

COURT OF APPEAL  
FIRST CIRCUIT  
STATE OF LOUISIANA

**No.** \_\_\_\_\_

H.L. HAWKINS, III and JOHN C. LOVELL, JR.,  
as Succession Representatives of the Succession of H.L. Hawkins, Jr.,  
HAWKEYE ENERGY, INC., and H.L. HAWKINS, JR., INC.

versus

THE MERIDIAN RESOURCE AND EXPLORATION LLC,  
THE MERIDIAN RESOURCE CORP.,  
f/k/a Texas Meridian Resources Exploration Inc., and  
JAMES T. BOND

\_\_\_\_\_

On application for supervisory writ  
to the 19th Judicial District Court,  
Parish of East Baton Rouge,  
Hon. Kay Bates, Judge

\_\_\_\_\_

**Application of The Meridian Resource Exploration LLC  
for Supervisory Writ**

**Volume 1 of 3**

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## Affidavit of Verification and Service

STATE OF LOUISIANA

PARISH OF ORLEANS

The allegations contained in this writ application are true, to the best of my knowledge and belief.

A copy of this writ application has been served by mail or hand delivery on the following persons:

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Sworn to and signed before me  
this \_\_\_\_ day of July, 2008

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Notary Public

## Grounds for This Court's Jurisdiction

The Meridian Resource and Exploration LLC, defendant and applicant, invokes this Court's supervisory jurisdiction under La. Code Civ. P. art. 2201 and Rule 4, Unif. R. La. Cts. App. The ruling complained of was rendered and signed on June 6, 2008; notice of judgment was mailed on June 9, 2008.<sup>2</sup> On July 3, 2008, Meridian gave timely notice of its intent to seek a supervisory writ, and the trial court set a return date of July 9, 2008 by which this writ application was to be filed in this Court.<sup>3</sup> This writ application is timely under the trial court's order and under Rule 4–3, Unif. R. La. Cts. App.

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<sup>2</sup> Writ app. vol. 1 pp. 28–30 *infra*.

<sup>3</sup> *Id.* pp. 24–27 *infra*.

## Introductory Statement

This case is a contract dispute between the executors of H.L. Hawkins Jr.'s succession and The Meridian Resource and Exploration L.L.C. The executors allege that Meridian's actions in drilling a well breached its contract with Hawkins, causing financial loss to Hawkins. Meridian's defense is that Hawkins knowingly consented to and ratified every action by Meridian at issue here. Meridian's evidence on this defense includes the depositions of Hawkins's two closest confidantes and former employees, both of whom testified that Hawkins enthusiastically supported Meridian's actions.

Despite this evidence of Hawkins's consent, the trial court has rendered a partial summary judgment on liability against Meridian for breach of contract. In rendering this judgment, the trial court failed to address the evidence of Hawkins's consent or explain why it did not raise a genuine issue of material fact. Instead, the trial court held that Meridian's liability is established by the *res judicata* effect of a judgment in prior litigation brought by Amoco Production Co. But the *Amoco* case involved different contracts, different contracting parties, and a different plaintiff from this one. Most important, the issue of Hawkins's consent could not be litigated or decided in *Amoco*, because Hawkins was not a party to that action.

The trial court's judgment is reversible error. For the sake of judicial economy and fairness, Meridian prays that the Court correct the error now, before the remaining issues in the case are tried. Otherwise, the case will have to be tried twice and probably appealed twice.

## Issues of Law Presented

*1. Consent.* Consent is the basis of any contractual obligation. Here, the trial court rendered partial summary judgment on liability against Meridian for breach of a contract with Hawkins, in the face of uncontroverted deposition testimony that Hawkins knew of and approved Meridian's actions and willingly accepted over \$1.7 million generated by those actions. Does this deposition testimony raise a genuine issue of material fact, making summary judgment improper?

*1. Res judicata.* The trial court applied *res judicata* to render summary judgment on liability for breach of contract against Meridian, based on a judgment in a prior action involving Amoco. But the *Amoco* action involved different contracts, different contracting parties, and different plaintiffs from this action. And the issue of Hawkins' consent, crucial here, could not be litigated or decided in *Amoco*. Under these facts, did the trial court commit reversible error in applying *res judicata*?

## Statement of the Case

### 1. Current Status in Trial Court

By this writ application, The Meridian Resources and Exploration LLC seeks review of a partial summary judgment on liability for breach of contract. No date has been set for trial of the remaining issues.

### 2. Facts

H.L. Hawkins Jr. was a geologist, a sophisticated businessman, and lifetime oil-and-gas man. His long-time employee and confidante, James David Fountain, described him as "an oil man. First, last, and foremost he as an oil man. He loved

that business, and he kept looking for the mother lode until the day he died.”<sup>4</sup> He was a geologist by training,<sup>5</sup> and got his start in the oil business by working for his father, eventually inheriting a two-thirds interest in his father’s company.<sup>6</sup> He had the requisite knowledge and expertise in the oil-and-gas business to decide for himself whether to drill a particular prospect.<sup>7</sup>

Hawkins was first introduced to Meridian (then known as Texas Meridian) through his right-hand man, James T. Bond, who happened to be the father-in-law of one of Meridian’s founders, Mike Mayell.<sup>8</sup> In 1993, Hawkins and Meridian entered into a letter agreement intended to govern Hawkins’s participation in future Meridian prospects. In that agreement, Hawkins attested that he was “sophisticated and knowledgeable in the business of oil and gas investments, and [was] able to bear the economic risks of this investment ...”<sup>9</sup> Under this agreement, if Hawkins elected to participate in drilling a particular well, then he would bear a one-eighth share of the expenses in exchange for a one-eighth share of the revenue.

Meridian, meanwhile, had a contractual arrangement with Amoco Production Company over an area in southwest Louisiana known as the Holmwood Prospect, owned by Amoco. These contracts consisted of a joint exploration agreement and a mineral lease. Under the joint exploration agreement, either Amoco or Meridian

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<sup>4</sup> Writ app. vol. 3 at 453–54, Fountain depo. at 12–13.

<sup>5</sup> Writ app. vol. 3 at 455, Fountain depo. at 16; writ app. vol. 3 at 406, Bond depo. at 46.

<sup>6</sup> Writ app. vol. 3 at at 455–56, Fountain depo. at 17–19; writ app. vol. 3 at 401–02, Bond depo. at 9–10.

<sup>7</sup> Writ app. vol. 3 at 456–59, Fountain depo. at 19–20.

<sup>8</sup> Writ app. vol. 3 at 428–29, Bond depo. at 123–24.

<sup>9</sup> Writ app. vol. 1 at 52 *infra*, Petition Exh. A, April 1, 1993 letter agreement, Exh. 1 (Master Participation Agreement) at 9 § G.

could propose to drill a well, and the other party could elect to participate (meaning to share the expenses and revenue) or to not participate.

In late March 1996, Meridian proposed to Amoco to drill a well to be known as the TMRX Ben Todd No. 1 well. Amoco responded by suggesting that Meridian's proposal would violate the joint exploration agreement, because the location chosen by Meridian was in a "restricted area." Meridian took a contrary view, believing that the joint exploration agreement gave it the right to drill the well in the planned location. In a letter dated June 11, 1996, Meridian informed Amoco that it intended to proceed with drilling the well.

On June 27, 1996, Meridian wrote to Hawkins asking him to make an election whether he wished to participate in the TMRX Ben Todd No. 1 well. The letter advised him that Amoco had "elected not to participate" in the well.<sup>10</sup>

Bond and Fountain recalled Hawkins's decision to participate with Meridian in the TMRX Ben Todd No. 1 well. Hawkins, Bond, and their wives were vacationing together on Hawkins's boat in Nashville. There, they received by fax the June 27, 1996 letter from Meridian about the proposed well.<sup>11</sup> Bond had previously discussed this project with Meridian geologists and had relayed the substance of those discussions to Hawkins. Hawkins agreed, after discussing the matter with Bond, to participate in drilling this well.<sup>12</sup> Indeed, Hawkins was elated

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<sup>10</sup> Writ app. vol. 2 at 185, Hawkins Exh. 7 (emphasis in the exhibit).

<sup>11</sup> Writ app. vol. 3 at 407–08, Bond depo. at 48–49.

<sup>12</sup> Writ app. vol. 3 at 409–10, Bond depo. at 54–55.

that Meridian was going forward with the Ben Todd No. 1 well. He had seen Meridian's 3-D seismic data and liked what he had seen.<sup>13</sup>

The executors allege that the June 27 letter was misleading because it failed to inform Hawkins that Amoco opposed drilling the well on grounds that it violated Meridian's contract with Amoco. If the letter were a misrepresentation, then the "misrepresentation" was corrected four days later, on July 1, 1996. On this date, Meridian informed Hawkins in writing (through Bond) that Amoco objected to drilling the TMRX Ben Todd No. 1 well, and that Amoco had filed suit against Meridian to stop the drilling. In a letter to Hawkins dated July 1, 1996, Meridian's Frank Steele wrote:

[T]his letter will serve as formal notice to you that Amoco Production Company ("Amoco") claims that pursuant to the Joint Exploration Agreement, between Amoco and TMRX, such drilling operations are prohibited without first obtaining Amoco's approval...

For your information and files, attached hereto is a copy of a letter from Amoco, dated June 28, 1996, advising TMRX that Amoco has filed a "Petition for Declaratory Judgment" ... in an attempt to prevent TMRX's drilling operations for the proposed TMRX-Ben Todd No. 1 well.<sup>14</sup>

Steele's letter notified Hawkins that Meridian "expect[ed] to incur significant legal expenses necessary to vigorously defend and protect our contractual and legal rights," and warned him that he would "be required to bear [his] proportionate share of all costs and expense attributable to TMRX's handling of the Amoco claim."<sup>15</sup>

On receiving Steele's July 1 letter, Bond immediately telephoned Hawkins to inform him of this development. Fountain was in Hawkins's office when the phone

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<sup>13</sup> Writ app. vol. 3 at 462, Fountain depo. at 28.

<sup>14</sup> Writ app. vol. 2 at 199, Hawkins Exh. 10.

<sup>15</sup> *Id.*

rang and heard Hawkins discussing “that there could be a lawsuit or would be a lawsuit [with Amoco] involving this well.”<sup>16</sup>

At this point, Hawkins believed that he could back out of his election to participate in the TMRX Ben Todd No. 1 well.<sup>17</sup> But he chose instead to go forward with his election. Bond testified, “Mr. Hawkins agreed and I agreed, we both agreed to participate after we had these facts.”<sup>18</sup> Fountain heard Hawkins convey his agreement to Bond on the telephone: “They’re the operators. If we’re going to participate, we’re going to participate. If not, we’re not. Since they’re the operators, they have to make the decision. If they’re going to drill the well, go ahead. That’s it.”<sup>19</sup> “Look,” Hawkins told Bond in front of Fountain, “Texas Meridian is the operator. If they want to go ahead with the well, we’ll go with them,” despite the Amoco lawsuit.<sup>20</sup>

Hawkins knew that vigorously defending the Amoco litigation would cost money, and that he would have to pay his proportionate share of those legal expenses. He did so, never once objecting to a single legal bill.<sup>21</sup>

Hawkins understood the risk of litigation. He understood that, whether or not he and Meridian thought that Meridian was in the right, Meridian could still lose. He himself had been involved in prior litigation in Mexico and lost millions. “[H]e

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<sup>16</sup> Writ app. vol. 3 at 462, Fountain depo. at 28.

<sup>17</sup> Writ app. vol. 3 at 465–66, Fountain depo. at 31–32; writ app. vol. 3 at 434, Bond depo. at 159.

<sup>18</sup> Writ app. vol. 3 at 423, Bond depo. at 112.

<sup>19</sup> Writ app. vol. 3 at 463, Fountain depo. at 29.

<sup>20</sup> Writ app. vol. 3 at 474, Fountain depo. at 71.

<sup>21</sup> Writ app. vol. 3 at 412–14, Bond depo. at 60–62.

thought he was right,” Fountain testified, “but he lost.”<sup>22</sup> He knew that the same thing could happen in the *Amoco* litigation. And he knew that if Amoco prevailed, one of the remedies Amoco might obtain was cancellation of the mineral lease.<sup>23</sup> But then, Hawkins was “a risk-taker ... from way back.”<sup>24</sup> He knew that the business he was in—oil and gas—was risky, and he was a man willing to take that risk.<sup>25</sup> So according to Bond, when Hawkins learned of the Amoco litigation, he elected to take the risk of defending that litigation.<sup>26</sup>

Hawkins did not undertake these risks for no reason. He undertook them because he thought that the potential benefits of drilling the well outweighed the risks. Indeed, the well proved productive, netting Hawkins over \$1.7 million in revenue—money he willingly accepted.<sup>27</sup>

Several months after the Amoco lawsuit was filed, a seat on Meridian’s board of directors became available. By this time, Hawkins owned a substantial amount of Meridian stock. So Meridian wanted Hawkins or one of his representatives to have that seat. Instead of taking the seat himself, Hawkins insisted that Bond take it. Bond did so, with the understanding that he was Hawkins’s representative on Meridian’s board of directors.<sup>28</sup>

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<sup>22</sup> Writ app. vol. 3 at 475, Fountain depo. at 76.

<sup>23</sup> Writ app. vol. 3 at 416, Bond depo. at 66.

<sup>24</sup> Writ app. vol. 3 at 469, Fountain depo. at 52.

<sup>25</sup> Writ app. vol. 3 at 468, Fountain depo. at 51.

<sup>26</sup> Writ app. vol. 3 at 414, Bond depo. at 62.

<sup>27</sup> See writ app. vol. 3 at 437–38, 446, deposition of Lloyd DeLano at 8–9 and DeLano depo. exh. 2.

<sup>28</sup> Writ app. vol. 3 at 476–80, Fountain at 104–05, 129–31; writ app. vol. 3 at 404–05, 431, Bond depo. at 24–25, 156.

As the litigation progressed, Bond kept himself and Hawkins informed through daily telephone calls.<sup>29</sup> “Everything I knew, he knew,” Bond testified.<sup>30</sup> Like Meridian, Hawkins thought that Meridian would win the lawsuit with Amoco; he had discussed his opinion about that with Bond several times.<sup>31</sup>

In August 1997, the judge in the *Amoco* action, Judge Trimble, rendered partial summary judgment in Amoco’s favor for breach of contract. In this judgment, Judge Trimble ruled that Amoco was entitled to terminate Meridian’s mineral lease.<sup>32</sup>

After a bench trial, Judge Trimble rendered a 34-page opinion in the *Amoco* action embodying his findings and conclusions.<sup>33</sup> This opinion included a finding of “moral bad faith” on the part of Meridian.<sup>34</sup> Hawkins was aware of this finding when it was rendered, and he thought the decision was wrong.<sup>35</sup> Bond testified, “Mr. Hawkins and I didn’t feel like, really, that it was moral bad faith on their part. We thought that — that we should have won the lawsuit.”<sup>36</sup>

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<sup>29</sup> Writ app. vol. 3 at 470–71, Fountain depo. at 66–67; writ app. vol. 3 at 403, Bond depo. at 14.

<sup>30</sup> Writ app. vol. 3 at 417, Bond depo. at 67.

<sup>31</sup> Writ app. vol. 3 at 424, Bond depo. at 115.

<sup>32</sup> Writ app. vol. 2 at 254, Hawkins Exh. 19 at Bates No. 645.

<sup>33</sup> Writ app. vol. 2 at 276, Hawkins Exh. 21.

<sup>34</sup> Writ app. vol. 2 at 295, Hawkins Exh. 21 at 20.

<sup>35</sup> Writ app. vol. 3 at 425–27, Bond depo. at 117–18.

<sup>36</sup> Writ app. vol. 3 at 427, Bond depo. at 118.

Five months later, Judge Trimble rendered final judgment in Amoco's favor, awarding \$7,662,293.16 plus interest from the date of judicial demand and cancelling the mineral lease.<sup>37</sup>

On July 12, 1999, the U.S. Fifth Circuit affirmed in part and reversed in part. *Amoco Production Co. v. Texas Meridian Resources Exploration Inc.*, 180 F.3d 664 (5th Cir. 1999). The court reversed the award of legal interest from the date of judicial demand, finding that Meridian's liability "was essentially based on the alleged violation of a contractual duty," and that "the present judgment does not sound in damages *ex delicto*." *Id.* at 673. The court refused Amoco's request for attorney's fees on appeal, finding that Meridian's position had legal merit ("both parties raised substantive issues on appeal") and that the dispute was caused in part by Amoco's failure to communicate ("both parties contributed to the dysfunctional communications resulting in this dispute."). *Id.* at 673–74.

While the *Amoco* case was on appeal, Hawkins died. After the Fifth Circuit's judgment, Meridian wrote to Hawkins's executors, informing them of the judgment and billing them for the succession's share of the judgment.<sup>38</sup> In September 1999, the executors sent Meridian a check for over \$1.5 million in payment of Hawkins's share. In their cover letter accompanying payment, they alluded to possible litigation against Meridian because of the outcome of the *Amoco* suit.<sup>39</sup> This was the first time that anyone associated with Hawkins objected to anything Meridian did in connection with the TMRX Ben Todd No. 1 well or the *Amoco* litigation.

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<sup>37</sup> Writ app. vol. 2 at 331, Hawkins Exh. 22.

<sup>38</sup> Writ app. vol. 2 at 210, Hawkins Exh. 13.

<sup>39</sup> Writ app. vol. 2 at 214, Hawkins Exh. 14.

### 3. Proceedings Below

More than five years after paying Hawkins' share of the *Amoco* judgment, the executors brought this civil action against Meridian, seeking various damages. Their basic legal theory was that Meridian's drilling of the TMRX Ben Todd No. 1 well constituted gross negligence or willful misconduct,<sup>40</sup> and therefore breached Meridian's contract with Hawkins.

In February of this year, the executors brought a motion for partial summary judgment, arguing that the *Amoco* judgment precludes Meridian from contesting its liability here. In opposition, Meridian argued that the *Amoco* judgment has no preclusive effect here, because neither the issues nor the parties are the same in both actions. Meridian further argued that Hawkins knew and approved of everything Meridian did in connection with the TMRX Ben Todd No. 1 well and that he willingly accepted over \$1.7 million in revenue resulting from Meridian's actions.

After a hearing of the executors' motion, the trial court took the matter under advisement. On June 6, 2008, the trial court issued written reasons for judgment granting the executors' motion, holding Meridian liable for breach of contract. Notice of judgment was mailed on June 9, 2008. Meridian has timely invoked this Court's supervisory jurisdiction to review the June 6 ruling.

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<sup>40</sup> The contract provides that Meridian "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." Writ app. vol. 1 at 59 *infra*.

## Assignment of Error

1. The trial court erred by failing to consider whether Hawkins consented to or ratified Meridian's actions alleged by his executors to have constituted breach of Meridian's contract with Hawkins.

2. The trial court erred in applying *res judicata* to preclude Meridian from contesting liability for breach of its contract with Hawkins.

## Memorandum in Support of Application

### 1. This Court reviews a summary judgment *de novo*.

Summary judgments are reviewed on appeal *de novo*. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. *Smith v. Our Lady of the Lake Hosp.*, 93-2512 (La. 7/5/94), 639 So.2d 730, 750.

A genuine issue is a triable issue. More precisely, an issue is genuine if reasonable persons could disagree. *Id.* at 751. In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. *Id.*

A fact is material when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. In other words, a material fact is one that would matter on the trial on the merits. *Id.*

Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of trial on the merits. *Id.* And since the mover bears the burden of proving the lack of a material issue of fact, inferences drawn from the underlying facts must be viewed in a light most favorable to the non-moving party. *Id.* at 752.

## **2. Hawkins's consent to Meridian's actions absolves Meridian of any liability to his succession.**

The partial summary judgment rendered by the trial court holds Meridian liable for breach of a contractual obligation owed to Hawkins. In rendering this judgment, the trial court alluded to but did not confront substantial evidence that Hawkins knew and approved of Meridian's actions at issue here. Since consent is the basis of any contractual obligation (*see* La. Civ. Code art. 1927), it follows that any act consented to by Hawkins cannot possibly have breached a contractual obligation owed to Hawkins.

This reasoning applies even when a written contract says otherwise. When an obligee expressly or impliedly consents to the obligor's departure from the terms of a written contract, then there is no breach of the contract. "[S]ilence or inaction of the [obligee] can result in the conclusion that he has consented to a different mode of execution than that expressed in the agreement." *Davis v. Laster*, 242 La. 735, 752, 138 So.2d 558, 564 (1962). Thus, "when the parties themselves have established by their acts a different mode of execution, and their actions, under those circumstances, may more clearly denote their appreciation of the meaning they intend to be imparted to their contract than the language itself, then, the result is that a departure from the strict language of the agreement has been consented to by the action of both parties." *Id.* at 753, 139 So.2d at 564.

Even if one assumes that Meridian's actions were unauthorized, Hawkins could consent to them after the fact by ratification, a feature of the law of mandate. Ratification is a person's consent to an obligation incurred on his behalf by another without authority. La. Civ. Code art. 1843. Express ratification occurs when the person evidences the intention to be bound by the ratified obligation. *Id.* Tacit ratification occurs when a person, with knowledge of an obligation incurred on his behalf by another, accepts the benefit of that obligation. *Id.*; see also *Bamber Contractors, Inc. v. Morrison Engineering & Contracting Co.*, 385 So.2d 327, 331 (La. App. 1 Cir. 1980); *Francis v. Bartlett*, 121 So.2d 18, 21 (La. App. 2 Cir. 1960). As the Supreme Court said 168 years ago, "A principal ... cannot hold his agent liable for his unauthorized acts, and at the same time seek to avail himself of those very acts, in case they turn out to be advantageous." *Dupre v. Splane*, 16 La. 51, 1840 WL 1303, \*2 (Sept. 1840).

When a principal ratifies the unauthorized act of its agent, the ratification discharges the agent from liability to the principal. See *North American Specialty Ins. Co. v. Employers Reinsurance Corp.*, 2002-2649 p. 5 (La. App. 1 Cir. 9/26/03), 857 So.2d 606, 610; *Ledoux v. Old Republic Life Ins. Co.*, 233 So.2d 731, 737 (La. App. 3 Cir. 1970).

Here, accepting the trial court's reasoning and the executors' arguments, Meridian was Hawkins's agent or mandatary. In rendering summary judgment against Meridian, the trial court reasoned that Meridian was obligated "to prudently and responsibly represent the interests of its investors, including Hawkins ...."<sup>41</sup> For their part, the executors argued that the contract between

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<sup>41</sup> Writ app. vol. 1 at 31 *infra*, reasons for judgment.

Meridian and Hawkins formed a joint venture between them.<sup>42</sup> Joint ventures are governed by the law of partnerships, under which a partner (i.e. Meridian) is the mandatory for the partnership / joint venture. *See Coffee Bay Investors, L.L.C. v. W.O.G.C. Co.*, 2003-0406 p. 7 (La. App. 1 Cir. 4/2/04), 878 So.2d 665, 670 (joint ventures are treated by law as a species of partnership and are governed by the law of partnerships); La. Civ. Code art. 2814 (partner is mandatory of the partnership).

Thus, if the trial court and the executors were correct in their characterizations of the legal relationship between Hawkins and Meridian, then Meridian was Hawkins's mandatory. As Meridian's principal, Hawkins could ratify any unauthorized act by Meridian.

Here, the record abounds with evidence that Hawkins consented to and ratified Meridian's actions that led to the *Amoco* judgment. At the very least, this evidence raises a genuine issue of material fact sufficient to defeat partial summary judgment on liability for breach of contract.

The day after Hawkins, through Bond, agreed to participate in the TMRX Ben Todd No. 1 well, Meridian informed him in writing of Amoco's objection to the well and of Amoco's lawsuit to stop the drilling. At that point, Hawkins believed that he had the right to back out of his participation, and that Meridian would have allowed him to back out if he wanted to. Instead, he chose to go forward with his

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<sup>42</sup> Writ app. vol. 2 at 117 and 122, Hawkins memorandum in support of summary-judgment motion at 7 and 12.

participation.<sup>43</sup> In fact, he was delighted that Meridian had decided to drill the well; his own review of the geological data told him that the well would be productive.<sup>44</sup>

During the *Amoco* litigation, Hawkins had the opportunity to become a director of Meridian because he owned a large block of Meridian stock. Instead of taking the position himself, he asked his right-hand man, Bond, to do so on his behalf. Bond accepted the appointment with the understanding that he would serve as Hawkins's representative on Meridian's board. Thus Hawkins, through Bond, was in a position to help steer Meridian's course through the *Amoco* litigation. As a director, Bond kept himself fully informed of the *Amoco* litigation's status; and as Hawkins's right-hand man, he kept Hawkins fully informed.<sup>45</sup>

As the litigation progressed, Hawkins was called upon from time to time to pay his share of the defense costs. He willingly paid them, never once objecting to a single legal bill.<sup>46</sup> And when the TMRX Ben Todd No. 1 well began producing, Hawkins willingly accepted his share of the net profits, totaling \$1,710,169.85.<sup>47</sup>

This evidence establishes Hawkins's consent to or ratification of Meridian's actions now being sued on by his executors. At a minimum, this evidence raises a genuine issue of material fact as to whether he consented to or ratified Meridian's actions, making summary judgment on liability improper.

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<sup>43</sup> Writ app. vol. 3 at 462–66, 474, Fountain depo. at 28–32, 71; writ app. vol. 3 at 423 and 434, Bond depo. at 112 and 159.

<sup>44</sup> Writ app. vol. 3 at 462, Fountain depo. at 28.

<sup>45</sup> Writ app. vol. 3 at 476–80, Fountain depo. at 104–05 and 129–31; writ app. at 404–05, 431, Bond depo. at 24–25, 156.

<sup>46</sup> Writ app. vol. 3 at 412–13, Bond depo. at 60–61.

<sup>47</sup> Writ app. vol. 3 at 446, DeLano depo. exh. 2.

**3. The *Amoco* judgment has no preclusive effect here because the parties and issues in that action are different from those here.**

The issue of Hawkins's consent to Meridian's actions was never litigated in the *Amoco* action. The issue could not possibly have been litigated there, because Hawkins was not a party to the *Amoco* action. Yet by erroneously applying *res judicata* here, the trial court would preclude Meridian from ever litigating this issue in any forum.

The application of *res judicata* here is erroneous for two reasons: (1) the issues are not the same; and (2) the parties are not the same.

**A. Louisiana law governs the preclusive effect of the *Amoco* judgment.**

The *Amoco* judgment was rendered by a federal court. Ordinarily, the preclusive effect of a federal court's judgment is determined by federal law. *Reeder v. Succession of Palmer*, 623 So.2d 1268, 1271 (La. 1993); *Pilie & Pilie v. Metz*, 547 So.2d 1305, 1309 (La. 1989). But under federal law, when the federal court's judgment is rendered under the court's diversity jurisdiction, the judgment's preclusive effect is determined by the law of the state in which the federal court sits; in such cases, state law is adopted as surrogate federal law. *See Semtek Intl. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508, 121 S. Ct. 1021, 1028, 149 L. Ed. 2d 32 (2001). This rule applies to both claim preclusion and issue preclusion. *See id.* (claim preclusion); *see also Conwed Corp. v. Union Carbide Corp.*, 443 F.3d 1032, 1037–38 (8th Cir. 2006) (issue preclusion); *Ananta Group, Ltd. v. Jones Apparel Group, Inc.*, 230 Fed. Appx. 39, 40 (2d Cir. 2007) (issue preclusion).

The *Amoco* judgment was rendered by a federal court sitting in Lake Charles, Louisiana. The basis of the federal court's subject-matter jurisdiction was diversity

of citizenship.<sup>48</sup> Therefore, the *Amoco* judgment's preclusive effect (if any) is determined by Louisiana law.

***B. The issues in the Amoco action are different from those here.***

For issue preclusion to apply under La. R.S. 13:4231(3), the issue in both actions must be identical; the issue in the second action must have been “actually litigated and determined” in the first, and its determination must have been “essential to [the] judgment” in the first. La. R.S. 13:4231(3).

The issues in *Amoco* are not the same as those here. The two cases involve different contracts with different contractual obligations owed to different obligees. In fact, the contract here between Hawkins and Meridian is not mentioned in any judgment in *Amoco* and appears to have had no effect on Judge Trimble's or the Fifth Circuit's decisions.

Most importantly, the issue of Hawkins's consent, crucial here, was not an issue in *Amoco*. Whether Hawkins agreed with Meridian's actions—highly relevant here—was irrelevant in *Amoco*. Because the issue was irrelevant there, Meridian did not have the opportunity to litigate the issue or have it decided there. Now, if summary judgment is not reversed, Meridian will be deprived of the opportunity to litigate the issue anywhere.

***C. The parties to the Amoco action are different from those here.***

The reason Hawkins's consent was not litigated or decided in *Amoco* is that Hawkins was not the plaintiff in *Amoco*. Because the two cases involve different plaintiffs, the identity of parties needed for *res judicata* is lacking.

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<sup>48</sup> See writ app. vol. 3 at 385, 386, Notice of Removal.

Identity of parties has always been required for *res judicata* under Louisiana law. Before 1984, former Civil Code article 2286 required that “the demand must be between the same parties ....” In 1984, article 2286 was redesignated as La. R.S. 13:4231. Although the statute was substantially amended by Acts 1990, No. 521, effective January 1, 1991, the amended version preserves the requirement of identity of parties and applies it to issue preclusion:

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

...

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

La. R.S. 13:4231. Under the plain language of this statute, both the plaintiff and the defendant from the first action must be parties to the second. Otherwise the identity of parties required for issue preclusion is lacking.

Here, the plaintiff from the first action, Amoco, is not a party to the second. Nor do the current plaintiffs, Hawkins’s executors, stand in Amoco’s shoes. Without the presence here of Amoco or someone in privity with Amoco, identity of parties does not exist, and issue preclusion cannot apply.

The trial court nevertheless applied issue preclusion, based on Hawkins’s privity with Meridian. The trial court reasoned that Meridian, defendant in the *Amoco* action, represented Hawkins’s interests in that action. Thus, the trial court found “an identity of interest between Hawkins and Meridian sufficient to treat them as identical parties for purposes of issue preclusion (collateral estoppel).”<sup>49</sup>

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<sup>49</sup> Writ app. vol. 1 at 32 *infra*, Reasons for Judgment.

The trial court's reasoning contradicts the text of La. R.S. 13:4231(3), which requires the presence in the second action of both the plaintiff and the defendant from the first. While the second action here includes the defendant from the first (Meridian), it does not include the plaintiff (Amoco) or anyone in privity with the plaintiff. The executors' alleged privity with Meridian does not make up for the absence here of Amoco.

Caselaw decided under current La. R.S. 13:4231 or its predecessors confirms that, for *res judicata* to apply, both the plaintiff and defendant from the first action must be parties to the second. When a second action involves only co-defendants or co-plaintiffs from the first action, identity of parties does not exist. The reason for this principle is plain: Any issue between two parties cannot have been fully and fairly litigated in the first action unless those parties were opponents in the first action.

One illustration of this principle is this Court's decision in *Harper v. Hunt*, 247 So.2d 192 (La. App. 1 Cir. 1971), decided under former Civil Code article 2286. *Harper* was an auto-accident case. In a prior action by a third party (Foster) against both Harper and Hunt, this Court had found Harper blameless for the accident. But in the second action (by Harper against Hunt), this Court held that its prior judgment in *Foster* against the two former co-defendants did not determine liability in the subsequent suit between them, because the parties were not the same. "An indispensable element of *res judicata* is that the parties must be identical. LSA-C.C. art. 2286. This action is not between the same parties to the prior action." 247 So.2d at 194.

Another illustration is *Greer v. State*, 616 So.2d 811 (La. App. 2 Cir. 1993). The first action in *Greer* was a concursus proceeding in which Greer and the State were aligned with each other. Greer later brought a separate action against the State, and the State pleaded *res judicata* based on the concursus. The trial court sustained the exception, but the court of appeal reversed. Although both parties to the second action were also parties to the first, they were not opponents in the first. “Consequently, we find that the two proceedings were not brought by the same parties ‘against each other’ in the same quality.” *Id.* at 816.

A third illustration—one decided under current La. R.S. 13:4231—is *Morris v. Haas*, 95-75 (La. App. 5 Cir. 5/30/95), 659 So.2d 804. There, a bank sued its debtor and eight guarantors, including Morris, Seale, Haas, and Ditta. After that case settled, two of its defendants (Morris and Seale) sued two of their former co-defendants (Haas and Ditta) for indemnity. Haas and Ditta pleaded an exception of *res judicata* based on the first action and settlement. The trial court sustained the exception, but the court of appeal reversed. It concluded that, because the parties in the second action were not opponents in the first, they did not appear in the same quality or capacity in the second action as they did in the first. *Id.* at 810.<sup>50</sup>

The executors may argue that *Harper* and *Greer* were decided under predecessors to current La. R.S. 13:4231. But these cases still have vitality today, because the requirement of identity of parties remains unchanged. *See Morris v. Haas*, 659 So.2d at 810 (“We find nothing in the new law on *res judicata* to suggest that identity of parties is no longer required for a bar of the second action.”); *see also*

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<sup>50</sup> At the risk of belaboring the point, additional examples include *Fitch v. Vintage Petroleum, Inc.*, 608 So.2d 286 (La. App. 3 Cir. 1992); *Amerson v. La. Dept. of Transp. & Dev.*, 570 So.2d 51 (La. App. 5 Cir. 1990); and *Prestridge v. Humble Oil & Refining Co.*, 131 So.2d 810, 817–18 (La. App. 3 Cir. 1961).

*Foley v. Entergy La., Inc.*, 2006-0983 p. 15 n. 4 (La. 11/29/06), 946 So.2d 144, 156 n. 4 (“Louisiana Revised Statute 13:4231(3) prevents relitigation of the same issue *between the same parties ...*”) (emphasis by the Court).

Applying this law here leads to the conclusion that the trial court erred in applying *res judicata*. Assuming that Mr. Hawkins was in privity with Meridian in the *Amoco* litigation, the result would be that this action involves two defendants from the first: Meridian and Hawkins (through Meridian). Because Meridian and Hawkins were not opponents in the *Amoco* action, they do not share the same quality as parties here, as required for *res judicata*. And because they were not opponents in *Amoco*, Meridian had no opportunity to litigate the critical issue here: Mr. Hawkins’s informed consent to drilling the TMRX Ben Todd No. 1 well, and his enthusiastic support of Meridian’s position in the *Amoco* litigation.

#### **4. The interests of judicial efficiency and fairness call for the Court’s exercise of its supervisory jurisdiction.**

This Court has frequently exercised its supervisory jurisdiction when doing so served the interests of judicial economy and fairness. *See, e.g., Brown v. Sanders*, 2006-1171 p. 2 (La. App. 1 Cir. 3/23/07), 960 So.2d 931, 933; *Armeline Planting Co. v. Liberty Oil & Gas Corp.*, 2005-1250 p. 3 (La. App. 1 Cir. 6/9/06), 938 So.2d 178, 179; *Basco v. Dorothy R. Racine Trucking, Inc.*, 1997-2740 p. 3 (La. App. 1 Cir. 12/28/98), 725 So.2d 606, 608.

The considerations of judicial efficiency and fairness are particularly acute where, as here, the judgment in question is a partial summary judgment on liability. This situation is different from one where a trial court erroneously *denies* a motion for partial summary judgment. In those cases, the normal consequence is merely that one more issue must be tried on the merits in the course of a trial that

would take place anyway. But when partial summary judgment is erroneously *granted*, the potential imposition on the resources of the courts and litigants is far greater, because the courts and the litigants will have to go through a second trial, which could have been avoided had the improper partial judgment been reversed immediately. *See Williams v. City of New Orleans*, 93-2043 (La. App. 4 Cir. 5/17/94), 637 So.2d 1130, 1133.

The *Williams* language applies here. The trial court committed reversible error by granting a summary judgment on liability for breach of contract in favor of Hawkins's succession, despite uncontroverted evidence that Hawkins himself knowingly consented to and ratified every action by Meridian complained of by his succession representatives. The trial court further committed reversible error by applying *res judicata* to preclude Meridian from litigating the issue of Hawkins's consent, even though Meridian has never had the opportunity to litigate that issue or have it decided by any court.

Given this reversible error, failure to correct the error until an appeal after trial will mean that the parties and the trial court will have to endure two trials. And final judgment after the second trial would likely result in a second appeal. The second trial and second appeal can be avoided if this Court exercises its supervisory jurisdiction now to review the partial summary judgment.

Moreover, failure to correct the error now could tilt the playing field at the first trial unfairly against Meridian. As the *Williams* court observed, a premature judgment of liability can influence the trial court's view of the balance of the case. In *Williams*, the result was that the trial court discounted serious credibility problems in plaintiff's case, including discrepancies between plaintiff's deposition

testimony and trial testimony. The trial court's negative view of the case also seemed to have carried over into the court's quantum decision. Meridian could be subjected to similar unfair prejudice if made to go to trial under the cloud of an erroneous finding of liability.

In sum: the interests of judicial efficiency and justice counsel this Court to exercise its supervisory jurisdiction to review the trial court's partial summary judgment on liability.

### **Conclusion and Prayer for Relief**

Louisiana law does not allow an obligee to enthusiastically support an obligor's course of action, only to turn around and sue the obligor if the course of action causes a loss. Nor does Louisiana law allow a principal to ratify a mandatary's action in the hope of gaining profit, only to turn around and sue the mandatary if the action instead causes a loss. Nor does Louisiana law preclude a litigant from litigating a crucial issue because of a prior judgment in another action to which the litigant's current opponent was not a party—especially when that crucial issue was not litigated or decided in the prior action. Yet the trial court's partial summary judgment here does all these things. For the sake of basic fairness, Meridian prays that the Court grant a supervisory writ, reverse the trial court's judgment, and allow Meridian to defend itself at trial.

Respectfully submitted:

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