Custody Modification

Glazer v. Glazer, 23-0502 (La. App. 4 Cir. 4/3/24), ____ So.3d ____, 2024 WL 1434289.

Mr. Glazer appealed the trial court's judgment ordering him to stop communicating with the children's school, arguing that the trial court erred in rendering an injunction without a trial on the merits. Conversely, Ms. Glazer moved to dismiss Mr. Glazer's appeal, arguing that the trial court's judgment was not a final judgment because it did not dispose of all the issues in her eighth rule for contempt and motion to modify custody, nor was it a partial final judgment because it was not designated as final.

Although the 4th Circuit Court of Appeal agreed with Ms. Glazer that "the conditions precedent to finalization of a partial judgment" did not exist, it converted Mr. Glazer's appeal to a writ application and granted it.

On review, the 4th Circuit Court of Appeal vacated the trial court's judgment and remanded the case, finding that the trial court erred as a matter of law in issuing a permanent injunction without a trial on the merits.

Domestic Abuse Assistance Act

Petite v. Hinds, 24-010 (La. 3/12/24), ____ So.3d ____, 2024 WL 1067465.

Ms. Petite filed a petition for protection from abuse, alleging that Mr. Hinds, L.H.'s grandfather, inappropriately touched L.H. The trial lasted three days, occurring over a year, during which the deposition of Ms. Petite's expert, Dr. Dodd, was admitted in lieu of her live testimony. In her deposition, Dr. Dodd stated that her diagnosis was "possible child sexual abuse." Two months after the trial ended, the trial court granted Ms. Petite an order of protection on behalf of L.H.

Mr. Hinds appealed the trial court's judgment, arguing that, among other things, the trial court erred in granting the order of protection because Ms. Petite failed to meet her burden of proof, by a preponderance of the evidence, that Mr. Hinds sexually abused L.H.

The 4th Circuit Court of Appeal affirmed the trial court's order of protection. Judge Belsome dissented, noting that Ms. Petite failed to meet her burden of proving by a preponderance of the evidence that the sexual abuse occurred — stated differently, that the sexual abuse "occurred more probably than not" — because Dr. Dodd's diagnosis was not consistent with the legal standard necessary to support the issuance of a protective order. *Petite v. Hinds*, 23-0262 (La. App. 4 Cir. 10/31/23), ____ So.3d ____, 2023 WL 7203699 at *6.

Mr. Hinds sought rehearing, which was granted. On rehearing, the 4th Circuit Court of Appeal modified the order of protection to exclude the indefinite provisions, finding that the trial court abused its discretion in granting them. *Petite v. Hinds*, 23-0262 (La. App. 4 Cir. 12/4/23), ____ So.3d ____, 2023 WL 8368321.

Mr. Hinds then applied for writ of certiorari in the Louisiana Supreme Court, which was granted. On review, the Louisiana Supreme Court vacated the order of protection, agreeing with Judge Belsome that the lower courts erred in finding that Ms. Petite met her burden of proving the allegations of sexual abuse by a preponderance of the evidence.

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U.S. Department of Commerce International Trade Administration

Frozen Warmwater Shrimp from Ecuador, India, Indonesia and Vietnam: Preliminary Affirmative Countervailing Duty Determination, 89 Federal Register 63, 22374 (April 1, 2024).

Petitioners American Shrimp Processors Association successfully prevailed in a countervailing-duty action against producers and exporters of frozen warmwater shrimp from Ecuador, India, Indonesia and Vietnam. The Department of Commerce announced preliminary affirmative countervailing duties (CVD) ranging from .39% to 196.41%. Importers will need to post cash deposits at their applicable rate and participate in verification proceedings before final margins are calculated. The petitions were filed on behalf of the domestic shrimp harvesting and processing sectors, who alleged that imported shrimp is being unfairly traded due to impermissible and countervailable subsidies provided by the noted foreign governments. The U.S. domestic industry will also have to prove to the International Trade Commission (ITC) that the illegally subsidized imports are causing material injury. A final hearing at the ITC is expected in October 2024.

Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws, 89 Federal Register 58, 20766 (March 25, 2024).

The International Trade Administration (ITA) announced a sweeping Final Rule impacting the administration and effectiveness of U.S. trade-remedy laws. The Final Rule had been under advisement since May 2023 and involves numerous changes to important trade-remedy regulatory provisions, including scope, circumvention and CVD facts available hierarchy. Most notably, the Final Rule removes the prohibition against countervailing transnational subsidies, which are subsidies provided by one country that favors production in a second country. When subsidized goods from the second country enter the United States market, they are now subject to U.S. countervailing duty laws. Many believe this change results from expansion of Chinese transnational subsidies through its Belt and Road Initiative. Other important changes include expansion of particular market situations and consideration of IP, labor and environmental issues in surrogate-value benchmark calculations.

Office of the U.S. Trade Representative

Petition for Relief Under Section 301 of the Trade Act of 1974, China's Policies in the Maritime, Logistics and Shipbuilding Sector (March 12, 2024).

The United Steelworkers Union (USW) led a coalition of five labor organizations to file a Section 301 petition with the Office of the U.S. Trade Representative seeking relief against discriminatory and unfair economic actions by the People's Republic of China in the maritime, logistics and shipbuilding sector that are allegedly restricting U.S. commerce. The petition describes the erosion of the U.S. commercial shipbuilding industry since the conclusion of World War II, with the number of commercial shipyards plunging by more than 70% due, in part, to China's unfair trade practices targeting dominance of global shipbuilding, starting with its Tenth Five-Year Plan in 2001.

The Biden Administration has discretion regarding the use of Section 301 to address these alleged unfair and burdensome economic activities. President Trump utilized his Section 301 discretion to impose sweeping punitive tariffs against Chinese imports in response to a host of complaints regarding Chinese government economic policies. The USW petition will be closely watched as the United States enters the final stages of the Presidential election cycle and trade-related issues become more prominent on the political stage.

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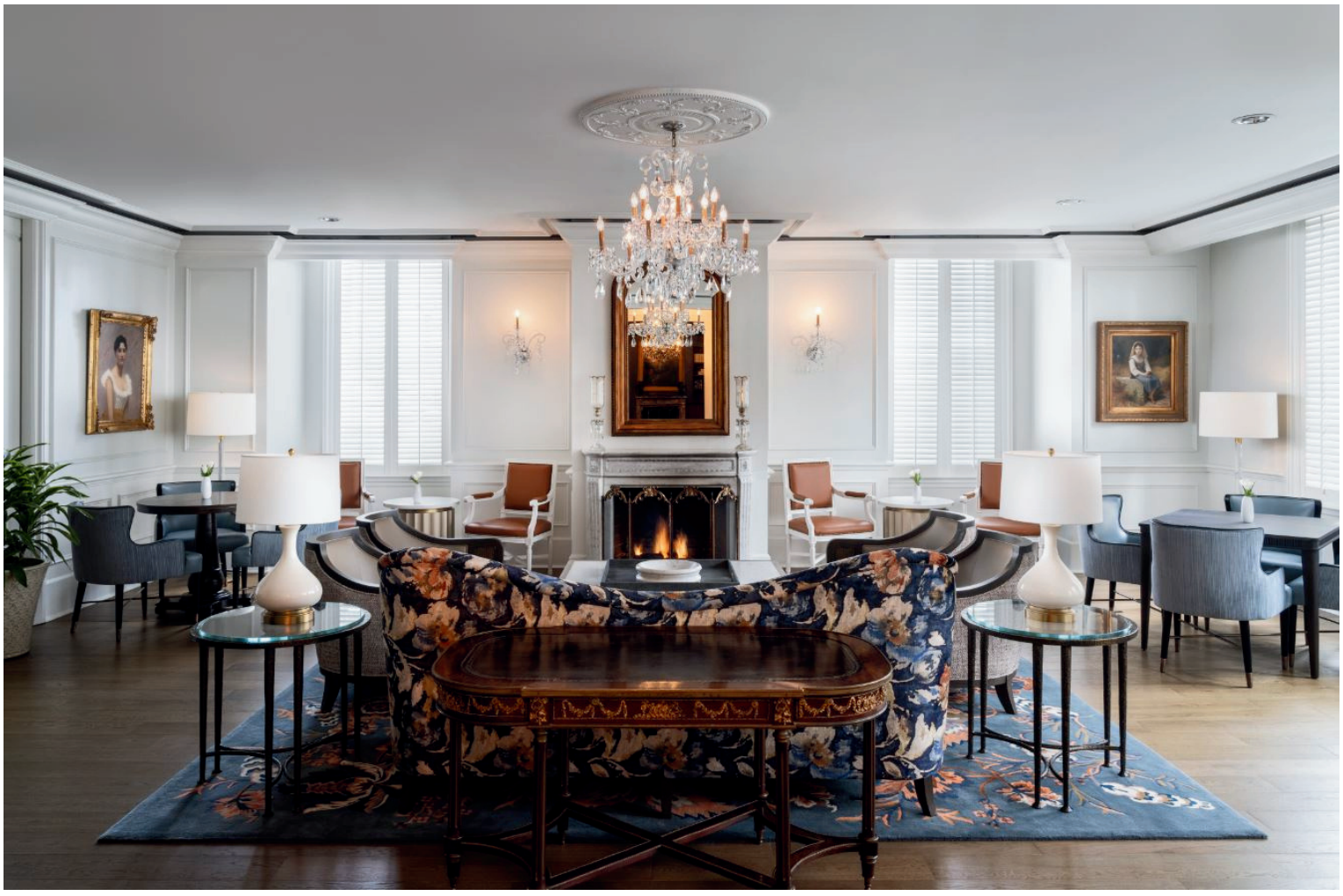

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3rd Circuit Clarifies Prescription Under the Louisiana Wage Payment Act

Scarborough v. LaRocca, 23-0166 (La. App. 3 Cir. 11/8/23), 374 So.3d 227.

In Scarborough v. LaRocca, the Louisiana 3rd Circuit Court of Appeal analyzed the workings of prescription under the Louisiana Wage Payment Act (LWPA).

Plaintiff Timothy Scarborough worked for Everybody Rides Auto Sales, which was operated by Phipps & LaRocca, LLC. He was terminated on April 8, 2011, and filed a pro se LWPA lawsuit on April 4, 2014, shortly before the LWPA's three-year prescription was set to expire. This petition alleged $30,000 in unpaid wages and commissions and sought penalties, interest and attorney fees. The original petition was filed against "Johnathan LaRocca, d/b/a Everybody Rides Auto Sales" but did not include the LLC as a party. LaRocca filed an exception, and Scarborough moved to serve an amended petition to include Phipps and LaRocca, LLC, as a co-defendant. (Although the opinion is not entirely clear on the timing, it appears that around this time Scarborough retained an attorney.)

In January 2015, the court ordered that the amended petition be allowed and that it relate back to the date of the initial petition. The court also ordered that the claim against LaRocca, individually, be dismissed without prejudice. Litigation continued and, several years later, in August 2022, Scarborough sought to file a second amended petition renaming LaRocca as a defendant and alleging personal and solidary liability for nonpayment of wages. Defendants again filed an exception. The trial court granted the exception on the basis that, after the earlier dismissal without prejudice, prescription again began to run against LaRocca. The August 2022 second amended petition was therefore patently untimely.

The 3rd Circuit reversed. It held that, as a general rule, an individual member will not be liable for the debts of an LLC. However, the allegations of the second amended petition stated that Phipps and LaRocca, LLC (later renamed JW LaRocca, LLC) failed to comply with corporate formalities, was undercapitalized and had abandoned the used car dealership at issue in the lawsuit. The petition also alleged that LaRocca had personally refused to pay the plaintiff's wages due at the time of his termination. These allegations, the 3rd Circuit held, were sufficient to give rise to alter ego or veil-piercing liability if proven at trial.

The 3rd Circuit then turned to an affidavit LaRocca filed along with his exception. This affidavit stated that Scarborough was employed by the LLC only, that "at no time did there exist an employer[-]employee relationship between Affiant and Timothy J. Scarborough," and that "[a]t no time did Affiant personally pay or otherwise com-

pensate Timothy J. Scarborough for work performed as a sales representative . . . .” The 3rd Circuit held that these “self-serving statements” were not determinative of the alter-ego question.

Notably, alter ego liability is solidary in nature. It is black letter law that interruption of prescription against one solidary obligor interrupts prescription against all solidary obligors under La. Civ.C. art. 1799. Therefore, if Scarborough can establish alter ego liability on remand, the interruption of prescription against the company would apply to LaRocca, individually, as well. The judgment below was therefore reversed and the matter remanded for further proceedings to finally resolve this 13-year-old wage dispute.

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JOA’s Exculpatory Clause Applied in Breach of Contract Action

In *Certain Underwriters at Lloyd’s v. Alliance Drilling Consultants, LLC*, 23-0265 (La. App. 3 Cir. 12/20/23), 377 So.3d 459, *writ denied*, 24-0117 (La. 3/12/24), ____ So.3d ____, 2024 WL 1068454, the appellate court addressed several issues, including whether a joint operating agreement’s exculpatory clause applied in a non-operator’s breach of contract action against an agent of the operator after a blowout. The court held that the clause did apply.

The dispute related to an oil well drilled in LaSalle Parish, pursuant to a joint operating agreement (JOA) entered in 1983 between Petro-Hunt, LLC, and XH, LLC. Under the JOA, XH served as operator and Petro-Hunt was a non-operator working-interest owner. The parties based their JOA on one of the American Association of Professional Landmen’s standard forms — either the 1977 version or the 1982 version of the A.A.P.L. Form 610 – Model Form Operating Agreement. (The court does not state which, and the portions of the JOA quoted by the court are identical in the 1977 and 1982 forms, so the language quoted from the JOA does not indicate which version was used.)

In 2008, XH entered an “Agency Agreement” with XTO Energy, Inc., which provided that XTO would “manage all of the oil and gas interest held by XH.” In 2014, XTO (on behalf of XH) proposed drilling the well at issue in this case, and Petro-Hunt agreed to participate in the well. XTO hired D&D Drilling & Exploration, Inc. to drill the well and hired Alliance Drilling Consultants, Inc. to serve as a consultant and wellsite supervisor. One of the individuals that Alliance provided to supervise drilling was Clifton Pritchard. D&D began drilling operations in July 2014, and a blowout occurred three days later.

Petro-Hunt’s insurer — Certain Underwriters at Lloyd’s, London — covered some of Petro-Hunt’s losses. In 2015, Petro-Hunt and Lloyd’s filed suit against XH, XTO, D&D, Alliance, Pritchard and the insurer for Alliance and Pritchard. The plaintiffs initially asserted both tort claims and breach-of-contract claims. The plaintiffs settled their claims against D&D, Alliance and Pritchard, then dismissed their tort claims. Thus, the plaintiffs proceeded to trial against XH and XTO based on breach-of-contract claims only. Those contract claims were based on allegations that XH did not use proper care in hiring and overseeing XTO, and that XTO did not use proper care in drilling.

Before trial, the parties filed cross motions for summary judgment. In resolving those motions, the trial court granted the plaintiffs’ motion in part, holding that Petro-Hunt was a third-party beneficiary of the Agency Agreement between XH and XTO. However, the trial court denied the plaintiffs’ motion in part, and granted the defendants’ motion in part, holding that the JOA’s exculpatory clause applied to the plaintiffs’ claim against XTO for an alleged breach of the Agency Agreement between XH and XTO.

The exculpatory clause, which is found in Article V.A of the JOA, states that the operator “shall conduct all such operations in a good and workmanlike manner, but it shall have no liability as Operator to the other parties for losses sustained or liabilities incurred, except such as may result from gross negligence or willful misconduct.” Also noteworthy is Article XVI of the JOA, which states that the JOA “shall be binding upon and shall inure to the benefit of the parties hereto and to their respective heirs, devisees, *legal representatives*, successors and assigns.” (emphasis supplied by the court). After a six-day trial in 2022, a jury returned a verdict finding that neither XH nor XTO had breached its contractual obligations because neither had engaged in gross negligence or willful misconduct. The plaintiffs appealed, asserting numerous assignments of error.

One of the plaintiffs’ assignments of error was that the trial court erred by holding that the exculpatory clause applied to XTO. The plaintiffs noted that the trial court had held that Petro-Hunt was a third-party beneficiary of the Agency Agreement between XH and XTO. That Agency Agreement required XTO to operate with care, and, unlike the JOA, the text of the Agency Agreement did not contain an exculpatory clause. Thus, argued the plaintiffs, they should not have needed to prove that XTO had engaged in gross negligence or willful misconduct because that heightened standard for proving liability comes from the JOA’s exculpatory clause, not the Agency Agreement that was binding on XTO.

In discussing this argument, the 3rd Circuit noted that Article XVI of the JOA provides that the JOA “shall inure to the benefit of the parties hereto and to their respective . . . legal representatives.” The 3rd Circuit concluded that XTO was an agent of XH and that an agent is a “legal representative” of its principal. Thus, under the terms of the JOA itself, it applied to XTO. This included the exculpatory clause. Further, the Agency Agreement provided that XTO would perform “in accordance with . . . the terms of applicable operating agreements.” The court reasoned that this language had the effect of incorporating the JOA’s exculpatory clause into the Agency Agreement. Thus, the trial court had not erred in holding that the plaintiffs had to prove gross negligence or willful misconduct to prevail. Accordingly, the 3rd Circuit rejected this assignment of error.

The court also rejected the plaintiffs’ other assignments of error.

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Pleading Under LHEPA

Terry v. Notre Dame Health Sys., 23-01582 (La. 2/6/24), 378 So.3d 728.

In this medical malpractice case, the decedent, who suffered from Alzheimer's disease and dementia, died after a fall she suffered while left unattended at Wynhoven Health Care Center. The decedent's daughter filed suit against several defendants, alleging that her mother's fall and subsequent death were caused by the defendants' "gross and wanton negligence" through the following actions and/or inactions: (1) failing to consider the safety of their patients; (2) failing to provide adequate medical treatment to the decedent; (3) failing to dispense the proper treatment to the decedent; (4) improperly supervising the decedent; (5) allowing an inexperienced and unskilled individual to tend to the decedent; and (6) committing other unnamed negligent acts. *Terry v. Notre Dame Health Sys*., 23-0068 (La. App. 5 Cir. 10/31/23), 374 So.3d 221, 224.

The defendants answered by alleging immunity under the affirmative defense provided by the Louisiana Health Emergency Powers Act (LHEPA) as the decedent's fall occurred during a state of public-health emergency due to the COVID-19 pandemic. Specifically, the LHEPA states: "During a state of public health emergency, no health care provider shall be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct." La. R.S. 29:771(B)(2)(c)(i).

The defendants subsequently filed a peremptory exception, asserting that the allegations as stated in the plaintiff's petition were insufficient to establish a cause of action for gross negligence or willful misconduct. The defendants, therefore, argued that they were immune from civil liability under the LHEPA.

The plaintiff filed both an opposition to the defendants' exception and an amended petition to include allegations regarding defendants' awareness of the decedent's extensive medical history, including her history of falls, among other conditions, when she arrived at Wynhoven. To support this allegation, the plaintiff attached excerpts from the decedent's medical records to both the opposition and her amended petition. The plaintiff further alleged the following: "[D]efendants ignored these conditions and left [the decedent] alone in her room in her wheelchair. . . . [D]efendants' attempt to keep [the decedent] safe by putting a call bell on her wheelchair was insufficient given her conditions, and defendants should have taken more stringent measures to ensure her safety." The plaintiff further alleged "that defendants did 'very little' to ensure [the decedent] would not fall again, and their conduct amounted to gross negligence as it shows a continuous pattern of lack of care." *Id.* at 225.

Following a hearing, the trial court sustained the defendants' exception, and the plaintiff appealed.

The appellate court recognized Louisiana's jurisprudence holding that "an affirmative defense may not form the basis of a peremptory exception when the asserted defense goes to the merits of the case. . . . When an exception of no cause of action is based on an affirmative defense, the exception should not be sustained unless the allegations of the petition exclude every reasonable hypothesis other than the premise on which the defense is based." *Id.* at 226. Nonetheless, the appellate court affirmed the trial court's decision sustaining the defendants' exception.

To support its decision, the appellate court

referenced its recent decision in *Welch v. United Med. Healthwest-New Orleans, LLC*, 21-0684 (La. App. 5 Cir. 8/24/22), 348 So.3d 216, 218, where it similarly found that the plaintiff's allegations failed to rise to the level of gross negligence. The appellate court reasoned as follows: "Plaintiff's conclusory statement that defendants did "very little" to ensure that [the decedent] was safe and would not sustain another fall is insufficient to state a valid cause of action against defendants for gross negligence or willful misconduct." *Id.* at 227.

The plaintiff then sought relief from the Louisiana Supreme Court. In a per curiam opinion reversing the lower courts' decisions and remanding the matter for further proceedings, the Court simply stated, "Accepting the facts as alleged in the four corners of the petition and amended petition as true, we find them sufficient to state a cause of action for gross negligence." *Terry v. Notre Dame Health Sys.*, 23-01582 (La. 2/6/24), 378 So.3d 728, 728.

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Taxation

Officer Held Responsible for Business's Failure to Pay Withholding Taxes

Favalora v. Dep't of Revenue, BTA Docket No. C06645D (2/7/24).

Favalora Constructors, Inc. was a small contracting business owned by Judith Favalora (Taxpayer) and her husband Lawrence Favalora. The business was formed by them during their marriage. Taxpayer testified that her husband ran the day-to-day operations of the business and handled the oversight of the construction projects, and she handled the administrative and accounting functions in the office. Taxpayer owned 51% of the business and was the secretary-treasurer. Although Taxpayer and her husband divorced in April 2009, she continued her ownership and position with the business until her resignation.

Taxpayer's duties included filing the company's quarterly Returns of Louisiana Withholding Tax Form L1 and the accompanying payment of tax due with each return. Taxpayer testified that she worked full time and received a salary when the company had money. Taxpayer further testified that she would write and sign company checks to pay the company's bills. Lawrence Favalora's testimony corroborated Taxpayer's testimony.

Beginning with the second quarter of 2014, Taxpayer prepared the returns and signed as the company's Secretary-Treasurer but failed to remit the withholding taxes reported on the returns. Ultimately, the company ceased operations sometime in late 2019 or early 2020. The Louisiana Secretary of State administratively dissolved the company in 2021. In January 2019, Taxpayer officially resigned as the company's Secretary/Treasurer. Her role with the company at this point was simply preparing the first- and second-quarter returns for 2019, which were the last returns the company filed.

Continued next page

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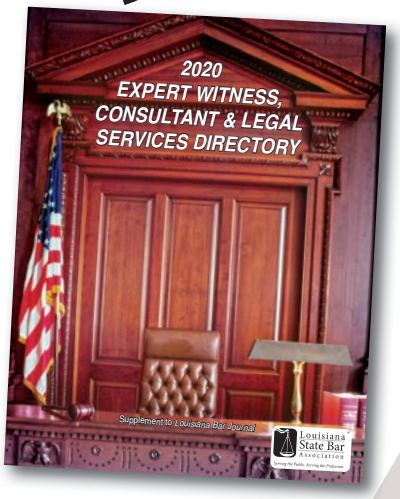

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As the business was insolvent, the Department of Revenue assessed Taxpayer with the withholding taxes under the authority of La. R.S. 47:1561.1 as an officer or director of the corporation having direct control and supervision of such taxes. Taxpayer timely appealed the assessment to the Louisiana Board of Tax Appeals (BTA).

The issue before the BTA was whether Taxpayer was personally liable under La. R.S. 47:1561.1(A) for the unremitted withholding taxes reported by the Company on its returns for 6/30/14 through 6/30/19.

The BTA found that Taxpayer was an owner or officer of the company. Her testimony established that she was responsible for the preparation and filing of the returns and had full knowledge that the withholding taxes were not being remitted to the Department of Revenue. The BTA noted that, under federal jurisprudence, willfulness is equated to knowledge — if an individual knew of the entity's obligation to pay withholding taxes and knew that the entity's funds were being used for other purposes instead, that individual is considered to have willfully failed to collect and pay over such tax and is thus charged with personal liability for the failure to do so. The BTA held Taxpayer's testimony established that she knew that the taxes were not being paid and that instead the company's funds were being used for other purposes. The BTA found Taxpayer personally obligated under La. R.S. 47:1561.1(A) for the withholding taxes for 6/30/14 through 12/31/18. The BTA found Taxpayer was not personally liable for the withholding taxes once she resigned from the company in January 2019.

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Tax Sale Procedure Violates Takings Clause

In the recent case of *Tyler v. Hennepin County*, 143 S.Ct. 1369 (2023), the U.S. Supreme Court held in a unanimous decision that Minnesota's property tax law as it relates to tax sales was unconstitutional under the Takings Clause of the U.S. Constitution. The decision is of significance for Louisiana tax sales under Louisiana's comparable statute. The Takings Clause provides that private property shall not be taken for public use, without just compensation. U.S. Const., Amdt. 5. As is evident, the Takings Clause has three requirements — a "taking," "public use" and "just compensation."

In the *Tyler* case, Hennepin County, Minnesota, sold taxpayer Geraldine Tyler's home for $40,000 to satisfy a $15,000 property-tax bill and retained the balance of $25,000 for itself. Minnesota has a statutory scheme similar to Louisiana's in that a taxpayer's failure to pay delinquent taxes results in a limited title in the property being transferred to the taxing jurisdiction. The taxpayer then has three years to redeem the property and regain title by paying all taxes and related amounts assessed (interest, late fees, etc.). If the taxpayer fails to do so, absolute title to the property vests in the state, and the tax debt is extinguished. The government may choose to keep the property or sell it to a private party and keep the proceeds. In either case, the taxpayer has no opportunity to recover the surplus.

Hennepin County argued that the taxpayer had no property interest to the extent the value of her home exceeded the tax debt that could be protected by the Takings Clause. The Court rejected that argument and held that the county could not use the tax debt to confiscate more property than was due, and if it did, that would constitute a "classic taking" of real property that would entitle the taxpayer to just compensation. *Id.* at 1376. Further, the Court reasoned that the Takings Clause was designed to bar a government from forcing some people alone to bear public burdens, and a taxpayer who loses a $40,000 house to satisfy a $15,000 tax debt has made a far greater contribution to the public fisc than was owed.

In its holding, the U.S. Supreme Court noted that most states require that no more than the minimum amount of land be sold to satisfy the tax debt, *i.e.*, the land is sold to a buyer who is willing to pay the tax debt for the least number of acres. By contrast, the Court specifically noted that Louisiana deems delinquent property to be entirely forfeited for failure to pay property taxes — a position that runs afoul of the Takings Clause if the third requirement of just compensation is not met. *Id.* at 1377.

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