Alternative Dispute Resolution

Don't Hide the Ball

Duhon v. Activelaf, L.L.C., 16-0818 (La. 10/19/16), ____ So.3d ____, 2016 WL 6123820.

The case provides valuable lessons about drafting and executing agreements to arbitrate.

On April 19, 2015, James Duhon went to Sky Zone, a trampoline park in Lafayette. When he arrived, Sky Zone staff directed him to a computer screen for check-in. At check-in, Duhon completed a Participation Agreement. Duhon used an electronic signature to agree to the terms of the agreement, which he read on the computer screen.

The electronic agreement required Duhon to "check" three paragraph boxes relating to the park's liability. The last and longest one covered several topics, including arbitration. The paragraph was more than 300 words long. Halfway down it purported that the patron waived trial and agreed to submit any dispute to arbitration. The end of the paragraph purported that the patron agreed to pay Sky Zone liquidated damages of $5,000 if he filed a lawsuit, although the agreement did not bind Sky Zone to arbitration.

Duhon sued Sky Zone in the 19th Judicial District Court, alleging that he had suffered injuries on his visit to Sky Zone due to Sky Zone's negligence. Sky Zone's exceptions to the suit included an exception of prematurity because Duhon had not initiated arbitration. Duhon countered that he did not knowingly consent to arbitration and that the agreement to arbitrate was adhesionary and unenforceable.

The district court overruled the exception of prematurity because the agreement to arbitrate lacked mutuality. Sky Zone sought and was granted supervisory review, and the Louisiana 1st Circuit Court of Appeal, in an unpublished opinion, reversed the district court, finding that the agreement to arbitrate met the requirements for enforceability as announced in *Aguillard v. Auction Management Corp.,* 04-2804 (La. 6/29/05), 908 So.2d 1. The Louisiana Supreme Court granted Duhon's application for writs.

Reversing the court of appeal, the Supreme Court held that the nature of the agreement and the placement of the arbitration provision within a long paragraph, along with a lack of mutuality of the arbitration obligation, prevented Duhon from giving effective consent to the arbitration provision ("the two-sentence provision mandating arbitration is camouflaged within the confines of an eleven-sentence paragraph, nine of which do not discuss arbitration.") In examining the enforceability of the agreement to arbitrate, the Supreme Court acknowledged that *Aguillard* provided the "template" for that determination.

Aguillard involved an arbitration provision in a contract to participate in a real estate auction. At the auction, Aguillard received his bidder number, a printed document entitled "Auction Terms and Conditions" and other documents. He physically signed a document that contained the arbitration provision at issue. The document was in nine-point type, and the entire agreement was in the same size type and same font. Importantly, the single arbitration sentence was its own paragraph, set apart by double-spacing both before and after the single-sentence paragraph. The wording of the provision made it clear that both parties were bound to arbitrate disputes.

The determination whether an agreement is an adhesion contract is an issue of consent. Did the party reading or reviewing the agreement, usually in printed form with small type, actually see and agree to the provisions? *Aguillard* recognized the strong state and federal policies in favor of arbitration and held that, under the facts presented in that case, the arbitration provision was not so inconspicuous as to be easily overlooked, and both parties were bound by the arbitration provision. Thus, Aguillard was bound to arbitrate.

In the majority opinion in *Duhon*, Chief Justice Bernette Joshua Johnson identified four factors that led to the result in *Aguillard*: (1) the arbitration language was a stand-alone, single-sentence paragraph, (2) the language was not concealed, (3) both parties were obligated to arbitrate, and (4) the parties did not have significantly different bargaining positions. Applying those factors to the contract before it in *Duhon*, the Supreme Court found that the language's placement and the lack of mutuality caused the agreement to arbitrate to be adhesionary and unenforceable.

The Supreme Court found it significant that the other two check-boxes in Sky Zone's electronic contract were shorter provisions that dealt with only a single subject each, while the third check-box paragraph was longer and dealt with multiple topics in addition to arbitration. In essence, the paragraph "camouflaged" the arbitration provision.

An important part of the opinion is significant with respect to electronic contracts containing arbitration provisions. The Court made it clear that the fact that the contract was read and affirmed electronically "is of no legal consequence" because of La. R.S. 9:2607, which legally recognizes electronic signatures.

The Supreme Court's decision does not appear to represent a seismic change away from the enforceability of arbitration clauses, but several practice observations spring from *Duhon.* First, the use of "check-boxes" or other electronic contract-execution techniques does not by itself invalidate an agreement to arbitrate. Second, the best practice would be to use a stand-alone arbitration paragraph with a single sentence if possible, and to include a separate acknowledgment by the parties of the agreement to arbitrate. Finally, the obligation to arbitrate should apply to both parties.

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Bankruptcy Law

Support Orders

Galaz v. Galaz (In re Galaz), No. 15-51151 (5 Cir. 12/12/16), 2016 WL 7209705.

Prior to filing for bankruptcy under Chapter 13 of the Bankruptcy Code, the debtor was ordered in her divorce decree to maintain health insurance and pay insurance premiums and medical expenses for her children.

In December 2007, the debtor filed bankruptcy and soon thereafter stopped paying the insurance premiums and medical expenses. In 2009, the state court entered an order awarding the debtor's ex-husband child-support arrearages and attorney's fees (First Support Order). The ex-husband then requested the bankruptcy court direct the debtor to pay the amounts due under the First Support Order from the debtor's estate.

At that time, the debtor had a pending adversary proceeding against her husband, and she argued that the bankruptcy court should offset the amounts due under the First Support Order against any judgment entered in the adversary. The bankruptcy court agreed with the debtor and denied the motion to direct payment.

In November 2011, the state court entered a second order demanding the debtor pay half of her daughter's medical premiums and expenses (Second Support Order, and collectively with the First Support Order, the Support Orders). Prior to entry of the Second Support Order, the debtor was discharged and her bankruptcy case was closed. The ex-husband moved for the state court to enforce the Support Orders against the debtor, and the debtor filed a Motion to Enforce Stay or Prior Order in the bankruptcy court. The bankruptcy court entered an order enjoining the ex-husband from collecting because the debtor had a right to offset the amounts against her judgment.

The ex-husband appealed, arguing that the bankruptcy court lacked subject matter jurisdiction to prohibit him from enforcing the Support Orders because the debtor's estate had been closed for almost three years when he filed the action to enforce the Support Orders. Alternatively, he argued that the obligations from the Support Orders were ineligible for setoff against the debtor's judgment because, under Texas law, child-support obligations may not be set off because the obligation lacks mutuality. Because this argument was not made below, it was waived. The debtor countered that the district court had "arising under, arising in, or related to" jurisdiction.

The 5th Circuit held that the bankruptcy court had jurisdiction to enjoin the ex-husband from enforcing the First Support Order because bankruptcy courts always have jurisdiction to enforce their own prior orders. The 5th Circuit held that permitting the ex-husband to enforce the order in state court, rather than be offset, would "create an end run around the bankruptcy court's previous ruling" and, therefore, the injunction was necessary to enforce the court's previous order.

The 5th Circuit did find, however, that the bankruptcy court lacked subject matter jurisdiction to enjoin the ex-husband from enforcing the Second Support Order. Unlike the First Support Order, the 5th Circuit held there was no "arising in" jurisdiction because the bankruptcy court was not enforcing one of its prior orders. The 5th Circuit found that almost all of the obligations under the Second Support Order arose after the bankruptcy case was closed and, therefore, did not pertain to the implementation or execution of the debtor's plan. The 5th Circuit thus held that the bankruptcy court lacked jurisdiction to enjoin the ex-husband from enforcing the obligations of the Second Support Order.

Deadline for Filing a Notice of Appeal

Netsch v. Sherman (In re Prism Graphics, Inc.), No. 16-10432 (5 Cir. 12/22/16), 2016 WL 7422270.

The trustee obtained a judgment against Bryan Netsch and Intense Printing, Inc. (appellants). Under Federal Rule of Bankruptcy Procedure 8002(a), appellants have 14 days after entry of judgment to file a notice of appeal. Here, however, appellants failed to file their notice timely. Instead, 12 days after the 14-day deadline passed, appellants filed a motion to extend time to file an appeal and their notice of appeal.

Appellants argued that the bankruptcy court should extend the deadline to file an appeal because the error constituted "excusable neglect" under Federal Rule of Bankruptcy Procedure 8002 as counsel for appellants mistakenly believed the 28-day appeal deadline allowed under the Federal Rules of Civil Procedure applied. The bankruptcy court denied the motion, and the district court affirmed.

On appeal, the 5th Circuit explained that, in analyzing whether to extend a deadline due to an error caused by "excusable neglect," courts consider the following factors set forth in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 113 S.Ct. 1489, 1498 (1993): "(1) 'whether the movant acted in good faith'; (2) 'the danger of prejudice' to the nonmovant; (3) 'the length of the delay and its potential impact on judicial proceedings;' and (4) 'the reason for the delay, including whether it was within the reasonable control of the movant.'"

In its reasons, the bankruptcy court first found that counsel acted in good faith and was candid about his reason for failing to meet the deadline. Second, the trustee expected an appeal to follow and, therefore, was not prejudiced by the late filing. Third, while the 12-day delay was long, it was consistent with counsel's mistaken belief that he had 28 days to file the appeal. However, the bankruptcy court held that the reason for the missed deadline was inexcusable. The bankruptcy court found that "confusing bankruptcy procedure with civil procedure does not constitute excusable neglect." The 5th Circuit agreed, noting the *Pioneer* court's holding that ignorance of the rules or mistakes made in construing the rules will not typically constitute excusable neglect. Finding the bankruptcy court properly applied the *Pioneer* test, the 5th Circuit affirmed the bankruptcy court's denial of the motion to extend time.

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Corporate and Business Law

No Action Against Corporate Employee for Tortious Interference

Gulf Eng'g Co. v. Kuhn, 16-0425 (La. App. 5 Cir. 12/21/16), ____ So.3d ____, 2016 WL 7384134.

In sustaining an exception of no cause of action, the Louisiana 5th Circuit Court of Appeal declined to expand the action for tortious interference with contract to apply to an employee who was not a corporate officer.

Gulf Engineering Co., L.L.C., had a contract with the Dow Chemical Co. to test equipment at Dow facilities in Louisiana. Dow assigned its employee, Allison Kuhn, to coordinate the assignments of third-party contractors, including Gulf. Kuhn was not a corporate officer of Dow. Gulf claimed that Kuhn interfered with Gulf's ability to perform its contractual duties and encouraged other contractors to solicit Gulf's employees, contrary to Dow policy, along with other actions that resulted in Gulf being unable to perform under its contract. Gulf also alleged that Kuhn told Gulf employees that Gulf's contract had terminated and that the employees should seek employment with the new contractor. Apparently, Kuhn's alleged actions took place prior to the termination of Gulf's contract with Dow.

Kuhn's supervisor and Dow's point of contact for Gulf's work was Troy Barbier. Barbier subsequently gave Gulf a 90-day notice of termination. Kuhn then allegedly ordered Gulf's supervisory personnel to vacate the Dow premises and stated that she did not consider either Dow or herself to be bound by the 90-day notice.

Gulf filed suit against Kuhn in the 29th Judicial District Court, alleging intentional interference with contract. The trial court sustained an exception of no cause of action, finding that a suit for intentional interference with contract can be maintained only against a corporate officer or someone who functions in a similar manner, and the cause of action for tortious interference with contract does not exist against a corporation's employee who is not a corporate officer.

Gulf then amended its petition, alleging that Kuhn was "charged with the same duties, authority, and responsibilities as a corporate officer of Dow, which rendered her position completely indistinguishable from that of a corporate officer of Dow, which she effectively served as at all times pertinent hereto." Gulf cited *9 to 5 Fashions, Inc. v. Spurney*, 538 So.2d 228 (La.1989), in its amended petition. The trial court sustained a second exception of no cause of action.

On appeal, Gulf argued that Kuhn was a *de facto* corporate officer, relying on *Commc'ns & Info. Res. v. Expressions Acquisitions Corp.*, 95-1070 (La. App. 5 Cir. 5/15/96), 675 So.2d 1164 (liability against a board member); *Chaffin v. Chambers*, 577 So.2d 1125 (La. App. 1 Cir. 1991, *rev'd*, 54 So.2d 665 (La. 1991)) (action between attorneys in joint partnership for tortious interference with a contract between an attorney and his client; reversal found no cause); and *WKG-TV Video Elec. Coll., Inc. v. Reynolds*, 618 So.2d 1023 (La. App. 1 Cir. 1993) (suit against a director/shareholder of a corporation). The 5th Circuit noted that in these cases the alleged tortious interference would also constitute a breach of fiduciary duty. Further, Gulf had not alleged what duties Dow's corporate officers had or how Kuhn's duties were the same.

In affirming the judgment of the trial court in sustaining the exception, the 5th Circuit stated that in *Spurney* the Louisiana Supreme Court has "recognized a limited cause of action for tortious interference with contractual relations, that applies 'to a corporate officer interfering with his employer's contractual relations with third persons.' *Miller v. Desoto Reg'l Health Sys.*, 13-639 (La. App. 3 Cir. 12/11/13), 128 So.3d 649, 658." The 5th Circuit then restated the elements of the action for intentional interference with contracts found at 235 of *Spurney*.

The court of appeal concluded:

> We find no error [in] the trial court ruling that Gulf's mere assertions that Ms. Kuhn had duties similar to those of Dow's corporate officers was not sufficient to state a cause of action for intentional interference with contracts as set forth in *Spurney, supra*. In addition, we decline to extend the cause of action set forth in *Spurney* to employees, even those in a supervisory capacity, who intentionally interfere with contracts between their employer and a third party.

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Family Law

Community Property

Baumbouree v. Baumbouree, 15-1053 (La. App. 3 Cir. 7/13/16), 202 So.3d 1077, *writ denied*, 16-1557 (La. 11/18/16), 2016 WL 7030773.

Dr. Baumbouree executed a stock-subscription agreement and shareholder agreement regarding the stock he owned in Hamilton Medical Group, stating that the stock was to be valued at $1,000 in the case of certain listed events. The court found that the agreement also applied to the parties' divorce and community-property partition, and that, for purposes of the partition, the stock was to be valued at $1,000, even though Ms. Baumbouree did not sign the agreements. The court found that his exclusive right to manage the asset registered in his name allowed him to sign the agreements, which then bound Ms. Baumbouree. The court did state that she had a remedy under La. Civ.C. art. 2354 if she could prove that he acted fraudulently or in bad faith in entering into the agreements. The dissent persuasively argued that the circumstances listed in the agreement did not include divorce, that the stock had much greater value as a result of the "multitude of benefits" that the ownership interest in the entity provided to Dr. Baumbouree and that the asset should have been valued in accordance with La. R.S. 9:2801.

Trahan v. Trahan, 16-0108 (La. App. 1 Cir. 9/16/16), 203 So.3d 447.

The trial court had legal authority to find Ms. Trahan in contempt for her failure to pay an equalizing payment set forth in a community-property-partition judgment. She argued that the appropriate remedy was to seek execution under a writ of *fieri facias*. The court found that the property-partition judgment requiring an equalizing payment was a judgment for the payment of money and she was able to pay the sum when the judgment was rendered. Thus, the judgment finding her in contempt for failing to pay it was affirmed.

Custody

Mason v. Mason, 16-0287 (La. App. 3 Cir. 10/5/16), 203 So.3d 519.

The trial court did not err by not allowing testimony, and not allowing a proffer of testimony, by one child regarding incidents in his relationship with the father, which the mother wanted to argue were similar to the remaining minor child's relationship to the father, particularly because all of the incidents with the first child predated the three custody hearings. An audio recording the mother made of the minor child was inadmissible hearsay evidence as the child testified. The mother was not allowed to seek testimony at trial on matters not alleged in her rule to modify custody.

The trial court did not err in dismissing the mother's rule for contempt and to modify custody after the father orally moved for "directed verdict" or no cause of action at the end of trial. An exception of no cause of action may be raised during the trial by the trial court on its own motion. Moreover, although the court was actually granting an involuntary dismissal, the judge's "slip of the tongue" was not reversible error.

The case of *Mulkey v. Mulkey*, 12-2709 (La. 5/7/13), 118 So.3d 357, restates but does not relax the *Bergeron* burden of proof, particularly as regards the preference of a child. The trial court did not err in modifying the physical custody schedule on its own motion, despite no pleading requesting such a change. The dissent argued that the schedule could not be modified without a pleading seeking to do so, as it provided Ms. Mason with no appropriate notice or opportunity to present evidence on the issue.

Evidence

Mayeux v. Charlet, 16-1463 (La. 10/28/16), 203 So.3d 1030.

Following the Supreme Court's remand of this matter to the trial court, the court ruled that Louisiana Children's Code article 609 regarding mandatory reporters of child abuse was unconstitutional. The Supreme Court granted writs to determine "whether a priest is a 'mandatory reporter,' as defined in La. Child. Code art. 603, when administering the Sacrament of Penance ('confession'), such that the provisions of La. Child. Code art. 609 would require him to report information learned during a sacramental confession." The court first found that the matter was premature because the trial court had not determined whether "the communications between the child and the priest were confessions *per se*." Priests would not be mandatory reporters if the information was not obtained during the confidential confessional communication. However, it addressed the issue, finding that "any communication made to a priest privately in the sacrament of confession for the purpose of confession, repentance, and absolution is a confidential communication under La. Code Evid. 511, and the priest is *exempt* from mandatory reporter status in such circumstances by operation of La. Child. Code art. 603, because 'under the . . . tenets of the [Roman Catholic] church,' he has an inviolable 'duty to keep such communications confidential.'" (Emphasis in original.) Finally, the court concluded:

> Because the provisions of La. Child. Code art. 609 speak only to "mandatory reporters," a priest when administering the sacrament of confession has no duty to report any confidential communications made during the confession that, by the tenets of the Roman Catholic Church, he is authorized to hear and is also duty bound to keep confidential.

Child Support

Toups v. Kauffman, 16-0248 (La. App. 4 Cir. 11/23/16), 204 So.3d 1044.

Following a change of circumstances, the parties' previous agreement that Ms. Kauffman would be solely responsible for the children's private school costs was modified such that each party would be responsible for 50 percent of those costs. The court of appeal stated: "Thus, regardless of whether a consent judgment contains a non-modification clause, either party is entitled to seek modification of child support, upon showing a material change in circumstances."

Dazet v. Price, 16-0362 (La. App. 5 Cir. 12/7/16), 204 So.3d 1152.

The court did not err in determining Mr. Dazet's income for child support purposes by examining his personal and business accounts, including his failure to produce documents. Proceeds from the sale of immovable property that he was receiving on an installment basis were included in his income for child support purposes. Mr. Dazet could not use his failure to produce documents to claim that the trial court erred in determining the child support because it lacked sufficient documentation to do so. The trial court did not err in not addressing whether Ms. Price was expense sharing with her new husband because there had been no claims regarding that in the lower court.

Successions

Succession of Cannatella, 16-0332 (La. App. 5 Cir. 12/7/16), 205 So.3d 1007.

Mr. Cannatella died after the parties were divorced, but before their community property had been partitioned. Although a succession was opened, because undecided claims concerning the community property remained, both proceedings were going forward simultaneously. When Ms. Watermeier filed pleadings in the succession matter seeking reimbursement for certain payments concerning former community property that she alleged the succession was partly responsible for, the trial court granted the succession's exceptions of *lis pendens* and stayed the succession proceedings until the partition proceedings were complete. The court of appeal reversed and lifted the stay, finding that claims for reimbursement incurred prior to the termination date of the community should be heard in the divorce proceedings; and claims arising after termination of the community and after the succession was opened should be heard in the succession proceeding. Further, the court of appeal directed that the judge in the succession matter should "use his discretion" regarding setting Ms. Watermeier's claims for reimbursements from the succession incurred post-termination in order to allow the judge in the divorce matter time to complete the community property partition. Essentially, the court directed that the community property partition should be completed and her claims for pre-termination reimbursements adjudicated, and then the succession proceeding could resume and determine her reimbursement claims for post-termination expenses.

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Fidelity, Surety and Construction Law

10-Year Prescriptive Period Applies to Claims for Violation of the Prompt Pay Statute

Boes Iron Works, Inc. v. Gee Cee Grp., Inc., 16-0207 (La. App. 4 Cir. 11/16/16), 206 So.3d 938.

Plaintiff, Boes Iron Works, Inc., entered into a subcontract with Gee Cee Group, Inc. to perform certain structural steel and iron work in connection with a project to repair and renovate Entergy's Gas Department Warehouse located in New Orleans (the project). In December 2001, Boes completed its work on the project and submitted two invoices to Gee Cee Group, which were not paid. Entergy paid Gee Cee Group for the work performed by Boes sometime in 2003. In April 2010, a representative of Boes met with Gibson Chigbu, the president of Gee Cee Group, to discuss payment. Following the meeting, Chigbu sent an email to Boes stating that he would pay $5,000 and that subsequent payments would be made in installments. Thereafter, in June 2010, Boes received a $5,000 check from the Gee Cee Company of LA, Inc., and, on Sept. 3, 2010, Gee Cee of LA issued a second check for $11,500. On both of the checks, it was noted that the payments were being made to Boes for its Job No. 1079, which was the number that Boes assigned to the Entergy project. Boes contacted Chigbu regarding the balance of $16,820. Thereafter, Boes sent an invoice to Gee Cee of LA showing a balance of $82,739.80. This amount included not only the balance due of $16,820, but also interest calculated at the rate set forth on the invoices. On Dec. 27, 2012, Boes' attorney sent a formal written demand to Gee Cee Group setting forth the same amount due of $82,739.80.

On Feb. 19, 2013, Boes filed suit against Gee Cee Group, Gee Cee of LA and Chigbu, the president of both Gee Cee Group and Gee Cee of LA, for breach of contract, violation of the prompt-pay statute and violation of misapplication-of-funds statutes. The trial court ruled in Boes' favor. In its written reasons for judgment, the court found that the April 2010 meeting and subsequent May 11, 2010, email from Chigbu served as a new promise by Gee Cee of LA to pay the debt of Gee Cee Group. The court found that Gee Cee LA was an alter ego or a mere continuation of Gee Cee Group and thus responsible for its debts. As to the terms of the new April 2010 agreement, the court found that defendants continued to owe Boes for the unpaid balance of $16,820 and that "it is clear that Boes is entitled to collect interest on the remaining unpaid balance." Finally, as to penalties, attorneys' fees and costs, the court found that Boes was entitled to penalties under the prompt-pay statute, La. R.S. 9:2784, but not under the misapplication-of-funds statute, La. R.S. 9:4814. The court thus rendered judgment in Boes' favor for the principal sum of $16,820 plus penalties and judicial interest from the date of judicial demand.

On appeal, defendants contend that the trial court legally erred in applying the continuation doctrine to find that Gee Cee of LA was responsible for Gee Cee Group's debt, given that a threshold requirement for applying the doctrine was not met. Defendants cited to the 4th Circuit's holding in *Pichon v. Asbestos Defendants*, 10-0570, p. 6 (La. App. 4 Cir. 11/17/10), 52 So.3d 240, 244, that "[a] threshold requirement to trigger a determination of whether successor liability is applicable under the 'continuation' exception is that one corporation must have purchased all or substantially all of the assets of another." Defendants noted that it was undisputed no asset transfer occurred between Gee Cee Group and Gee Cee of LA. The 4th Circuit agreed with the defendants that the trial court's reliance on the continuation doctrine was misplaced as the threshold requirement of an asset transfer was lacking. However, the 4th Circuit found that the single-business-enterprise doctrine (SBE) — another veil-piercing doctrine — applied and dictated the same legal result. The 4th Circuit explained that the SBE doctrine is invoked "to break down corporate walls between affiliated corporations." The SBE applies when a corporation is found to be the "alter ego, agent, tool or instrumentality of another corporation." In applying the SBE doctrine, the 4th Circuit relied on *Green v. Champion Ins. Co.*, 577 So.2d 249, 257 (La. App. 1 Cir. 1991), in which the 1st Circuit Court of Appeal adopted the SBE doctrine and enumerated a non-exclusive, 18-factor test to determine whether a group of affiliated entities constitutes a SBE. Considering the *Green* factors, the 4th Circuit found that Gee Cee Group and Gee Cee of LA were an SBE. Accordingly, the 4th Circuit found no error in the trial court's finding that Gee Cee of LA was liable for Gee Cee Group's debts.

In challenging the trial court's award of penalties under the prompt-pay statute, defendants conceded a violation of the prompt-pay statute; however, they contended that Boes' prompt-pay claim was prescribed. Defendants argued that *Specialty Construction, L.L.C. v. Jim Meyers Const. Co.*, 10-1378 (La. App. 1 Cir. 2/11/11), applied a one-year prescriptive period to a prompt-pay claim and held that prescription would run no later than two years from the date on which payment was received. The 4th Circuit found that the defendants' reliance on *Specialty Construction* was misplaced as the focus in *Specialty Construction* was the calculation of the deadline for filing suit to enforce a claim and privilege granted by the Private Works Act. As the prompt-pay statute contains no prescriptive period, the 4th Circuit held that a prompt-pay claim is subject to a 10-year prescriptive period. Pursuant to La. R.S. 9:2784 (C), the 4th Circuit found that the 10-year prescriptive period commenced to run 14 days after the date on which Gee Cee Group received payment from Entergy for the work. At trial, Boes established that Entergy paid Gee Cee Group "sometime in 2003." Given that Boes' petition was filed on Feb. 19, 2013, the 4th Circuit held that the trial court did not err in awarding Boes penalties under the prompt-pay statute as it could not be said that Boes' petition was prescribed under the applicable 10-year prescriptive period.

Finally, on appeal, Boes contended that the trial court erred in rejecting its claim for penalties under the misapplication-of-funds statute. Boes contends that because Chigbu admitted that Gee Cee Group deposited Entergy's payments for Boes' work into its operating account and that it paid other business-related expenses instead of paying Boes, the trial court erred in failing to award penalties for misapplication of funds. The 4th Circuit found no error in the trial court's denial of penalties as there was no direct evidence of a knowing misapplication of funds.

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Mineral Law

Royalties; Conditional Allowable

Gladney v. Anglo-Dutch Energy, L.L.C., 16-0468, ____ So.3d ____ (La. App. 3 Cir. 12/21/16), 2016 WL 7402427.

This case involves a dispute regarding the proper payment of royalties. Plaintiffs leased property to Anglo-Dutch Energy, L.L.C. and Anglo-Dutch (Everest), L.L.C. The mineral lease stated that plaintiffs were entitled to 1/5 royalty on production. Lessees drilled a gas well on plaintiffs' land and started producing from a reservoir that extended beneath their property and neighboring lands. A few months later, Anglo-Dutch decided to apply for a geographic unit. Prior to approving the unit, the Commissioner issued a conditional allowable, which allows an operator to extract a certain volume of production from the reservoir prior to the establishment of a unit. It is a way of ensuring that the owners of the various tracts are able to receive their equitable share of the production prior to the existence of a unit.

The conditional allowable in this case stated, "[a]ll monies generated from the date of first production, the disbursement of which is contingent upon the outcome of the current proceedings before the Office of Conservation for the Frio Zone will be disbursed based upon results of those proceedings." Lessees' application for the conditional allowable was granted on May 17, 2012. Lessees' application for the geographic unit was submitted on July 3, 2012. The unit was established on Oct. 30, 2012.

In March 2013, plaintiffs claimed that they were not paid the proper amount of royalties from May 2012 through October 2012. Plaintiffs argued they should have been paid their royalties on a lease basis since first production under the conditional allowable (since May 17, 2012). Anglo-Dutch argued royalties were to be paid to plaintiffs on a unit-basis for the entire time. The parties did not disagree that from Oct. 30, 2012, forward that the plaintiffs' royalties were to be paid on a unit basis. The only dispute was whether the royalties from May 17, 2012, through Oct. 30, 2012, should be paid on a unit or lease basis. The district court ruled in favor of the Anglo-Dutch lessees. Plaintiffs appealed.

The Louisiana 3rd Circuit Court of Appeal reversed the district court. It found that the language of the mineral lease (not the Commissioner's order) governed the payment of royalties. The lease provided that plaintiffs were to get lease-based royalties on all production from the well. The lease governed the parties' relationship prior to the unitization order. The creation of the conditional allowable did not abrogate the terms of the mineral lease. The 3rd Circuit also relied on an affidavit submitted by the chief hearing officer over unitization hearings, who confirmed that the Commissioner's conditional allowable could not alter the terms set forth in the mineral lease between the parties.

The 3rd Circuit also rejected Anglo-Dutch's argument that the lawsuit was a collateral attack on the orders of the Commissioner of Conservation because plaintiffs were not questioning the unit order, nor were they questioning the Commissioner's ability to issue the order. Rather, what was at issue here was the appropriate basis for paying royalties (either on a lease basis or unit basis) and determining the appropriate date as to when such unit-based royalties were to begin. The 3rd Circuit found it compelling that the Commissioner's order provided that the effective date of the unit was Oct. 30, and that Oct. 30 was to be the date on which lessees would have to begin to provide for the sharing of production on a unit basis, not the date of first production. Thus, from the period beginning May 17, 2012, through Oct. 30, 2012, the royalties were to be paid on a lease-basis as described in the mineral lease, not a unit basis.

Proposed Regulations Relating to Natural-Resource-Damage-Restoration Banking in Louisiana

New regulations have been proposed to establish procedures for the certification and operation of natural-resource-damage-restoration banks in Louisiana. These proposed regulations can be found in La. Register, Jan. 20, 2017, at pp. 128-136. The natural-resource-damage-restoration banking program is designed to allow, encourage and incentivize private investors to undertake environmental-restoration projects and generate restoration credits that responsible parties can purchase to fully or partially resolve natural-resource-damage liabilities from oil spills under the Oil Pollution Act (OPA) or the Oil Spill Prevention and Response Act (OSPRA). The focus of the proposed regulations is the restoration of Louisiana's coastal area. Whether a private party may use this type of restoration banking in response to injuries resulting from a particular oil spill is left to the authority of the natural-resource-damage-assessment trustees. The trustees would retain final authority to purpose and select the purchase of credits from certified natural-resource-damage-restoration banks. The trustees are designated from certain state agencies, such as the Louisiana Coastal Protection and Restoration Authority, the Louisiana Oil Spill Coordinator's Office, the Louisiana Department of Environmental Quality, the Louisiana Department of Natural Resources and the Louisiana Department of Wildlife and Fisheries.

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Professional Liability

Prescription

Correro v. Ferrer, 16-0861 (La. 10/28/16), ____ So.3d ____, 2016 WL 6311881.

"Wrong site" surgery was performed on a patient who then timely filed with the Division of Administration a request for a panel review of the actions of a surgeon, a hospital and the hospital's employees. After the panel meeting was scheduled, the surgeon admitted his "liability and breach of the standard of care" and waived his participation in the panel proceedings.

The attorney chair scheduled the panel meeting concerning the remaining parties. The patient requested that the panel meeting be postponed because she had recently learned that others who had participated in the surgery were not employees of the hospital, and she wished to amend her request for review to include them as parties. The attorney chair refused, stating that the proceeding had been pending for "almost a year," adding that he viewed the request as an action by the patient to "start over by adding new defendants," which would significantly delay matters. The chair also wrote that the patient could file "a new complaint in a new proceeding" but that the panel meeting set for the following day would go forward as scheduled. On the following day, the patient amended her complaint and added additional defendants, specifically referencing her initial complaint, and stating that the amendment was made within three years of the incident and that she first learned from the hospital's panel brief that potentially culpable parties were not employees of the hospital. The chair went forward with the panel meeting, nevertheless, and an opinion was rendered finding that both the surgeon and hospital had breached the applicable standard of care.

A month later, the PCF informed the patient that it had converted her amended complaint against the newly named non-hospital-employed defendants into a separate request for a panel, stating that it had not known that an opinion had been rendered on the initial panel request when the recently submitted amendment was filed; thus, the PCF decided that "the amendment will be processed as a new request for a medical review panel."

The newly named defendants then filed an exception of prescription, which the trial court granted. The court of appeal reversed, finding that "the timely filed claim with the initial panel . . . served to suspend prescription" against the unknown/unnamed joint tortfeasors to the same extent suspension occurred as to those named in the initial request for review. The plaintiff then filed a lawsuit against the defendants named in the initial panel request, to which the surgeon (who had acknowledged his liability and waived panel proceedings) and hospital responded by filing separate exceptions of prescription, each arguing that the plaintiff's claim against them had prescribed 90 days after the panel opinion was issued. The plaintiff countered that the remaining claims against the newly added parties suspended prescription against all joint and solidary obligors, including the hospital and the surgeon. The trial court granted the exception of prescription, dismissed the surgeon and hospital, and the court of appeal affirmed.

The Supreme Court accepted the patient's writ application. It began its *per curiam* opinion by affirming its "long held" principle that prescriptive statutes are strictly construed in favor of maintaining the cause of action and that absent clear and contrary legislative intent "prescriptive statutes which can be given more than one reasonable interpretation should be construed against the party claiming prescription." *Maltby v. Gauthier*, 506 So.2d 1190, 1193 n. 5 (La. 1987). Thus, if there are two possible constructions, the one that favors maintaining an action, as opposed to barring, should be adopted. *Carter v. Haygood*, 04-0646, p. 10 (La. 1/19/05), 892 So.2d 1261, 1268.

The Court noted that it had "repeatedly cautioned" that parties cannot make prescription more onerous, noting it had recently "reaffirmed" in *In re Tillman*, 15-1114, p. 16 (La. 3/15/16), 187 So.3d 445, 455, that administrative agencies cannot adopt rules that shorten the prescriptive period.

The MMA specifically controls prescription and its suspension. La. R.S. 40:1299.47(A)(2)(a) specifically provides that the filing of a panel request suspends prescription until 90 days following notification of the panel opinion as to the all joint and solidary obligors and all joint tortfeasors, including but not limited to health-care providers, to the same extent that prescription is suspended against the parties subject to the request for review.

When the plaintiff timely amended her complaint to add new respondents, the panel was still pending, and prescription of her claims against all joint and solidary obligators, named or not, was suspended. The Court noted that "it logically" followed that had the patient's timely filed amended complaint been treated *only* as an amendment, the suspension that began with the initial panel request would have continued. The Court observed that the issue in this case arose because the Division of Administration (the PCF?) made "an administrative decision" to convert the patient's timely filed amendment into a new panel request. The Court said:

> Consequently, if we interpret the provisions of La. Rev. Stat. § 40:1299.47(A)(2)(a) in accordance with the holdings of the lower courts, *i.e.*, finding notification of the [Panel] opinion served to end suspension of prescription against Dr. Ferrer and Glenwood, the DOA's administrative decision would effectively have shorten[ed] the suspensive period, and in turn the prescriptive period, contrary to our holding in *Tillman*. Thus, our rules of strict construction require us to find the timely filed amendment, adding Caldwell and Greer, likely suspended, or rather maintained the suspension of, prescription against all joint and solidary, including Dr. Ferrer and Glenwood.

The question, as first framed by the Supreme Court, was whether a timely amendment to a medical-review panel can be converted into a new complaint by the Division of Administration (or PCF), thus ending suspension of the original complaint and causing a patient's claims against the first-named health-care providers to prescribe while the second complaint was still pending against alleged joint and solidary obligors. It answered no, it cannot.

The grant of defendants' exception of prescription was reversed, and the matter was remanded for further proceedings consistent with the Court's opinion.

Negligent Credentialing: Medical Malpractice or General Tort?

Billeaudeau v. Opelousas Gen. Hosp. Auth., 16-0846 (La. 10/19/16).

This case was first reported in LBJ Vol. 64, No. 1, June/July 2016. It involves a lawsuit against the hospital for the negligent credentialing of a physician in emergency medicine that allowed her to treat a stroke patient in an emergency room. The plaintiffs moved for partial summary judgment, asking the trial court to acknowledge that negligent credentialing was a tort that fell outside the MMA's coverage; the court did so and certified its judgment as final. The court of appeal, as had the trial court, analyzed the six factors of *Coleman v. Deno*, 01-1517 (La. 1/25/02), 813 So.2d 303, the seminal case on the question of what is covered by the MMA, and affirmed the trial court's opinion. The Supreme Court, noting that Billeaudeau's singular *res novo* issue was whether a negligent credentialing claim falls within the protections of the MMA, granted the defendants' writ.

The plaintiffs argued that the defendant physician should not have been working in the emergency department and that credentialing her to do so was simply a matter of "corporate malfeasance" in the hiring process. They also contended that the hospital's duty arose under La. R.S. 40:2114, the "Organization of medical and dental staff" statute. The defendants' argument was that the entire case was about whether the patient should have been given a certain kind of medication at a certain time, which was purely a medical decision.

The Court observed that the definition of "malpractice" in the MMA, La. R.S. 40:1299.41(A)(8), "clearly covers negligent 'training and supervision of health care providers,' it does not directly address negligence in the credentialing or hiring of said providers." It then took cognizance of the *Coleman* factors and examined each to decide whether credentialing is an act of medical negligence or an act of administrative negligence.

The Court found the first three factors mitigated in favor of finding credentialing to be more of a general tort than a medical tort. Factor 1 (whether the *wrong* was treatment-related) was more of a general tort because the decision to hire a physician is administrative. Factor 2 (whether medical evidence is required to determine the appropriate standard of care) sounded more in general negligence because "expert *medical* evidence" would not be necessary, even though some other sort of expert testimony might be. Factor 3 (whether the tort involved assessment of the patient's condition) mitigated against a finding of malpractice, as there could have been no medical evaluation of the patient at the time the "administrative decision to credential" the physician was made.

The Court found Factor 4 (whether the incident involved a physician/patient relationship *or* was within the scope of activities a hospital is licensed to perform) mitigated in favor of finding the case did fall within MMA coverage because credentialing is within the scope of activities a hospital is licensed to perform pursuant to La. R.S. 40:2114(E).

"Whether the injury would have occurred if the patient had not sought treatment" (Factor 5) "was also difficult to apply in this case." The plaintiffs contended that the patient needed treatment from a medical professional, irrespective of whether it was the defendant or anyone else, but it nevertheless decided that it weighed against finding that the claim sounded in medical malpractice. The defendant hospital argued that there would have been no injury but for the physician's alleged malpractice, a point the plaintiffs conceded, but they countered that the *Coleman* factors must be examined *in toto*. In examining these arguments, the Supreme Court took "particular guidance" from its holding in *LaCoste v. Pendleton Methodist Hospital, L.L.C.*, 07-0008 at pp. 15-16, 966 So.2d 528-29, in which it explained that "any wrong that a patient suffers in a hospital or doctor's office would not occur if the patient had not first entered the facility." In this case, as in *LaCoste*, the "wrongs" alleged by the plaintiffs were not treatment/failure-to-treat related. The Court explained that "this factor likewise does not weigh greatly in favor of finding the negligent credentialing alleged in the petition was medical malpractice under the LMMA." *Coleman* Factor 6 (whether the alleged tort was intentional) was not at issue.

The Court prefaced its conclusion with its oft-repeated caution that "[a]n expansive reading of the definition of medical malpractice contained in the MMA runs counter to our previous holdings that coverage of the Medical Malpractice Act should be strictly construed." It rejected defendants' contentions that the plaintiffs' claims of administrative negligence were inseparable from the medical malpractice claim they already settled, finding that "the application of the *Coleman* factors demonstrate[s] the alleged negligent credentialing was *administrative*, not medical in nature." Thus, it fell outside the ambit of the MMA, the plaintiffs were entitled to summary judgment on that issue, and the judgment of the court of appeal was affirmed.

Billeaudeau was a 4-3 opinion, with one concurring and three dissenting opinions.

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Taxation

Jurisdiction of the Louisiana Board of Tax Appeals

Dep't of Rev. v. Jazz Casino Co., 16-0180 (La. 2/7/17), 2017 WL 496266.

Jazz Casino Co., L.L.C., operates a land-based casino in New Orleans. In connection with its operations, Jazz rented rooms. The Louisiana Department of Revenue collected certain taxes on these hotel/motel room rentals (hotel occupancy taxes) on behalf of the State of Louisiana and on behalf of the Louisiana Tourism Promotion District (LTPD), the Louisiana Stadium & Exposition District (LSED) and the New Orleans Exhibition Hall Authority (NOEHA). Asserting entitlement to an exemption, Jazz sought a refund of hotel occupancy taxes it paid during the relevant periods, requesting a refund of state, LTPD, LSED and NOEHA hotel occupancy taxes. The Department denied the refund claims. Jazz appealed to the Louisiana Board of Tax Appeals (BTA).

After protracted litigation, Jazz and the Department ultimately stipulated that Jazz had overpaid $1,983,315.27, exclusive of interest, in hotel occupancy taxes. Of this amount, 2 percent was attributable to state general sales taxes and 98 percent was attributable to LTPD, LSED and NOEHA taxes. Based on the stipulations of the parties, the BTA rendered a judgment ordering the Department to refund the entire $1,983,315.27 to Jazz, with applicable statutory interest. This judgment was not appealed and became final.

Subsequently, the Department filed with the BTA a motion to annul the BTA's judgment, contending that the BTA did not have the subject matter jurisdiction to order a refund of taxes the Department had collected and remitted to LTPD, LSED and NOEHA. The BTA denied the motion to annul.

On appeal, the Department contended that the BTA lacked subject matter jurisdiction to order it to refund hotel occupancy taxes levied by NOEHA and LSED because the BTA's jurisdiction set forth in La. R.S. 47:1401 and 1407 did not extend to NOEHA and LSED taxes. Specifically, the Department asserted that La. R.S. 47:1401 extended the BTA's jurisdiction only to taxes "administered" by the Department. It further asserted that La. R.S. 47:1502 limited the taxes administered and collected by the Department to those set forth in the provisions of Subtitle II of Title 47, La. R.S. 47.21-47:1690, and that neither NOEHA nor LSED taxes are found in Title 47. The Department contended that because it does not "administer" the NOEHA or LSED taxes, but rather collected those taxes as an agent of those political bodies, with no authority to issue refunds, the BTA did not have subject matter jurisdiction to order it to issue a refund of such taxes.

The Louisiana Supreme Court disagreed. The Court reasoned, because the Legislature, through its constitutionally recognized authority and duty to provide a "complete and adequate remedy" for the recovery of an illegal tax paid by a taxpayer, vested the BTA with jurisdiction to hear and decide disputes or controversies between taxpayers and the Department in the enforcement of any tax "administered" by the Department, the question before the Court was whether the Department "administers" the NOEHA and LSED hotel occupancy taxes, thereby bringing disputes between the Department and the taxpayer as to these taxes within the jurisdiction of the BTA.

The Court found that nothing in the language of La. R.S. 47:1502 limited the Department's authority to administer only the taxes referred to therein. Looking to the ordinances and provisions of the NOEHA and LSED, the Court found the Department was authorized to collect such taxes on behalf of the respective entities. The Court held that while the word "administer" is not defined in La. R.S. 47:1401, it was clear through various legislative provisions, ordinances and resolutions that the Department was authorized to and had been "administering" the NOEHA and LSED taxes. The Court held the BTA had subject matter jurisdiction to hear and decide the dispute between Jazz and the Department as to the Department's denial of Jazz's request for a refund of these taxes and upheld the denial of the Department's motion to annul judgment.

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Substance-Over-Form Doctrine

Summa Holdings, Inc. v. Comm'r, No. ____ F.3d ____ (6 Cir. 2017), 2017 WL 631663.

The substance-over-form doctrine allows the Internal Revenue Service to reclassify a tax-motivated arrangement consistent with its substance, rather than its form. However, the doctrine has its limitations. In *Summa Holdings, Inc. v. Commissioner*, the 6th Circuit reversed the U.S. Tax Court and declined to apply the doctrine to a series of transactions among Summa, a family-owned company; a domestic international-sales corporation (DISC); and two Roth IRAs that generated significant tax benefits.

The DISC was 100 percent owned by a holding company that, in turn, was owned by the IRAs. Summa paid commissions to the DISC, which then distributed dividends to the holding company. The holding company paid tax on the dividends and distributed the balance to the IRAs. Consequently, the arrangement allowed the family to transfer to the IRAs more than $5 million, an amount far in excess of the Roth IRA contribution limits.

The court upheld the taxpayer's strategy of using the DISC and IRAs for the intended purpose: tax avoidance. The substance-over-form doctrine should be limited to situations in which "the taxpayer's formal characterization of a transaction fails to capture economic reality and would distort the meaning of the Code in the process." The court refused to apply the doctrine simply because the arrangement lacked a purpose other than federal income tax effects and generated tax benefits.

The year at issue in *Summa* was before the enactment of Internal Revenue Code section 7701(o), which clarified and codified the economic-substance doctrine. If the economic-substance doctrine were relevant, the result could be different because the lack of a valid business purpose could be enough for the IRS to successfully deny the tax benefits of a transaction.

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