06/22/2005 "See News Release 047 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 04-C-0473

WILLIS-KNIGHTON MEDICAL CENTER

VERSUS

CADDO-SHREVEPORT SALES AND USE TAX COMMISSION

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
SECOND CIRCUIT, PARISH OF CADDO

ON REHEARING

WEIMER, J., additional reasons.

I voted to grant a rehearing as to the issues related to LSA-C.C. art. 466 for the sole purpose of making the interpretation of that statute apply prospectively only. As outlined in the opinion, our role is to apply the law as written by the legislature. I remain convinced that LSA-C.C. art. 466, as written, is clear and unambiguous and its application in this case does not led to absurd consequences. As such, the article should be applied as written. Absent a so-called "societal expectation test" contained within the language of the statute, the judiciary should not superimpose such.

Nevertheless, one must note the legislative response which was swift and overwhelming. See Senate Bill No. 196 of 2005 which amended LSA-C.C. art. 466 to divide the article into three disjunctive paragraphs.[1]

---

[1] Senate Bill No. 196 reads, in pertinent part:

> Art. 466. Component parts of ~~buildings or other constructions~~ **an immovable**
> Things permanently attached to ~~a building or other construction, such as~~

Concepts of separation of powers prohibit the legislature from "overruling" a judicial opinion. Obviously, the legislature can change the law by amending statutory provisions if the legislature decides that the language of a statute did not convey the actual intent of the legislature or if the legislature disagrees with a judicial interpretation.

Further, it is appropriate to reiterate our statements in **Unwired Telcom Corp. v. Parish of Calcasieu**, 2005 WL 106468 at *9, 03-0732 (La. 1/19/05), ___ So.2d ___ (on reh'g), in which we stated:

~~plumbing, heating, cooling, electrical or other installations,~~ **an immovable** are its component parts.

~~Things are considered permanently attached if they cannot be removed without substantial damage to themselves or to the immovable to which they are attached.~~ **Things, such as plumbing, heating, cooling, electrical or other installations, are component parts of an immovable as a matter of law.**

Other things are considered to be permanently attached to an immovable if they cannot be removed without substantial damage to themselves or to the immovable or if, according to prevailing notions in society, they are considered to be component parts of an immovable.

Senate Bill No. 196 also provides:

> Section 2. This Act shall apply to existing immovables and shall be used in any determination of whether a thing is a component part, but no provision may be applied to divest already vested rights or to impair obligations of contracts.

Senate Bill No. 196 goes on to provide:

> According to legislative intent, the two Paragraphs of Article 466 contemplate distinct tests for the classification of things as component parts of building or other constructions. The things that are indicatively enumerated in the first Paragraph of Article 466 are component parts as a matter of law. All other things are considered to be permanently attached and, therefore, component parts of a building or other construction under the second Paragraph of Article 466, if they cannot be removed without substantial damage to themselves or to the immovable. Further, Louisiana courts have correctly superimposed on the two Paragraphs of Article 466 the realistic test of "societal expectations." Things attached to an immovable may be component parts of the immovable or may remain movables depending on societal expectations, namely, prevailing notions in society and economy concerning the status of those things.
>
> Section 4. This Act is intended to clarify and re-confirm interpretation of Louisiana Civil Code Article 466, including the "societal expectations" analysis, that prevailed prior to the decision in *Willis-Knighton Medical Center v. Caddo Shreveport Sales* _____So.27 2d_____, 2005 WL 737481 (La.) 2004-0473 (La. 4/1/05). [Words which are ~~struck through~~ are deletions from existing law; words in **boldface type and underscored** are additions.}

> [T]he principle of separation of powers leaves no room for the adjudication of cases by the legislature .... [*Quoting* **St. Paul Fire & Marine Ins. Co. v. Smith**, 609 So.2d 809, 819 (La. 1992).]

> [I]t is not within the province of the legislature to interpret legislation after the judiciary has already done so. Under our system of government, "[i]t is emphatically the province and duty of the judicial department to say what the law is." **Marbury v. Madison**, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). The interpretation of the law belongs to the judiciary, not the Legislature.

Conversely, courts should avoid "legislating from the bench" and should apply the law as written, provided such application does not lead to absurd consequences. See LSA-C.C. art. 9. That stated, one must acknowledge the so-called "societal expectations test" was utilized in the jurisprudence, albeit without statutory authority. Although jurisprudence is persuasive in analyzing statutory law in our civil law system, the courts are not the lawmakers. The sources of law, as stated in the Louisiana Civil Code, are legislation and custom. Judicial pronouncements are not sources of law. In our civilian jurisdiction, legislation, the solemn expression of the legislative will, is the superior source of law. *Jurisprudence constante* carries "considerable persuasive authority," but is not the law and must yield to legislative pronouncements. See **Willis-Knighton Medical Center v. Caddo-Shreveport Sales and Use Tax Comm'n**, 2005 WL 737481 at *14, 04-0473 (La. 4/1/05), ___ So.2d ___.

When one couples the prior judicial pronouncements with the legislature's recent amendment to LSA-C.C. art. 466 and the plurality decision in this matter, there exist a unique convergence of factors which mitigate in favor of applying this decision prospectively.

In **Lovell v. Lovell**, 378 So.2d 418 (La. 1979), this court decided not to give retroactive effect to its decision. **Lovell** involved a declaration of unconstitutionality

of LSA-C.C. art. 160, an article which imposed the alimony obligation only on the husband. Citing **Chevron Oil Company v. Huson**, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the **Lovell** court listed three factors which should be considered in determining whether or not a decision should be given retroactive effect:

> (1) the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the merits and demerits must be weighed in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation; and (3) the inequity imposed by retroactive application must be weighed.

Lovell, 378 So.2d at 421-22.

Upon consideration of these factors, I conclude the statutory interpretation in the instant case should not be applied retroactively. Although the statute is clear, courts have consistently considered the societal expectation test. No doubt there was some reliance on these judicial pronouncements. In this matter, as acknowledged in the opinion, the trial court, the court of appeal, and the parties did not address <u>whether</u> the societal expectation test should be applied, but <u>how</u> it should be applied. Given the recent legislative enactment and the fact this matter is a plurality decision, declaring the decision has prospective effect serves the salutary and practical purpose of promoting predictability and stability in the law, important considerations in the law of property. Given the prior judicial pronouncements and the legislative response to this decision, a weighing of the equities indicates this matter should be applied prospectively.