

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0329

BARBER BROTHERS CONTRACTING COMPANY, LLC

VERSUS

**EAST BATON ROUGE CITY-PARISH, DEPARTMENT OF PUBLIC
WORKS**

Judgment Rendered: September 10, 2010

**Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 569,723**

The Honorable Wilson Fields, Judge Presiding

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Baton Rouge**

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCleendon, J. concurs and Assigns Reasons.

WHIPPLE, J.

This matter is before us on appeal by the defendant, the City of Baton Rouge/Parish of East Baton Rouge (hereinafter referred to as the “City/Parish”), from a judgment in a suit for declaratory judgment rendered in favor of plaintiff, Barber Brothers Contracting Company, LLC (hereinafter referred to as “Barber Brothers”). For the following reasons, the judgment of the trial court is affirmed in part and vacated in part.

FACTS AND PROCEDURAL HISTORY

In 2007, the City/Parish advertised for bids for the construction of and/or improvements to Burbank Drive in East Baton Rouge Parish, Louisiana, which were designated as City/Parish Project Nos. 06-CS-HC-0008 and 06-CS-HC-0009.¹ The low bidder, Barber Brothers, was awarded the contract for the project by the City/Parish. Subsequent to the acceptance of its bid, Barber Brothers contended that there was a significant, unexpected increase in the price for asphaltic cement and fuel. Thus, Barber Brothers sought a price adjustment pursuant to the *Supplemental Specifications for Street and Road Rehabilitation* (hereinafter “*Supplemental Specifications*”), which, Barber Brothers contended, applied to all construction projects awarded by the City/Parish. The City/Parish denied that the *Supplemental Specifications* were applicable to this particular project and refused to grant Barber Brothers the price adjustment.

On August 13, 2008, Barber Brothers filed a Petition for Declaratory Relief seeking a judicial declaration that the *Supplemental Specifications* applied and were to be used in conjunction with the *Standard Specifications for Public Works Construction* (hereinafter referred to as the “*Standard Specifications*”) with respect to the project at issue, and that the City/Parish should thus be ordered to

¹Project No. 06-CS-HC-0008, pertaining to the bid proposal and contract for Burbank Drive Segment 1, and Project No. 06-CS-HC-0009, pertaining to the bid proposal and contract for Burbank Drive Segment 2, were bid and awarded jointly. Thus, for ease, throughout the opinion we refer to them collectively as “the project.”

grant a price adjustment according to the contract. The matter was heard before the trial court on July 9, 2009. At the conclusion of the hearing, the trial court took the matter under advisement. On August 24, 2009, the trial court rendered oral reasons for judgment in favor of Barber Brothers, declaring that the *Supplemental Specifications* were incorporated into the contract with the City/Parish and applied to the project. A written judgment was signed by the trial court on December 21, 2009, containing the following declaration:

IT IS ORDERED, ADJUDGED AND DECREED that the *January 1998 Supplemental Specifications for Street and Road Rehabilitation* are to be used in conjunction with the *1997 Standard Specifications for Public Works Construction*, and as such, are applicable to those certain contracts for the public works projects designated as “*City of Baton Rouge/Parish of East Baton Rouge Project Nos. 06-CS-HC-0008 & 06-CS-HC-0009*”, and further, the City of Baton Rouge/Parish of East Baton Rouge be and it is hereby ordered to grant a price adjustment in accordance with the terms of the contracts, and to pay all costs of these proceedings.

The City/Parish appeals, assigning the following as error:

1. The trial court erred, as a matter of law, by declaring that the *Supplemental Specifications for Street and Road Rehabilitation* were a part of the Contract Documents when they were not so specified in the exclusive list of documents which did comprise the Contract Documents.
2. Although the meaning of the contract was clear on its face and should have been decided upon the contents within its four corners, if the court found that the contract was ambiguous, it should have entertained relevant extraneous evidence to assist its understanding of the intent of the parties to the contract. Thus, it should not have granted the Motion in Limine.
3. The trial court erred by signing a judgment directing the City/Parish to make a price adjustment. Not only was such an adjustment not permitted under the Contract Documents incorporated into it, even if the provision of the *Supplemental Specifications for Street and Road Rehabilitation* were applicable, the materials upon which Barber Brothers sought an adjustment were not within the eligible items for price adjustment as set forth in that document. Since the court was silent on this issue in its oral reasons for judgment, it may have understood this. Regardless, this portion of the judgment is in error.

DISCUSSION

Assignment of Error Number Two

In its second assignment of error, the City/Parish contends that the trial court erred in granting Barber Brother's motion in limine. If a trial court commits an evidentiary error that interdicts its fact-finding process, this court must conduct a *de novo* review. Wright v. Bennett, 2004-1944 (La. App. 1st Cir. 9/28/05), 924 So. 2d 178, 182. Thus, any alleged evidentiary errors must be addressed first on appeal, inasmuch as a finding of error may affect the applicable standard of review. See Bolton v. B E & K Construction, 2001-0486 (La. App. 1st Cir. 6/21/02), 822 So. 2d 29, 32.

Louisiana Code of Evidence article 103(A) provides, in part, that "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." The proper inquiry for determining whether a party was prejudiced by a trial court's alleged erroneous ruling on the admission or denial of evidence is whether the alleged error, when compared to the entire record, had a substantial effect on the outcome of the case. If the effect on the outcome of the case is not substantial, reversal is not warranted. LSA-C.E. art. 103(A). The party alleging prejudice by the evidentiary ruling of the trial court bears the burden of so proving. Emery v. Owens Corporation, 2000-2144 (La. App. 1st Cir. 11/9/01), 813 So. 2d 441, 449, writ denied, 2002-0635 (La. 5/10/02), 815 So. 2d 842. Generally, the trial court is granted broad discretion in its evidentiary rulings and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. Turner v. Ostrowe, 2001-1935 (La. App. 1st Cir. 9/27/02), 828 So. 2d 1212, 1216, writ denied, 2002-2940 (La. 2/7/03), 836 So. 2d 107.

When the terms of a written contract are susceptible to more than one interpretation, or there is uncertainty or ambiguity as to its provisions, or the intent

of the parties cannot be ascertained from the language employed, parole evidence is admissible to clarify the ambiguity or show the intention of the parties. Hawco Manufacturing Company, Inc. v. Superior Chain, Inc., 98-1037 (La. App. 1st Cir. 9/24/99), 754 So. 2d 1062, 1065. The intent of the parties constitutes an issue of fact that can be inferred from all the surrounding circumstances. Hawco Manufacturing Company, Inc. v. Superior Chain, Inc., 754 So. 2d at 1066. The rules of interpretation of a contract, however, establish that when the words of a written agreement are clear and explicit and lead to no absurd result, no further interpretation as to the intent of the parties can be made. Martin Exploration Company v. Amoco Production Company, 93-0349 (La. App. 1st Cir. 5/20/94), 637 So. 2d 1202, 1205, writ denied, 94-2003 (La. 11/4/94), 644 So. 2d 1048. A determination of the existence or absence of an ambiguity in a contract entails a question of law. Hawco Manufacturing Company, Inc. v. Superior Chain, Inc., 754 So. 2d at 1066.

At the hearing on the petition, the parties stipulated to the introduction of Exhibits No. 1 and No. 2, which are the bid proposals and contracts for Project No. 06-CS-HC-0008 and Project No. 06-CS-HC-0009; Exhibit No. 3, the *Standard Specifications*; and Exhibit No. 4, the *Supplemental Specifications*. Prior to the hearing on the petition for declaratory judgment, however, Barber Brothers filed a motion in limine seeking to prohibit the introduction of parole evidence or other documentary or testimonial evidence by the City/Parish as a purported aid in interpreting the contracts for the project, arguing that the terms of the contracts are clear and unambiguous and that the matter should be decided on the face of the contracts. The City/Parish objected to the motion in limine, arguing that the testimony and evidence it sought to introduce was going to show that the *Supplemental Specifications* were not a part of the project contract. The trial court granted the motion in limine and sustained Barber

Brother's objection, thereby refusing to allow the City/Parish to present the testimony of Bryan Harmon, the Deputy Director of the Department of Public Works and Chief Engineer for the City/Parish, for the purpose of providing an interpretation of the contract documents at issue herein. Thus, the City/Parish proffered excerpts of other contracts entered into by the City/Parish and the deposition testimony of Harmon.

Therefore, also before us is the City/Parish's motion to supplement the appellate record with the proffered deposition testimony of Harmon, which motion was referred to the merits of this appeal. On appeal, the City/Parish argues that it sought to introduce evidence in the form of other contracts that the City/Parish had previously entered into with Barber Brothers, as well as Harmon's testimony, to show that the City/Parish only incorporated or included by specific reference the *Supplemental Specifications* in its contracts when the subject of the contract was street or road **rehabilitation**, not in cases of **new road construction**. It further contends that "[i]f the trial court found any ambiguity to the contract at issue, then it should have entertained this evidence."

Implicit in the trial court's grant of Barber Brothers' motion in limine and denial of the City/Parish's attempts to present evidence of the parties' intent is the court's finding that the contract documents herein are unambiguous. Notably, on appeal, the City/Parish continues to argue that "the contract is clear," a position that it contends it has "consistently held." Also, the City/Parish does not point to any ambiguities in the contract documents that would presumably require either party to present evidence of contractual intent. Nonetheless, the City/Parish urges on appeal that the trial court erred in failing to allow parole evidence. We disagree. On review, we find that the contract documents at issue herein contain no ambiguities. Accordingly, we find that the trial court was correct in

determining that such parole evidence was unnecessary. See LSA-C.C. art. 2046; Bridges v. Mosaic Global Holdings, Inc., 2008-0113 (La. App. 1st Cir. 10/24/08), 23 So. 3d 305, 312-313, writ denied, 2008-2738 (La. 2/20/09), 1 So. 3d 496.

Accordingly, we find no merit to this assignment of error and further deny the City/Parish's motion to supplement the record on appeal.

Assignment of Error Number One

In the City/Parish's first assignment of error, it contends that the trial court erred in determining that the *Supplemental Specifications* were a part of the contract documents for the project at issue, when the bid Construction Proposal form and Agreement did not enumerate the *Supplemental Specifications* as a document that the parties were bound by.

The Construction Proposal for the project herein provides as follows:

I (We) hereby agree to furnish all materials, tools, equipment, and labor to perform the work required for the construction of the [project]: as set forth in the following documents:

1. Notice to Contractors
2. Construction Proposal
3. Special Provisions/Technical Specifications
4. Agreement
5. The Construction Drawings
6. The Standard Specifications
7. The following enumerated addenda: Nos. 1 & 2²

The Agreement similarly provided:

The following Contract Documents are all hereby made a part of this Agreement to the same extent as if incorporated herein in full:

1. Notice to Contractors
2. Construction Proposal
3. Special Provisions/Technical Specifications
4. The Construction Drawings
5. The Standard Specifications
6. The following enumerated addenda _____

²The Construction Proposal for Project No. 06-CS-HC-0009 is identical except that it states "No. 1" in the blank following number seven.

Nonetheless, both the Agreement and the Construction Proposal listed the *Standard Specifications* as one of the documents that the parties were bound by. According to *Standard Specifications* Section 5, entitled, "Control of Work," Subsection 5-7, entitled, "Coordination of Plans and Specifications:"

Specifications and plans referred to in the contract documents shall be considered as being included in the document in which such reference is made. **When a particular specification or standard is referred to, such reference shall be to the specification or standard, including officially adopted revisions and amendments thereto,** which is in force at the time of advertising for bids.

(Emphasis added.)

The above mentioned amendments to the *Standard Specifications*, i.e., the *Supplemental Specifications*, which were in effect at the time this project was advertised for bids, provide as follows:

THESE SPECIFICATIONS SUPPLEMENT AND AMEND THE 1997 STANDARD SPECIFICATION FOR PUBLIC WORKS CONSTRUCTION AND MUST BE USED IN CONJUNCTION WITH THEM.

(Emphasis added.)

Moreover, Section 5-7 of the contract for the project herein corresponds to Section 5-7 of the *Standard Specifications* and provides, in part, as follows:

COORDINATION OF PLANS AND SPECIFICATIONS:
This sub-section of the Standard Specifications is deleted and replaced by the following:

The plans, specifications and other Contract Documents will govern the work to be done. Anything mentioned in the specifications and not shown on the plans, or shown on the plans and not mentioned in the specifications, shall be of like effect as though shown or mentioned in both.

Specifications and plans referred to in the Contract Documents shall be considered as being included in the document in which such reference is made. **When a particular specification or standard is referred to, such reference shall be to the specification or standard, including officially adopted revisions and amendments thereto, which is in force at the time of advertising for bids.**

In case of conflict, the order of precedence of the following documents in controlling the work shall be:

1. Permit from outside agencies required by law
2. Issued addendums
3. Special provisions
4. Plans
- 5. Supplemental specifications**
6. Standard specifications
7. Standard plans

(Emphasis added.)

The price adjustment sought by Barber Brothers was based on Subsection 10-8.1 of the *Supplemental Specifications*, which, according to the contract language herein, takes precedence over the *Standard Specifications*, and provides for a payment adjustment for asphalt cement and fuels as follows:

Payment for contract items indicated herein will be adjusted to compensate for cost differentials of asphalt cement, gasoline and diesel fuel when such costs increase or decrease more than 5% from the Louisiana Department of Transportation and Development's established base prices for these items. The base price index for fuels and asphalt will be the monthly price index in effect at the time bids are opened for the project.

Payment adjustments will be made each monthly estimate period when the price index for this period varies more than 5% from the base price index. The monthly price index to be used with each monthly estimate will be the price index for the month in which the estimate period begins.

The City/Parish contends that Barber Brothers' request for a price adjustment pursuant to Subsection 10-8.1 of the *Supplemental Specifications* was denied because the *Supplemental Specifications* were not a part of the contract documents, as they were not enumerated as such in the Construction Proposal or Agreement. Despite the above noted contract language set forth in Section 5, the City/Parish further argues that the *Supplemental Specifications* clearly are only applicable to road rehabilitation projects, not new construction projects. We disagree.

On review, we note that the *Supplemental Specifications* specifically state that they "must be used in conjunction with" the *Standard Specifications*.

Moreover, the contract at issue herein provides that any reference to the *Standard Specifications* “include[s] officially adopted revisions and amendments thereto, which is in force at the time of advertising for bids.” Although the City/Parish argues that the *Supplemental Specifications* only apply to road rehabilitation contracts, the City/Parish’s contention is contrary to the contract documents at issue herein. Clearly, based on the apparently mandatory language noted above, where the bid documents refer to the *Standard Specifications*, such reference encompasses all officially adopted revisions and amendments thereto, including the *Supplemental Specifications*.

Thus, we find that the trial court correctly determined that the *Supplemental Specifications* are to be used in conjunction with the *Standard Specifications*, and as such, are applicable to the project herein. Accordingly, we find no merit to this assignment of error.

Assignment of Error Number Three

In its final assignment of error, the City/Parish contends that the trial court erred in directing the City/Parish to make a price adjustment. In support, the City/Parish contends that although the written judgment prepared by Barber Bothers containing the ordered adjustment was signed by the trial court, the trial court was silent as to any such order in its oral reasons for judgment. Moreover, relying on the underlying contract documents, Barber Brothers disputes that such an adjustment is allowed.

The function of a declaratory judgment is simply to establish the rights of parties or to express the opinion of the court on a question of law without ordering anything to be done. See LSA-C.C.P. arts. 1871 and 1881; Mull & Mull v. Kozak, 2003-0668 (La. App. 1st Cir. 6/25/04), 878 So. 2d 843, 846, writ denied, 2004-2332 (La. 12/17/04), 888 So. 2d 866. The distinctive characteristic of a declaratory judgment is that the declaration stands by itself with no executory

process following as a matter of course, so that it is distinguished from a direct action in that it does not seek execution or performance from the defendant or opposing litigants. Billingsley v. City of Baton Rouge, 95-2162 (La. App. 1st Cir. 4/30/96), 673 So. 2d 300, 302, writ denied, 96-1490 (La. 9/20/96), 679 So. 2d 439.

Because the function of a declaratory judgment is simply to establish the rights of the parties or to express an opinion of the court on a question of law without ordering anything else to be done, the December 21, 2009 judgment of the trial court could not, as a matter of law, include an order to grant a price adjustment in accordance with the terms of the contracts. See Mull & Mull v. Kozak, 878 So. 2d at 846. As stated above, the purpose of a declaratory judgment is merely to establish the rights between the parties or express the opinion of the court on a question of law. LSA- C.C.P. arts. 1871 and 1872. Here, the trial court determined as a matter of law that the *Supplemental Specifications* were part and parcel of the contract and were to be used in conjunction with the *Standard Specifications*. However, to the extent that the trial court further ordered the City/Parish to grant Barber Brothers a price adjustment, we conclude that such an order was not proper in this proceeding.

Thus, premitting further discussion of the merits of the arguments urged by the City/Parish in support of this assignment, we find that the trial court erred in ordering the City/Parish “to grant a price adjustment in accordance with the terms of the contracts” in this declaratory judgment proceeding.³ Finding merit to

³In doing so, we express no opinion as to the merits of any claim for an adjustment or the amount of adjustment, if any, is ultimately due. We simply recognize that the relief granted exceeded the scope of permissible relief via declaratory judgment. We also note that at oral arguments, reference was made to an amending and supplemental petition purportedly filed herein, subsequent to the rendition of the judgment before us on appeal, seeking an amount allegedly due as a price adjustment under the terms of the “contract,” as determined by the trial court. Although the record before us is devoid of any such petition, we specifically note that by vacating this portion of the trial court’s action in the declaratory judgment proceeding, we express no opinion as to the validity, or lack thereof, of any claim, demand, or defense which may be asserted by the parties.

this assignment of error, we must vacate the portion of the December 21, 2009 judgment which specifically ordered the City/Parish to grant Barber Brothers a price adjustment in accordance with the terms of the contracts.

CONCLUSION

For the above and foregoing reasons, the portion of the December 21, 2009 declaratory judgment of the trial court ordering the City/Parish to grant a price adjustment is hereby vacated. In all other respects, the December 21, 2009 declaratory judgment in favor of Barber Brothers is affirmed. Costs of this appeal in the amount of \$2,517.61 are assessed one-half each to the parties.

AFFIRMED IN PART; VACATED IN PART; MOTION TO SUPPLEMENT DENIED.

STATE OF LOUISIANA

COURT OF APPEAL

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BARBER BROTHERS CONTRACTING COMPANY, LLC

VERSUS

EAST BATON ROUGE CITY-PARISH, DEPARTMENT OF PUBLIC WORKS



McCLENDON, J., concurs and assigns reasons.

Even if we were to conclude that ambiguity existed in the language of the documents at issue, the rules of contract construction require that said ambiguity be interpreted against the City-Parish, who supplied the language. See LSA-C.C. art. 2056; **Campbell v. Melton**, 01-2578, pp. 6-7 (La. 5/14/02), 817 So.2d 69, 75. Therefore, I respectfully concur in the result reached by the majority.