

COURT OF APPEAL  
FIFTH CIRCUIT  
STATE OF LOUISIANA

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

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

\_\_\_\_\_  
On Application for Supervisory Writ  
to the 23rd Judicial District Court,  
Parish of St. James  
Hon. Pegram J. Mire, Judge

\_\_\_\_\_  
**Thomas & Betts Corp.'s  
Application for Supervisory Writ**

\_\_\_\_\_  
**Request for Expedited Consideration  
Request for Stay Order**

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**Affidavit of Verification and Service**

**State of Louisiana**

**Parish of Orleans**

Before me, Notary, personally came and appeared **Louis C. LaCour Jr.**, who, after being sworn by me, Notary, stated that the allegations in this writ application are true, and that a copy of this application has been served on the following persons by means equally prompt as that used for filing:

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Louis C. LaCour, Jr.

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Notary Public

## **Request for Expedited Consideration and Request for Stay Order**

On March 28, 2006, this Court reversed an \$88.75 million JNOV against applicant, Thomas & Betts Corp. (“T&B”), and reinstated a defense verdict in T&B’s favor. *In re Gramercy Plant Explosion at Kaiser*, 04-1151 c/w and through 04-1191 (La. App. 5 Cir. 3/28/06), 927 So. 2d 492, *writ denied*, 2006-1003 (La. 6/14/06).<sup>1</sup> Despite the reversal of the JNOV, the trial court has rendered a judgment purporting to allow one of the plaintiff–appellees, Terrence Hayes, to execute his \$5 million portion of the JNOV against T&B.<sup>2</sup> Besides lacking any legal justification, the trial court’s judgment threatens irreparable injury and disruption to T&B’s business operations. T&B requests that the Court give this application expedited consideration, or that the Court immediately stay the trial court’s judgment pending this Court’s consideration of T&B’s application.

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<sup>1</sup> Exh. 8 *infra*.

<sup>2</sup> Exh. 1 *infra*.

## **Jurisdictional Statement**

Applicant, Thomas & Betts Corp., invokes this Court's supervisory jurisdiction under La. C.C.P. Art. 2201 and Rule 4, Unif. Rules of La. Cts. of Appeal. This writ application is timely under Rule 4-3. The judgment complained of was rendered on July 20, 2006.<sup>3</sup> T&B gave notice of its intent to seek a supervisory writ on July 26, 2006.<sup>4</sup>

Despite every effort by counsel to obtain a signed order setting a return day, it was not possible to do so in sufficient time to present with this application. Though contact was made with the trial judge's office in order to arrange for execution of the order, and despite being told to travel to the judge's office to do so, when the courier arrived with the notice and order he was advised that the judge had left for the day and would be otherwise unreachable. When the executed order is received, it will be immediately filed with this Court.

Given the urgency of this application, and its filing only two days after notice of the judgment, applicant believes that it has complied with the spirit, if not the letter, of the rule requiring attachment of the return-day order.

## **Statement of the Case**

On July 5, 1999, one or more explosions occurred at the Kaiser plant in Gramercy, La. The incident generated scores of lawsuits, most of which were consolidated in the 23rd JDC, St. James Parish. Among the many lawsuits were those by Kaiser Aluminum & Chemical Corp., AXA Global Risks et al. (Kaiser's reinsurers), and Terrence Hayes. Thomas & Betts Corp. (T&B) was one of numerous defendants named in many of those lawsuits. In the fall of 2001, a six-week jury trial was held in the district court. Before and during trial, many claims

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<sup>3</sup> Exh. 1 *infra*.

<sup>4</sup> Exh. 2 (notice of intent) and Exh. 3 (order setting return date), *infra*.

settled. By the time the jury delivered its verdict, the few claims remaining included those of Kaiser, AXA, Hayes, and the class-action representatives against T&B and another defendant. The jury exonerated T&B, assigning 75% fault to Kaiser, 25% fault to defendants who had settled, and 0% fault to T&B.

Kaiser, AXA, Hayes, and the class moved for JNOV and a conditional new trial. The district court rendered a single judgment granting both JNOV and conditional new trial to the various movers.<sup>5</sup>

T&B appealed that judgment, seeking reversal of both the JNOV and conditional new trial.<sup>6</sup> While the case was on the appeal, the class-action aspect was settled, leaving Kaiser, AXA, and Hayes as the only appellees.

As an appellee, Hayes participated fully in the appellate proceedings. He was served with T&B's original brief, after which he filed his own brief, addressing both the JNOV and new-trial issues.<sup>7</sup> In the days leading up to oral argument, he signed a motion seeking to enlarge the time for oral argument in this Court.<sup>8</sup> After this Court denied the motion, he negotiated with Kaiser-AXA's counsel to split the argument time allotted to appellees. When the day of oral argument arrived, he sat at counsel table, took a portion of the appellees' argument time, and delivered oral argument to the three-judge panel. In short, he participated in every aspect of the appellate proceedings leading up to this Court's judgment.

On March 28, 2006, this Court reversed the district court's judgment and reinstated the jury verdict exonerating T&B. Although the Court taxed costs to Kaiser-AXA alone, its decree was unrestricted to any appellee:

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<sup>5</sup> Exh. 4 *infra*.

<sup>6</sup> Exh. 5 *infra*.

<sup>7</sup> Exh. 6 *infra*.

<sup>8</sup> Exh. 7 *infra*.

## DECREE

For the foregoing reasons, the judgment of the district court is reversed and the jury verdict is reinstated. Costs of this appeal are assessed to the appellees, Kaiser and AXA.

### **REVERSED; VERDICT REINSTATED**<sup>9</sup>

The cover page of this Court's decision lists Hayes as the first appellee.<sup>10</sup> Hence, this Court undoubtedly considered Hayes a party affected by its judgment.

This Court's March 28 judgment is now final. Hayes elected not to apply to the Louisiana Supreme Court for writs. Kaiser and AXA applied for writs, but their writ application was denied.<sup>11</sup>

Despite the unqualified, unambiguous language of this Court's decree and Hayes's full participation in the appellate proceedings leading to that decree, Hayes now takes the position that he was not a party to the appeal after all, and that therefore, this Court's decree does not apply to him.<sup>12</sup> He filed a motion in the district court to enter a "judgment" purporting to enforce the reversed JNOV.<sup>13</sup> Before the hearing of Hayes's motion, T&B applied to this Court for a writ of prohibition, seeking to prevent the trial court from hearing Hayes's motion. Although this Court denied that writ application as premature (because the trial court had not yet decided the issue), this Court invited T&B to apply for supervisory review following the trial court's decision.<sup>14</sup>

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<sup>9</sup> Exh. 8 p. 17 *infra*.

<sup>10</sup> *Id.* p. 1.

<sup>11</sup> Exh. 9 *infra*.

<sup>12</sup> Exh. 10 *infra*.

<sup>13</sup> Exh. 1 *infra*.

<sup>14</sup> Exh. 11 *infra*.

On July 10, 2006, the trial court held a hearing of Hayes's motion, and took the matter under advisement. On July 20, the trial court granted Hayes's motion.<sup>15</sup>

### **Issue Presented**

Did the March 28, 2006 decision of this Court adjudicate the claims of Terrence Hayes against Thomas & Betts?

### **Assignment of Error**

The district court erred by granting a motion to enforce a JNOV in Hayes's favor after this Court reversed the JNOV and reinstated the jury verdict exonerating T&B.

### **Argument**

On March 28, 2006 this Court issued its decision in the matter entitled *In re Gramercy Plant Explosion at Kaiser*, 04-1151 (La. App. 5 Cir. 3/28/06), 927 So. 2d 492, *writ denied*, 2006-1003 (La. 6/14/06). In that decision, this Court reversed the trial court's grant of JNOV and reinstated the original jury verdict exonerating T&B.

One of the appellees in the appeal was Terrence Hayes, represented by Mr. Walter Dumas. As the court will note from the record in the prior appeal and recall from its own observation, Mr. Dumas—on behalf of Mr. Hayes—fully participated in the appeal, and shared oral argument with counsel for Kaiser/AXA. He did so because he knew his client's interests were at stake as one of the beneficiaries of the trial court's JNOV against T&B. Now, with the appeal having resulted in reinstatement of the defense verdict, he contends that the judgment on appeal does not apply to him — despite his full participation in the proceedings before this Court during the appeal.

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<sup>15</sup> Exh. 1 *infra*.



As described more fully below, there is no legitimate question that *all* plaintiffs' claims against T&B, including Hayes's, were resolved in T&B's favor by this Court. Yet, choosing to ignore this simple truth, Hayes has obtained from the trial court a judgment purporting to "enforce" a non-existent JNOV in his favor, in patent disregard of this Court's decision.

### **1. The trial court's judgment is contrary to this Court's March 28 judgment.**

Parties appeal judgments, not motions for judgment. There was one judgment by the 23rd JDC granting JNOV and new trial to various parties. T&B appealed that one judgment in its entirety. And this Court reversed that same judgment in its entirety. Although the Court's taxation of costs is restricted to Kaiser and AXA, its decree reversing the 23rd JDC judgment and reinstating the jury verdict is not similarly restricted:

For the foregoing reasons, the judgment of the district court is reversed and the jury verdict is reinstated. Costs of this appeal are assessed to the appellees, Kaiser and AXA.

### **REVERSED; VERDICT REINSTATED**

Nowhere in its judgment does this Court affirm anything in Hayes's favor.

In an attempt to escape this Court's plain, unambiguous decree, Hayes resorts to picking apart T&B's appellate brief. His chief argument is that the assignment of errors in T&B's original brief did not name him as one of the parties who moved the 23rd JDC for JNOV.<sup>16</sup> The trial court accepted this assignment-of-errors argument as justification for disregarding this Court's decree.

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<sup>16</sup> There is good reason why T&B's assignment of errors referred to "Kaiser's and Axa's motion for [JNOV]" and not Hayes's. Hayes's motion for JNOV, just one page long (not counting signature block), was a simple adoption of Kaiser's and AXA's motions. His entire argument for JNOV was as follows:

Plaintiff, Terrence Hayes, ... adopt[s] by reference the supporting memorandum of Kaiser, ... and AXA Global Risks et al.... The evidence presented at trial supports the instant motion inasmuch as the verdict is completely inconsistent with the evidence.

Any issue that might have been raised over T&B's assignment of errors is moot. This Court has decided the case, and its decree is what counts now. That decree reverses the 23rd JDC judgment in its entirety, without restriction to any appellee. If Hayes believed the decree to be overbroad in light of the assignment of errors, then he should have applied to this Court for rehearing, or applied to the Supreme Court for writs. He did neither. His attempt to raise an issue over T&B's assignment of errors comes too late, because this Court's judgment is now final.

Even if Hayes's argument about the assignment of errors had been made timely in a proper court, it would have no merit. An assignment of errors is not necessary in a civil appeal. La. C.C.P. Art. 2129. And regardless of how a party phrases its assignment of errors, the appellate court retains the power to render any judgment that is just, legal, and proper upon the record on appeal. La. C.C.P. Art. 2164.

Consistent with these Code articles, the Louisiana Supreme Court has repeatedly held that a Louisiana appellate court can decide any issue necessary to reach a just result, even if the issue is excluded from the assignment of errors. In *Georgia Gulf Corp. v. Board of Ethics for Public Employees*, 96-1907 (La. 5/9/97), 694 So. 2d 173, 175-76, the Court held that due-process issues could be considered at the appellate level even though the issues were not assigned as error. And in *Nicholas v. Allstate Ins. Co.*, 99-2522 pp. 6-8 (La. 8/31/00), 765 So. 2d 1017, 1022-23, the Court held that the adequacy of certain jury instructions could be decided on appeal, even though not assigned as error. Although these controlling

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85 R. 22547. Thus, the arguments accepted by the trial court in granting JNOV were not advanced by Hayes, but by Kaiser-AXA. T&B had this in mind when it wrote its appellate brief, hence the references to Kaiser-AXA's motion. This Court must have had the same thing in mind when it wrote its opinion; after all, the appellate record before this Court included Hayes's one-sentence adoption of Kaiser-AXA's JNOV papers. This Court knew, as T&B knew, that the parties carrying the ball on the JNOV motion were Kaiser and AXA, and that the issues and arguments were identical.

authorities were cited below, they are not mentioned in Hayes’s filings or in the trial court’s judgment.

Also absent from the trial court’s judgment is the Louisiana decision most closely on point: *Greenfield v. Lykes Bros. Steamship Co.*, 02-1377 p. 4 n. 2 (La. App. 1 Cir. 5/9/03), 848 So. 2d 30, 32 n. 2. In *Greenfield*, a plaintiff appealed a judgment on an exception of prescription in favor of six defendants. But in his assignment of errors, he referred to only one of the six. Nevertheless, the Court of Appeal rendered judgment of reversal as to all six defendants. *Id.* p. 9, 848 So. 2d at 34. In the Court of Appeal’s mind, Articles 2129 and 2164 and the Supreme Court’s *Nicholas* decision rendered any omission of other defendants from the assignment of errors inconsequential:

While all four assignments of error relate to “defendant, Westinghouse,” it is apparent from the argument in brief that Mr. Greenfield is also challenging the efficacy of the judgment as to the other five named defendants on the same grounds that he is challenging the judgment rendered in favor of Viacom, Inc. [Westinghouse’s successor]. In considering Mr. Greenfield’s arguments in these regards, we note that La. C.C.P. art. 2129 states that assignments of error are not necessary in any appeal. Under La. C.C.P. art. 2129 and 2164, together with Uniform Rules of Louisiana Court of Appeal, Rule 1-3, we have clear authority to consider the matters before us even though there are no specific assignments of error regarding the judgment in favor of these defendants/ appellees. *See Nicholas v. Allstate Insurance Co.*, 99-2522, pp. 7-8 (La. 8/31/00), 765 So. 2d 1017, 1022-23.

*Id.* p. 4 n. 2, 848 So. 2d at 32 n. 2. The Court of Appeal further noted that the other defendants–appellees were served with the appellant’s brief and responded with their own appellees’ briefs in which they generally adopted and supported Westinghouse/Viacom’s arguments. *Id.*

The same principles apply here. Here, as in *Greenfield*, there was one judgment appealed that was in favor of several parties. Despite the phrasing of the assignment of errors, this Court understood that the appellant, T&B, was challeng-

ing the appealed judgment as to all appellees. And the grounds for reversal as to one appellee applied equally to the others.

The similarities do not end there. The conduct of Hayes in this case was the same as the conduct of the appellees in *Greenfield*. Like the appellees in *Greenfield*, Hayes's counsel was served with T&B's original appellate brief — the one with the assignment of errors he quoted in his motion and memorandum. After receiving that brief with T&B's assignment of errors, he continued his full participation in the case as an appellee. He filed an appellee's brief, responding to T&B's arguments on both JNOV and new trial.<sup>17</sup> He joined appellees' motion to enlarge the time for oral argument, describing himself in that motion as one of the appellees.<sup>18</sup> When that motion was denied, he negotiated with Kaiser–AXA's counsel to split the appellees' oral-argument time, and appeared personally before this Court to deliver oral argument. He did all these things *after* reading T&B's brief with its assignment of errors.

The *Greenfield* case was cited below, and the similarities between its facts and those here were discussed at length in T&B's trial-court brief. Yet neither Hayes nor the trial court has mentioned *Greenfield* or attempted to distinguish it.

The only authorities offered by the trial court to support its grant of the motion are *Shear v. Shear*, 96-0934 (La. App. 5th Cir. 5/28/97), 695 So. 2d 1026, and *McGowan v. Ramey*, 484 So. 2d 785 (La. App. 1st Cir. 1986). But neither case supports the proposition that an appellate decree, reversing the entirety of the appealed judgment, is limited by the manner in which the issues were presented to the appeals court. Rather, this court's decision in *Shear* simply held that the Court could not consider a prescription issue because there was no judgment on that point

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<sup>17</sup> Exh. 6, *infra*.

<sup>18</sup> Exh. 7, *infra*.

in the trial court. And in *McGowan*, the court was unable to consider the appeal because no error whatsoever was assigned.

Hayes's conduct before this Court proves that his counsel understood two facts: (1) Hayes was included in T&B's appeal; and (2) the Court of Appeal's judgment would affect Hayes. Having participated fully in the appellate proceedings leading to the Court's judgment, Hayes cannot genuinely claim to be unaffected by that judgment.

## **2. Request for sanctions.**

A lawyer who signs a pleading certifies that the pleading is well grounded in fact, is warranted by existing law or a good-faith argument for change in existing law, and is not interposed for any improper purpose such as harassment. *See* La. C.C.P. Art. 863(B). When a lawyer signs a pleading in violation of this provision, "the court shall impose upon" the lawyer or the lawyer's client, or both, "an appropriate sanction which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee." La. C.C.P. Art. 863(D).

Here, Hayes's counsel has signed a pleading that is not well grounded in fact, that disregards the applicable Code of Civil Procedure articles and decisions of the Louisiana Supreme Court, and that cannot possibly have been filed for any proper purpose.

### ***A. Not grounded in fact.***

This Court's decree unambiguously reversed the JNOV in its entirety, without restriction to any appellee. Hayes's motion, seeking to execute a judgment that has been reversed, flouts this Court's judgment. This alone makes the signing of Hayes's motion sanctionable.

Moreover, the words in Hayes's pleading are belied by the actions of his counsel before this Court. As stated above, after being served with and reading T&B's original brief with its assignment of errors, Hayes's counsel continued his full participation in the appellate proceedings, thus tacitly conceding that he had a stake in the appeal.

***B. Not warranted by law.***

Hayes's motion violates multiple controlling legal authorities. By attempting to limit this Court's judgment through parsing of T&B's assignment of errors, his motion violates La. C.C.P. Art. 2129 and the Louisiana Supreme Court's decisions in *Georgia Gulf* and *Nicholas*, cited above. Moreover, he disregards *Greenfield*, the Louisiana decision most closely on point. These authorities have been cited in two prior filings in opposition to Hayes's motion: an opposition memorandum in the trial court and a prior writ application in this Court. Yet to date, Hayes has failed to distinguish any of these controlling authorities; instead, he has ignored them. The trial court's failure to mention these controlling authorities in its judgment does not excuse Hayes's counsel from the responsibility to address them.

***C. Interposed to harass T&B.***

No legitimate purpose is served by Hayes's pleading. His position has no merit, procedurally or substantively. Even if his position had merit, the proper places to seek relief would have been with this Court (on rehearing) or the Louisiana Supreme Court (on writs). The only purpose served by his pleading is an improper one: to harass T&B.

In short, counsel's signature on Hayes's pleading is sanctionable under Article 863, on multiple grounds.

## Conclusion

This Court's March 28 judgment begins and ends with these words (underlining, bold print, and capitalization by this Court):

### **REVERSED; VERDICT REINSTATED**

The judgment under which Mr. Hayes claims recovery—the district court's JNOV—no longer exists. The original jury verdict has been made the judgment of the Court, and that verdict wholly exonerates T&B of any liability to *any* party, including Hayes.

The active involvement of Hayes's counsel in the appellate proceedings — most of which occurred *after* he was served with T&B's original brief — shows his clear understanding that Hayes's rights would be adjudicated by this Court. His current position is contrary to his prior actions before this Court. His position and the trial court's judgment are contrary to the plain language of this Court's decree.

In its March 28 judgment, this Court held that the jury had a reasonable basis for finding T&B blameless.<sup>19</sup> This holding, now final, is the law of the case, and renders judgment dismissing Hayes's claims against T&B entirely “just, legal, and proper upon the record on appeal.” La. C.C.P. Art. 2164. T&B is entitled to the benefits of the jury's verdict and this Court's March 28 judgment.

For all these reasons, T&B asks that this Court grant a supervisory writ, to reverse the judgment below, and to state unequivocally (again) that its March 28 judgment applies to Hayes's claim. T&B further prays that appropriate sanctions be levied against Hayes's counsel.

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<sup>19</sup> Exh. 8 pp. 12–15 *infra*.

Respectfully submitted,

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