Construction Law Damages

Panel Presentation: Construction Causes of Action, Damages and Presentation at Trial/Arbitration

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As construction law practitioners know well, potential damages in construction law disputes can be extremely high. From contractors and subcontractors which have expended substantial amounts of labor or materials to projects but are unpaid, to owners which can incur huge impacts from delay or defects, the range of damages in dispute is wide and the amounts are often substantial.

This paper, presented as part of the panel presentation *Construction Causes of Action, Damages and Presentation at Trial/Arbitration*, will focus on the primary available categories of damages for potential claim categories. There are categories not covered here, including damages tied to project-specific contracts and facts. Details of underlying claims, various contractual or other limitations on damages (such as liquidated damages provisions, for example), or the intricacies of collection efforts, like lien right issues are not covered in this paper.

General Background on Damages

At a high level, the Supreme Court of Texas has outlined the rule for measuring damages in a breach of contract case, which is the most common construction dispute claim: "More than half a century ago, we observed that "[t]he universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained." *Zachry Const. Corp. v. Port of Houston Auth. of Harris Cnty*., 449 S.W.3d 98, 114 (Tex. 2014). The *Zachry* case is more well known, of course, on the issue of no-damages-for-delay clauses, but the high-level comment on damages is an appropriate starting point in any discussion of construction dispute damages.

Beyond this general rule, Texas law also recognizes, generally, the discretion of the jury (or the judge in bench trials) to determine damages. "[T]he trier of fact is afforded considerable discretion in evaluating opinion testimony on the issue of damages." *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986); *Gicor, Inc. v. Brewer*, 2023 WL 4781217 *16 (Tex. App.—Beaumont 2023, pet. filed).

No damages analysis would be complete without understanding the differences between "direct" and "consequential" damages. While both are generally recoverable as actual damages (where proven) the practical reality is that many construction contracts contain limitations or waivers of consequential damages, making the distinction critical.

"Direct" damages are those that "are the necessary and usual result of, and flow naturally and necessarily from a contractual breach". *James Constr. Grp., LLC v. Westlake Chem. Corp.*, 650 S.W.3d 392, 417, fn. 25 (Tex. 2022), reh'g denied (Sept. 2, 2022). "Consequential" damages "result naturally, but not necessarily, from the defendant's breach, and are not the usual result of

the wrong". *Id.* at 417, fn. 25. For example, direct damages typically cover things like repair costs; whereas, consequential damages are generally more profit related.

The Court in *James* noted, as the Supreme Court of Texas has before, that "the line between direct and consequential damages often is not a bright one" and that the distinction between the two "is not always so easily applied in practice". *Id.* Interestingly on lost profits damages, courts have recognized them as both direct and, potentially, consequential. "Benefit-of-the-bargain damages include lost profits that are proved with reasonable certainty. *See Phillips v. Carlton Energy Grp., LLC*, 475 S.W.3d 265, 278 (Tex. 2015); *see also USPLS, LC v. Gaas*, 2022 WL 3722135, at *8 (Tex. App.—Houston [1st Dist.] Aug. 30, 2022, pet. denied) (mem. op.) ("Lost profits may be either direct damages—profits lost on the contract itself—or consequential damages—profits lost on other contracts resulting from the breach."). *Am. Midstream (Alabama Intrastate), LLC v. Rainbow Energy Mktg. Corp*., 667 S.W.3d 837, 864 (Tex. App. – Houston [1st Dist.] 2023, pet. filed).

Owner Claims

The primary types of owner damages claims are costs to repair/complete and delay claims, as follows.

Owner's Claim: Costs to Complete or Repair vs. Difference-in-Value

The Supreme Court of Texas has outlined the approach for an owner's calculation of damages in a construction project:

> "There are two measures of damages for the breach of a construction contract: (1) remedial damages, which is the cost to complete or repair less the unpaid balance on the contract price, and (2) difference-in-value damages, which is the difference between the value of the building as constructed and its value had it been constructed according to the contract.

McGinty v. Hennen, 372 S.W.3d 625, 627 (Tex. 2012) (citing *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 164 (Tex.1982)).

These differing measures of damages apply (or do not apply) depending on the circumstances and status of project completion, as outlined in November 2023 by the Dallas Court of Appeals in *Joy & Yoo Properties, Inc. v. Roeder Holdings, LLC*, 2023 WL 8230569, at *10 (Tex. App.—Dallas 2023, no pet.) (citing M*cGinty v. Hennen*, 372 S.W.3d 625, 627 (Tex. 2012)):

> "Remedial damages are appropriate when the contractor has substantially performed; the difference-in-value measure applies when the contractor has not substantially complied with the contract terms."

Id. at *10.

To measure the damages for costs to complete or repair, the owner must prove that its damages are reasonable and necessary.

> A party seeking to recover remedial damages must prove that the damages sought are reasonable and necessary. *Mustang Pipeline Co. v. Driver Pipeline Co*., 134 S.W.3d 195, 200 (Tex.2004) (per curiam). To establish that, the plaintiff must show more than simply "the nature of the injuries, the character of and need for the services rendered, and the amounts charged therefor." *Dall. Ry. & Terminal Co. v. Gossett*, 156 Tex. 252, 294 S.W.2d 377, 383 (1956). Instead, some other "evidence showing that the charges are reasonable" is required. *Id*."

McGinty at 627.

The level of formality and specificity required to prove that damages are reasonable and necessary is not squarely determined. Two cases decided in 2023 shed some light on this burden. First, the Amarillo Court of Appeals in *Wildcat Concrete & Construction, LLC v. Vanderlei*, 2023 WL 8817556 (Tex. App.—Amarillo 2023, no pet.) rejected a claim based on a failure to prove the reasonable and necessary requirement for damages. The Court first noted the gaps in the evidence presented:

> As can be seen, the foregoing consists of ***no more than an indefinite estimate of the hours spent supervising unenumerated tasks***. This indefinite estimate of hours was then multiplied by some unmentioned monetary figure to derive a total of $100,000. Kornelis then drew on his undescribed "expertise" to deem the sum reasonable. Whether his "expertise" pertained to the field of construction work or operating a dairy is unknown. Indeed, ***nothing of record reveals the extent, if any, of Kornelis's "expertise" in building structures in general, much less those used in the dairy industry.***
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> Whether the time expended in performing their nondescript supervisory roles had any relationship to time expended by those actually experienced in the field of construction also is unknown. The court is also left without information about the charges levied or costs incurred by the average foreman or supervisor when performing like duties. Nor is there any indication of the tasks being supervised, their necessity, the necessity of expending whatever time was spent in supervising them, or the number of days spent supervising completion of the work. Vanderlei ***merely gave the trial court a range of hours which could have been spent on any particular day which, in his opinion, somehow warranted the receipt of $100,000***.

Wildcat Concrete & Constr., LLC at *2 (emphasis added).

The *Wildcat Concrete* Court then went on to cite the Statler Brothers famous song "Flowers on the Wall":

> "For all we know, it could consist of 100 hours actually supervising the propriety of ongoing construction multiplied by $1,000 per hour or 1,000 hours ***"playin' solitaire 'til dawn with a deck of 51"*** multiplied by $100. Simply put, Vanderlei left us to speculate. The dearth of explanation and foundation underlying the

> witness testimony rendered it conclusory, and, consequently, no evidence supporting the trial court's award."

Id. at 2 (emphasis added)[1].

On the other hand, a January 2023 decision by the 14th Court of Appeals in Houston upheld a finding that damages were reasonable and necessary (in that case, a claim by the contractor against a subcontractor) noting "'reasonable'" and "'necessary'" are not magic words that a witness must speak to support a damages award." *AdvanTech Constr. Sys., LLC v. Michalson Builders, Inc.*, 2023 WL 370513 at *12 (Tex. App.—Houston [14th Dist.] 2023, no pet.). The Court outlined the evidence supporting the award even though no witness specifically stated that the damages claimed were reasonable and necessary:

> Here, the trial court awarded remedial damages. ***No trial witness explicitly testified that the expenses incurred to hire another subcontractor were reasonable and necessary.*** However, Michalson's construction superintendent Juan Perez testified, "It's a higher cost [to bring in a new contractor versus using the existing one] because no contractor wants to come in on a job that's already been started. So they're [sic] pricing is going to be really steep." Czapski testified it would have been cheaper to keep AdvanTech on the job:
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> > It's definitely cheaper, and it's generally less messy to keep the guy on the job. That's why we sticked [sic] with him for so long through all these problems and headaches. We were really just hoping he would finish it because ... it was substantially more expensive to have somebody else go in there and finish it after him.
>
> Michalson also presented evidence comparing the original costs to the completion costs. The original cost of the project was to be $77,400. Michalson approved change orders of $6,790 for a total of $84,190. The additional cost of completion of the project was $39,802.34, which is consistent with the trial testimony that bringing in another contractor would be "substantially more expensive," but it was less than half of the original cost of the project. ***Based on this evidence, a rational factfinder could have concluded that the completion costs were reasonable and necessary***.

Id. at 12 (emphasis added) (internal citations omitted).

If only part of the contract price has been paid to the contractor, then the amount of the owner's damages is credited against the balance still unpaid. *Turner, Collie & Braden, Inc.* at 164. This is discussed in the contractor's damages discussion further below.

In an instance where there has been a "complete failure of performance" to construct a building, the proper measure of damages is the "excess of the reasonable and necessary cost of completion

[1] The Court did not cite the remaining lines of this passage "Smoking cigarettes and watching Captain Kangaroo—now don't tell me, I've nothing to do…", which any country music fan has naturally memorized to completion.

over and above the unpaid portion of the contract price". *Stonehill-PRM WC I, L.P. v. Chasco Constructors, Ltd*., 2009 WL 349136, at *7 (Tex. App.—Austin 2009, no pet.).

The difference-in-value method for determining damages appears less frequent in application than the costs to complete or repair. The measure of differing values is made between the value of the project as built at the time of its completion to the value if it had been constructed as required by the contract. *McGinty* at 627; *see also Precision Homes, Inc. v. Cooper*, 671 S.W.2d 924, 929 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd. n.r.e.) (measuring the difference as of the time it was built versus its value had it been built in a workmanlike manner).

In general, these damages measures are independent. Texas law does not permit a double recovery for the same injury. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 441 (Tex. 1995). However, there are fact-specific instances where damages for diminution in value and damages for cost of repairs are not always duplicative. Diminution in value does not double dip on the cost of repairs if the diminution is calculated based on a comparison of the original value of the property and the value *after repairs are made*. *See Ludt v. McCollum*, 762 S.W.2d 575, 576 (Tex.1988); *see also, Royce Homes, L.P. v. Humphrey,* 244 S.W.3d 570, 582 (Tex. App.—Beaumont 2008, pet. denied) (noting the potential availability of both remedies, but the failure to produce clear evidence of remaining diminution in value after repair); *Parkway Co.* at 441.

Owner's Delay Damages

Many projects, particularly commercial or industrial projects intended to produce revenue from leases or from manufacturing capability, are based on strict economics that hinge on timely project completion and startup. The impact to an owner caused by project delay can be extremely costly.

The support and carry costs of construction, independent from the progressible work itself, can be substantial. Examples can include the costs of construction equipment required for the progressible work to be completed, insurance to be maintained during the length of construction, scaffolding and other support structures, among other reoccurring costs.

The *existence* of these additional costs is often difficult to challenge. But other disputes may remain, such as the *cause* of the delay, *contributing factors*, and potential *waivers* of consequential damages. As to this last point, delay damages may be characterized as either direct or consequential depending on the circumstances. For example, the Court in *Zachry Const. Corp.*, though dealing with a contractor's claims for delay damages and the important topic of when and how no-damages-for-delay clauses are enforceable, added a blanket statement that "Delay damages are consequential damages". *Id.* at 114, fn. 71.

On the other hand, the Houston 14th Court of Appeals in *Tennessee Gas Pipeline Co. v. Technip USA Corp*., 2008 WL 3876141, at *12 (Tex. App. – Houston [14th Dist.] 2008, pet. denied) reviewed the long list of owner-claimed delay damages and found them to be direct damages. *Tennessee Gas Pipeline Co.* involved a construction project for equipment on existing pipelines. The project was alleged to have been planned for 17 months, but ultimately took three years to complete. The contractor made a claim for an equitable adjustment and the owner, TGP, eventually

sued for the damages it claimed to have suffered due to the delay. The contractor, Technip, claimed those damages were barred by the consequential damages waiver in the parties' contract. *Id.* at *3.

The Court's discussion of the type of delay damages claimed, and its finding that they were direct damages not barred by the parties' contract, provides a good overview of potential delay impacts to owners:

> "TGP contends that it is entitled to the jury award for its "project delay costs" because the Project took longer to complete than agreed and TGP incurred ***substantial expenses for the extended administration***. Specifically, TGP asserts that it incurred ***extended expenses for labor, travel, environmental contractors, TGP inspectors, purchase and supply of additional construction consumables, costs for hauling wastewater from the site, and services and utilities***. TGP contends that these expenses constitute "direct damages" because they naturally and necessarily flow directly from the breach in that the expenses would not have been incurred but for the breach of the Contract by Technip.
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> Article 4 of the Contract, "Owner's Responsibilities," provides that TGP is required to provide: permits; construction and permanent power; incoming high power transmission lines; storage and lay down areas at the Sites; space at the Sites for construction trailers; water; potable water; fire water; hydrotest media; and operation personnel for commissioning." ***Hence, the parties clearly contemplated that TGP would incur these costs throughout the Project and a breach of the Contract by delay naturally and necessarily would cause these costs to be extended over a longer period of time***.
>
> ***We conclude that these damages that resulted from the delay represent direct damages because they clearly flow naturally and necessarily from the breach***. Because TGP is expressly responsible for these costs under the Contract, it can be conclusively presumed to have been foreseen or contemplated by Technip that, as a consequence of its breach of the Contract by delay, TGP would have to continue paying these ongoing costs. *See id*."

Id. at *8 (emphasis added) (internal citation omitted).

The Court upheld the damages finding as it was supported by documentary proof, proof of causation and other testimony from multiple witnesses:

> The record shows that TGP submitted evidence of its project delay damages in the form of a chart summary of the expenses it incurred by station for each category of costs during the delay or schedule "slip." In addition, to support the chart summary, TGP submitted a breakdown of expenses per station, listing individual payments made on particular dates within each category of expenses.

Of course, one factor to consider in connection with delay claims (for both the owner's side and contractor's side) is the possibility of a lost profits claim. If the claim survives contractual waivers or limitations, the law is reasonably settled on the standards of proof required, albeit they are

factually specific to the circumstances of each case. The benefit-of-the-bargain measure of damages may include reasonably certain lost profits. *Bowen v. Robinson*, 227 S.W.3d 86, 96 (Tex. App. – Houston [1st Dist.] 2006, pet. denied).

Lost profits must be proven with reasonable certainty and competent evidence—the requirement of 'reasonable certainty' "is intended to be flexible enough to accommodate the myriad circumstances in which claims for lost profits arise" and this is a "fact intensive determination" where opinions and estimates "must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained." *Id.* at 96-97.

Beyond the common categories discussed above, there are any number of potential claims ranging from contract-specific expense disputes (*e.g*., per diem and equipment rentals) to challenges about the number of hours reported or labor classification, or other contract/project-specific claims.

Beyond a claim as to the project itself, it is possible that a contractor or subcontractor damages property beyond the subject matter of the contract and thus has potential tort liability to the owner or claims by third parties for alleged injuries or property damages (and, thus, for which the owner may seek defense and indemnity from the contractor).

Contractor Claims

Contractors and subcontractors likewise have potentially large damages when they are unpaid or face disruption, interference or delay by the owner or parties for which the owner is responsible (*e.g*., architect, engineer or owner's other vendors or contractors). They look back upstream to the owner to pay these damages (and have tools available to aid in those claims such as lien rights and Prompt Pay Act claims).

Setting aside factually-specific claims and the potential for defense or indemnity issues arising from third party claims, the contractor's typical claims against the owner are discussed here.

Contractor Damages for Non-Payment (including Texas Prompt Pay Act)

This first category of damages is straightforward in concept. The contractor and owner have agreed to certain compensation for the work, perhaps some reimbursable hourly arrangement or perhaps a fixed sum, but in either event a contractually-agreed rate for performance. Sometimes the contractor may claim it has been short-paid on the agreed compensation, or sometimes it may claim that it has suffered owner-caused impacts (or impacts caused by others for which the contractor is not responsible such as architects, engineers or other owner vendors or contractors) entitling it to additional compensation.

Under Texas law, when a contractor has substantially performed a building contract, it is entitled to bring a contract cause of action to recover the full contract price less the cost of remedying those defects that are remediable. *Vance v. My Apartment Steak House of San Antonio, Inc*., 677 S.W.2d 480, 481 (Tex.1984); *Gulf Liquids New River Project, LLC v. Gulsby Eng'g, Inc*., 356 S.W.3d 54, 71 (Tex. App.—Houston [1st Dist.] 2011). This is essentially the reverse of the owner's claims described above for the costs to complete or repair measured against what remains due and owing to the contractor.

The Supreme Court of Texas in *Vance* noted "the doctrine of substantial performance is merely an equitable doctrine that was adopted to allow a contractor who has substantially completed a construction contract to sue on the contract rather than being relegated to his cause of action for quantum meruit." *Vance* at 482. Where a contract has not been fully performed, substantial performance is regarded as a condition precedent to the right to sue on that contract. *Kelly v. Tracy*, 2022 WL 2837335, at *6 (Tex. App.—Houston [1st Dist.] 2022, no pet.). It is the burden of the contractor to plead and prove its entitlement to recovery under a theory of substantial performance. *Id.; Vance* at 482.

If the contractor has not substantially performed, then it may still be able to recover on an alternative quantum meruit claim despite the existence of an express contract. *See Murray v. Crest Constr., Inc.*, 900 S.W.2d 342, 345 (Tex. 1995) (contractor that had not substantially performed and thus could not recover under contract but could bring cause of action in quantum meruit):

> Generally, a party may not recover under quantum meruit when there is an express contract covering the services or materials furnished. *Truly v. Austin*, 744 S.W.2d 934, 936 (Tex.1988). Construction contracts are an exception to this rule. It is undisputed that Murray has failed to substantially perform the Borden and Cooper jobs, a condition precedent to recovery under the express contract. *See Dobbins v. Redden*, 785 S.W.2d 377, 378 (Tex.1990). Even though Murray may not recover under the express contract, Murray may bring an action in quantum meruit to recover the amount of benefits conferred by its partial performance on to Crest.

Id. at 345.

Quantum meruit damages are discussed further below.

Two other aspects of recovery could potentially give the contractor leverage in a straightforward dispute, assuming the contractor is confident in its ability to prove that it performed pursuant to the contract and any offsetting costs to complete or repair are low. First, Texas law allows the recovery of attorneys' fees for breach of contract (TEX. CIV. PRAC. & REM. CODE 38.001, *et. seq*.) (subject to some past statutory confusion about which types of entities were subject to that award). Second, the Texas Prompt Pay Act provides for substantial potential interest recovery if an owner was found to have been in breach due to nonpayment.

The Texas Prompt Pay Act expressly permits an owner to withhold up to 100 percent of the difference between the amount a contractor claims is due and the amount the owner claims is due, so long as that withholding is in good faith. A good faith dispute includes a dispute regarding whether the work was performed in a proper manner. Tex. Prop. Code §28.003. The Act imposes interest at a monthly rate of 1 ½% on untimely payments. This 18% figure can multiply quickly in high damages claims. The statute does not say that this high interest will be owed on funds withheld in good faith under §28.003.

At present, appellate courts which have reviewed the issue have found that the good faith withholding right does *not* ultimately protect the owner from the high interest rate if it is found

liable for the payment, regardless of whether the withholding it was in good faith or not. This view is exemplified by the following case:

> In the event of a good faith dispute about the amount owed for a payment requested by a contractor, section 28.003(b) allows the party disputing the payment to withhold from the payment no more than the amount in dispute.1 Id. § 28.003(b). ***"However, while section 28.003 allows a party to withhold prompt payment in the event of a good faith dispute, it does not exempt this withheld amount from accruing interest if the withholding party is ultimately found to be at fault for the breach."*** *Landmark Org., LP. v. Dephini Constr. Co*., No. 13–04–00371–CV, 2005 WL 2560022, at *5 (Tex.App.-Corpus Christi Oct. 13, 2005, pet. denied) (mem.op.).

Patel v. Creation Const., Inc., 2013 WL 1277874, at *3 (Tex. App.—Eastland 2013, no pet.) (emphasis added).

The Supreme Court of Texas has not yet addressed this good faith issue in the context of the Act.

Interestingly, in August 2023 a bankruptcy court in Florida addressed this very question, trying to predict what the Supreme Court of Texas would say when/if it ultimately addresses the issue. There, the court reviewed the various appellate decisions and found them to be inconsistent with the statute. The Court held:

> "This Court must predict how the Texas Supreme Court would interpret the TPP Act. Because the Texas Supreme Court has instructed courts interpreting statutes to look to the plain language of the text and interpret it in light of the statute as a whole, ***this Court concludes that the Texas Supreme Court would decline to follow the reasoning — or more precisely, the lack thereof — of the intermediate Texas appellate courts that have interpreted the TPP Act. Instead, the Texas Supreme Court would hold that amounts withheld under the TPP Act because of a good-faith dispute are not subject to prejudgment interest rate at 18 percent***."

In re Eagleford Recycling Servs., LLC, 2023 WL 4986393, at *10 (Bankr. M.D. Fla. Aug. 3, 2023) (emphasis added).

Contractor Damages for Delay and/or Disruption

Generally, a contractor has a right to seek delay damages for breach of contract if it incurred such damages. The parties are free to modify or exclude it by agreement, but unless they do, the right provided by law is as much a part of the contract as the rights the contract expressly creates. *Zachry Const. Corp*. at 114.

A contractor is entitled to recover damages from an owner for losses due to delay and hindrance of its work if it proves: (1) that its work was delayed or hindered, (2) that it suffered damages because of the delay or hindrance, and (3) that the owner was responsible for the act or omission

that caused the delay or hindrance. *Port of Houston Auth. of Harris Cnty. v. Zachry Constr. Corp.*, 513 S.W.3d 543, 560 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).[2]

The Houston 1st Court of Appeals has detailed the differences between delay damages and disruption damages:

> ***Under construction law, delay damages have a technical definition distinct from disruption damages. Delay damages refer to damages "arising out of delayed completion, suspension, acceleration or disrupted performance"***; these damages compensate the contracting party that is injured when a project takes longer than the construction contract specified. Phillip J. Bruner & Patrick J. O'Connor, 5 Construction Law § 15:29 (2002); *see Green Intern., Inc. v. Solis*, 951 S.W.2d 384, 393 (Tex.1997) (referring to delay damages as "a term of art in the construction industry referring to compensable damage from a delay that could have been avoided by due care").
>
> ***Disruption damages, on the other hand, are for a project that may be timely completed but nevertheless includes disruption to the contractor and compensates it for "a reduction in the expected productivity of labor and equipment—a loss of efficiency measured in reduced production of units of work within a given period of time."*** Bruner & O'Connor, 5 Construction Law § 15:102. Disruption damages can also be caused by an "event [that] both disrupts and delays a critical path activity...." *Id.* at § 15:103. A project that finishes on time but at greater expense because of disruptive events or scheduling errors presents a claim for disruption damages. *See Sauer Inc. v. Danzig*, 224 F.3d 1340, 1348–49 (Fed.Cir. 2000) (distinguishing between "delay claim" in which completion of project is delayed and "disruption claim" in which non-breaching party is entitled to "equitable adjustment to cover increased costs which were the direct and necessary result of the change or changed conditions, where the condition or the change directly leads to disruption, extra work, or new procedures"); *U.S. Indus., Inc. v. Blake Const. Co*., 671 F.2d 539, 546–47 (D.C.Cir.1982) (distinguishing between "delay damages" that compensate non-breaching party's inability to work because of breaching party's delay and "disruption damages" that compensate non-breaching party for damages suffered because delay made non-breaching party's "work more difficult and expensive than [it] anticipated and than it should have been"); Bruner & O'Connor, 5 Construction Law § 15:103 (disruption damages are damages caused by "delays .... regardless of whether the contractor timely completed its own obligation to the owner" as opposed to delay damages, which require the party to have "delayed completion" of the project).

Cnty. of Galveston v. Triple B Servs., LLP, 498 S.W.3d 176, 181–82 (Tex. App. – Houston [1st Dist.] 2016, pet. denied).

[2] This decision is an appeal following the remand of the *Zachry* case after the no-damages-for-delay decision by the Supreme Court of Texas—the Supreme Court of Texas opinion is the more commonly-cited of the two.

Importantly, as noted above, the Supreme Court of Texas in *Zachry* stated in a footnote that delay damages are consequential, so there remains a risk that such damages have been waived by other contract provisions. That said, a significant amount of law exists on the differences between direct and consequential damages, and arguments can be made both ways.

Contractor Damages for Quantum Meruit

The general rule for quantum meruit is that the claim is not viable where there is a contract between the parties. That said, as explained by other papers discussing causes of action, there are various notable exceptions to that, either permitting quantum meruit in full or recognizing that some damages may be claimed under contract while others may be claimed in quantum meruit.

The law is reasonably settled on how quantum meruit damages are to be determined, assuming the claim is valid:

> "The plaintiff is required to produce evidence of the correct measure of damages in order to recover on a quantum meruit claim. *LTS Grp., Inc. v. Woodcrest Capital, L.L.C.*, 222 S.W.3d 918, 920–21 (Tex. App.—Dallas 2007, no pet.). ***The measure of damages for recovery on a quantum-meruit claim is the reasonable value of the work performed and the materials furnished.*** *Hill,* 544 S.W.3d at 733. Evidence of anticipated benefits of a contract, without more, will not support the recovery of damages for a quantum meruit claim. *Marrocco v. Hill*, No. 14-14-00137-CV, 2015 WL 9311521, at *3 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015, no pet.) (mem. op.); *Green Garden Packaging Co., Inc. v. Schoenmann Produce Co*., Inc., No. 01-09-00924-CV, 2010 WL 4395448, at *6–7 (Tex. App.—Houston [1st Dist.] Nov. 4, 2010, no pet.) (mem. op.) (concluding evidence of anticipated profits under contract was not proper measure of damages for quantum meruit claim); *M.J. Sheridan & Son Co., Inc. v. Seminole Pipeline Co.*, 731 S.W.2d 620, 625 (Tex. App.—Houston [1st Dist.] 1987, no writ) (concluding evidence of actual costs incurred on job represented damages for breach of contract, not quantum meruit)."

Brandt Companies, LLC v. Beard Process Sols., Inc., 2018 WL 4103210, at *13 (Tex. App. – Dallas 2018), review granted, judgment vacated, and remanded by agreement, 2019 WL 13268066 (Tex. Feb. 8, 2019).

In *Kelly v. Tracy,* 2022 WL 2837335, at *10 (Tex. App. – Houston [1st Dist.] 2022, no pet.) the Houston 1st Court of Appeals discussed the types of evidence which supported the contractor's claim for quantum meruit—though a long cite, it helps identify what a court may find persuasive:

> The above evidence, which included evidence of ***what the insurance company agreed to pay for similar services***, ***the contract price***, and ***what Tracy believed would be a reasonable value for the services completed by Wood Master***, was sufficient to allow a jury to determine the issue of fair and reasonable compensation for the services and materials provided by Wood Master. *See E&A Utils., Inc. v. Joe*, No. 14-08-00890-CV, 2010 WL 2901711, at *3 (Tex. App.—Houston [14th

> Dist.] July 27, 2010, no pet.) (mem. op.) (***testimony that amount invoiced was "fair amount" for services and materials provided was some evidence of reasonable value for the work performed, even though invoice did not itemize value or price of services and materials***); *Brender v. Sanders Plumbing, Inc.*, No. 02-05-067-CV, 2006 WL 2034244, at *4 (Tex. App.—Fort Worth July 20, 2006, pet. denied) (mem. op.) ("To establish the right to recover reasonable charges [under quantum meruit theory], a claimant need not use the word 'reasonable'; ***a claimant need only present sufficient evidence to justify a jury's finding that the costs were reasonable***."); *Insignia Capital Advisors, Inc. v. Stockbridge Corp.*, No. 08-01-00119-CV, 2002 WL 1038805, at *3 (Tex. App.—El Paso May 23, 2002, pet. denied) (mem. op., not designated for publication) (evidence of quantum meruit damages can include ***"[e]vidence of what others received for like services ... or opinion of witnesses who are familiar with the value of such services, including the opinion of the person performing the service and possibly even the person benefiting***"); *Montclair Corp. v. Earl N. Lightfoot Paving Co*., 417 S.W.2d 820, 831 (Tex. App.—Houston 1967, writ ref'd n.r.e.) ("Certainly the ***contract price*** is evidentiary of the reasonable value of what is furnished.").

Kelly at *11.

One nuance is important. Given the law that, in some instances, a contractor may be able to recover in quantum meruit in part, even when part of its claim is covered by a contract, the contractor must be prepared to allocate its damages claim. For example, in *Bluelinx Corp. v. Texas Const. Sys., Inc*., 363 S.W.3d 623, 627 (Tex. App.—Houston [14th Dist.] 2011, no pet.), the Court addressed this issue directly, albeit for amounts that were ultimately quite low.

> TCS pleaded quantum meruit, but Bluelinx contends it should not have been submitted as a matter of law because an express contract exists between the parties. We disagree. A party may recover in quantum meruit when there is no express contract covering the services or materials furnished. *See Black Lake Pipe Line Co. v. Union Constr. Co.*, 538 S.W.2d 80, 86 (Tex.1976), *overruled on other grounds by Sterner v. Marathon Oil Co.*, 767 S.W.2d 686 (Tex.1989); *Coastal Chem, Inc. v. Brown*, 35 S.W.3d 90, 101 (Tex.App.—Houston [14th Dist.] 2000, pet. denied). The existence of an express contract does not preclude quantum meruit recovery for services or materials that are not covered by the contract. *Black Lake*, 538 S.W.2d at 86; *Beverick v. Koch Power, Inc*., 186 S.W.3d 145, 154 (Tex.App.-Houston [1st Dist.] 2005, pet. denied); *Coastal Chem*, 35 S.W.3d at 101.
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> . . .
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> The jury heard testimony regarding expenses for certain materials. Sturges testified to $2,130.02 in ***changed materials expenses that were incurred at the request of Frank Miller, the project manager at Bluelinx, and were not covered by the contract***… Therefore, *quantum meruit recovery based on $2,130.02 in materials expenses was proper*.

. . .

> TCS argues that a portion of the jury's damages award can be supported by considering $8,613.34 Bluelinx withheld as a retainage from TCS's payment application that was never reimbursed. ***The goods and services to which this retainage relates are covered by the parties' contract***… TCS's claim for the $8,613.34 does not fall within any of the three recognized exceptions, and ***TCS cannot recover this amount under quantum meruit***.

Id. at 627-629 (emphasis added).

In essence, just as many other areas of damages must be segregated or allocated, the same is true where a contractor may make a hybrid claim of part contract and part quantum meruit.