitled “Comparative fault.” “Fault” is “the key word used in La.C.C. art. 2315, the ‘fountainhead’ of tort responsibility in Louisiana.” Veazey v. Elmwood Plantation Assocs., Ltd. (La. 1994).
- Article 2323 employs the terms “fault,” “negligence,” and “tortfeasor.” These terms historically have been used in the language of tort.

# Arguments for *Not* Applying Comparative Fault: Legislative History

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- Article 2323 was amended during the first extraordinary session of the 1996 Louisiana Legislature.
- During that special session, the Legislature focused on revising Louisiana's tort laws.
- The title of the House bill reflecting that revision is “**Tort Reform-Comparative Fault**; Limitation of Solidary Liability.”



# Arguments for Not Applying Comparative Fault: Dumas Revisited

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- In Dumas, the Supreme Court held that with the 1996 amendments to Articles 2323 and 2324, “the legislature has effected a total shift in **tort policy**.” (emphasis added).
- Court stated that revision embodied Legislature’s policy choice that “each **tortfeasor** pays only for that portion of the damage he has caused and the **tortfeasor** shall not be solidarily liable with any other person for damages attributable to the fault of that other person. . . . The legislature has struck a new balance in favor of known, present and solvent **tortfeasors**.” (emphasis added).
- The language of Dumas is focused on **tort** liability. Noting the Supreme Court’s “description [in Dumas] of the 1996 amendment to article 2323 is rife with references to tort law,” Judge Milazzo held in Hanover Ins. Co. v. Plaquemines Parish Gov’t that “**the Louisiana Supreme Court would likely hold that article 2323 applies to tort claims only**.” (emphasis added).

# Rewriting the Statute?

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- If we apply contextual approach to reach Judge Milazzo’s conclusion, what happens to the instruction in Article 2323 that the judge apply comparative fault “regardless of the basis of liability” and “under any law”?
- One solution: Read Article 2323 in pari materia with ancillary **tort** laws outside of Chapter 3 of Title V of Book III of the Civil Code.
- Title 9 of Revised Statutes contains Civil Code ancillaries, several of which expound on tort liability in Chapter 3 (offenses and quasi offenses). LA. REV. STAT. §§ 9:2800.51-2800.60 (products liability); LA. REV. STAT. § 9:2800.6 (merchant liability); LA. REV. STAT. § 9:2794 (physician liability in med. malpractice actions).
- Argument: Clarification in Article 2323(B) that comparative fault applies to a claim “under any law . . . regardless of the basis of liability” means apply comparative fault to claims made under the ancillaries to the tort articles of the Civil Code.

Assuming comparative fault does not apply, does the plaintiff recover 100% damages?

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- Practically speaking, the plaintiff will still have to prove that the defendant's breach of contract cause the particular damages. So does the elimination of comparative fault make much of a difference?
- Other doctrines: failure to mitigate; obligee negligence under Article 2003

# Failure to Mitigate Damages

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- Under Civil Code article 2002, “An obligee must take reasonable efforts to mitigate the damage caused by the obligor’s failure to perform.”
- If a contractor installs a leaky roof, the owner can’t just leave all the windows and doors open. If the owner does that, his failure to mitigate damages may reduce his ability to recover moisture related damages from the contractor.
- “Under Louisiana law, failure to mitigate is the equivalent of comparative fault.” Mac Sales Inc. v. E.I. duPont de Nemours & Co. (U.S. 5th Cir. 1997).
- Query: Is that right? Mitigation of damages relates to the obligee’s obligation to mitigate damages that have occurred – not to whether the obligee’s fault caused the damages to occur in the first place.

# Civil Code article 2003

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- “If the obligee’s negligence contributes to the obligor's failure to perform, the damages are reduced in proportion to that negligence.” LA. CIV. CODE art. 2003.
- Note the crucial difference between Articles 2323 and 2003. Article 2323 applies if plaintiff’s negligence caused **the damage**. Article 2003 applies if negligence “contributes to **the obligor’s failure to perform**.”
- Very little jurisprudence. Under plain language of article: If owner agrees to buy solid wood to provide contractor to build owner a house, but owner negligently provides particle board instead, the owner’s recovery against contractor is reduced. Yes, contractor breached contract to build structurally sound house, but owner’s negligence contributed to the contractor’s failure to perform.
- Note, Article 2003, cmt. b, says to “[c]ompare Art. 2323.”

# Pro Rata Liability?: Maloney v. Oak Builders, Inc. (La. 1970)

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- Even if comparative fault does not apply, unless there is some basis for holding more than one contractor solidarily liable for breaches of separate contracts, each contractor likely only be liable for the amount of damages caused the contractor's breach.
- In Maloney, court of appeal and Supreme Court imposed liability on each subcontractor to the general contractor "for only his or its share of poor and deficient workmanship or lack of performance." "Each subcontractor was obligated to perform a different part of the building contract. There was no collective activity; no subcontractor was liable for the work of another subcontractor. Responsibility was individual and proportionate. Under such facts and circumstances, we find that the subcontractors cannot be held liable solidarily to the general contractor for the amount he was condemned to pay plaintiffs' attorney."
- Thus, in Maloney, Court held each subcontractor liable to the general contractor for the proportionate share of the damage caused; and applied the same shares to hold the subcontractors liable to the general contractor for attorneys' fees that the general contractor was required to pay the owner.

## Pro Rata Liability?: Maloney v. Oak Builders, Inc. (La. 1970) (continued)

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- Under Maloney, unless there is some basis for solidary liability, each contractor would only be liable for the amount of damages actually caused by the contractor's breach of contract.
- See also Rivnor Properties v. Herbert O'Donnell, Inc. (La. 5<sup>th</sup> Cir. 1994) (citing Maloney and holding that “each subcontractor was liable to the general contractor for only his or its share of the poor and deficient workmanship or lack of performance”).

# Solidary Liability in Breach of Contract Construction Cases?

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- Louisiana courts of appeal have held that contractors on a construction project who commit breaches of separate contracts that contribute to the same item of damages are solidarily liable for those damages.
- An obligation is solidary when each obligor is liable for the whole performance. LA. CIV. CODE art. 1794. The “obligation may be solidary **though it derives from a different source** for each obligor.” LA. CIV. CODE art. 1797 (emphasis added).
- The fact that several parties on a project contracted separately with the owner does not alter the fact that they are responsible for payment of the same thing, *i.e.*, the damages caused by their breaches of contracts that caused the same item of damages.



# Solidary Liability in Breach of Contract Construction Cases—Town of Winnsboro

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- Seminal case: La. Second Circuit in Town of Winnsboro v. Barnard & Burk, Inc. General contractor, engineering firm, and testing laboratory each separately contracted with town to perform work on a street system. Defects consisted of failures of the street system's soil cement base and improper backfill and construction of street curbs and gutters.
  - General contractor - improper mixing of soil, cement, and water that comprised the soil cement base for the street system; improper compaction of backfill under concrete curbs and gutters; and misalignment of curbs and gutters.
  - Engineering firm - failed to provide a competent employee to supervise construction, inadequately supervised conformity of the construction with project plans and specifications, and disregarded procedures provided by the specifications.
  - Testing lab - failed to provide adequate and experienced personnel and failed to make sufficient tests relative to soil cement operations and the construction of curbs and gutters.

# Solidary Liability in Breach of Contract Construction Cases—Town of Winnsboro

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- Held: “The defendants’ respective breaches of their contracts combined and contributed to cause the same item of damages sustained by the plaintiff. At this point, the defendants are all obliged to the same thing . . . that is, the cost of repairing the defects in the street system. Thus, all of the elements of an obligation in solido as defined by [the Civil Code] are met.”

# Solidary Liability in Breach of Contract Construction Cases (continued)

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- Standard Roofing Co. of New Orleans v. Elliot Construction Co. (La. 1<sup>st</sup> Cir.): Roofing subcontractor and a roofing system supplier were solidarily liable for damages to the roof of a community center.
- A & M Pest Control Service, Inc. v. Fejta Construction Co. (La. 4<sup>th</sup> Cir.): General contractor and subcontractor on a commercial building construction project were solidarily liable for damage caused by a break in a sprinkler system installed by the subcontractor.
- Query: Did 1996 tort amendment that we have been discussing alter the holding of these pre-1996 cases imposing solidary liability? Consider: Article 2324(A) states solidary liability exists as to conspiracies to commit a tort and intentional torts, and then subsection (B) states, “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.” LA. CIV. CODE art. 2324. Does subsection (B) abolish non-tort solidarity for breaches of contracts that contribute to the same damage? (Seem like the same quandary we have been discussing relative to comparative fault? It is.)

# Conclusion

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- Almost 16 years since the 1996 tort amendments without any definitive answer whether comparative fault applies to breach of contract claims.
- Hanover vs. Plaquemines Parish gave a fairly good summary of the major arguments we have discussed for and against applying comparative fault to breach of contract claims.
- Until the issue is resolved, the issue may provide settlement leverage for both plaintiffs and defendants in construction cases. Defendants can wave the comparative fault shield, and Plaintiffs can point out that under Hanover and Touro Infirmary, the issue can be disposed of pretrial through summary judgment and/or motion to strike procedure.

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QUESTIONS?