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OBLIGATIONS—DUTY OF THE CONTRACTOR TO THE OWNER
FURNISHING MATERIALS

Murphy Corporation, a distributor of petroleum products, entered into an agreement with Petrochem Maintenance Corporation for renovation of one of Murphy's service stations. Murphy was to furnish the materials and Petrochem the labor; accordingly, two underground gasoline storage tanks were supplied by Murphy and installed by Petrochem. After completion and acceptance of the work, one of the new tanks was found to be defective; apparently, some unknown force had broken the welded seam of the tank. Murphy sought to recover damages and replacement costs on the basis of article 2762¹ of the Civil Code which renders the contractor liable for poor workmanship and defective materials. *Held*, defendant Petrochem was not liable. Where materials are furnished by the owner, the contractor's duty extends only to defects which are "either patent or discoverable upon ordinary and reasonable inspection by the contractor, due regard being given in each instance to the contractor's greater opportunity to notice or discover defects or, through his superior and technical knowledge, to recognize the suitability of the material."² *Murphy Corp. v. Petrochem Maintenance, Inc.*, 180 So.2d 716 (La. App. 1st Cir. 1965), *writ refused*, 248 La. 910, 182 So.2d 662 (1966).

Article 2762 provides:

"If a building, which an architect or other workman has undertaken to make by the job, should fall to ruin either in whole or in part, on account of the badness of the workmanship, the architect or undertaker shall bear the loss if the building falls to ruin in the course of ten years, if it be a stone or brick building, and of five years if it be built in wood or with frames filled with bricks."³

This article is a continuation of article 2733⁴ of the 1825 civil code, and is derived from article 1792⁵ of the French Civil Code.

1. LA. CIVIL CODE art. 2762 (1870).

2. *Murphy Corp. v. Petrochem Maintenance, Inc.*, 180 So.2d 716, 722-23 (La. App. 1st Cir. 1965).

3. LA. CIVIL CODE art. 2762 (1870).

4. LA. CIVIL CODE art. 2733 (1825). This article contained a comma after the word "less," which was deleted in the 1870 code article 2762.

5. FRENCH CIVIL CODE art. 1792: "If a building, which an architect or other workman has undertaken to make by the job, should fall to ruin either in whole or in part, on account of the badness of the workmanship, or even because of badness of the soil, the architect and undertaker shall bear the loss, if the building falls to ruin in the course of ten years."

Although the article does not mention defective materials, the early decision of *Lewis v. Blanchard*⁶ construed it to include both poor workmanship and defective materials furnished by the undertaker. It refers to buildings, but has been interpreted to apply to a bridge,⁷ a sugar cane hoisting derrick⁸ and new installations and repair on a city sewerage system.⁹ In 1840 *Mouton v. Droz*¹⁰ extended the article to make a contractor liable for defective materials even when furnished by the owner. Mouton had furnished old, deteriorated shingles which were to be used in roofing his house. The shingles did not turn water when it rained, causing damage to the plaintiff's furniture and walls. The builder was liable since he did not object to their poor quality before putting them to use.

*Delee v. Hatcher*¹¹ followed *Mouton* and allowed a cotton gin owner to recover from his builder for bad workmanship and defective materials even though he had furnished the materials. The court said it was for the builder to ascertain the suitability of the materials and reject them if they were found to be of no use. The court quoted Marcadé:

"The badness of the workmanship comprehends not only a defect of construction, but, likewise, the using of bad materials, notwithstanding these materials be furnished by the proprietor, as it is the duty of the undertaker to reject them."¹²

In *Poirier v. Zaidman*¹³ the plaintiff supplied old lumber and instructed defendant to use it in building a shed. Seeking recovery for damages due to defects the plaintiff was denied recovery. The short opinion did not discuss 2762, *Mouton*, nor *Delee*. These old decisions can be reconciled with the legislation. Article 2762 should be read in *pari materia* with articles 2758,¹⁴

6. 8 Mart. (N.S.) 290 (La. 1829).

7. Penn Bridge Co. v. New Orleans, 222 Fed. 737 (5th Cir. 1915).

8. Federal Land Bank of New Orleans v. Lococo, 178 So. 192 (La. App. 1st Cir. 1938).

9. Brasher v. City of Alexandria, 215 La. 887, 41 So. 2d 819 (1949).

10. 16 La. 111 (1840).

11. 19 La. Ann. 98 (1867).

12. *Ibid.*; 6 MARCADÉ, EXPLICATION DU CODE CIVIL no. 1792 (1867) (court's own translation).

13. 192 So. 382 (La. App. Orl. Cir. 1939).

14. LA. CIVIL CODE art. 2758 (1870): "When the undertaker furnishes the materials for the work, if the work be destroyed, in whatever manner it may happen, previous to its being delivered to the owner, the loss shall be sustained by the undertaker, unless the proprietor be in default for not receiving it, though duly notified to do so."

2759,¹⁵ and 2760.¹⁶ These articles set forth a scheme of liability in case of destruction or loss of the work before delivery¹⁷ under which *fault* determines upon whom the loss shall fall.¹⁸ Although article 2762 does not mention fault, nor have the cases discussed it, a careful reading of these cases¹⁹ indicates the courts considered the concept of fault retained in article 2762. Articles 2758-2760 apply before delivery of the work and article 2762 applies after delivery.²⁰ There is no reason to make the contractor absolutely liable, after delivery of a thing, for the defective materials furnished by the owner when before delivery, under the same circumstances, the contractor would be liable only if at fault.²¹ Thus, before *Murphy*, the contractor's duty was to ascertain the suitability and the usefulness of the materials furnished to him and if unfit, to reject them.²² This duty was not absolute. Only if the undertaker was at fault in not correctly judging the suitability or objecting to the use of defective materials would he be liable.

Another aspect of the same problem is the amount of knowledge expected of the undertaker in making his determinations of suitability. The cases have not discussed this point, but one may infer that the builder will be charged with having the special knowledge and technical skill necessary to one exercising the art. In *Mouton*, the builder was at fault since he did not object to using shingles which other builders testified he should have known were defective. In *Poirier*, the court might have felt that the owner was as aware of the condition of the materials she furnished as the builder, since they were from a de-

15. *Id.* art. 2759: "When the undertaker only furnishes his work and industry, should the thing be destroyed, the undertaker is only liable in case the loss has been occasioned by his fault."

16. *Id.* art. 2760: "In the case mentioned in the preceding article, if the thing be destroyed by accident, and not owing to any fault of the undertaker, before the same be delivered, and without the owner be in default for not receiving it, the undertaker shall not be entitled to his salaries, unless the destruction be owing to the badness of the materials used in the building."

17. *Id.* art. 2758.

18. Article 2759 speaks of "fault" and articles 2758 and 2760 refer to "default."

19. *Lewis v. Blanchard*, 8 Mart. (N.S.) 290 (La. 1829); *Mouton v. Droz*, 16 La. 111 (1840); *Delee v. Hatcher*, 19 La. Ann. 98 (1867); *Poirier v. Zaidman*, 192 So. 382 (La. App. Orf. Cir. 1939).

20. *Brasher v. City of Alexandria*, 215 La. 887, 41 So. 2d 819 (1949).

21. LA. CIVIL CODE art. 2759 (1870).

22. Comment, 7 LA. L. REV. 564, 570 (1947): "Badness of workmanship' as used in this article includes badness of materials even though furnished by the owner, for it is the duty of the undertaker to reject them if they are unfit."

molished building, so that the builder could not be at fault if she instructed him to use them anyway.²³

Murphy v. Petrochem made no change in the law, but did make it more certain by setting out in clear language the scope of the contractor's duty and the criteria by which his actions would be judged. *Murphy* stated that the duty of the contractor to inspect the materials furnished by the owner extends "to defects which are either patent or discoverable upon ordinary and reasonable inspection by the contractor, due regard being given in each instance to the contractor's greater opportunity to notice or discover defects or, through his superior and technical knowledge, to recognize the suitability of the material."²⁴ The cracked seam in the storage tank could not have been patent nor discoverable by an ordinary, reasonable inspection because the tank was coated with coal tar preservative to inhibit rust and had an accumulation of mud covering that portion of the tank which contained the cracked weld.

A different but related question is liability for building defects due to faulty plans and specifications furnished by the owner. The courts have applied article 2762²⁵ and have constructed a special rule. First announced in 1919, it is to this effect:

"The law is that the contractor is liable for errors of construction resulting from following the plans and specifications furnished by the owner only when such errors are apparent and easily detected and such as should have been discovered by the exercise of ordinary care and skill."²⁶

This rule is similar to that set out in *Murphy*. Interpreting it, the court has said, "while the contractor is expected to avoid patent errors of the plan which jump to the eye, he is not bound for errors which are not patent."²⁷ Where the owner required that the contractor follow the bridge plans he had furnished,

23. In the instant case the court, in dealing with this question, said: "In our opinion the Poirier case, *supra*, may be reconciled with the two older cases because in Poirier it may be inferred the proprietor was as aware of the condition of the material as was the contractor since she knew it originated from a demolished building but nevertheless directed the contractor to use such lumber." See 180 So. 2d at 722.

24. 180 So. 2d at 722-23.

25. *Penn Bridge Co. v. New Orleans*, 222 Fed. 737 (5th Cir. 1915); *Brasher v. City of Alexandria*, 215 La. 887, 41 So. 2d 819 (1949).

26. *Industrial Homestead Ass'n v. Bunker*, 2 Peltiers 79 (La. 1919).

27. *Hebert v. Weil*, 115 La. 424, 431, 39 So. 389, 392 (1905).

the court held the contractor was not liable for subsequent defects caused by the defective specifications.²⁸ Also where the owner warrants the sufficiency of the plans furnished, the contractor is not liable if defects appear because of faults in the specifications.²⁹ "It is also settled that, where the contractor has expert knowledge on the subject and has reason to feel that there is a defect in the specifications, it is his duty to examine them and to warn the owner of his fears."³⁰ The defects must be obvious to the expert using special knowledge or skill. If the architect drawing the plans or the owner furnishing them has more knowledge about the thing to be constructed than the contractor, the defects should not be considered as obvious to the latter.³¹ The expertise of the builder and of the contractor is weighed by the court.

Revised Statute 9:2771 passed in 1958,³² will have some effect on the decisions relating to plans and specifications. It reads:

"No contractor shall be liable for destruction or deterioration of or defects in any work constructed, or under construction, by him if he constructed, or is constructing, the work according to plans or specifications furnished to him which he did not make or cause to be made and if the destruction, deterioration or defect was due to any fault or insufficiency of the plans or specifications. This provision shall apply regardless of whether the destruction, deterioration or defect occurs or becomes evident prior to or after delivery of the work to the owner, or prior to or after acceptance of the work by the owner. The provisions of this section shall not be subject to waiver by the contractor."³³

Since this section has been held substantive and not remedial,³⁴ any cause of action subject to it would necessarily have arisen after 1958.

Barnhill Brothers Inc. v. Louisiana Department of High-

28. Penn Bridge Co. v. New Orleans, 222 Fed. 737 (5th Cir. 1915).

29. *Ibid.*; Keller Constr. Corp. v. George W. McCoy & Co., 239 La. 552, 119 So. 2d 450 (1960); Draube v. Rieth, 114 So. 2d 879 (La. App. Orl. Cir. 1959).

30. Draube v. Rieth, 114 So. 2d 879, 882 (La. App. Orl. Cir. 1959).

31. Pittman Constr. Co. v. Housing Authority, 169 So. 2d 122 (La. App. 4th Cir. 1964).

32. La. R.S. 9:2771 (1950).

33. *Ibid.*

34. Barnhill Bros. Inc. v. Louisiana Dep't of Highways, 147 So. 2d 650 (La. App. 1st Cir. 1962).

*ways*³⁵ applied R.S. 9:2771 to hold a contractor not liable for defects in a highway where the department had furnished him defective plans. However, the case appeared to have been decided upon the fact that the owner had impliedly warranted the sufficiency of the plans and not on the new statute's authority. Whatever effect the court gives section 2771 in the future³⁶ might provide a basis for the determination of the contractor's liability in the material cases.

As was said previously, *Murphy* does not appear to change the law, but to state in explicit terms what the law has been. There is no way to estimate the effect of the plans and specifications decisions upon the *Murphy* rule, but due to the similarity of the two problems, these decisions should furnish some guidelines.

The *Murphy* rule is just and reasonable. It would be unfair to hold the contractor absolutely liable for defects which did not arise through his fault. On the other hand, the contractor should not be allowed to incorporate materials which he knows to be defective into a work for which he expects to be reimbursed, notwithstanding that the owner furnished such defective materials.

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35. 147 So. 2d 650 (La. App. 1st Cir. 1962).

36. For a possible interpretation of LA. R.S. 9:2771 (1950) see *Legislative Symposium: The 1958 Regular Session—Civil Code and Related Subjects*, 19 LA. L. REV. 51, 63 (1958): "[I]n the opinion of the writer, this legislation should be interpreted so as to relieve the contractor of the obligation to determine the sufficiency of furnished plans, but not to relieve him of liability for construction according to plans which he recognizes to be deficient."