NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 1656
and 2012 CW 1926

THERESA DAIGLE, WIFE OF/AND RODNEY DAIGLE

VERSUS

TALLOW CREEK, LLC, SOUTHERN HOMES, LLC, ASI UNDERWRITERS, ABC INSURANCE COMPANY, MNO INSURANCE COMPANY, JOHN DOE SUPPLY AND JOHN DOE SUBCONTRACTORS

Judgment Rendered: June 7, 2013

Appealed from the
Twenty-second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 2009-17466

Honorable Richard A. Swartz, Judge Presiding

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Mc McClendon, J. I concur with the result Reached by the majority.

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

WHIPPLE, C.J.

In this Chinese-drywall litigation, the homebuilder appeals the trial court's judgment, granting the motion for summary judgment filed by the drywall sub-contractor's insurer and dismissing the homebuilder's claims for indemnity and defense costs against the insurer. The homebuilder also filed in this court a motion for leave to file an appendix attached to its reply brief. Additionally, the homebuilder filed an application for supervisory writs from the trial court's ruling continuing without date cross-motions for summary judgment filed by the homebuilder and the drywall sub-contractor on the issue of contractual duty to defend, which writ application was referred to the panel considering the related appeal.[1] For the following reasons, we deny the motion for leave to file the appendix, deny the writ application, vacate the judgment granting summary judgment, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

In December 2009, Rodney and Theresa Daigle filed a "Petition for Breach of Contract, Warranty and for Damages" in the trial court, alleging that during construction, Chinese-manufactured drywall had been installed in their home, which they purchased in October 2006, and it had caused physical damage to the property. They named as defendants: Tallow Creek, LLC, the alleged seller of the home; Southern Homes, LLC, the alleged builder of the home[2]; ASI Underwriters, the Daigles' homeowner's insurer; "ABC Insurance Company," as Tallow Creek's general liability insurer;

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[1] Daigle v. Tallow Creek, 2012 CW 1926 (2/28/13) (unpublished writ action).

[2] Southern Homes contended that it had been improperly named as a defendant and that it had in no way participated in the construction or design of the Daigles' home. Thus, it raised exceptions of no cause of action and no right of action. The Daigles' claims against Southern Homes were ultimately dismissed with prejudice.

"XYZ Insurance Company," as Southern Homes's general liability insurer; "John Doe Supply," the drywall supplier; "John Doe Subcontractors," the drywall subcontractor; and "MNO Insurance Company," the general liability insurer of the drywall supplier or the drywall subcontractor.

On April 27, 2010, Tallow Creek answered the petition, acknowledging that it was the builder of the Daigles' home and averring that all claims against it were limited to those available under the New Home Warranty Act ("NHWA"), LSA-R.S. 9:3141 et seq. Tallow Creek also filed third-party demands against, among others, Graf's Drywall, LLC, the drywall subcontractor; Western World Insurance Company, the insurer of Graf's; and Interior/Exterior Building Supply, LP ("InEx") and Interior/Exterior Enterprises, LLC, the alleged suppliers of the Chinese-manufactured drywall. Tallow Creek contended that Graf's Drywall had installed the drywall in the Daigles' home and also that Graf's Drywall had contractually agreed to indemnify and hold harmless Tallow Creek from any and all damages rendered against it. Additionally, Tallow Creek averred that Graf's Drywall "was to have procured insurance naming Tallow Creek as an additional insured" and that "[b]ased upon the issuance of said policies, Graf's [Drywall] and ***its insurers*** are obligated to provide Tallow Creek indemnity coverage ***and defense*** in this matter." (Emphasis added).

Meanwhile, the United States District Court for the Eastern District of Louisiana was handling preliminary settlement proceedings in multidistrict litigation involving Chinese-drywall claims, and on May 13, 2011, the federal district court in In re: Chinese-Manufactured Drywall Products

Liability Litigation, MDL No. 2047, entered an order,[3] conditionally certifying a nationwide class consisting of "[a]ll persons or entities with claims, against the Settling Defendants arising from, or otherwise related in any way to Chinese Drywall sold, marketed, distributed, and/or supplied by InEx" and preliminarily approving a class action settlement agreement reached by the Plaintiffs' Steering Committee, InEx, and InEx's primary insurers Arch Insurance Co. and Liberty Mutual Insurance Co. (referred to by the federal district court as the "InEx Settlement"). According to the federal district court's May 13, 2011 Order, the InEx Settlement provided for settlement of the claims against InEx, its primary insurers, and "certain entities downstream in the chain-of-commerce from InEx."[4]

In furtherance of its preliminary approval of the InEx Settlement, the federal district court further issued a stay in its May 13, 2011 order, as follows: **"Prosecution of the 'Related Actions'** (including, but not limited to, those listed in Exhibit 1.25 to the InEx Settlement) **against InEx, the Insurers, and the other Settling Defendants** shall be stayed pending the settlement proceedings and further Orders of the Court." (Emphasis added). The instant state court suit, Daigle v. Tallow Creek, LLC, bearing docket number 2009-17466 in the 22nd JDC, is listed in Exhibit 1.25 as a "Related Action" referenced in the federal court's May 13, 2011 Order

[3]The Order related to the following federal suits: Wiltz v. Beijing New Building Materials Public Limited Co., No. 10-361; Payton v. Knauf Gips, KG, No. 09-7628; Silva v. Arch Insurance Co., No. 09-8034; Silva v. Interior Exterior Building Supply, LP, No. 09-8030; Gross v. Knauf Gips, KG, No. 09-6690; Rogers v. Knauf Gips, KG, No. 10-362; Amato v. Liberty Mutual Insurance Co., No. 10-932; Abel v. Taishan Gypsum Co., Ltd., No. 11-80; and Abreu v. Gebrueder Knauf Verwaltungsgesellschaft, KG, No. 11-252.

[4]The InEx Settlement document is not contained in the record on appeal. With regard to the "entities downstream in the chain-of-commerce from InEx" referenced in the May 13, 2011 Order, the Order cites to "R. Doc. 8628." However, that cited document is also not contained in the record before us in this state court suit.

staying those related actions. Accordingly, by its May 13, 2011 Order, the federal district court stayed prosecution of the instant action, "**against InEx, the Insurers, and the other Settling Defendants** ... pending the settlement proceedings [in the federal district court] and further Orders of the Court."

On June 16, 2011, InEx then filed in the instant state court action a "Notice of Conditional Certification of a Nationwide Class Action, Preliminary Approval of a Class Settlement, and Suggestion of a Stay of these Proceedings Pursuant to 28 U.S.C. §1651," informing the trial court below of the federal court's May 13, 2011 Order and asserting that "pursuant to 28 U.S.C. §1651, upon issuance of the May 13, 2011 Order, a stay went into immediate effect with respect to further prosecution of any claims against [InEx] and the Settling Parties." After considering the Notice filed by InEx, the trial court below issued an order on June 17, 2011, ordering that "this matter is stayed pending resolution of class settlement proceeding before the United States District Court for the Eastern District of Louisiana in the matter entitled *In re: Chinese Manufactured Drywall Products Liability Litigation*, MDL [N]o. 2047, or further orders of the United States District Court."

Nonetheless, despite the May 13, 2011 Order of the federal district court staying prosecution of this action "against InEx, the Insurers, and the other Settling Defendants" pending settlement proceedings and further orders of the federal court and the June 17, 2011 Order of the trial court below, staying "this matter ... pending resolution of class settlement proceeding" in the federal district court, the parties in the instant state court suit continued to prosecute this action below. Specifically relevant herein, on September 26, 2011, Tallow Creek filed an exception of peremption, contending that the Daigles' claims against it were perempted under the

NHWA because the suit was filed more than two years after the relevant peremptive period set forth in LSA-R.S. 9:3144(A)(1). Following a hearing on the exception and a stipulation by counsel for the Daigles that the Chinese-manufactured drywall installed in the Daigles' home was installed over two years before the state court suit was filed, the trial court signed a judgment on November 7, 2011, maintaining Tallow Creek's exception and dismissing the Daigles' claims against Tallow Creek and Southern Homes with prejudice.

Moreover, after the dismissal of the Daigles' claims against Tallow Creek, Western World moved for summary judgment, seeking dismissal of Tallow Creek's third-party demand against it. As mentioned above, Western World is the general liability insurer of Graf's Drywall, the drywall subcontractor that installed the drywall in the Daigles' home. In support of its motion, Western World averred that there were no specific allegations against it in the third-party demand other than its status as an insurer of Graf's Drywall and, thus, that Tallow Creek's recovery on its third-party demands were "for any damages which may be awarded to the plaintiffs against Tallow Creek" and, as such, "depend[ed] upon the success of the main demand." Western World further averred that, because the Daigles' claims against Tallow Creek had been dismissed, Tallow Creek would "never be cast in judgment in this case." Accordingly, Western World asserted, Tallow Creek's action against Western World was nothing "other than a claim for indemnity on the main demand," and with dismissal of the main demand against it, there was "nothing for which Tallow Creek may

seek indemnity from Graf's Drywall or Western World."[5]

In opposition to the motion for summary judgment, Tallow Creek asserted that Western World had failed to address Tallow Creek's claim against it for a defense. Tallow Creek noted that in paragraph 12 of its third-party demand, it averred that "Graf's [Drywall] **and its insurers** are obligated to provide Tallow Creek indemnity coverage and **defense** in this matter." (Emphasis in original). Tallow Creek argued that its demand for defense against Western World is based upon clear contract language in the contract between Tallow Creek and Graf's Drywall and, thus, that "[r]egardless of whether Tallow Creek could be cast in judgment in this matter, Tallow Creek has incurred and continues to incur defense costs," for which Western World is obligated to pay.

In support of its opposition, Tallow Creek filed: (1) the addendum to the Tallow Creek-Graf's Drywall subcontract, obligating Graf's Drywall to defend Tallow Creek "against any and all claims, ... costs and expenses (including, but not limited to, ... attorney fees and costs ...), which arise or are in any way connected with the work performed, materials furnished, or services provided" by Graf's Drywall and further obligating Graf's Drywall to provide Tallow Creek with "a Certificate of Insurance and additional insured endorsement naming [Tallow Creek] as an additional named insured..."; and (2) a printout purporting to establish the attorney's fees incurred by Tallow Creek. Neither Western World nor Tallow Creek filed the general liability insurance policy issued by Western World to Graf's Drywall or any "additional insured" endorsement naming Tallow Creek as

[5]In support of its motion, Western World filed as exhibits: (1) Tallow Creek's answer and exceptions to the Daigles' petition and third-party demand against Western World; and (2) the trial court's November 7, 2011 judgment dismissing the Daigles' claims against Tallow Creek.

an insured under such policy.

Following a hearing on the motion, the trial court, by judgment dated June 6, 2012, granted Western World's motion for summary judgment and dismissed Tallow Creek's third-party demand against it. In reasons for judgment, the trial court noted that Tallow Creek sought indemnity "as well as the cost of defense" from Western World, but concluded that a third-party defendant is liable to the third-party plaintiff only if the third-party plaintiff is cast in judgment.

From this June 6, 2012 judgment, Tallow Creek has brought the instant appeal, contending that the trial court erred in failing to recognize that its third-party demand included "an *independent claim for defense* against Western World pursuant to the contract between Tallow Creek and Graf's [Drywall]." Tallow Creek contends on appeal that "Western World, as the insurer of Graf's [Drywall], is liable for Graf's [Drywall's] obligation to defend Tallow Creek that Graf's [Drywall] undertook in the Tallow Creek-Graf's [Drywall] Contract."

Meanwhile, on April 23, 2012, Graf's Drywall also filed a motion for summary judgment, seeking dismissal of Tallow Creek's third-party demand against it, on the basis that its "alleged indemnity obligation [to Tallow Creek] never accrued" where Tallow Creek "ha[d] been dismissed from the main demand." Tallow Creek then filed a cross-motion for summary judgment against Graf's Drywall on June 12, 2012, contending that Graf's Drywall's contractual obligations to Tallow Creek included paying for Tallow Creek's defense in this matter and, thus, that Tallow Creek was

entitled to judgment against Graf's Drywall for those defense costs incurred.[6]

A hearing on the cross-motions for summary judgment was scheduled for June 20, 2012. However, according to the minute entry for that date, at the scheduled hearing, counsel for InEx "advised the Court of the Stay Order filed in this matter in June 2011 and objected to these matters going forward at this time." The minute entry further notes that counsel for Tallow Creek and Graf's Drywall argued that the "'Stay Order' issue" would not be raised and that they wanted to proceed. Nonetheless, after reviewing the record, the trial court "ordered the motions for summary judgment are hereby continued without date pending a determination that the Stay Order does not apply." It is from this ruling that Tallow Creek filed its writ application that was referred to this panel for consideration.

MOTION FOR LEAVE TO FILE APPENDIX

At the outset, we address Tallow Creek's motion filed in this court for leave to file an appendix attached to its reply brief, containing certificates of liability insurance and the commercial general liability policy issued by Western World to Graf's Drywall. Western World opposed the motion, noting that the documents contained in the appendix, and attached to Tallow

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[6]In support of its motion, Tallow Creek filed the same two exhibits it filed in opposition to Western World's motion for summary judgment: (1) the addendum to the Tallow Creek-Graf's Drywall subcontract, obligating Graf's Drywall to defend Tallow Creek "against any and all claims, ... costs and expenses (including, but not limited to, ... attorney fees and costs ...), which arise or are in any way connected with the work performed, materials furnished, or services provided" by Graf's Drywall and further obligating Graf's Drywall to provide Tallow Creek with "a Certificate of Insurance and additional insured endorsement naming [Tallow Creek] as an additional named insured..."; and (2) a printout purporting to establish the attorney's fees incurred by Tallow Creek.

Later, Tallow Creek fax-filed on June 18, 2012, a reply memorandum in support of its cross-motion for summary judgment and supplemental opposition to Graf's Drywall's motion for summary judgment, in which it averred that Graf's Drywall had breached its subcontract with Tallow Creek when Graf's Drywall "failed to make Tallow Creek an **additional insured** under the insurance policies it held while performing its drywall work on the Daigle house." (Emphasis in original).

Creek's reply brief, were not offered or admitted into evidence in connection with Western World's motion for summary judgment and are not contained in the record on appeal.

An appellate court shall render judgment "upon the record on appeal." LSA-C.C.P. art. 2164. Attachments to a brief that were not considered by the trial court and that do not constitute part of the appellate record will not be considered by this court on appeal. LSA-C.C.P. art. 2128; Dawson v. Cintas Corporation, 97-2275 (La. App. 1st Cir. 6/29/98), 715 So. 2d 165, 167. Accordingly, Tallow Creek's motion for leave to file the appendix is denied.

WRIT APPLICATION NUMBER 2012 CW 1926

In its writ application, Tallow Creek seeks review of the trial court's "refusal to hear" the cross-motions for summary judgment without first determining "whether Graf's [Drywall] was entitled to the protection of the [InEx] Stay Order." Tallow Creek argues that "[i]t is undisputed that Graf's [Drywall] did *not* purchase the Chinese-manufactured drywall it installed in the Daigle Plaintiffs' home from [InEx]" and, thus, that "[i]t remains unclear how Graf's [Drywall] or its insurer, Western World, could be entitled to the protection of the [InEx] Stay Order." Tallow Creek further asserts that Graf's Drywall, its insurer Western World, and InEx waived whatever right they may have had to raise the InEx Stay Order as a defense to Tallow Creek's cross-motion for summary judgment when: Western World filed its own motion for summary judgment; InEx did not raise the issue of the InEx stay order during the briefing or at the hearing on Western World's motion for summary judgment; Graf's Drywall filed its own proactive motion for summary judgment against Tallow Creek; and counsel for Graf's Drywall

informed counsel for Tallow Creek that Graf's Drywall would not avail itself of whatever protection the Stay Order may have provided it.

At the outset, we note that the June 20, 2012 minute entry does not indicate that the trial court "refused to hear" the cross-motions for summary judgment as contended by Tallow Creek. Instead, the court "continued" the hearing on the motions. A continuance may be granted in any case if there is good ground therefor. LSA-C.C.P. 1601. Moreover, a trial judge has wide discretion in the control of his docket, in case management, and in determining whether a motion for continuance should be granted. Willey v. Roberts, 95-1037 (La. App. 1st Cir. 12/15/95), 664 So. 2d 1371, 1374, writ denied, 96-0164 (La. 3/15/96), 669 So. 2d 422. Thus, the trial court's ruling will not be disturbed on appeal in the absence of a clear showing of abuse of that discretion. Norwood v. Winn Dixie, 95-2123 (La. App. 1st Cir. 5/10/96), 673 So. 2d 360, 362. Appellate courts interfere in such matters only with reluctance and in extreme cases. Willey, 664 So. 2d at 1374.

As stated above, on the date of the scheduled hearing, counsel for InEx reminded the court of the federal court's May 13, 2011 stay order "filed in this matter in June 2011" and objected to the motions going forward at that time. Upon reviewing the record, which contains the federal court's stay order, the trial court below continued the motions "without date pending a determination that the Stay Order does not apply."

Construing InEx's "objection" to the motions being heard at that time as a motion to continue the hearing, see Perkins v. Willie, 2001-0821 (La. App. 1st Cir. 2/27/02), 818 So. 2d 167, 169, we find no abuse of the trial court's discretion in this matter in continuing the hearing on the cross-motions pending a determination as to the applicability of the federal court's Stay Order.

The All Writs Act, 28 U.S.C. §1651, authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." And, while the Anti-Injunction Act, 28 U.S.C. §2283, limits the federal courts' authority to enjoin state court proceedings, the Act authorizes a federal court to enjoin such proceedings when expressly authorized by statute, where necessary in aid of the federal court's jurisdiction, or where necessary to protect or effectuate the court's judgments. Chick Kam Choo v. Exxon Corporation, 486 U.S. 140, 145-146, 108 S. Ct. 1684, 1689, 100 L. Ed. 2d 127 (1988); In re Vioxx Products Liability Litigation, 869 F. Supp. 2d 719, 723-724 (E.D. La. 2012).

With respect to the "in aid of jurisdiction" exception, federal injunctive relief may be necessary to prevent a state court from interfering with a federal court's consideration or disposition of a case and thereby impairing the federal court's flexibility and authority to decide that case. In re Vioxx Products Liability Litigation, 869 F. Supp. 2d at 725. Moreover, while the aid of jurisdiction exception has traditionally applied only where a *res* was at stake, some of the federal circuit courts of appeal have applied it in the context of complex multidistrict litigation, to enjoin a concurrent state court *in personam* proceeding. In re Vioxx Products Liability Litigation, 869 F. Supp. 2d at 725-726. See, e.g., In re: Diet Drugs, 282 F.3d 220, 233-239 (3rd Cir. 2002); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1024-1025 (9th Cir. 1998); and In re Corrugated Container Antitrust Litigation, 659 F.2d 1332, 1334-1335 (5th Cir. 1981), cert. denied, 456 U.S. 936, 102 S. Ct. 1993, 72 L. Ed. 2d 456 (1982). Thus, "[u]nder an appropriate set of facts, a federal court entertaining complex litigation, especially when it involves a substantial class of persons from multiple states, or represents a

consolidation of cases from multiple districts, may appropriately enjoin state court proceedings in order to protect its jurisdiction," a concern that is particularly significant where there are conditional class certifications and impending settlements in federal actions. In re: Diet Drugs, 282 F.3d at 235-236.

In the instant case, the federal district court in In re: Chinese-Manufactured Drywall Products Liability Litigation, MDL No. 2047, multidistrict litigation involving at least one defendant herein, InEx, the supplier of the Chinese-manufactured drywall, issued a stay order, specifically staying prosecution of certain enumerated state court actions "against InEx, the Insurers and the other Settling Defendants." An excerpt of the list of state court actions affected, contained in Exhibit 1.25 to the InEx Settlement, was filed into the record of this state court action together with the federal court's May 13, 2011 Order, demonstrating that the state court matter before us is one of the "Related Actions" to which the federal court's May 13, 2011 Order applies.

The federal court's May 13, 2011 Order raises a question as to whether the stay order has the effect of staying prosecution of Related Actions, such as the instant state court suit, in their entirety as actions "against InEx, the Insurers and the other Settling Defendants" or whether the federal court intended to stay the Related Actions only as to prosecution of those actions "against InEx, the Insurers and the other Settling Defendants."

To the extent that the federal court's May 13, 2011 Order can be read to stay prosecution of the Related Actions only "against InEx, the Insurers and the other Settling Defendants," an unresolved question then remains as to the identity of "the other Settling Defendants" and whether the parties involved in the proceedings below at issue in the writ application and appeal

before this panel are "other Settling Defendants" as provided in that Order. With regard to the identity of "the other Settling Defendants," the federal court's May 13, 2011 Order provides at one point therein that the term "Settling Defendants" refers, in part, to "the Downstream InEx Releasees (*including, but not limited to*, those indentified in Exhibit 1.10 to the InEx Settlement...except that any Builder listed on Exhibit 1.10 shall not be considered a Settling Defendant)." (Emphasis added). However, Exhibit 1.10 is not contained in the record before us to resolve and determine whether the parties before the court are "Downstream InEx Releasees."[7]

The federal court's May 13, 2011 Order further states that "[c]apitalized terms used in this Order shall have the same meaning as those defined in the Settlement Agreement Regarding Claims Against Interior-Exterior in MDL 2047 dated April 25, 2011 (the 'InEx Settlement')." However, while the terms "Settling Defendants" and "InEx Releasees" are capitalized in the May 13, 2011 Order, the InEx Settlement is also not contained in the record of this state court proceeding to allow for a determination of the intended meaning and scope of those terms.

Thus, even if the federal court's May 13, 2011 Order were intended to be narrowly construed as ordering a stay of the prosecution of this state court action only "against InEx, the Insurers and the other Settling Defendants," a determination cannot be made from the record of this state court proceeding as to the identity of the other Settling Defendants and, thus, as to whether any action or ruling by the trial court on the cross-motions for summary

[7]Additionally, to the extent that the list provided in Exhibit 1.10 does not constitute a complete list of "Downstream InEx Releasees," that exhibit alone may not allow for a determination as to whether the May 13, 2011 Stay Order applies to the parties involved in the proceedings below relating to the writ application and appeal now before this panel.

judgment of Tallow Creek and Graff's Drywall would have violated the federal court's May 13, 2011 Order.

For these reasons, and without even addressing the June 17, 2011 order of the trial court below staying "this matter" pending resolution of the class settlement proceeding in the federal district court, we find no abuse of the trial court's wide discretion in continuing the hearing on the cross-motions for summary judgment pending a determination as to the applicability of the federal court's May 13, 2011 Stay Order to these particular proceedings.[8] Accordingly, Tallow Creek's writ application is denied.

TALLOW CREEK'S APPEAL OF THE JUNE 6, 2012 JUDGMENT DISMISSING TALLOW CREEK'S THIRD-PARTY DEMAND AGAINST WESTERN WORLD

Turning now to Tallow Creek's appeal of the dismissal of its third-party demand against Western World, we note that the procedural posture of this matter, as discussed at length above, causes this court great concern as to the propriety of continued prosecution of this matter following the issuance of the May 13, 2011 Stay Order by the federal court and the corresponding June 17, 2011 Stay Order by the trial court below. Notably, both of these stay orders were issued prior to the trial court hearing and ruling upon Western World's motion for summary judgment at issue in this appeal.

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[8]Moreover, we reject Tallow Creek's argument that Graf's Drywall, through its actions in filing its own motion for summary judgment and in informing Tallow Creek that it would not avail itself of the federal court's stay order, somehow waived any protections it may have had under the federal court's May 13, 2011 Order. As noted above, the purpose of a federal court stay order in complex multidistrict litigation is *to aid the federal court in its jurisdiction* by preventing a state court from interfering with a federal court's consideration or disposition of a case and thereby impairing the federal court's flexibility and authority to decide that case. In re Vioxx Products Liability Litigation, 869 F. Supp. 2d at 725-726.

While the trial court arguably could have implicitly vacated its own stay order by proceeding with the prosecution of various actions in this matter,[9] including the granting of Western World's motion for summary judgment, the same argument cannot be made with regard to the federal court's May 13, 2011 Stay Order. As discussed above, the record before us reveals that a federal stay order has been rendered affecting this matter. However, the extent and applicability of that order to the proceedings before us in this appeal cannot be determined on the record before us.

If the federal court's May 13, 2011 Stay Order were intended to stay prosecution of this matter in its entirety, then rendition of the judgment on appeal, granting Western World's motion for summary judgment, after such a stay was issued, violated the May 13, 2011 Stay Order of the federal court. If, on the other hand, the May 13, 2011 Stay Order were intended to apply only to InEx, the Insurers, and the other Settling Defendants, then the trial court's judgment granting Western World's motion for summary judgment nonetheless would have been rendered in violation of the May 13, 2011 Stay Order if indeed Western World were "another purported '[InEx] releasee'" under the InEx Settlement, as suggested by Tallow Creek in its related writ application addressed herein by this panel.

Given the unresolved questions surrounding the propriety of the June 12, 2012 trial court judgment on review in this appeal, in light of the issuance of May 13, 2011 Stay Order by the federal court (as well as the state's court's own stay order previously issued), we are constrained to

[9]Given the trial court's decision to continue the subsequent hearing on the cross-motions for summary judgment filed by Graf's Drywall and Tallow Creek, upon having the federal court's Stay Order brought to its attention, it is not clear from the record that the trial court actually intended to vacate its own stay order, issued in response to the federal court's Stay Order, in ruling on Western World's motion in the June 6, 2012 judgment before us on appeal.

conclude that we must decline to review the merits of the June 12, 2012 judgment. Indeed, to the extent the parties seek interpretation of or relief from the federal court's May 13, 2011 Stay Order, such relief should be obtained in the federal court prior to any action by the trial court herein. See In re Chinese-Manufactured Drywall Products Liability Litigation, MDL No. 2047 (E.D. La. 6/9/11), 2011 WL 2313866 (wherein Tallow Creek sought review or amendment of the precise May 13, 2011 Stay Order at issue herein so that it could proceed with its motion for summary judgment in a suit it filed in Orleans Parish against InEx and Graf's Drywall).

The appellate court may render any judgment that is just, legal and proper upon the record on appeal. LSA-C.C.P. art. 2164. The purpose of this article is to give the appellate courts freedom to do justice on the record irrespective of whether a particular legal point or theory was made, argued or passed on by the trial court. LSA-C.C.P. art. 2164, Official Revision Comments—1960, comment (a); Fidelity and Casualty Company of New York v. Clemmons, 198 So. 2d 695, 698, writ refused, 251 La. 27, 202 So. 2d 649 (1967). Given the issues regarding the trial court's potential lack of jurisdiction to render the judgment on appeal and the potential need for the parties to seek relief from the federal court's May 13, 2011 Stay Order in federal court, and in light of the fact that these issues were not considered by the parties or the trial court below, we vacate the trial court's June 12, 2012 judgment and remand this matter for further proceedings consistent with this opinion. See generally National Linen Service v. City of Monroe, 40,241 (La. App. 2nd Cir. 9/21/05), 911 So. 2d 913, 916 (concluding that remand of the matter therein without decision required the existing judgment to be set aside).

CONCLUSION

For the above and foregoing reasons, Tallow Creek, LLC's motion for leave to file an appendix attached to its reply brief is denied. Furthermore, Tallow Creek's application for supervisory writs bearing number 2012 CW 1926 is likewise denied. The June 12, 2012 judgment on appeal is vacated, and this matter is remanded for further proceedings consistent with the views expressed herein. Costs of this appeal are assessed equally against Tallow Creek, LLC, and Western World Insurance Company.

MOTION FOR LEAVE TO FILE APPENDIX DENIED; WRIT APPLICATION NUMBER 2012 CW 1926 DENIED; JUNE 12, 2012 JUDGMENT VACATED; MATTER REMANDED.