Index of All Items Contained in Writ Application

STATE OF LOUISIANA

PARISH OF ORLEANS

Before me, the undersigned Notary Public, personally came and appeared Mr. Scott G. Wolfe, Jr., who is an attorney-at-law practicing in the State of Louisiana with Bar No. 30122, and its principal office address at 4821 Prytania Street, New Orleans, Louisiana, 70115, who did under oath swear before me that:

i) He has read the allegations of this writ application, and that they are true to the best of his information, knowledge and belief;

ii) That he provided notice to the trial judge on March 10, 2009, and to opposing counsel on March 9, 2009, of Wolfe World, L.L.C.'s intention to apply for this writ;

iii) That this writ application was sent via U.S. Mail to opposing counsel, and via hand delivery to respondent judge on March 12th, 2009;

iv) That party to this litigation is: (a) Brother's Roofing and Sheetmetal, L.L.C., Plaintiff, represented by David H. Cliburn, 2008 B-Burnside Ave., Gonzales, Louisiana, 70737, Phone: 225-647-4118, Fax: 225-647-4128, and Email: dhcliburn@eatel.net; *and* (b) Wolfe World, L.L.C. d/b/a Wolfman Construction, Defendant and Plaintiff-in-Reconvention, represented by Scott G. Wolfe, Jr., 4821

Prytania Street, New Orleans, LA 70115, Phone: 504-894-9653, Fax: 866-761-8934, email: scott@wolfelaw.com;

v) The respondent judge is the Honorable Herbert A. Cade, Orleans Civil District Court Division K, 421 Loyola Ave, Room 302, New Orleans, LA 70112, Phone: 504-592-9232, Fax: 504-523-8193.

Signed: _____

Witnesses:

_____

_____

Sworn to and subscribed before me,

Undersigned Notary Public, on this ___

Day of March 2009.

_____

Concise Statement of the Grounds for Jurisdiction of This Court

This court has jurisdiction to grant this application for supervisory writ, and to consider the merits of the same, according to its constitutionally granted supervisory power, and Louisiana Code of Civil Procedure Article 2201.

Interlocutory v. Final Judgments, and Irreparable Injury

As argued more extensively *infra*, the Defendant is aggrieved by a February 2009 determination by the trial court granting partial summary judgment against it. The Defendant avers that this judgment is a final judgment, but the trial judge has marked it "interlocutory" and denied a motion for suspensive appeal of the judgment.

The Defendant herein applies for a supervisory writ to change the argued erroneous classification of the judgment.

The Defendant avers that the erroneous classification of the judgment warrants the execution of the supervisory power of this appellate court.

Additionally, or in the alternative, the Defendant avers that the judgment of the trial court – regardless of its designation – will cause irreparable injury to the Defendant. As this court is of course aware, the test for determining whether an interlocutory judgment may cause irreparable

injury is "whether any error in the judgment may be corrected as a practical matter on appeal following the determination of the merits." *In re Depland*, 2003-0385, p. 2 (La. App. 4 Cir. 2003), 854 So.2d 438, 440; *White Oak, Inc. v. Katz & Simone*, 515 So.2d 476, 476-77 (La. App. 1 Cir. 1987).

In the instant matter, the Defendant submits that the non-review of the trial court's decision may cause irreparable injury because of the following non-exhaustive reasons:

(a) The trial judge granted the partial motion for summary judgment based on its consideration of a statement by the Defendant, and the Defendant avers that the statement was "settlement communications" protected as privileged by Louisiana Code of Evidence art 408;

(b) The judgment awards monetary damages to the Plaintiff, and the Plaintiff is allowed to remove money currently held in the registry of the Court. The removal of these proceeds is irreparable injury to the Defendant, who also claims entitlement to the proceeds;[1]

[1] Even though the trial judge has determined that Defendant "judicially confessed" to owing the Plaintiff $5,000.00, the trial judge did not determine that Defendant's Reconventional Demand does not have merit, and accordingly, the Defendant has a claim for the money being held in the court registry in which the judgment at issue allows the Plaintiff to obtain.

Concise Statement of the Case

The matter before this Court amounts to a simple construction dispute between a general contractor, Wolfe World, LLC d/b/a Wolfman Construction ("Wolfman" or "Defendant"), and a subcontractor, Brothers Roofing and Sheetmetal ("Brothers" or "Plaintiff").

Wolfman hired Brothers to perform roofing work at two independent properties.

Brothers filed to preserve its privilege under the Louisiana Private Works Act with relation to one project ("Jenson" project), and then brought the instant litigation seeking payment for its work thereon.

Wolfman answered the suit with claims that poor workmanship on the other project ("Browning" project) rendered Brothers indebted to it, and offset amounts Wolfman owed on the Jensen project. Wolfman further argued that the Statement of Claim and Privilege was filed improperly under the Act. Wolfman filed a Reconventional Demand with its prayers.

Brothers conducted the deposition of Wolfman, and thereafter brought the Motion for Summary Judgment in controversy. In the motion, Brothers argued it was entitled to a judgment as a matter of law, representing that the Defendant agreed with Plaintiff's position, or alternatively, had made a judicial confession to owing Defendant at least $5,000.00.

The Honorable Cade granted the alternative prayer of Defendant, and the Plaintiff moved to suspensivly appeal the partial judgment. The suspensive appeal motion was denied based on the partial judgment being "interlocutory." Defendant now seeks this supervisory writ.

Trial has not been set in this matter, and at the time of this filing, there are no hearings scheduled.

Issues and Questions of Law Presented For Determination

The following issues and questions of law are presented for determination by the Court:

(1) Whether the partial summary judgment granted by the Court is interlocutory or final;

(2) If final, whether the judgment is appealable according to La. C.C.P. 1914(A), or should have been designated as appealable according to La. C.C.P. 1914(B);

(3) If interlocutory, whether the Court should grant the writ application because the interlocutory order may cause irreparable injury;

(4) Whether there are genuine issues of material fact as to whether the Defendant had made a "judicial confession" during its deposition.

Assignments and Specifications of Error

(1) Judgment should be designated as Partial Final Judgment, and not an Interlocutory order;

(2) The Final Judgment is Appealable under La. C.C.P. art 1915(A), or alternatively, should be expressly designated as appealable under La. C.C.P. art. 1915(B);

(3) Defendant Did Not Make a Judicial Confession, or alternatively, there are genuine issues of material fact that bar the Partial Summary Judgment at controversy

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Law & Argument

Error 1: Judgment should be designated as a Partial Final Judgment

In open court on February 13, 2009, the trial court granted partial summary judgment in favor of the Plaintiff, holding that Defendant owed the Plaintiff at least $5,000.00 in connection with the instant litigation.[2] Defendant immediately moved to suspensively appeal the court's determination, and on February 23, 2009, the trial judge denied the appeal.[3] In its "Reasons for Judgment," the trial judge set forth that "the judgment rendered was interlocutory thus the Motion for Suspensive Appeal is denied."

[2] Although not specified in the Court's "Reasons for Judgment," it presumably was ruling that the Defendant had "judicially confessed" to owing Plaintiff this amount. In Plaintiff's Motion for Summary Judgment, it was Plaintiff's alternative prayer that "Scott Wolfe Sr. admitted in his deposition in this matter that he owes Brother's five thousand ($5,000.00) dollars from the Jensen job, leaving no question of material fact as to that amount….Scott Wolfe, Sr. has made a judicial admission." *See Plaintiff's Memorandum in Support of its Motion for Summary Judgment*, p. 11-12.

[3] The Plaintiff moved to suspensivly appeal the judgment in open court immediately after it was verbally rendered. The Plaintiff further requested that the bond requirement for suspensive appeals be waived because an amount exceeding the amount in controversy was held by the court registry related the bond placed by Defendant in connection with the Statement of Claim and Privilege. In open court, the trial judge advised that the bond requirement would be considered satisfied as requested, and requested that we confirm our motion for appeal in writing. Despite our understanding that the appeal had been granted in open court, it was denied in writing on February 23, 2009, with the trial judge stipulating that the judgment was interlocutory.

The Plaintiff submits that the partial summary judgment in controversy (the "Judgment"), was not interlocutory, but was instead a partial final judgment.

La. C.C.P. Art. 1841, distinguishes between two types of judgments under Louisiana procedure, final judgments and interlocutory judgments. It separates them as follows:

> A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.
>
> A judgment that determines the merits in whole *or in part* is a final judgment.

In the Court's February 23, 2009, written reasons, the trial judge sets forth that it granted the partial summary judgment in controversy because of a "finding" that defendant owed plaintiff $5,000.00. It was thereafter classified as interlocutory because the judgment left other issues for trial, and specifically did not address plaintiff's entitlement to penalties, attorneys' fees, costs, or the full amount sued.[4]

The Defendant argues that the judgment should not be classified interlocutory simply because it is only a partial decision. Clearly, by the

[4] The exact language of the Court is the "The Court granted a partial summary judgment finding that defendant owed Plaintiff $5,000.00. The judgment does not award nor deny plaintiff's entitlement to penalties, attorney fees, costs, or for the full amount sued. Obviously, the judgment is interlocutary."

terms of Art. 1841, a decision on the merits of an action "in part" may be (and are) classified as final judgments.

The judgment presently at issue did not determine a "preliminary matter" before the Court, but instead ruled on the partial merits of the case, finding that the Defendant is indebted to the Plaintiff in the amount of $5,000.00. "A judgment that determines the merits in whole or in part is a final judgment." *Jackson Nat'l Life Ins. Co. v. Kennedy-Fagan*, 873 So. 2d 44, 47 (La.App. 1 Cir. Feb. 6, 2004); *see also Motorola, Inc. v. Associated Indem. Corp.*, 867 So.2d 723, 725-26 (La. App. 1 Cir. 2003) ("A judgment that determines the merits in whole or in part is a final judgment).

The classification as an interlocutory order is not procedurally founded since the judgment determines the merits of this action in part. Defendant avers, therefore, that the trial judgment should be amended to reflect that it is a partial final judgment.

Error 2: The Final Judgment is Appealable under La. C.C.P. art 1915(A), or alternatively, should be expressly designated as appealable under La. C.C.P. art. 1915(B)

The Defendant desires to suspensively appeal the trial court's decision to grant Plaintiff's Partial Motion for Summary Judgment. The appeal was denied, based on the trial court's determination that the judgment was interlocutory.

As argued in this writ application, the judgment should be termed a partial final judgment as opposed to a interlocutory order. However, that classification does not end this court's analysis. As expressed in *Kennedy-Fagan*, "whether a partial final judgment is immediately appealable, however; must be determined by examining the requirements of La. C.C.P. art. 1915." *Kennedy-Fagan* at 47.

La. C.C.P. art 1915 is divided into two general sections.

Section A sets forth those types of judgments that are immediately appealable. Section B sets forth not immediately those judgments that are appealable, and provides the circumstances that must exist for these "B" judgments to reach an appeals court.

With regard to the judgment at controversy, the Defendant argues that it is a final and appealable judgment under the requirements of 1915(A)(3).

However, in the alternative, the Defendant requests that the trial court should classify the judgment as appealable under 1913(B)(1).

Part I: Judgment is Appealable Under 1915(A)(3)

In *Motorola*, the 1st Circuit made clear that art 1915 "authorizes the immediate appeal of partial final judgments, including partial summary judgments." *Motorola* at 726.

Art. 1915(A)(3) provides that:

> A. final judgment may be rendered and signed by the court, even though it may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case, when the court:
> (3) Grants a motion for summary judgment, as provided by Articles 966 through 969, but not including a summary judgment granted pursuant to Article 966(E).

As argued by Defendant herein, the judgment at controversy is a final judgment because it partially decides the merits of the action. Furthermore, it was granted upon summary judgment as provided for in Article 966. According to Article 1915, therefore, it should be designated as a final appealable judgment unless the summary judgment was granted pursuant to Article 966(E).

La. C.C.P. Art. 966(E) provides that "A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action,

or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case."

This type of summary judgment has been classified by the courts as "issue summary judgments." *Kennedy-Fagan*, at 48, *Motorola*, fn 5.

While 966(E) regards circumstances when a "partial" judgment is rendered, it is important to note that it does not encompass every type of "partial" judgment. Indeed, 966(A)(1) very clearly states that summary judgment may be requested "for all or part of the relief" prayed.

Instead, 966(E) separates from ordinary partial summary judgments those partial determinations that are "dispositive of a particular issue," as distinguished from one that is dispositive of particular merits. The court in Kennedy-Fagan discusses the distinction as follows:

> The judgment does not determine all claims between all parties…Nevertheless, the judgment at issue clearly meets the requirements of La. C.C.P. Art. 1915(A)(3). Thus, the trial court was not required to "certify" its judgment as appealable under La. C.C.P. art. 1915(B), and we clearly have jurisdiction to determine this appeal. *Id.* at 48*, citing Motorola.*

The *Kennedy-Fagan* court clarifies its determination in its footnote no. 4:

> The judgment at issue does not actually dismiss any party from the principal demand, so it technically does not meet the criterion of dismissal required under La. C.C.P. art. 1915(A)(1). Nevertheless, for practical

> purposes, it resolves all issues as to the sum in dispute as between the debtor and the two competing groups of claimants…Thus it is not an "issue" summary judgment under La. C.C.P. art. 966(E), and meets the criterion of La. C.C.P. art. 1915(A)(3). *Id.*

The judgment currently in controversy is analogous to those partial summary judgments in *Kennedy-Fagan, Motorola* and similar jurisprudence, because it grants the Plaintiff's motion and awards concrete damages to the Plaintiff. Accordingly, this Court has partially decided the merits of the action, and not simply an "issue" or "theory" of the case.

For these reasons, the judgment should be classified as a final judgment as per La. C.C.P. art. 1841, and immediately appealable as per La. C.C.P. 1915(A)(3). The denial of the Defendant's suspensive appeal of the partial summary judgment, therefore, was in error, and should be reversed.

Part II. Alternatively the Judgment should be designated as immediately appealable under art. 1915(B)(1)

In some instances, a partial summary judgment is not appealable under art. 1915(A)(3). After consideration of the above, if this Honorable Court determines that the instant partial summary judgment is not immediately appealable, the Defendant argues that it should be designated as appealable under the provisions of Art. 1915(B)(1).

La. Art. 1915(B)(1) provides:

> When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories, whether in an original demand, reconventional demand, cross-claim, third party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.

In the event that this Court considers the summary judgment as one granted by authority of Art. 966(E), this provision would apply. According to Louisiana case law, this particular provision "attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at time that serves the needs of the parties." *R.J. Messinger, Inc. v. Rosenblum*, 894 So.2d 1113, 1122 (La. 2005).

In determining whether an "express determination" of appealability should be made, "it is of paramount importance that a trial court judge fully understand and carefully perform the role of 'dispatcher,' rather than routinely certifying partial judgments." *Motorola* at 731, citing *Mark Tatum & William Norris, III,* Comment, Summary Judgment and Partial Judgment in Louisiana: The State We're In, 59 La.L.Rev. 131, 169 (1998).

Louisiana courts have set forth factors that should be considered by trial judges in determining whether to mark a 1915(B) judgment subject to immediate appeal:

> …we consider the 'overriding inquiry' of 'whether there is no just reason for delay,' as well as the other non-exclusive criteria trial courts should use in making the determination of whether certification is appropriate:
>
> (1) The relationship between the adjudicated and the unadjudicated claims;
> (2) The possibility that the need for review might or might not be mooted by future developments in the trial court;
> (3) The possibility that the reviewing court might be obligated to consider the same issue a second time; and
> (4) Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like.
>
> *Bridges v. Nat'l Fin. Sys.*, 960 So.2d 202, 204 (La. App. 1 Cir. 2007), citing *R.J. Messinger* at 1122.

In the instant case, the Defendants argue that the factors weigh in favor of making the matter as immediately appealable. The judgment at controversy awards $5,000.00 to the Plaintiffs, ruling that the Defendant has made a judicial confession for that amount.

The relationship between this particular issue and the other issues in this case, is not such that the issues would be re-reviewed on appeal in the

event the decision was upheld. Furthermore, the miscellaneous factors also weigh in favor of the Defendants, as the non-reviewability of the judgment has economical implications, as the Plaintiffs will be able to withdraw money held in the registry of this Honorable Court.

If this particular judgment was not designated as appealable, and was later reversed on appeal after trial on the merits, it would be unfair to the Defendant that the Plaintiff was able to withdraw money from this Court's registry and maintain control of it during the interim period.

Error 3: Defendant Did Not Make a Judicial Confession, or alternatively, there are genuine issues of material fact that bar the Partial Summary Judgment at controversy

It is contended that a statement made by Scott Wolfe Sr. during his August 19, 2008, deposition should be considered an adverse admission that is tantamount to a "judicial confession." Plaintiff specifically represents the language of Mr. Wolfe Sr. as follows:

> Why are you asking for the $11,000.00? Why don't you take the difference that we actually do owe you? I've agreed that we owe you 5,000 bucks and we have agreed to give it to you. We have been agreeing to give it to you from day one. I don't know why you are trying to steal the other $6,000. Why would you be doing that? Why would you want to get paid an additional $6,000?
>
> See Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 10 of 13

In summary fashion, the Plaintiff has used this statement to conclude as follows: "Scott Wolfe Sr.'s admission, that he has not paid Brother's for the second half of the Jensen job in the amount of $11,060.00, and that under any circumstances he owes Brother's five thousand ($5,000.00) dollars. *Id.* at 11.

The Plaintiff contended in its motion that the above-quoted statement qualifies as a Judicial Confession as defined by La. C.C. Article 1853. That article provides:

> A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it.
>
> A judicial confession is indivisible and it may be revoked only on the ground of error of fact.

Part I: Statement is not a Judicial Admission because Defendant did not make an explicit admission to an Adverse Fact, and comment itself was Settlement Communications

Louisiana jurisprudence analyzing this code article does not lightly qualify statements as judicial admissions, instead requiring them to be an explicit admission of an adverse fact. *See generally Cichirillo v. Avondale Industries, Inc.*, 917 So.2d 424, 429 (La. 1979).

In *Newman v. George*, for example, a creditor's statement at trial that its records were not accurate was not considered a judicial confession, as the testimony as a whole provided support for the amounts claimed due. 968 So. 220, 223-224 (La. App. 4th Cir. 2007).[5]

[5] Louisiana courts have consistently looked to the entirety of testimony in determining whether there has been a judicial admission, such as in *Matchum v. Allstate Ins. Co.*, which provides that a statement was not a judicial confession when "the passenger's

The statement in controversy was made at the end of Mr. Wolfe Sr.'s deposition, and in an attempt to further settlement communications with the Plaintiff.[6]

Revealing of this intent is the phrase "I've agreed that we owe you 5,000 bucks and we have agreed to give it to you. We have been agreeing to give it to you from day one," whereby the Defendant references its other attempts to settle this case with the Plaintiff, and the reasons for the same.[7]

Wolfman has made several offers to settle the case with Plaintiff, increasing the amount that was negotiated on "day one" from $5,000.00 to $7,000.00. However, these settlement offers, and the discussion of $5,000.00 quoted by the Plaintiff from the deposition of Mr. Wolfe Sr., are all *settlement communications* that is not admissible as evidence in this proceeding.

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testimony was not consistent to a degree that no uncertainty existed." 192 So.2d 364 (La. 1966). In the instant matter, the Plaintiff did not submit the testimony transfer for the Court's review until *after* the judge had ruled, whereupon the Defendant objected to the transcripts introduction based on its inability to respond and it being submitted in violation of La. C.C.P. art. 966, as well as local rules.

[6] The Defendant contended in its Opposition Memorandum, and contends herein, that the communication was a "settlement communication," and should not have been considered by the trial court in making its decision. The statement was made voluntarily by Mr. Wolfe Sr. at the very end of its deposition, was made directly to the Plaintiff – and not Plaintiff's counsel – and was an attempt to influence the Plaintiff to accept a lower amount than prayed.

[7] Mr. Wolfe Sr. was also referencing a meeting between himself and Mr. George Malta, a representative of Brother's Roofing, when this $5,000.00 settlement amount was discussed. This meeting was referenced in the affidavit of Mr. Wolfe Sr., attached with its Opposition Memorandum, and was purported to be further evidence that genuine issues of material fact were at dispute between the parties with regard to this issue.

Louisiana Code of Evidence, Art 408, provides that in a civil case, "evidence of (1) furnishing or offering or promising to furnish…anything of value in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount."

In the Commentary to this article, it is noted that a rationale underlying the rule for exclusion is that "such evidence is irrelevant or at best ambiguous, for compromise offers may reflect merely a desire to buy peace rather than an admission of liability." *See 1998 Comment (c)*, 4 J. Wigmore, Evidence in Trials at Common Law § 1071, at 36 (Chadbourn rev. 1972).

Wolfman objected to the consideration of this evidence through its Opposition Memorandum to Plaintiff's Motion for Summary Judgment. The trial judge not only considered the evidence notwithstanding Wolfman's objection, but it made the statement the bedrock of its February 13, 2009 decision ruling that Wolfman's comment was tantamount to a judicial confession.

Aside from the concern that the statement was settlement communications by Wolfman to the Defendant directly, the statement itself

has a practical problem as well, as it references an amount "owed from day one."

A lot has occurred "since day one," including the filing of a Statement of Claim and Privilege by the Plaintiff (alleged faulty) and the bonding out of that lien. The filing of the construction lien without reasonable cause qualifies the Defendant for attorneys' fees in having it removed, both remedies being prayed for by Defendant in its Reconventional Demand.

Therefore, it is – and always has been – the Defendant's contention that the improper lien has caused it damages, cost it in lost interest and legal expense, and that it is entitled to an offset of these expenses and costs as to any amount owed to Plaintiff.

Even if Wolfman's statement was not settlement communications and was considered a "judicial confession" that it owed the Plaintiff "$5,000.00" on "day one," since additional expenses have been incurred since day one and Wolfman avers that those expenses offset any amount owed to Plaintiffs, the "confession" is still not straight-forward enough to conclude that Wolfman was agreeing that it owed Plaintiff $5,000.00 *today*.

Part II: Statement is not a Judicial Admission regardless of its content because the "admission" can be contradicted at trial

Even more relevant to this proceeding than *Newman* and the question of whether the quote by Mr. Wolfe Sr. is an "express admission of an adverse fact," Louisiana jurisprudence has held that deposition testimony cannot be considered a judicial confession.

Citing comment (c) of Art. 1853, the Louisiana 4th Circuit held that "deposition testimony was not a judicial admission which [he] could not contradict at trial." *Howell v. American Cas. Co.*, 691 So.2d 715, 722 (La. App. 4th Cir. 1995). Referencing the comment, the court stated, "If even 'testimony on the witness stand' does not constitute a judicial confession which precludes further evidence on the subject, the deposition testimony does not."[8] *Id.*

The strict requirements of the "judicial confession" was further discussed in *Crawford v. Deshotels*, wherein the Louisiana Supreme Court clarified that "a judicial confession by a party does not preclude that party from denying the correctness of the admission, unless the party claiming the

[8] The referenced comment provides: "Under this Article, testimony given on the witness stand by a party, without intention of waiving evidence as to the subject matter of that testimony, or factual allegations made in other proceedings, do not constitute judicial confession. *See* Jackson v. Gulf Ins. Co., 250 La. 819, 199 So.2d 866 (1967).

benefit of the admission has relied on the admission to his prejudice." 359 So.2d 118 (La. 1978).

In 2006, the 3rd Circuit re-iterated that a confession must be an "express acknowledgement of an adverse fact," and summarized the jurisprudence above-discussed by stating that in *addition to* the requirement that the confession must be express, "the adverse party must have believed the fact was no longer at issue or must have relied on it, to his detriment." 944 So.2d 732, 735 (La. 3rd Cir. 2006).

If the Defendant has relied on the statement, it was only for the purposes of making a settlement offer, which is not admissible as evidence and expressly objected to being used in that fashion.

Perhaps the best summary comes from *Jackson v. Gulf Ins. Co.*, which is the foundation of the Article's Comment (c) whereby the Court summarized that:

> A judicial confession…is a party's admission, or concession, in a judicial proceeding of an adverse factual element, waiving evidence as to the subject of the admission. A party's testimony is offered as evidence, not as a waiver of it. To be an effective agency of truth, the trier of fact must be allowed to weigh the disserving testimony of a party, as well as other evidence. When the truth is found elsewhere, the party's disserving testimony must yield in order to achieve the ends of justice. Hence, we reject as unsound the several expressions of the Courts of Appeal tending to equate a party's

disserving factual testimony with a judicial confession. 199 So.2d 866 at 832.

Prayer for Relief

Wherefore, after consideration of the foregoing, the Defendant prays that this Court:

(a) Grant its Application for Supervisory Writ;

(b) Reverse the trial court's determination that the granting of partial summary judgment was an 'interlocutory judgment, and designate the judgment as an immediately appealable final judgment under 1915(A)(3), or alternatively, a judgment designated as appealable under 1915(B); and

(c) Thereafter, consider the appeal of the Defendant that the Motion for Summary Judgment was granted in error, and reverse the trial court's determination that the Defendant judicially confessed to owing Plaintiff $5,000.00.

Respectfully Submitted,

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Wolfe Law Group, L.L.C.
Scott G. Wolfe, Jr. (30122)
4821 Prytania Street
New Orleans, LA 70115
P: 504-894-9653
F: 866-761-8934
E: scott@wolfelaw.com

Attorney for Wolfe World, L.L.C. d/b/a Wolfman Construction