1-5-2022

# GEFA v. CH2M Hill Eng., ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

Elizabeth E. Long
*Senior Judge, Fulton County Superior Court Business Case Division*

**IN THE SUPERIOR COURT OF FULTON COUNTY**
**BUSINESS CASE DIVISION**
**STATE OF GEORGIA**

| | |
|---|---|
| GEORGIA ENVIRONMENTAL FINANCE AUTHORITY,<br><br>Plaintiff,<br><br>v.<br><br>CH2M HILL ENGINEERS, INC., LAYNE CHRISTENSEN COMPANY, TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA and LIBERTY MUTUAL INSURANCE COMPANY,<br><br>Defendants. | CIVIL ACTION NO.<br><br>2018CV308768 |

## ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

This construction dispute concerns the failed effort to construct a deep, fresh water well in Tybee Island, Georgia (the "project"). The parties include the project's owner, Plaintiff Georgia Environmental Finance Authority ("GEFA"), the project's designer and construction site supervisor, Defendant CH2M Hill Engineers, Inc. ("CH2M"), and its builder, Defendant Layne Christensen Company ("Layne").

This matter comes before the Court on four different motions for summary judgment: (1) GEFA'S Motion for Summary Partial Summary Judgment against CH2M, (2) CH2M's Motion for Summary Judgment against GEFA, (3) GEFA's Motion for Partial Summary Judgment against Layne, and (4) CH2M's Motion for Summary Judgment against Layne's Cross Claims.[1] Having

[1] There are four different Rule 6.5 Statements to support the four different motions for summary judgment, and they will be cited as follows:

reviewed the record and considered the arguments of counsel during a hearing on December 13, 2021, the Court enters the following order.

## I. FINDINGS OF FACT

### A. GEFA's Preliminary Plans to Construct a Deep Water Well in Coastal Georgia.

GEFA is a state-run instrumentality whose mission is to help local Georgia communities "provide needed facilities that both protect the environment and provide for … future economic expansion." O.C.G.A. § 50-23-2. Coastal Georgia relies heavily on the Floridian Aquifer for its drinking water.[2] Concerns about the continued viability of this water source led GEFA to begin looking for alternative methods to supply water to Georgia's coastal region.[3] Hilton Head, South Carolina had successfully created a deep water well utilizing the Cretaceous Aquifer, which is found far below the land's surface.[4] GEFA commissioned this project to explore the viability of using the Cretaceous Aquifer for drinking water on the Georgia coast, deciding to drill the well on Tybee Island.[5] Should the well prove a feasible source of drinking water, GEFA intended that the City of Tybee Island would have the option to "develop whatever additional water treatment and infrastructure may be necessary to use the well for water supply . . ."[6]

### B. GEFA Enters into Contracts Governing the Project.

---

(1) Satement supporting GEFA'S Motion for Summary Partial Summary Judgment against CH2M ("GEFA SUMF");
(2) Statement supporting CH2M's Motion for Summary Judgment against GEFA ("CH2M SUMF");
(3) Statement supporting GEFA's Motion for Partial Summary Judgment against Layne ("GEFA-Layne SUMF"), and the
(4) Statement supporting CH2M's Motion for Summary Judgment against Layne's Cross Claims ("CH2M-Layne SUMF").

[2] CH2M SUMF ¶ 3, GEFA's Resp. to SUMF ¶ 3.
[3] Id. at ¶¶ 4, 5.
[4] GEFA's Resp. to CH2M SUMF ¶ 6.
[5] CH2M SUMF ¶ 6l GEFA's Resp. to CH2M SUMF ¶ 6; CH2M-Layne SUMF ¶ 4; Layne Resp. to CH2M-Layne SUMF ¶ 4.
[6] CH2M SUMF ¶ 9, Ex. D (Apr. 15, 2015 letter, p. 1); GEFA Resp. to CH2M SUMF ¶ 9.

The Design Contract. On May 27, 2014, GEFA contracted with CH2M to design the well and then oversee its construction and testing (the "Design Contract").[7] Various sections of the Design Contract require the GEFA's approval of CH2M's design work.[8]

The Technical Specifications, the Bidding Documents, and the Construction Contract. In accordance with its contractual responsibilities, CH2M designed the well and prepared technical specifications for its construction (the "Technical Specifications").[9] In summarizing the work to be performed, the Technical Specifications describe the project as the construction of a "production" well and also as a "test" well.[10] These Technical Specifications prepared by CH2M were incorporated into documents that would govern of the project's construction (the "Construction Documents") as well as documents that would be used to solicit bids from well-drilling contractors (the "Bidding Documents").[11]

Layne, a nationally recognized well drilling company, was the successful bidder, and, on September 29, 2015, it entered into a contract with GEFA to construct the well (the "Construction Contract").[12] The title page and prefatory comments to the Construction Contract refer to the project as a production well. Section 1.1.9.17 of the Construction Contract defined the "Contract Documents" to include, "the executed [Construction] Contract, the Bidding Documents, the Bid, the General Requirements which include all incorporated forms, the Construction Documents, and all Change Orders." This definition was adopted in § 1.1.6.1 of the Design Contract.

---

[7] GEFA SUMF ¶ 1; CH2MHM Resp. to GEFA SUMF ¶ 1.
[8] See e.g., Design Contract, §§ 2.1.5.1, 2.1.6.9 and 2.1.7.3.
[9] GEFA SUMF ¶ 3; CH2M Resp to GEFA SUMF ¶ 3.
[10] Technical Specifications, § 01 11 00 1.01(A) and (B).
[11] GEFA SUMF ¶¶ 3, 8; CH2M Resp. to GEFA SUMF ¶ 3, 8.
[12] GEFA-Layne SUMF ¶ 3, Layne Resp. to GEFA-Layne SUMF ¶ 3; GEFA Brf. in Supp. of MPSJ against Layne, Ex. B.

Layne and CH2M had no direct contractual relationship.[13] The Construction Contract specifically states CH2M is not GEFA's agent but only acts as GEFA's consultant "in determining if the conditions of the contract had been met."[14] In CH2M's role as construction supervisor, the Design Contract had numerous provisions regarding its obligation to report and/or seek approval from GEFA regarding changes in the project.[15] The Construction Contract contained similar provisions directing how Layne should handle changes in the scope of work.[16] Notably, § 1.1.7.1 required GEFA's approval for any amendment to the Contract Documents and specifically stated that CH2M "had no authority to amend the Contract Documents, orally or in writing, either expressly or by implication."

C. Well Design Issues and Concerns.

GEFA and CH2M generally agree about the various phases of the well's construction.[17] Once those phases were complete, the well was to be cleaned and primed for operation followed by testing that would allow a feasibility report to be completed.[18]

Of particular import to these motions is C2HM's design concerning the screen assembly which is inserted into the well's borehole. A screen assembly includes varying intervals of solid, pipe-like casing referred to as blank casing interspersed with sections of screen casing. Generally, blank casing supports the well's structure and serves to reduce the amount of debris and sediment

---

[13] CH2M-Layne SUMF ¶ 9; Layne Resp. to CH2M-Layne SUMF ¶ 9.
[14] GEFA-Layne SUMF ¶ 5; Layne Resp. to GEFA-Layne SUMF ¶ 5.
[15] See e.g. Design Contract § 2.2.6.2 (requires CH2M to "report deviation from the Contract Documents" to GEFA); § 2.2.9.1 (states CH2M "shall review and submit for approval of GEFA, Change Orders to the Construction Contract, as conditions warrant"); § 2.2.9.3 (provides CH2M "shall order no changes in the Work without the approval of [GEFA]").
[16] See e.g. Construction Contract § § 1.1.2.1. (requires "consensus decisions by the Project Team, where differing from the Contract Documents, be expeditiously resolved and reduced to writing in an appropriate change order"); § 2.2.3.2 (provides that if Layne "believes that any corrections required by [CH2M] constitute a change to the contract, [Layne] shall immediately notify" and request instructions from both CH2M and GEFA), and § 3.2.3 (expressly forbids "any changes whatsoever in the work" absent a GEFA- approved change order and provides Layne shall have no claim for payment for any such work performed).
[17] CH2M SUMF, ¶ 25; GEFA Resp. to CH2M SUMF ¶ 25.
[18] Id.

that can infiltrate the well in areas where it is not drawing water whereas permeable screen casing is used in areas of the well where water flows so that it may enter into the well.[19]

In designing a screen assembly, a key concern is its hang weight which addresses the ability of the screen casing to maintain its shape and strength while holding the weight of blank casing hanging below it.[20] Failure to properly account for the screen assembly's hang weight could compromise a well's functionality.[21]

Here, § 33 21 13.06 (3.04(B)) of the well's Technical Specifications states, "[c]asing which fails, collapses, or separates during construction shall be removed from the hole and repaired or replaced at [Layne's] sole expense." Another provision in the Technical Specifications, § 33 21 13.03 (3.04(A)) provides, ". . . if the casing or screen is broken or collapses, then the well will not be considered satisfactory and the well will be abandoned by [Layne] at [its] own expense."

The Technical Specifications for the screen assembly prepared by CH2M established the blank casing should have a minimum thickness of 0.365 inches.[22] Those same Technical Specifications estimated the total length of blank and screen casing, stating the "[f]inal casing lengths shall be determined by CH2M" after the borehole for the well had been drilled and more was known about the well's subsurface geological conditions.[23]

D. Concerns about the Design of the Screen Assembly Arise.

At some point, CH2M considered redesigning the screen assembly. Its anticipated re-design would substantially reduce the amount of screen casing while increasing the amount of blank casing, thereby increasing the screen assembly's hang weight.[24] In an April 4, 2016 letter

---

[19] C2HM SUMF ¶ 25, n. 1; GEFA Resp. to C2HM SUMF ¶ 25.
[20] CH2M Resp. in Opp. to GEFA's MPSJ, Ex. J (Bongioanni Dep., p. 27).
[21] CH2M SUMF ¶ 48; GEFA Resp. to CH2M SUMF ¶ 48; CH2M-Layne SUMF ¶ 14; Layne Resp. to CH2M-Layne SUMF ¶ 14.
[22] GEFA SUMF ¶ 5; CH2M Resp. to GEFA SUMF ¶ 5; see also Technical Specifications § 33 21 13.06 2.02(E).
[23] Technical Specifications § 33 21 13.06 3.01(C); CH2M SUMF ¶ 46; GEFA Resp. to CH2M SUMF ¶ 46.
[24] CH2M SUMF ¶ 47; GEFA Resp. to CH2M SUMF ¶ 47.

to CH2M discussing the anticipated re-design, Layne shared its concerns about the increased hang weight.[25]

On May 26, 2016, CH2M issued a revised design of the screen assembly which called for significantly more blank casing than it had estimated in the Technical Specifications.[26] In order to address hang weight concerns caused by the change, CH2M determined to reduce the thickness of the blank casing from 0.365 to 0.25 inches. [27] This change spurred numerous discussions between CH2M regarding the hang weight and the suitability of the thinner blank casing in this deep well application.[28]

On July 8, 2016, CH2M circulated its final screen assembly design to Layne which employed the thinner casing, essentially rejecting Layne's concerns.[29] It is undisputed that GEFA was never presented with a formal change order concerning the redesigned screen assembly. Further, GEFA contends it was never made aware of the concerns Layne raised with CH2M about its revised design.[30]

E. Screen Assembly is Installed, an Obstruction is Detected, and Construction Ceases.

Layne installed the screen assembly in accordance with CH2M's revised design.[31] On or about July 26, 2016, Layne ran a caliper tool down the well that could not pass 3,015 feet below the land's surface, and Layne advised CH2M an obstruction had been detected.[32] On or about August 12, 2016, Layne ran a camera down the well which revealed a problem with a 200-foot

[25] Layne Resp. to CH2M-Layne SUMF, Ex. 13.
[26] GEFA SUMF ¶¶ 14, 17; CH2M Resp. to CH2M SUMF ¶¶ 14, 17.
[27] CH2M-Layne SUMF ¶ 16; CH2M Resp. to CH2M SUMF ¶ 16.
[28] GEFA SUMF ¶ 15; CH2M Resp. to CH2M SUMF, ¶ 15.
[29] GEFA SUMF ¶ 18; CH2M Resp. to GEFA SUMF ¶ 18.
[30] GEFA Brf. in Supp. of MPSJ against CH2M, pp. 11-12.
[31] GEFA-Layne SUMF ¶ 24; Layne Resp. to GEFA-Layne SUMF ¶ 24.
[32] GEFA SUMF ¶¶ 19-20; CH2M Resp. to GEFA SUMF ¶¶ 19-20.

section of the thinner blank casing found approximately 3,015 feet below land surface.[33] GEFA describes the problem as a "collapse" while CH2M describes it as a "partial deformation."[34] Because of the current posture of the case, with various motions for summary judgment, the Court will simply refer to the well's problem as a collapse/deformation, recognizing that the parties dispute the precise descriptor.

F. GEFA, CH2M, and Layne Consider How to Proceed.

Construction ceased while the problem and possible remedies were investigated.[35] Layne's crew and equipment remained on site as the parties considered how to proceed. Immediately following the collapse/deformation, CH2M and Layne presented GEFA with differing ideas about how to move forward.

On August 24, 2016, Layne informed GEFA that it was in a "standby mode" pending a decision on how to proceed.[36] Despite the collapse/deformation, Layne "recommended developing and testing the well . . . in an effort to try to gather test data as initially planned."[37] Layne advised repair attempts could further damage the well and should be carefully evaluated. In an August 26, 2016 response, CH2M, in its role as GEFA's construction supervisor, rejected Layne's position that it was experiencing any standby time reimbursable under the terms of the Construction Contract.[38] On September 2, 2016, Layne lodged a Notice of Protest contesting CH2M's rejection of its standby time.[39]

---

[33] Id. at ¶ 21.
[34] Id. at ¶¶ 21-22, 25. Each parties' expert has used the word "collapse" to describe the problem. In rendering his opinion, GEFA's expert refers to the problem as a collapse. (GEFA Resp. to CH2M's MSJ, p. 12-13; Ex. 13, p. 9.) CH2M's expert referred to the problem as a "partial collapse." (CH2M Resp. to GEFA MSJ, Ex. Y, p. 3.) The report of Layne's expert is titled "Opinion on the Collapse of the GEGA Tybee Island Cretaceous Aquifer Production Well" and throughout the body of the report, he repeatedly refers to the problem as a collapse. (Id. at Ex. Z).
[35] Id. at ¶ 25.
[36] GEFA-Layne SUMF ¶ 33; Layne Resp. to GEFA-Layne SUMF ¶ 33; GEFA MPSJ against CH2M, Ex. N.
[37] Id.
[38] GEFA SUMF ¶ 27; CH2M Resp. ¶ 27; GEFA MPSJ against CH2M, Ex. Q.
[39] GEFA SUMF ¶ 28; CH2M Resp. ¶ 28.

On September 12, 2016, CH2M sent Layne a formal Notice of Non-Compliant Work, advising Layne that the as-built well did not comply with the Construction Documents because of the "deformation . . . of the casing."[40] On October 17, 2016, CH2M sent Layne and Up-Dated Notice of Non-Compliant work that provided more detailed information about the collapse/deformation.[41] Pursuant to those provisions of the Technical Specifications obligating Layne to resolve casing defects, the notice provided Layne with two weeks either to begin repairing or replacing the casing or to notify GEFA that such repair or replacement was not possible so that arrangements could commence for the construction of a new well.[42]

The casing was not repaired or replaced, and no new well was constructed. Because of the collapse/deformation, GEFA ultimately determined that well would not be suitable to serve as a municipal water source for Tybee Island and declined to complete the well, so no feasibility testing occurred.[43] This litigation ensued.

## II. PROCEDURAL POSTURE

GEFA filed the above-styled complaint on August 7, 2018. On November 19, 2019, that complaint was amended and now includes claims for: (1) breach of contract against CH2M and Layne, (2) professional negligence against CH2M, (3) negligence against CH2M and Layne, (4) indemnity against CH2M should Layne prevail on its counterclaim for standby time, and (5) attorney's fees against both Defendants.[44]

CH2M filed a responsive pleading that included a counterclaim against GEFA for breach of contract seeking to recover monies owed under the Design Contract and attorney's fees.

---

[40] GEFA SUMF ¶ 29; CH2M Resp. ¶ 29; GEFA MPSJ against CH2M, Ex. R.
[41] GEFA SUMF ¶ 30; CH2M Resp. ¶ 30: GEFA MPSJ against CH2M, Ex. S.
[42] Id.
[43] GEFA Resp. to CH2M's MSJ, p. 12-13; Ex. 13, p. 9 (Expert opines, "GEFA acted prudently in not accepting the [well] because of the damaged and collapsed casing" which compromised its use as a municipal water source.)
[44] GEFA also brought claims against the two insurance companies that jointly supplied a performance bond for the project on behalf of Layne. (Am. Compl., Count III.)

Layne filed its responsive pleading which included: (1) counterclaims against GEFA for breach of contract, breach of the Prompt Pay Act (O.C.G.A. § 13-11-4), and breach of the implied warranty of suitability of design plans and specifications, (2) cross claims against CH2M for implied indemnity and negligent misrepresentation[45] should GEFA prevail on its claims against Layne, and (3) claims to recover its litigation expenses and prejudgment interest against both GEFA and CH2M.

Certain damage claims are pertinent to these motions. GEFA seeks to recover the costs to design and construct a new well which it has valued based on the costs it paid Layne and CH2M for their design and construction work on the current well.[46] Layne claims amounts owing on its last pay applications which includes standby time and retainage held by GEFA.[47]

## III. STANDARD OF REVIEW

In Fulton County v. Ward-Poag, 310 Ga. 289, 292 (2020), the Georgia Supreme Court recently reiterated the "well-established principles" guiding a trial court's review of a motion for summary judgment. "A trial court can grant summary judgment to a moving party only if there are no genuine issues of material fact and the undisputed evidence warrants judgment as a matter of law. See O.C.G.A. § 9-11-56(c). In reviewing the evidence, a court must construe all facts and draw all inferences in favor of the non-movant." Ward-Poag expressly relied on Messex v. Lynch, 255 Ga. 208, 210 (1985) which further provides, "[t]he party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists, and the trial

---

[45] In its pleadings, Layne styled this cross claim as negligent misrepresentation/professional negligence. However, after CH2M argued Layne lacked the privity required to assert a professional negligence claim, Layne appears to have abandoned that aspect of the claim, only offering argument as to why its negligent misrepresentation cross claim against CH2M should proceed. (CH2M Brf. in Supp. of MSJ against Layne, p. 9; Layne Resp. in Opp. to CH2M MSJ, Section B.)

[46] CH2M SUMF ¶ 54; GEFA Resp. to CH2M SUMF, ¶ 54.

[47] Layne Ans. / Countercls. and Cross-Cls., ¶¶ 47-49.

court must give that party the benefit of all favorable inferences that may be drawn from the evidence."

Further, when cross-motions for summary judgment are filed, "each party must show that there is no genuine issue of material fact regarding the resolution of the essential points of inquiry and that each, respectively, is entitled to summary judgment; either party, to prevail by summary judgment, must bear its burden of proof." Plantation Pipe Line Co. v. Stonewall Ins. Co., 335 Ga. App. 302 (2015) (citation and punctuation omitted).

## IV. ANALYSIS

### A. GEFA's Motion for Partial Summary Judgment against CH2M.

GEFA seeks partial summary judgment on its claim that CH2M breached the Design Contract and a judgment that CH2M must indemnify GEFA as to Layne's standby claim. GEFA does not seek summary judgment on its professional or ordinary negligence claims against CH2M, presumably recognizing these claims raise disputed issues of fact.

#### *1. GEFA's Breach of Contract Claim against CH2M.*

GEFA's breach of contract claim is based on CH2M's: (1) failure to comply with the Design Contract's provisions to notify or obtain GEFA's approval for design changes to the screen assembly and (2) failure to guard against non-conforming work when supervising the well's construction. The three essential elements for a breach of contract claim are "(1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." SAWS at Seven Hills, LLC, v. Forestar Realty, Inc., 342 Ga. App. 780, 784 (2017). The Court finds questions of fact as to the first two elements preclude summary judgment on this claim.

Considering the evidence in the light most favorable to CH2M, a jury could conclude the parties envisioned that changes in the screen assembly would be addressed in a final change order at the project's conclusion. Kevin Clark, GEFA's designated representative, testified:

> Q. So . . . as to the well screen assembly, you expected to have a final change order that would be prepared at the conclusion of the project, correct? . . .
>
> A. Yes.[48]

As Clark further testified, in the latter stages of the project, GEFA was aware that the screen assembly had been designed and installed and never inquired about the final design changes thus allowing the inference that they were expecting these changes to be addressed in a final change order.

> Q. And you understand at this point in July of 2016 the screen had already been installed?
>
> A. Yes.
>
> Q. So you anticipated that Layne would do that work, and then on the back end, or after the fact there would be a final change order, correct? . . .
>
> A. Correct.[49]

A jury could determine this course of dealing explains CH2M's failure to seek a change order regarding its design and why it allowed Layne to perform the alleged work GEFA now claims is non-conforming. See generally Lloyd's Syndicate No. 5820 v. AGCO Corp., 294 Ga. 805, 812 (2014) citing Scruggs v. Purvis, 218 Ga. 40, 42 (1962) ("The construction placed upon a contract by the parties thereto, as shown by their acts and conduct, is entitled to much weight and may be conclusive upon them"); Banks v. Echols, 302 Ga. App. 772, 776 (2010) citing Southern Life Ins.

---

[48] Layne's Resp. to CH2M-Layne SUMF, Ex. 1 (Clark Dep., p. 46 (objection omitted)).

[49] Id. GEFA sought to clarify this testimony with a subsequent affidavit from Clark wherein he acknowledges changes to the screen assembly were to be addressed in a final, post-construction change order; however, he avers such changes were limited to a cost reconciliation concerning the materials actually used, not design changes. (Clark Aff., ¶ 10.)

Co. of Ga v. Citizens Bank of Nashville, 91 Ga. App. 534, 538 (1955)("[W]here, by a course of conduct, one leads another to believe that he will not insist upon the strict terms of the contract, he will not be heard to complain because the other contracting party relies upon his acquiescence.")

Considering the damages element of GEFA's contract claim, even if a jury determines CH2M breached the Design Contract in failing to obtain a change orders for the re-design of the screen assembly and allowing Layne to perform work that did not conform to the original design, that failure did not necessarily lead to the collapse/deformation. Indeed, CH2M has argued, the cause of the collapse/deformation is "hotly contested" with experts offering differing opinions as to whether CH2M or Layne was at fault.[50] Thus, a jury will need to consider the question of causation in order to resolve GEFA's breach of contract claim.

*2. GEFA's Indemnification Claim against CH2M for Layne's Standby Claim.*

Pursuant to § 1.1.1.5.1 of the Design Contract, if completion of the project is delayed due to CH2M's negligence or breach of the Design Contract, it "shall indemnify [GEFA] against all reasonable costs, expenses, liabilities or damages resulting from such delay." To the extent that GEFA may be liable to Layne on its standby claim, it seeks indemnification from CH2M.

At present, no award of Layne's standby time has been made against GEFA, and there has been no finding that the delay which prompted the standby claim was due to CH2M's negligence or contract breach. Accordingly, the Court finds GEFA's request for summary judgment on its indemnification claim against CH2M to be premature.

B. CH2M's Motion for Summary Judgment against GEFA.

---

[50] CH2M Resp. in Opp. to GEFA's MPSJ, p. 20. Experts for CH2M and Layne have reached differing conclusions regarding the cause of deformation/collapse. CH2M's expert concluded the problem was "most likely" caused when the casing "ovalized" or became out of round as a result of Layne's installation and/or gravel packing. (Id. at Ex. Y, p. 3.) Layne's expert determined CH2M negligently "failed to recognize potential casing collapse conditions by specifying too thin a casing wall" based on the depth of the application. (Id. at Ex. Z, p. 6.)

*1. Causation.*

First, CH2M argues all of GEFA's claims fail because GEFA cannot establish that CH2M caused any damages. Whether a plaintiff is claiming breach of contract, professional negligence, or ordinary negligence, it must prove the defendant's breach caused damage to the plaintiff. See SAWS (damages caused by breach are essential element of a claim for breach of contract); Pattman v. Mann, 307 Ga. App. 413, 417 (2010) (causal connection between defendant's conduct and plaintiff's injury is essential element of a claim for ordinary or professional negligence). CH2M argues, "GEFA must do more than point out that the [collapse/deformation] was not part of the plan. It must also show that having the casing free of the [collapse/deformation] was material to its contractual expectations with CH2M and caused GEFA actual injury."[51] Specifically, CH2M contends the purpose of the well was to explore the possibility of using the Cretaceous Acquifer as a viable source of drinking water for coastal Georgia; and it contends that undisputed evidence indicates CH2M and Layne could have finished the well and conducted the testing necessary for this purpose.[52]

GEFA responds that this argument ignores the project's own Technical Specifications, which CH2M prepared. They speak to GEFA's expectations regarding the casing. Specifically, §§ 33 21 13.06 (3.04(B)) and 33 21 13.03 (3.04(A)) provide the casing should be removed and repaired "if it fails, collapses or separates during construction" and that "if the casing or screen is broken or collapses, then the well will not be considered satisfactory." Thus, the Court finds a jury could determine that GEFA was damaged by receiving a well with defective casing.

Further, CH2M argues the project was only intended to create a test well while GEFA responds the project was also intended to create a production well that could serve as a municipal

[51] CH2M Brf. in Supp. of MSJ against GEFA, p. 11.
[52] CH2M SUMF, ¶¶ 28-30.

water source. Neither of those terms appear to have a uniformly accepted definition. Even if this terminology were somehow determinative, the Contract Documents use both of these terms to describe the well. As the party moving for summary judgment, CH2M itself has referred to the project as a "production well" in the Technical Specifications and Bidding Documents it prepared.[53]

Accordingly, the Court finds disputed questions of fact as to whether the well, as constructed, failed to meet its intended purpose resulting in damages to GEFA.

Finally, CH2M asserts the damages GEFA may have incurred due to the collapse/deformation are impermissibly speculative "because it was unknown whether the Cretaceous Aquifer was a viable water source."[54] Again, considering the evidence in the light most favorable to GEFA, the Technical Specifications reflect that a well with casing free from defect was GEFA's desired end result and a jury could determine GEFA was damaged because it did not receive the object of its bargain. Also, there is evidence in the record, including the successful deep water well in nearby Hilton Head, suggesting the viability of this deep aquifer as a water source was not impermissibly speculative.

*2. Proof of Damages*

CH2M also claims GEFA has offered no proof of its damages. It cites John Thurmond & Assoc., Inc. v. Kennedy, 284 Ga. 469 (2008) as establishing the proper measure of GEFA's damages. Thurmond holds, "under Georgia law, cost of repair and diminution in value are alternative, although oftentimes interchangeable measures of damages in negligent construction and breach of contract cases." Id. at 471. CH2M argues GEFA has failed to offer evidence under either measure. Although CH2M implies these are the only measure of damages in a construction

[53] Technical Specifications, § 01 11 00 1.01(A) and (B); Bidding Documents, title page.
[54] CH2M Brf. in Supp. of MSJ against GEFA, p. 13.

defects dispute, Thurmond is not so limiting. As the Georgia Supreme Court expressly noted in Thurmond,

> [w]e begin our analysis of the proper measure of damages . . . by acknowledging that damages are intended to place the injured party, as nearly as possible, in the same position they would have been if the injury had never occurred. Juries, therefore, are given wide latitude in determining the amount of damages to be awarded based on the unique facts of each case.

Id. at 469 (Citations omitted). Thurmond rejected a defendant's strict reading of precedent in a manner that "create[d] an immutable rule" capping the amount of damages a plaintiff might recover. Id. at 473. "To construe this language so as to mechanically limit damages would be contrary to the charge that the method of calculating damages should be flexible so as to reasonably compensate the injured party, and at the same time, be fair to all parties." Id. Essentially, Thurmond recognizes that claims for construction defects arise in a variety of circumstances and the law of damages must provide a certain amount of latitude to address a given situation.

Here, considering the evidence in the light most favorable to GEFA, repair of the well is not viable and the well, in its current state, is of no value to GEFA. Moreover, a jury could also find there is no way to accurately determine the diminished value of such a singular project. Accordingly, based on this unique situation, a jury could determine that awarding GEFA the cost of a new well is the most appropriate way to place GEFA "in the same position" it would have occupied but for its injury, particularly considering the provisions in the Contract Documents that contemplate GEFA should receive a well free from casing defects.

CH2M circles back to its argument regarding the well's purpose – as a project to test the viability of the Cretaceous Acquifer – to argue that "GEFA's demand to replace a well that would have served the intended purpose of the project constitutes economic waste."[55] See generally

[55] CH2M Brf. in Supp. of MSJ against GEFA, p. 15.

Granite Const. Co. v. United States, 962 F.2d 998, 1007 (Fed. Cir. 1992)("There is ample authority for holding that the government should not be permitted to direct the replacement of work in situations where the cost of correction is economically wasteful and the work is otherwise adequate for its intended purpose.") However, as established above, the record offers contradictory evidence on the well's intended purpose, so the economic waste argument is not susceptible to summary judgment.

*3. Indemnification*

Layne filed a counterclaim against GEFA to recover standby time under the Contract. Should Layne obtain such an award, GEFA seeks indemnification from CH2M under § 1.1.1.5 of the Design Contract, contending any standby time award would result from CH2M's negligence and/or breach of contract. CH2M seeks summary judgment on this indemnification claim, contending that the standby claim fails as a matter of law because Layne is not contractually entitled to standby compensation. CH2M likens Layne's standby claim to a liquidated damages provision and argues that standby time was indisputably unmerited under the Construction Contract's terms. Notably, GEFA, the party who directly contracted to pay Layne standby compensation and who, therefore, would be primarily responsible for Layne's standby claim, has not lodged these attacks on Layne's standby claim. The Court cannot find that the claim fails as a matter of law.

*4. Attorney's Fees and Prejudgment Interest*

Because they are derivative, the Court finds GEFA's claims for attorney's fees and prejudgment interest should be decided by the jury along with GEFA's substantive claims. See Z-Space, Inc. v. Dantanna's CNN Ctr., LLC, 349 Ga. App. 248, 259 (2019)(claims for attorney's fees and interest are derivative in nature).

CH2M also sought summary judgment on the merits of GEFA's claim for attorney's fees under O.C.G.A. § 13-6-11, arguing that GEFA is unable to demonstrate any of the underlying conditions of the statute to justify such an award. O.C.G.A. § 13-6-11 permits a plaintiff who has specially pled to recover his fees "where the defendant has acted in bad faith . . . ." This bad faith "must relate to the acts in the transaction itself prior to the litigation, not to the conduct during or motive with which a party proceeds in litigation." Fresh Floors, Inc. v. Forrest Cambridge Apartments, L.L.C., 257 Ga. App. 270, 271 (2002). "On summary judgment, even slight evidence of bad faith can be enough to create an issue for the jury." Nash v. Reed, 349 Ga. App. 381, 383 (2019)(Citation and punctuation omitted).

Here, CH2M ignored repeated concerns about the "collapse strength" of its screen assembly design and pursued what a jury could find was a risky design choice without informing GEFA. Further, CH2M was aware, under the Technical Specifications that it prepared, Layne alone was charged with addressing defects in the casing. After the deformation/collapse was discovered, CH2M internally referenced the "beauty" of this contract requirement as it made Layne alone responsible for addressing issues "if the casing is collapsed."[56] Consequently, a jury could also determine that CH2M took unnecessary risks in designing the screen assembly based on the notion it could avoid accountability for any resulting problems. Accordingly, the record contains the "slight evidence" of bad faith sufficient to submit this claim to a jury. Id.

C. GEFA's Motion for Partial Summary Judgment against Layne.

GEFA seeks summary judgment on its breach of contract claim against Layne as well as Layne's counterclaims for monies owed under the Construction Contract, violations of the Prompt

[56] GEFA's Brf. in Opp. to CH2M MSJ, Ex. 6.

Pay Act, and breach of the implied warranty of suitable design. GEFA does not seek summary judgment on its negligence claims against Layne.

GEFA first claims Layne breached the Construction Contract by failing to repair or replace the collapsed/deformed casing or build a new well which implicates the Spearin doctrine. This doctrine was first established in United States v. Spearin, 248 U.S. 132 (1918), and later recognized by the Georgia Supreme Court in Decatur County v. Prayton, Howton & Wood Contracting Co., 165 Ga. 742 (1928). It provides, "[i]f a contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in plans and specifications." Id. at 760. Layne argues, "[a]t its core, Spearin is based in equity – a recognition that contractors do not indemnify owners or their engineers for negligent designs."[57] In support of its argument that Spearin controls, Layne notes GEFA's designated representative testified that the only defect in Layne's work was its installation of the thinner liner according to CH2M's revised design.[58]

While Layne asserts this situation constitutes a "textbook Spearin fact pattern," a jury could determine that Layne failed to adhere to the plans and specifications for the well as outlined in the Contract Documents and, thus, the doctrine does not apply.[59] Further, while Georgia law on the Spearin doctrine is scant, other jurisdictions have recognized an equitable exception to the doctrine where a contractor knows or should have known of a defect in the specifications. For example, in Housing Auth. of City of Texarkana v. E.W. Johnson Constr. Co., 573 S.W.2d 316, 322 (Ark. 1978), the Supreme Court of Arkansas recognized Spearin; however, it also found "a competent and experienced contractor cannot rely upon submitted specifications and plans where he is fully

[57] Layne Resp. in Opp. to GEFA MSJ, p. 14.
[58] Layne Resp. to GEFA-Layne SUMF, Ex. 4 (Clark Dep., p. 58.)
[59] Layne's Resp. in Opp. to GEFA's MPSJ, p. 15.

aware, or should have been aware, that the plans and specifications cannot produce the proposed results." Here, based upon its communications with CH2M raising concerns about the design of the screen assembly, a jury could find that Layne knew the thinner casing would or was likely to fail. Accordingly, a jury will need to determine whether the Spearin doctrine applies in this case. Therefore, GEFA is not entitled to summary judgment on this particular breach of contract claim or on Layne's counterclaim for breach of the implied warranty of suitability of design plans and specifications which is based on Spearin.

GEFA also asserts Layne breached the Construction Contract, by failing to obtain a signed change order before performing non-conforming work, failing to notify GEFA that CH2M sought to change the Contract Documents, and failing to notify GEFA that it disagreed with CH2M's decision to change the thickness of the blank casing. Like the breach of contract claim GEFA asserted against CH2M, a jury will need to assess the conflicting evidence as to the parties' intent concerning the scope of the final, post-construction change order and also whether any breach of these particular contract terms caused GEFA damages. These same questions of fact also bar summary judgment on Layne's counterclaims for monies owed under the Construction Contract and for violations of the Prompt Pay Act.

D. CH2M's Motion for Summary Judgment against Layne's Cross-Claims.

CH2M seeks summary judgment on all of Layne's cross claims including: (1) implied indemnity should GEFA prevail on its claims against Layne, (2) negligent misrepresentation, and (3) attorney's fees.

*1. Implied Indemnity*

CH2M argues Layne's cross claim for implied indemnity is barred by Georgia's apportionment statute, O.C.G.A. § 51-12-33. O.C.G.A. § 51-12-33(b) provides:

> [w]here an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

With the enactment of the apportionment statute, the only category of common law indemnity that remains is vicarious liability where one "is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another" such as arises between a principal and his agent. District Owners Ass'n, Inv. v. AMEC Environmental & Infrastructure, Inc., 322 Ga. App. 713, 715-716 (2013). Because no relationship exists whereby Layne could be held vicariously liable to GEFA for CH2M's actions, CH2M, contends a jury will have to apportion fault, and, consequently, Layne's cross claim for implied indemnity fails.

Layne responds that the statute only applies in the context of joint tortfeasors. Id. at 716. Thus, it recognizes to the extent GEFA has asserted a negligence claim against both Defendants, the apportionment statute would apply. Yet, it argues to the extent GEFA alleges Layne is in breach of its contractual obligation to re-place the well, irrespective of the cause for the collapse/deformation, the apportionment statute would not apply. For example, should a jury find CH2M's negligence was the sole cause of the collapse/deformation and apportion no fault to Layne but still require Layne to replace the well under the Construction Contract, Layne claims it would still have a right to seek indemnity from CH2M.

The Court agrees with Layne. Until a jury resolves the questions about the liability of these two Defendants, the Court cannot determine, as a matter of law, Layne's implied indemnity claim is without merit.

2. *Negligent Misrepresentation*

Layne asserts CH2M negligently misrepresented "that the thinner casing was a sound engineering choice and that it would not be susceptible to collapse or deformation during installation" upon which Layne relied to its detriment.[60] Layne identifies two ways it could be damaged by this alleged misrepresentation. First, Layne claims that should a jury return a verdict against it in favor of GEFA, Layne will have been injured to the extent that liability was caused by CH2M's negligence.[61] Second, Layne contends "in the event that GEFA prevails . . . and Layne forfeits or otherwise loses the benefit of the unpaid pay [applications] including amounts due, CH2M is liable to Layne for those amounts as a result of its negligent misrepresentations."[62]

Again, CH2M argues this claim is barred by Georgia's apportionment statute, and, again, the Court finds a jury will need to make certain decisions regarding the contract and tort liability of these two Defendants before it is known whether the apportionment statute would bar Layne's negligent misrepresentation claim as a matter of law.

In further support of its motion, CH2M argues Layne's negligent misrepresentation cross claim fails because Layne cannot demonstrate that it reasonably relied on the alleged misrepresentation or that it was damaged as a result. Reasonable reliance and resulting damages are both essential elements of a negligent misrepresentation claim. J.E. Black Const. Co., Inc. v. Fergueson Ent., Inc., 284 Ga. App. 345, 348 (2007) (Citation and punctuation omitted).

CH2M argues Layne could not have reasonably relied on CH2M's misrepresentation about the suitability of the thinner casing because it knew the thinner casing was not an appropriate design choice. Only in clear circumstances is reasonable reliance to be determined by the Court and not a jury. Edel v. Southtowne Motors of Newnan II, Inc., 338 Ga. App. 376, 380 (2016)

---

[60] Layne Ans. / Countercls., and Cross-cls., ¶¶ 80-81.
[61] Id. at ¶ 85.
[62] Id. at ¶ 86.

(addressing reasonable reliance requirement in context of common law fraud claim). Here, it is far from clear whether Layne, the project's contractor, could or could not reasonably rely on the design choices made by the project's designated engineer, CH2M.

As to damages, CH2M makes a multi-pronged attack on the standby portion of Layne's damages which the Court addressed and rejected in relation to CH2M's motion against GEFA, above. However, Layne also seeks to recover the contract retainage GEFA has withheld, so even if Layne was not contractually entitled to compensation for its standby time, there could be other damages to Layne arising from this negligent misrepresentation claim that a jury may consider.

*3. Attorney's Fees*

Layne's claims for attorney's fees and prejudgment interest present jury questions based upon the same law and analysis the Court used addressing CH2M's motion against GEFA, above.

## V. CONCLUSION

In light of the foregoing, it is hereby ordered and adjudged that all pending motions for summary judgment are DENIED.

**So ordered this 5th day of January, 2022.**

Elizabeth E. Long

ELIZABETH E. LONG, SENIOR JUDGE
Fulton County Superior Court
Business Case Division
Atlanta Judicial Circuit

***Served upon registered service contacts through eFileGA***