

COURT OF APPEAL  
FOURTH CIRCUIT  
STATE OF LOUISIANA

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

ROSARIO SOARES

Plaintiff–Respondent

versus

TIDEWATER, INC., et al.

Defendants–Applicants

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From the Civil District Court, Parish of Orleans  
Hon. Nadine M. Ramsey, Judge

On Application for Supervisory Writ

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This application is filed on behalf of defendants–applicants:  
Tidewater Marine International, Inc.; Tidewater Marine, L.L.C.; Zapata  
Gulf Marine International, Ltd.; Zapata Gulf Marine, L.L.C.; Zapata  
Gulf Marine Operators, L.L.C.; Twenty Grand Marine Service, L.L.C.;  
Twenty Grand Offshore, Inc.; Jackson Marine, L.L.C.; and Pental  
Insurance Company, Ltd.

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**Application for Supervisory Writ**

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Civil Case

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## Affidavit of Verification and Service

State of Louisiana  
Parish of Orleans

Before me, the undersigned Notary, personally came and appeared Raymond P. Ward, who, after being duly sworn by me, Notary, testified that the allegations in this Application for Supervisory Writ are true, and that a copy of this application has been served by mail on the following persons:

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Raymond P. Ward

Sworn and subscribed before me  
on this date, August \_\_\_\_, 2006.

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Notary

## **Statement of Jurisdiction**

Defendants–applicants invoke this Court’s supervisory jurisdiction under La. C.C.P. Art. 2201 and Rule 4, Uniform Rules of La. Courts of Appeal. The judgment complained of was rendered and signed on July 25, 2006, and notice of judgment was mailed the same date. Upon being notified of applicants’ intent to apply for a supervisory writ, the trial court set a return date of August 24, 2006. This writ application has been filed timely under Rule 4–3, Uniform Rules of La. Cts. of App. Therefore, this Court has jurisdiction to review the judgment complained of.

## Statement of the Case

This case has previously been before this Court. In a decision rendered January 12, 2005, this Court affirmed a judgment sustaining peremptory exceptions and dismissing the plaintiff's suit as to two defendants. *Soares v. Tidewater, Inc.*, 2004-1154 (La. App. 4 Cir. 1/12/05), 895 So.2d 568, *writ denied*, 2005-1120 (La. 6/17/05), 904 So.2d 710.<sup>1</sup> The issues raised by this application are:

1. Is this Court's January 12, 2005 judgment the law of the case, requiring dismissal of the plaintiff's claims against the remaining defendants?
2. If so, did the trial court err by refusing to grant the remaining defendants' motion for summary judgment, and instead staying the proceedings?

The facts are fairly simple. The plaintiff, Rosario Soares, alleged that he was a seaman and a citizen of the Republic of India.<sup>2</sup> He alleged that on October 23, 1998, he was injured while working on a vessel located in navigable waters off the coast of the United Arab Emirates.<sup>3</sup> He further alleged that each of the following defendants was his direct or indirect employer, the owner or operator of the vessel, or both:

- Tidewater, Inc.<sup>4</sup>

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<sup>1</sup> Appendix 29–54.

<sup>2</sup> Appendix 3.

<sup>3</sup> Appendix 4. The defendants contested Soares's allegation about where he was injured; they believe that he was injured at his home in India. But for purposes of this writ application, the Court can assume that the injury occurred where Soares alleged it occurred.

<sup>4</sup> Seaman's petition ¶ III, Appendix 3.

- Tidewater Marine International, Inc.<sup>5</sup>
- Zapata Gulf Marine International, Ltd.<sup>6</sup>
- Zapata Gulf Marine, L.L.C.<sup>7</sup>
- Zapata Gulf Marine Operators, L.L.C.<sup>8</sup>
- Al Wasl Marine, Ltd.<sup>9</sup>
- Tidewater Marine, L.L.C.<sup>10</sup>
- Twenty Grand Marine Service, L.L.C.<sup>11</sup>
- Twenty Grand Offshore, Inc.<sup>12</sup>
- Jackson Marine, L.L.C.<sup>13</sup>

Finally, he alleged that defendant Pental Insurance Co., Ltd. is a liability insurer responsible for the damages he complains of.<sup>14</sup>

Soares disclaimed any reliance on Louisiana law.<sup>15</sup> Rather, he claimed entitlement to recovery under the Jones Act, general maritime law, the law of the United Arab Emirates, the law of India, “the laws of any foreign nation,” and “the international *lex maritime*.”<sup>16</sup>

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<sup>5</sup> *Id.*,

<sup>6</sup> *Id.*

<sup>7</sup> First supplemental and amending petition ¶ III(a), Appendix 8.

<sup>8</sup> *Id.*, ¶ III(b).

<sup>9</sup> *Id.*, ¶ III(c). In addition, Soares alleges that he had a contract of employment with Al Wasl Marine, Ltd. See fourth supplemental and amending petition ¶ 2, Appendix 16.

<sup>10</sup> *Id.*, ¶ III(d), Appendix 9.

<sup>11</sup> *Id.*, ¶ III(e).

<sup>12</sup> *Id.*, ¶ III(f).

<sup>13</sup> Sixth supplemental and amending petition ¶ 2, Appendix 20.

<sup>14</sup> First supplemental and amending petition ¶ III(i), Appendix 10.

<sup>15</sup> Third supplemental and amending petition ¶ 1, Appendix 14.

<sup>16</sup> *Id.* (Jones Act and general maritime law); fifth supplemental and amending petition ¶ 1 (Jones Act, general maritime law, law of the UAE, law of India, and

In response to Soares’s petition, the defendants pleaded peremptory exceptions of no right of action and no cause of action.<sup>17</sup> The basis of these exceptions was 46 U.S.C. App. § 688(b), which generally denies recovery under the Jones Act or general maritime law to foreign seamen injured in another country’s territorial waters:

**(b) Limitation for certain aliens; applicability in lieu of other remedy**

- (1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred—
  - (A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources—including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and
  - (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term “continental shelf” has the meaning stated in article I of the 1958 Convention on the Continental Shelf.
- (2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person—
  - (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

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other foreign law); sixth supplemental and amending petition ¶ 2 (same, plus “the international *lex maritime*.”).

<sup>17</sup> Appendix 22, 25. In addition, Al Wasl pleaded a declinatory exception of lack of personal jurisdiction. Appendix 25. Because Al Wasl’s peremptory exception has been sustained and, on appeal, affirmed, its declinatory exception is now moot.

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

On May 13, 2004, the trial court sustained the exceptions as to defendants Tidewater, Inc. and Al Wasl Marine, L.L.C. and dismissed Soares's suit as to these two defendants.<sup>18</sup> Soares appealed, but this Court rendered a detailed, 20-page opinion affirming the trial court's May 13, 2004 judgment. *Soares v. Tidewater, Inc.*, 2004-1154 (La.App. 4 Cir. 1/12/05), 895 So.2d 568, *writ denied*, 2005-1120 (La. 6/17/05), 904 So.2d 710 ("*Soares I*").<sup>19</sup>

Armed with this Court's judgment, the remaining defendants returned to the trial court and filed a motion for summary judgment.<sup>20</sup> The basis of this motion was simple: This Court's judgment in favor of Tidewater, Inc. and Al Wasl Marine, L.L.C. is the law of the case, and the legal basis for dismissing the claims against those two defendants applies equally to all the others.<sup>21</sup>

In opposing this motion, Soares did not deny any material fact that the movers asserted to be undisputed; nor did he establish any distinction between his claims against the dismissed defendants and those against the remaining defendants. Instead, he advised the trial court that he had instituted proceedings in the courts of the United

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<sup>18</sup> Judgment of May 13, 2004, Appendix 27–28.

<sup>19</sup> Appendix 29–54.

<sup>20</sup> Appendix 56 (motion for summary judgment).

<sup>21</sup> *Id.*; *see also* Appendix 58 (statement of uncontested material facts).

Arab Emirates, and implored the trial court to stay its proceedings pending the conclusion of the UAE proceedings.<sup>22</sup>

At the conclusion of the summary-judgment hearing (held July 21, 2006), the trial court took the matter under advisement. On July 25, the trial court rendered judgment staying its proceedings, thus refusing to grant the defendants' motion for summary judgment.<sup>23</sup>

The remaining defendants now seek a supervisory writ from this Court to review the trial court's July 25 judgment.

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<sup>22</sup> Appendix 60–61.

<sup>23</sup> Appendix 1–2.

## **Issues of Law Presented for Review**

1. In *Soares I*, this Court interpreted 46 U.S.C. App. § 688(b) to require dismissal of Soares's claims against two defendants. Since no distinction exists between his claims against these two defendants and his claims against the remaining defendants, does law of the case require dismissal of his claims against the remaining defendants?
  
2. La. C.C.P. Art. 966(B) requires a trial court to render summary judgment "forthwith" if the record shows the absence of any genuine issue of material fact and the mover's entitlement to judgment as a matter of law. In light of Art. 966(B), did the trial court err in refusing to render summary judgment and, instead, staying the proceedings?

## **Assignment of Error**

The trial court erred in staying the proceedings rather than granting the remaining defendants' motion for summary judgment.

## Memorandum in Support of Application

### **1. The *Herlitz* factors call for this Court to grant a writ and to consider the merits of this application.**

“When the overruling of the exception is arguably incorrect, when a reversal will terminate the litigation, and when there is no dispute of fact to be resolved, judicial efficiency and fundamental fairness to the litigants dictates that the merits of the application for supervisory writs should be decided in an attempt to avoid the waste of time and expense of a possibly useless future trial on the merits.” *Herlitz Const. Co., Inc. v. Hotel Investors of New Iberia, Inc.*, 396 So.2d 878 (La. 1981).

All three *Herlitz* factors apply here. In light of La. C.C.P. Art. 966 and this Court’s judgment in *Soares I*, the judgment complained of is incorrect — certainly it is arguably incorrect. Reversal will terminate the litigation. And Soares’s failure to contradict defendants’ statement of uncontested material facts establishes that there is no dispute of fact to be resolved. Accordingly, “judicial efficiency and fundamental fairness to the litigants dictates that the merits of the application for supervisory writs should be decided ....” *Herlitz*, 396 So.2d at 878.

### **2. The trial court erred in failing to grant defendants’ motion for summary judgment.**

#### ***A. This Court should apply a de novo standard of review.***

A Louisiana appellate court reviews a ruling on a motion for summary judgment *de novo*, under the same criteria that govern the trial court’s consideration of the motion. Under La. C.C.P. Art. 966, summary judgment should be granted if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that

there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. *Guillory v. Interstate Gas Station*, 94-1767 p. 5 (La. 3/30/95), 653 So.2d 1152, 1155.

***B. In light of this Court's prior decision in this case, the law-of-the-case doctrine requires dismissal of Soares's claims against the remaining defendants.***

This Court's decision in *Soares I* is the law of the case and requires dismissal of Soares's claims against the remaining defendants.

The law-of-the-case doctrine refers to two rules applicable here:

- (1) the conclusive effects of appellate-court rulings at the trial on remand; and
- (2) the rule that an appellate court will ordinarily not reconsider its own rulings of law on a subsequent appeal in the same case.

*Bank One, N.A. v. Velten*, 2004-2001 pp. 5–6 (La. App. 4 Cir. 8/17/05), 917 So.2d 454, 458, *writ denied*, 2006-0040 (La. 4/28/06), 927 So.2d 283.

The doctrine describes the relationship between prior judgments by trial and appellate courts rendered within the same case. The policy reasons behind the doctrine include the following:

- (1) avoiding relitigation of the same issue;
- (2) promoting consistency of result in the same litigation; and
- (3) promoting efficiency and fairness to both parties by affording a single opportunity for the argument and decision of the matter at issue.

*Id.* p. 6, 917 So.2d at 458–59.

The doctrine unquestionably applies here. As the lengthy opinion in *Soares I* shows, this Court carefully and thoroughly analyzed the

application of 46 U.S.C. App. § 688(b) to Soares's claims, and concluded that the statute required dismissal of his claims against two defendants. Soares's claims against the remaining defendants are indistinguishable from his claims against the dismissed defendants. Indeed, in opposing summary judgment, Soares himself was unable to identify any distinction between the claims or to articulate any legal argument against application of law of the case.<sup>24</sup>

***C. The trial court's stay of proceedings violates the requirement of La. C.C.P. Art. 966(B) that summary judgment be rendered "forthwith."***

La. C.C.P. Art. 966(B) requires a trial court to render summary judgment "forthwith" if the record shows the absence of any genuine issue of material fact and the mover's entitlement to judgment as a matter of law. *Forthwith* means:

1. Immediately; without delay.
2. Directly; promptly; within a reasonable time under the circumstances.

Black's Law Dictionary 664 (7th ed. 1999). The Code of Civil Procedure allows delay in rendering summary judgment in only one instance: when the party opposing the motion files affidavits establishing the need to conduct additional discovery. La. C.C.P. Art. 967(C). But when there is no showing that further discovery is necessary, the Code does not give a trial court the option of simply staying proceedings.

Here, Soares did not file any affidavits in opposition to the motion for summary judgment; nor did he show the need to conduct any additional discovery. Therefore, the Code did not give the trial court the

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<sup>24</sup> See Appendix 60–61.

option of a continuance — much less an indefinite stay of all proceedings. Rather, the Code required the trial court to render a decision on the summary-judgment motion “forthwith.”

### **Prayer for Relief**

The *Herlitz* factors call for this Court to exercise its supervisory jurisdiction here. Under the law-of-the-case doctrine, this Court’s decision in *Soares I* entitles the remaining defendants to summary judgment dismissing Soares’s claims against them. And La. C.C.P. Art. 966(B) requires summary judgment to be rendered “forthwith.” The remaining defendants pray that this Court grant a supervisory writ, reverse the trial court’s judgment, and render summary judgment in their favor dismissing Soares’s petition.

Respectfully submitted:

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