

34TH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. BERNARD

STATE OF LOUISIANA

NO. 97356

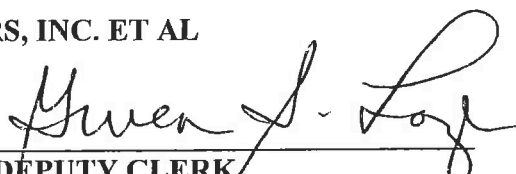
DIVISION "C"

COLLEEN DILL JOHNSON, wife of/and JOE JOHNSON, JR.

VERSUS

WAYNE WESTCOTT BUILDERS, INC. ET AL

FILED: _____ JAN 06 2009


DEPUTY CLERK
Gwen S. Loze

COLLEEN DILL JOHNSON AND JOE JOHNSON, JR'S
MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, comes Plaintiffs, Colleen Dill Johnson, wife of/and Joe Johnson, Jr. (hereinafter referred to as the "Johnsons"), who submits to this Honorable Court that it is entitled to a Summary Judgment in its favor as to the Cross-Claim brought against it by Third Party Defendants, Republic Vanguard Insurance Company.

1.

On April 21, 2005, Republic Vanguard Insurance Company filed a Cross-Claim against Plaintiffs averring that the Plaintiffs had "bound themselves to defend and indemnify Republic Vanguard and have thus far breached their obligation to do so."

2.

The Plaintiffs submit that there are no genuine issues of material fact at issue, and that the Plaintiffs are entitled to a judgment as a matter of law.

3.

Upon this Court's interpretation of the Release Agreement in controversy, the Plaintiff's persuade that a judgment will be rendered in their favor, and against Republic Vanguard, holding that the Release Agreement in controversy does not obligate the Plaintiffs to defend, indemnify and/or hold harmless Republic Vanguard from the instant litigation.

WHEREFORE, the Plaintiffs pray that this Honorable Court enter an order of summary judgment in favor of Plaintiff, ordering that the Release Agreement at controversy does not require the Plaintiffs to defend, hold harmless and/or indemnify Republic Vanguard Insurance Company from these proceedings.

RESPECTFULLY SUBMITTED,



SCOTT G. WOLFE, JR. (30122)
WOLFE LAW GROUP, L.L.C.
4821 PRYTANIA STREET
NEW ORLEANS, LA 70115
(504) 894-9653

Attorneys for PLAINTIFFS,
COLLEEN DILL JOHNSON, wife
of/and JOE JOHNSON, JR.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing pleading has been delivered to all counsel of record via facsimile transmission or US mail, postage prepaid, on this 30th day of December, 2008.



SCOTT G. WOLFE, JR

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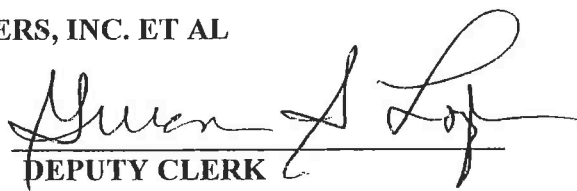
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STATEMENT OF UNDISPUTED FACTS

NOW INTO COURT, through undersigned counsel, comes Plaintiffs, Colleen Dill Johnson, wife of/and Joe Johnson, Jr. (hereinafter referred to as the "Johnsons"), who submits to this Honorable Court the following as its statement of undisputed facts:

1. On or around February 28, 2002, the Johnson's filed suit against Niels Sand and its insurer, Republic Vanguard, in case captioned *Colleen Johnson wife of and Joe Johnson, Jr. v. Niels Sand, III d/b/a Sand Roofing and Republic Vanguard Insurance Company*, 34th J.D.C., No. 95-448, Division E;
2. On or around January 8, 2003, Joe Johnson, Jr. and Colleen Johnson settled the dispute it had with Niels Sand Roofing related to certain damages at property located at 2004 Landry Court, Meraux, Louisiana (hereinafter "Property");
3. On or around January 8, 2003, in association with the above settlement, an agreement captioned "Receipt, Release and Hold Harmless Agreement," the contents of which are properly represented by the document attached to Republic Vanguard's Cross-Claim as Exhibit A (hereinafter the "Release Agreement").
4. On or around December 13, 2004, Defendant Wayne Westcott Builders filed suit against Niels Sand, and its insurer Republic Vanguard Insurance Company, alleging that certain defects in the Property were the fault of other parties, and particularly Niels Sands. *See Third Party Demand of Westcott ¶7.*

5. On or around April 21, 2005, Republic Vanguard filed a cross-claim against Plaintiffs, alleging that based on the Release Agreement, Plaintiffs were bound to defend and indemnify Republic Vanguard from Defendant Westcott's causes of action and allegations.
6. The Release Agreement does not declare in an unequivocal fashion that Plaintiffs must indemnify Republic or Sands for its own negligence.

RESPECTFULLY SUBMITTED,



SCOTT G. WOLFE, JR. (30122)
WOLFE LAW GROUP, L.L.C.
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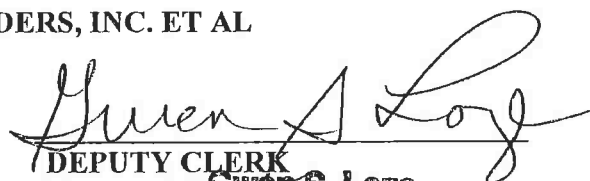
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**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

MAY IT PLEASE THE COURT, now through undersigned counsel comes Plaintiffs, Colleen Dill Johnson, wife of/and Joe Johnson, Jr. (hereinafter referred to as the "Johnsons"), who submits to this Honorable Court the following Memorandum in Support of its Motion for Summary Judgment.

Introduction and Factual Background

This action finds its genesis in October of 2002, when the Johnson's filed a lawsuit against their builder Wayne Westcott Builders, Inc. alleging defects in the construction of their Meraux home and breaches of warranties.

Contemporaneously with the filing of this action, the Johnson's were also in dispute with Mr. Neil Sands and his company, Sands Roofing, who installed the roof and its component parts at the Property (hereinafter "Property" refers to 2004 Landry Court, Meraux, Louisiana, the property at controversy in these proceedings). That dispute had culminated in litigation, as well, with suit filed by Plaintiffs on February 22, 2002 (34th JDC, 95-448, Div E). The parties settled this litigation on January 8, 2003, for the sum of \$16,775.00.

To effect this settlement, on January 8, 2003, the Johnson's signed an agreement captioned "Receipt, Release and Hold Harmless Agreement," whereby they released certain claims against Neil Sands in exchange for the payment (hereinafter "Release Agreement").

On or around December 13, 2004, Wayne Westcott Builders, Inc. filed a Third Party Demand against Sands Roofing and its insurer, Republic Vanguard, averring that these parties were liable to it for the negligent installation of the roof at the Property. In turn, Republic Vanguard filed a cross claim against Plaintiffs on April 21, 2005, alleging that the Release Agreement obligates Plaintiffs to indemnify Republic and Sands from Westcott's allegations.

In dispute, therefore, is the interpretation of the Release Agreement, as the Court is now called upon to determine whether under its terms, the Plaintiffs are obligated to defend and indemnify Republic and Sands Roofing from Westcott's action and allegations.

The Plaintiffs maintain it does not.

Standard of Law for Motion for Summary Judgment

A party may submit a motion for summary judgment as to any and all claims made against that party where there is no genuine issue of material fact. La. C.C.P. Art. 966(C)(1). Summary judgment may be granted as to the entirety of the complaint or any and all subparts or individual claims asserted therein.

A court must grant a motion for summary judgment "if the depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law." La. C.C.P. Art. 966(B). The summary judgment procedure is favored under our law. Ross v. Conco, Inc., 02-0299 (La. 10/15/02), 828 So.2d 546. In fact, due to the amendments of the summary judgment statute, it may now be appropriate to grant a summary judgment in close cases in which a motion for summary judgment may have been denied under the old law. Young v. Dupre Transport Co., 700 So.2d 1156 (La. App. 4th Cir. 1997).

Summary judgment is especially appropriate in cases similar to the instant proceeding, when the material issues, if any, concern the meaning of a written document. By way of an example, contract disputes are routinely adjudicated summarily when the key issue is one of interpretation. Alford v. Kaiser, 589 So.2d 546 (1st Cir. 1991), writ denied, 594 So.2d 893 (La.

Interpreting the Receipt, Release and Hold Harmless Agreement

Presumably, Republic's assertion that the Plaintiffs are bound to defend and indemnify it and its insured from these proceedings is rooted in the Release Agreement's 4th paragraph, which reads as follows:

I/We agree not to institute or continue any further litigation against **the released parties** for claims arising out of **the work**, and to instruct my/our attorney to dismiss any pending litigation against **the released parties** immediately, and with prejudice. I/We agree that if I/We or anyone else reinstitutes litigation claiming damages arising out of **the incident**, I/We will defend, indemnify and hold harmless **the released parties** from and against all costs and damages which may be asserted against them, and also for attorney's fees incurred by **the released parties** in the defense of such litigation by the attorneys of their choice. In the event that such litigation was successful, I/We agree not to enforce or recovery any judgment I/We receive against **the released parties**.
[emphasis in original].

Breaking apart this component of the Release Agreement, it is clear that the most applicable language states as follows:

I/We agree that if I/We or anyone else reinstitutes litigation claiming damages arising out of the incident.

Republic's argument that the Johnson's are bound to indemnify them from these proceedings rests heavily upon this sentence. The Johnson's submit to this Court that Republic is attempting to give great latitude to the phrase "reinstitutes litigation," and that the phrase should not be interpreted to apply to the instant circumstances.

General Rules Governing Interpretation of Indemnity Agreements Supports Johnson's Position that Summary Judgment Should Be Granted in its Favor, as the contract is clear, not ambiguous and leads to no absurd consequences

As the Court is of course aware, Louisiana Civil Code Article 2046 provides that "if the words of the contract are clear, unambiguous and lead to no absurd consequences, the court need not look beyond the contractual language to determine the true intent of the parties."

Furthermore, the question of whether a contract is ambiguous is not a question of fact, but a question of law. *La. Ins. Guar Ass'n v. Interstate Fire & Cas.*, 93-911 (La. 1/14/94), 630 So.2d 759.

This goes hand-in-hand with long standing Louisiana jurisprudence holding that when a clause in a contract is clear and unambiguous, the letter of that clause should not be disregarded under the pretext of pursuing its spirit. *Maloney v. Oak Builders, Inc.*, 256 La. 85, 235 So.2d 386 (1970).

The general rules that govern the interpretation of contracts also apply to contracts of indemnity. *Sovereign Ins. Co. v. Tex. Pipe Line Co.*, 488 So.2d 982 (La. 1986).

In the instant proceeding, the Johnson's have made an agreement to indemnify and defend Republic and Sands in the event that the Johnson's, or anyone else, "reinstates litigation" claiming damages arising out of the incident.

At the time of signing this settlement agreement, the Parties were engaged in litigation captioned *Colleen Johnson wife of and Joe Johnson, Jr. v. Niels Sand, III d/b/a Sand Roofing and Republic Vanguard Insurance Company*, 34th J.D.C., No. 95-448, Division E (the "Litigation"). In fact, dismissing this litigation was a condition of the Release Agreement.

After the January 8, 2003, signing of the Release Agreement, the Johnson's did in fact dismiss the Litigation. To date, neither the Johnson's nor anyone else has "reinstated" the Litigation.

The terms of the Release Agreement are clear, they are not ambiguous, and the lead to no absurd consequences. At the time of the Release Agreement's signing, the parties were engaged in litigation over construction defects at the Property. The Release Agreement requested the dismissal of that litigation, and forbid the Plaintiffs (or anyone else) from reinstating the litigation.

La. C.C. art. 2051 aids the Court's efforts to interpret the words of the Release Agreement, whereby it provides that "Although a contract is worded in general terms, it must be interpreted to cover only those things it appear the parties intended to include." See La. C.C. art. 2051; see also *Sovereign Ins. Co. v. Texas Pipe Line Co.*, 488 So.2d 982, 984 (La. 1986).

The scope of the parties' agreement is clear from a plain reading of the above-quoted paragraph. To extend its meaning to require the Johnson's to indemnify the Third Party Defendants from different claims brought by Wayne Westcott Builders, Inc. through independent litigation, would require the Court to interpret the above-quoted paragraph beyond the meaning

of its plain terms in violation of La. C.C. art 2046. This is cannot do, and accordingly, the Plaintiffs' Motion for Summary Judgment should be GRANTED.

Alternatively assuming the Court can look past the words of the Release Agreement, Summary Judgment in favor of Plaintiffs is still appropriate because (1) Contract should be interpreted in favor of Plaintiffs as per La. C.C. art 2057; and (2) Contract does not specifically delineate that Plaintiffs will indemnify Republic and Sands for its own negligence.

1) Contract Should be Interpreted in favor of Plaintiffs

La. C.C. art. 2057 provides that in the case of doubt, "a contract *must* be interpreted against the obligee and in favor of the obligor of a particular obligation." *Emphasis added.*

La. C.C. art. 2056 provides further that in case of doubt, "a provision in a contract must be interpreted against the party who furnished its text."

In the instant matter, Republic and Sands are both the obligees and the party who furnished the text of the Release Agreement. In the event the agreement is considered ambiguous, unclear or absurd by the Court, the Plaintiffs submit that the text should be interpreted in its favor.

2) Contract does not specifically require Johnsons' to Indemnify Republic and Sands for its own Negligence

Even if the Court finds the Release Agreement's terms unclear or ambiguous, and thereafter finds evidence that the terms were *meant* to require Plaintiffs' to indemnify the relevant parties in independent actions such as the instant action – the Johnsons' submit that the Court should still grant its Summary Judgment since Republic and Sands are requiring the Johnsons' to indemnify them from their own negligence without an unequivocal requirement for such indemnity within the Release Agreement.

In interpreting indemnity agreements, Louisiana jurisprudence has clarified that:

When there is doubt as to indemnification against an indemnitee's own negligence liability...usage, custom or equity may **not** be used to interpret a contract expansively in favor of the indemnitee. In such a case, if the provision is still in doubt after applying the rules of construction and interpreting the provision in light of the contract as a whole, i.e., if the intention to indemnify against an indemnitee's liability for his negligence is equivocal, the court has established a presumption that the parties did not intend to

indemnify an indemnitee against losses resulting from his own negligent act. *Polozola v. Garlock, Inc.*

The rule or presumption of *Polozola v. Garlock, Inc.* is derived from the principals of equity. To impose on a person an obligation to indemnify another against the indemnitee's own negligence without the obligor's unambiguous consent is contrary to the principals of equity. 488 So.2d 982, 985-86.

The case cited by the *Texas Pipe Line* court further advises us in this action that "A contract of indemnity whereby the indemnitee is indemnified against the consequences of his own negligence is strictly construed, and such a contract will not be construed to indemnify an indemnitee against losses resulting to him through his own negligent act, unless such an intention was expressed in unequivocal terms." *Polozola v. Garlock, Inc.*, 343So.2d 1000, 1003 (La. 1977) [emphasis added]. See Also *Perkins v. Rubicon, Inc.*, 563 So.2d 258 (La. 1990) (In the absence of an express and unequivocal statement that a party is to be indemnified for that party's own negligence, the contract of indemnification will not be construed to create such an obligation).

In the instant matter, regardless of the Court's interpretation of the phrase "reinstates litigation," no reading of the Release Agreement will find an unequivocal declaration by the Johnsons' that they will agree to indemnify Republic and Sands for their own negligent acts.¹

It's clear from a reading of Wayne Westcott Builders, Inc.'s Third Party Demand against Niels Sands and Republic Vanguard, and particularly ¶ 7 of that pleading, that Westcott seeks damages from Sands and Republic related to Sand's own negligence.

¹ Important to note that the term "the incidents" is used in the Release Agreement, but is not defined. In the event the Court does find ambiguity in the document requiring further interpretation, it will be called upon to define 'the incidents.' The Plaintiffs aver that in these circumstances, to deny the Plaintiff's Motion for Summary Judgment, the Court would be required to stretch the term "the incidents" to include the negligence complained of by Wayne Westcott Builders, Inc. Plaintiff's persuade this Court that this would be out-of-bounds from the Louisiana jurisprudence which requires such indemnification agreements to be unequivocal, unambiguous and clearly expressed.

Plaintiffs aver that they did not agree to indemnify Sands and Republic from that complaint, nor does the document they signed lend itself to such an agreement. Accordingly, in addition to the above-delineated reasons, the Johnsons' request that their Motion for Summary Judgment be GRANTED.

RESPECTFULLY SUBMITTED,



SCOTT G. WOLFE, JR. (30122)
WOLFE LAW GROUP, L.L.C.
4821 PRYTANIA STREET
NEW ORLEANS, LA 70115
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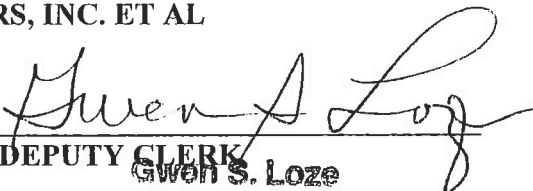
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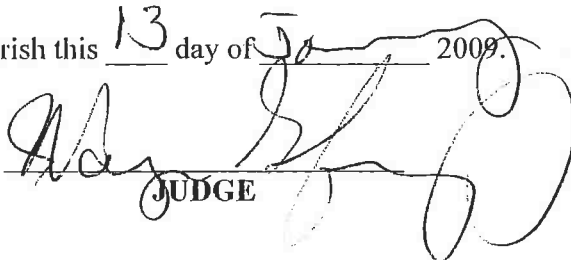
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RULE TO SHOW CAUSE

IT IS ORDERED that the Third Party Defendants Republic Vanguard Insurance Company and Niels Sand d/b/a Sands Roofing appear before this Honorable Court on the 17 day of February 2009, at 9:30 AM/PM, to show cause as to why Plaintiffs' Motion for Summary Judgment should not be GRANTED.

Signed in St. Bernard Parish this 13 day of Jan 2009.

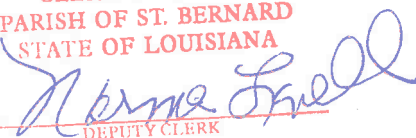

JUDGE

PLEASE SERVE

REPUBLIC VANGUARD INSURANCE COMPANY

Though its counsel of record,
James Prather
Galloway, Johnson, Tompkins, Burr & Smith
Three Sanctuary Blvd, Suite 301
Mandeville, LA 70471
985-674-6680

A TRUE COPY
Lena R. Torres
CLERK OF COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

By 
DEPUTY CLERK

JAN 15 2009

/S/Norma Lovell