STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CW 1240
2011CW1318
2011 CA 1369

IMG BY JRK
CW BY JRK

STEPHEN J. WILLIAMS

VERSUS

INTERNATIONAL OFFSHORE SERVICES, LLC

***DATE OF JUDGMENT:*** DEC 07 2012

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT
NUMBER 116856, DIV. A, PARISH OF LAFOURCHE
STATE OF LOUISIANA

HONORABLE JOHN E. LEBLANC, JUDGE

WHIPPLE, J. DISSENTS + ASSIGNS REASONS BY JRK
CARTER, C.J DISSENTS FOR THE REASONS ASSIGNED BY WHIPPLE, J BY JRK

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BEFORE: CARTER, C.J., WHIPPLE, KUHN, GUIDRY, AND WELCH, JJ.

**Disposition: JUDGMENT VACATED; 2011 CW 1318 GRANTED AND 2011 CW 1240 DISMISSED.**

KUHN, J.

Defendant-appellant, International Offshore Services, LLC (IOS) appeals the trial court's judgment granting summary judgment in favor of plaintiff-appellee, Stephen Williams, declaring that he was not prohibited from engaging in certain business operations by the terms of either an employment agreement or an operating agreement entered into by the parties. Also referred to this panel on review are two writ applications. Because we conclude that the trial court lacked subject matter jurisdiction over Williams' claims, we vacate the judgment granting declaratory relief, dismiss 2011 CW 1240 as moot, and grant 2011 CW 1318 to sustain the exception raising the objection of lack of subject matter jurisdiction.

## FACTUAL AND PROCEDURAL HISTORY

In 2006, Williams founded IOS, a corporation which owns and operates several marine vessels that provide support services to the oil and gas industry. In January 2009, Williams sold the majority interest in IOS to Ferry Holdings Corp. (Ferry), a subsidiary of Platinum Equity LLC. As part of the sale, Williams retained a 20% ownership interest and also entered into an employment agreement to work as the CEO of IOS for two years following the sale (the Employment Agreement), which included a non-compete provision.[1]

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[1]Section 4.2 of the Employment Agreement states, in pertinent part:

> **Non-Competition.** Executive agrees that during the Employment Term and, provided that the Company continues to pay Executive his Base Compensation, Executive further agrees and covenants for a period of two years following the Termination Date within the Restricted Territory, Executive shall not, directly or indirectly:
>
> a. Carry on or engage in the Restricted Business....
>
> For this purpose, the **"Restricted Territory"** means (x) the State of Louisiana, Parishes of Acadia, Ascension, Assumption, Calcasieu, Cameron, East Baton Rouge, Iberia, Iberville, Jeff Davis, Jefferson, Lafayette, Lafourche, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Landry, St. Martin, St. Mary, St. Tammany, Terrebonne, Vermilion, and West Baton Rouge, the State of Texas, County of Harris, and the State of Alabama, County of Mobile....
>
> The **"Restricted Business"** means the business presently conducted by the Company or any subsidiary, which the parties agree consists of (A) providing offshore marine transportation to the oil and gas industry, (B) operating offshore construction barge, offshore pipeline lay and bury barge, or offshore well intervention and diving support barge, (C) operating any offshore supply vessel or tug, or (D) acting as a broker or intermediary with respect to any of the foregoing.

In July 2009, Ferry sought to refinance the purchase of its membership interest in IOS, which included bringing in more equity owners. As a result, a Third Amended and Restated Operating Agreement (the Operating Agreement) was executed by all members of IOS, including Williams. The Operating Agreement, dated July 7, 2009, contained a non-compete provision, which was substantially similar to the non-compete provision in the Employment Agreement,[2] and also contained an arbitration provision.[3]

After serving his two-year term, Williams resigned as CEO of IOS in January 2011. Following his resignation, Williams purchased four liftboats through his newly formed company, Alliance Liftboats, LLC, for the purpose of providing liftboat services to the oil and gas industry.

On January 17, 2011, IOS and Ferry instituted a claim for arbitration with the American Arbitration Association, asserting that Williams breached the non-compete terms of the Operating Agreement and fiduciary duties he owed to IOS. IOS and Ferry requested that the arbitration panel: (1) enter an award in favor of IOS and Ferry and against Williams enjoining him from violating the Operating Agreement or his fiduciary duties; (2) declare the respective rights and obligations of Williams, IOS, and Ferry under the Operating Agreement; and (3) award damages to IOS and Ferry.

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[2]Section 13.2 of the Operating Agreement defines "Restricted Business" and mirrors the language of Section 4.2 of the Employment Agreement, as set forth above.

[3]The arbitration provision in the Operating Agreement states, in pertinent part:

> **Binding Arbitration.** Any controversy or claim arising out of or relating to this Operating Agreement, including to interpret or enforce any provision of this Operating Agreement, shall be settled by final and binding arbitration administered by the American Arbitration Association, under its Commercial Arbitration Rules... and judgment on the award rendered by the arbitrators may be entered in any court of competent jurisdiction. ... Any arbitration pursuant to this Section 17.19 shall be conducted in **St. Louis, Missouri**. Any arbitration award may be entered in and enforced by any court of competent jurisdiction and the parties hereby consent and commit themselves to the jurisdiction and venue of any state or federal court located in St. Louis, Missouri for purposes of the enforcement of any arbitration award. Each of the parties hereto hereby irrevocably waives, to the fullest extent permitted by applicable law, any objection which it may now or hereafter have to the laying of such venue or any defense of inconvenient forum. (Emphasis added).

On January 19, 2011, Williams filed a petition for declaratory judgment, naming IOS as defendant. Although the original petition did not include any allegations about the non-compete provision in the Operating Agreement, Williams supplemented his petition, in March 2011, to include allegations that he was entitled to a declaration that his activities did not violate either the Employment Agreement or the Operating Agreement.

IOS filed a peremptory exception raising the objection of no cause of action and a dilatory exception raising the objection of prematurity, contending that it was entitled to a dismissal of Williams' claims as related to the Operating Agreement because Williams failed to abide by the arbitration agreement as set forth in the Operating Agreement. After a hearing on May 25, 2011, the trial court denied relief in open court, and on June 24, 2011, signed a judgment overruling IOS's exceptions of no cause of action and prematurity.

On July 8, 2011, IOS filed a writ application with this court, bearing number 2011 CW 1240, seeking review of the trial court's June 24, 2011 judgment, denying the exceptions of no cause of action and prematurity with regard to the claims as to the Operating Agreement.[4] This court ordered that the writ be referred to the panel to which the related appeal was assigned. See ***Williams v. Int'l Offshore Services, L.L.C.***, 2011-1240 (La. App. 1st Cir. 7/22/11)(an unpublished writ action).

During May 2011, Williams filed a motion for summary judgment, averring that there was no genuine issue of fact regarding whether he was competing against IOS in contravention of the terms of the non-compete clauses in the Employment Agreement and Operating Agreement. Williams requested that the trial court decree that he was not prohibited from engaging in certain specified business

[4]IOS originally filed a writ application on these issues on June 21, 2011, but due to defects in the filing, the writ was not considered. See ***Williams v. Int'l Offshore Services, L.L.C.***, 2011-1122 (La. App. 1st Cir. 6/30/11)(an unpublished writ action).

activities. Williams also sought a declaration that the non-compete and non-solicitation provisions in both the Employment Agreement and the Operating Agreement were null and unenforceable or, alternatively, did not prevent Williams from engaging in certain specified business.

Before the hearing on Williams' motion for summary judgment, however, IOS passed a corporate resolution stating that it released Williams from all claims arising from the non-compete provision as found in the Employment Agreement. In the corporate resolution, IOS expressly reserved all its rights in connection with the non-compete provision as found in the Operating Agreement.

On May 26, 2011, IOS filed a declinatory exception raising the objection of lack of subject matter jurisdiction, averring that as a result of its corporate resolution, there was no longer a justiciable claim or controversy regarding the Employment Agreement, and, thus, any claim relating to it should be dismissed for lack of subject matter jurisdiction. Because the exception was not filed in compliance with the required time period prior to the scheduled hearing date as mandated by the district court rules, the trial court declined to hear the exception prior to ruling on Williams' motion for summary judgment.

A hearing on Williams' motion for summary judgment was held on June 3, 2011. The trial court concluded that Williams was not prevented or prohibited by either the Employment Agreement or the Operating Agreement from engaging in the liftboat business, engaging in the business of providing oil and gas well plug and abandonment services, or engaging in any other specified business, and on June 21, 2011, signed a judgment granting summary judgment in favor of Williams. Also on June 21, 2011, the trial court heard IOS's exception of lack of subject matter jurisdiction premised on the corporate resolution and overruled it in open court. A written judgment to that effect was signed on July 12, 2011.

IOS subsequently filed a writ application, challenging the trial court's overruling of its exception of lack of subject matter jurisdiction. That writ application, like the earlier one, was also referred to the panel to which the related appeal was assigned. See ***Williams v. Int'l Offshore Services, L.L.C.***, 2011-1318 (La. App. 1st Cir. 8/15/11)(an unpublished writ action). Lastly, IOS filed this appeal challenging the June 21, 2011 judgment, which granted Williams' motion for summary judgment on the merits of his claim for declaratory relief, and the July 12, 2011 overruling of the exception of lack of subject matter jurisdiction.

**DISCUSSION**

A court's subject matter jurisdiction is an issue that cannot be waived or conferred by the consent of the parties. The issue of subject matter jurisdiction may be raised at any time, even by the court on its own motion, and at any stage of an action. ***Joseph v. Ratcliff***, 2010-1342 (La. App. 1st Cir. 3/25/11), 63 So.3d 220, 224. Appellate courts have the duty to examine subject matter jurisdiction *sua sponte*, even when the parties do not raise the issue. ***Motorola, Inc. v. Associated Indem. Corp.***, 2002-0716 (La. App. 1st Cir. 4/30/03), 867 So.2d 715, 717.

Subject matter jurisdiction is the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute, or the value of the right asserted. La. C.C.P. art. 2. A judgment rendered by a court which has no jurisdiction over the subject matter of the action or proceeding is void. See La. C.C.P. arts. 3 and 925(C).

Both the federal and state arbitration acts indicate the strong legislative policies of both sovereigns favoring arbitration. See 9 U.S.C. § 1 *et seq.*; La. R.S. 9:4201 *et seq.*[5] Any doubt as to whether a controversy is arbitrable should be

[5]Both acts are almost identical in substance as they were both drafted from the Uniform Arbitration Act. See ***FIA Card Services, N.A. v. Weaver***, 2010-1372 (La. 3/15/11), 62 So.3d 709, 712.

resolved in favor of arbitration. ***Woodson Constr. Co., Inc. v. R.L. Abshire Constr. Co., Inc.***, 459 So.2d 566, 569 (La. App. 3d Cir. 1984).

At oral arguments, the parties verified to this court that Williams' claims under the Operating Agreement were in arbitration. Once arbitration has commenced, the courts are precluded from exercising jurisdiction. ***Peter Vicari General Contractor, Inc. v. St. Pierre***, 2002-250 (La. App. 5th Cir. 10/16/02), 831 So.2d 296, 299 (citing ***Woodson Constr. Co., Inc.***, 459 So.2d at 570-71). Accordingly, *sua sponte*, we conclude that the trial court did not have subject matter jurisdiction over the claims arising out of the Operating Agreement and, therefore, incorrectly granted summary judgment in favor of Williams on this basis.

In appeal of the grant of summary judgment, as well in its writ application bearing number 2011 CW 1318, IOS challenges the trial court's denial of the exception of lack of subject matter jurisdiction insofar as Williams' claims to relief under the Employment Agreement. IOS urges that by virtue of the corporate resolution that released Williams from "any and all" claims IOS may have arising from the non-compete provisions in the Employment Agreement, Williams' demand for declaratory relief seeking a decree of his obligations under the Employment Agreement was rendered moot, thereby further depriving the trial court of subject matter jurisdiction.[6] Specifically, IOS contends that, based on its subsequent corporate action, there no longer remains any justiciable claim or controversy as to the non-compete agreement in the Employment Agreement.

If a case is moot, there is no subject matter on which the judgment of the court can operate. ***Council of City of New Orleans v. Sewerage and Water Bd. of New Orleans***, 2006-1989 (La. 4/11/07), 953 So.2d 798, 801. It is well settled that courts will not decide abstract, hypothetical, or moot controversies, or render

[6]A reconventional demand IOS had asserted was voluntarily dismissed with prejudice.

advisory opinions with respect to controversies. ***In the Matter of E.W.***, 2009-1589 (La. App. 1st Cir. 5/7/10), 38 So.3d 1033, 1036. Cases submitted for adjudication must be justiciable, ripe for decision, and not brought prematurely. A "justiciable controversy" is one presenting an existing actual and substantial dispute involving the legal relations of parties who have real adverse interests and upon whom the judgment of the court may effectively operate through a decree of conclusive character. ***Women's Health Clinic v. State***, 2002-0016 (La. App. 1st Cir. 5/10/02), 825 So. 2d 1208, 1210, writ denied, 2002-2002 (La. 11/1/02), 828 So.2d 586.

Moreover, even though the requirements of justiciability are satisfied when the suit is initially filed, when the fulfillment of these requirements lapses at some point during the course of the litigation before the moment of final disposition, mootness occurs. In such a case, there may no longer be an actual controversy for the court to address, and any judicial pronouncement on the matter would be an impermissible advisory opinion. Thus, jurisdiction, although once established, may abate if the case becomes moot. ***In the Matter of E.W.***, 38 So.3d at 1037.

Because IOS voluntarily waived its rights arising from the non-compete provisions in the Employment Agreement prior to rendition of summary judgment in favor of Williams, and in light of the allegations of Williams' petition, there was no justiciable controversy for the trial court, and consequently this court, to act upon; in other words, with the corporate resolution waiver, there no longer existed a controversy presenting an actual and substantial dispute involving the legal relations of the real adverse interests of the parties relative to the Employment Agreement. See ***Chauvin v. Wellcheck, Inc.***, 2005-1571 (La. App. 1st Cir. 6/9/06), 938 So.2d 114, 118 (a litigant not asserting a substantial existing legal right is without standing to seek a declaratory judgment). Accordingly, we conclude that the trial court did not have subject matter jurisdiction over the claims

arising out of the Employment Agreement and, therefore, incorrectly granted summary judgment in favor of Williams on this basis.

## CONCLUSION

Because the trial court did not have jurisdiction over Williams' claims arising out of either the Operating Agreement (as those claims were in arbitration pursuant to the arbitration provision) or the Employment Agreement (as IOS's corporate resolution waiving any claims it may have had against Williams resulted in no justiciable controversy and, therefore, rendered his request for declaratory relief moot), we vacate the trial court's judgment granting summary judgment in favor of Williams. Likewise, we grant 2011 CW 1318, filed by IOS, to reverse the trial court's July 12, 2011 judgment overruling the exception raising the objection of lack of subject matter jurisdiction to decide Williams' claims relative to the Employment Agreement. We hereby order that the exception be sustained, and we hereby dismiss Williams' claims relative to the Employment Agreement. And because the trial court lacked subject matter jurisdiction over any of Williams' claims for declaratory relief, writ application bearing number 2011 CW 1240, also submitted by IOS, wherein it sought review of the trial court's June 24, 2011 judgment overruling its exceptions raising the objections of no cause of action and prematurity, is dismissed as moot. Appeal costs are assessed against plaintiff-appellee, Stephen Williams.

**JUDGMENT VACATED; 2011 CW 1318 GRANTED AND 2011 CW 1240 DISMISSED.**

**STEPHEN J. WILLIAMS**

**VERSUS**

**INTERNATIONAL OFFSHORE SERVICES, LLC**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2011 CW 1240**
**2011 CW 1318**
**2011 CW 1369**

**WHIPPLE, J, dissenting.**

I respectfully dissent from the majority's opinion vacating the June 21, 2011 partial summary judgment and granting IOS's writ application in 2011 CW 1318 and dismissing the writ application in 2011 CW 1240, each of which I address individually below.

**2011 CW 1240**

In this writ application, IOS challenges the trial court's denial of its exceptions of no cause of action and prematurity, filed in response to Williams's Second Supplemental and Amended Petition, wherein Williams challenged his obligations under the non-compete provision of the **Operating Agreement**. In support of these exceptions, IOS avers that, pursuant to the arbitration clause in the Operating Agreement, any dispute as to the terms of the Operating Agreement, including interpretation of the non-compete provision therein, must be decided in the arbitration forum.

At the hearing on IOS's exceptions of no cause of action and prematurity, the trial court denied the exceptions in open court, concluding that Williams's petition stated a cause of action and was not premature. Specifically, the trial court found that Williams had a cause of action and that "[w]hether or not that is concurrent with the arbitration agreement or not" was "not the issue for the [trial court]."

In the present matter, the parties do not dispute that there is a written arbitration provision in the Operating Agreement. Rather, the issue is

whether this specific "non-compete issue" is referable to arbitration. IOS avers this issue is referable to arbitration, relying on the presumption of arbitrability and the language of the arbitration provision. IOS contends the arbitration provision in the Operating Agreement broadly covers "any controversy or claim." Thus, IOS argues, because Williams's supplemental petition for declaratory judgment seeks a declaration that the non-compete clause in the Operating Agreement would not restrict certain activities, this claim is subject to arbitration.

In opposition, Williams avers that public policy and judicial efficiency provide an exception under these particular facts, and that the non-compete issue should remain pending in the district court, ancillary to his original petition. As support, Williams notes that Louisiana has a strong public policy of restricting non-competition agreements, citing SWAT 24 Shreveport Bossier, Inc. v. Bond, 2000-1695 (La. 6/29/01), 808 So. 2d 294. Louisiana's policy against non-competition agreements and the exceptions thereto are set forth in LSA-R.S. 23:921. Specifically, LSA-R.S. 23:921(A) provides:

> (1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void. However, every contract or agreement, or provision thereof, which meets the exceptions as provided in this Section, shall be enforceable.
>
> (2) The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause or choice of law clause in an employee's contract of employment or collective bargaining agreement, or **attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void** except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the

> occurrence of the incident which is the subject of the civil or administrative action. [Emphasis added.]

In sum, LSA-R.S. 23:921(A)(2) clearly provides that every choice of forum and choice of law clause in agreements between **employees** and employers is null, unless agreed to by the employee after the incident. As such, Williams avers that: (1) it is undisputed that IOS was his employer; (2) IOS is now attempting to remove the "non-compete issue" as related to the Operating Agreement to a new forum, the arbitration forum; and (3) to allow such would violate the public policies set forth in La. R.S. 23:921(A)(2).

In evaluating these "public policy" arguments, I note that the parties do not cite (nor have I found) a case where an arbitration clause was set aside specifically for being in violation of Louisiana's public policy against non-compete agreements. However, the clear language of LSA-R.S. 9:4201 provides an exception to arbitration clauses for "such grounds as exist at law or in equity for the revocation of any contract." Furthermore, as stated by the United State Supreme Court in M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 15, 92 S. Ct. 1907, 1916, 32 L. Ed. 2d 513 (1972), "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[1]

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[1] Zapata involved a contract for a tug owner to tow a barge from Louisiana to Italy. The contract contained a choice-of-forum clause for the London Court of Justice. Ultimately, the Supreme Court remanded the matter, stating:

> Although their opinions are not altogether explicit, it seems reasonably clear that the District Court and the Court of Appeals placed the burden on Underwater to show that London would be a more convenient forum than Tampa, although the contract expressly resolved that issue. The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or **overreaching**. Accordingly, the case must be remanded for reconsideration. [Emphasis added.]
> Zapata Off-Shore Company, 92 S. Ct. at 1916.

Counsel for IOS further argues that any "public policy" in LSA-R.S. 23:921 should not trump the Federal Arbitration Act. In support, IOS cites Dahiya v. Talmidge International LTD., 05-0514 (La. App. 4 Cir. 5/26/06), 931 So. 2d 1163. In Dahiya, a foreign maritime worker brought suit in a Louisiana district court for injuries. His maritime employer sought to stay the proceeding pending arbitration of the claim, as required by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Similar to the present matter, the plaintiff argued that Louisiana's anti-forum-selection-clause provision as set forth in LSA-R.S. 23:921(A)(2) and the public policies therein conflict with and prohibit the Convention's mandate to enforce the arbitration clauses. The Fourth Circuit ultimately rejected the argument and ordered arbitration, but only after weighing the two competing policies at play, i.e., Louisiana's policy against forum selection clauses in employment agreements and the Convention's policy of rigorous enforcement of arbitration agreements in order to have predictability in the resolution of disputes in the **international** commercial system. The Fourth Circuit found the federal policy outweighed the Louisiana public policy, noting the Louisiana policy seeks to protect Louisiana citizen-employees and the plaintiff in the case at hand was a resident and citizen of India. Notably, Dahiya did not establish a steadfast rule that federal law always supercedes state law that purports to nullify a forum selection clause; rather, Dahiya recognized that the competing purposes of the state and federal law must be weighed against each other.

On this basis, Williams counters that the operative language of the non-compete agreements in the Employment Agreement and Operating

Agreement are identical and are both governed by Louisiana law.[2] Therefore, he contends that maintaining the claim in the district court as it pertains to both the Employment Agreement *and* the Operating Agreement serves the interest of justice by avoiding or reducing the possibility of inconsistent judgments on the same material facts and application of law. i.e., the district court finding that Williams's proposed new business ventures did not violate the language of the non-compete agreement in the Employment Agreement, but the arbitration panel finding that the new business ventures did violate the same non-compete agreement as set forth in the Operating Agreement. I agree.

In particular, I note that LSA-R.S. 9:4201 specifically provides an exception to the application of arbitration clauses for "such grounds as exist at law or in equity," which include judicial efficiency and the prevention of inconsistent decisions. Moreover, given the status of the parties, the nature of their relationship, and the timing and purpose underlying the confection of the subsequent Operating Agreement, I find no error in the trial court's ruling denying these exceptions by the defendant.

Although it is well established that arbitration is favored under state and federal law, IOS's arguments in this writ application raise several concerns. Plaintiff's petition for declaratory relief involves interpretation of a non-competition clause. Virtually the same non-competition clause is found in the Employment Agreement and the Operating Agreement between the parties. It is undisputed that the Employment Agreement does not contain an arbitration clause and that all claims related to the non-compete agreement as stated in the Employment Agreement are contractually and

[2] Section 17.2 of the Operating Agreement states-

> **Application of Louisiana Law.** This Operating Agreement, and the application or interpretation hereof, shall be governed exclusively by its terms and the law of the State of Louisiana (without giving effect to principles of conflicts of laws).

legally reserved to the district court. As such, I agree with Williams that inconsistent decisions could result if the district court interpreted the clause in the Employment Agreement, while the arbitration panel interpreted the same language but as found in the Operating Agreement.

However, the more compelling argument is that since the claim involves a non-compete clause between an employee and employer, allowing the defendants to transfer the claim to the arbitration panel and forcing plaintiff to be bound thereby would violate LSA-R.S. 23:921(A)(2) and the public policies therein. Although this precept is qualified by In Re Gulf Fleet Holdings, wherein the court held that the public policy considerations of LSA-R.S. 23:921 -- unequal bargaining power and loss of livelihood -- do not come into play where the employee is the former owner of the company and the employment agreement was part of a multi-million dollar purchase of the company, these considerations are seemingly inapplicable under the particular facts presented herein. Specifically, in this case, the dispute involves two contractual agreements, the employee/owner has specifically agreed and acknowledged in both contracts that there is a reservation of some rights to compete, and the district court is exercising lawful jurisdiction to consider, in a properly filed declaratory judgment action by the employee, the very same provision which would be at issue in the subsequently confected Operating Agreement.[3]

Accordingly, I conclude the trial court did not err in denying IOS's exceptions of no cause of action and prematurity, and hereby deny this application for supervisory writs. Thus, I find no error in the trial court's exercise of jurisdiction and to render declaratory judgment addressing the

[3]I note that my colleagues conclude that the trial court had no jurisdiction herein because, although nothing in this regard appears of record, at oral argument (and by a letter from defendants thereafter), the parties' counsel disclosed that some arbitration has occurred herein. However, I note that nothing has been presented to this court to establish that a final award has been confirmed. Moreover, in my opinion, the fact of (or propriety of) an arbitration panel's exercise of jurisdiction is neither dispositive or persuasive in our resolution of the issues presented for review, where, as noted above, **the dispute involves two separate contractual agreements, the employee/owner and the purchaser have specifically agreed and acknowledged in both contracts, that there is a reservation of some rights to compete, and the district court is exercising lawful jurisdiction to consider, in a properly filed declaratory judgment action by the employee, the very same provision which would be at issue in a subsequently confected Operating Agreement.**

parties' respective claims and defenses related to the non-compete provisions in both the Operating Agreement and Employment Agreement.

**2011 CW 1318**

In this writ application, IOS challenges the trial court's denial of IOS's exception of lack of subject matter jurisdiction regarding Williams's claim for declaratory judgment as to his obligations under the **Employment Agreement**. Specifically, IOS contends that by virtue of that the corporate resolution which it passed, through which IOS released Williams from any and all claims arising from the non-compete agreement in the Employment Agreement, Williams's demand for declaratory judgment decreeing his obligations under the Employment Agreement was rendered moot, thereby further depriving the trial court of subject matter jurisdiction. Specifically, IOS contends that based on its actions, there no longer remains any justiciable claim or controversy as to the non-compete agreement in the Employment Agreement.[4] Accordingly, in this writ application, IOS seeks reversal of the trial court's July 12, 2011 judgment denying its exception and requests dismissal of the judicial proceedings (and any resulting rulings) in the trial court to the extent they relate to the Employment Agreement.

The corporate resolution passed by IOS provides, in pertinent part, as follows:

> BE IT HEREBY RESOLVED, that International Offshore Services, L.L.C. ("IOS") does hereby irrevocably and unconditionally release, Steven J. Williams ("Williams") from **any and all Claims** (as defined below) whether known or unknown, asserted or unasserted, which are in any way on account of, relating to, or arising from Section 4 ("Limitation on Activities") of the International Offshore Services L.L.C. Employment Agreement, signed by Williams on January 8,

[4]In its writ application, IOS also contends that the trial court erred in granting Williams's motion for summary judgment on his declaratory action claim involving the Employment Agreement before resolving IOS's exception of lack of subject matter jurisdiction. However, I also reject this argument as meritless, finding no reversible error on this basis.

> 2008, a copy of which is attached to this Resolution, and agrees that it will not enforce or seek to enforce any Claims against Williams for any breach of the "Limitation on Activities" provisions of said Employment Agreement.
>
> BE IT FURTHER RESOLVED, that the above irrevocable release does not, nor does it in any way indicate any intent to, waive or release any Claims against Williams which are in any way on account of, relating to, arising out of, or arising from the Third Amended and Restated Operating Agreement of International Offshore Services, L.L.C., dated July 7, 2009 ("Third Amended and Restated Operating Agreement"), or any earlier version of the operating agreements of IOS, including without limitation the Non-Competition provisions contained in Section 13 of the Third Amended Operating Agreement or any similar provisions contained in any earlier versions of the operating agreements of IOS, by operation of law, or otherwise, and IOS does hereby expressly reserve all of its rights under said Third Amended and Restated Operating Agreement [and earlier versions] and all claims it may have against Williams under said Third Amended Operating Agreement and Williams agrees to and consents to this reservation of rights under the Third Amended Operating Agreement.
>
> BE IT FURTHER RESOLVED, that for purposes of this Resolution, Release and Agreement, the term "Claims" comprehensively includes, but is not limited to, actions, lawsuits, proceedings, claims, causes of action, demands, grievances, liabilities, suits, and judgments, whether actual or potential, whether presently known or unknown, recognized by the law of any jurisdiction, whether arising in tort, in contract, at law, in equity, at common law, or under any federal, state, county or local statute or law, under any and all theories of recovery of whatsoever nature, under any theory of liability, whatsoever. [Emphasis added.]

In denying the exception of lack of subject matter jurisdiction, the trial court stated as follows:

> The resolution by IOS seeks to walk away from the controversy. But it's this Court's position, and I do not feel, that defeats subject matter jurisdiction. Because it is still Mr. William's right to determine the extent and scope of any limitations that the agreement may have put on him, whether or not IOS chose to participate in the battle, and certainly, they did until the very end.

If a case is moot, there is no subject matter on which the judgment of the court can operate. Council of City of New Orleans v. Sewerage and Water Board of New Orleans, 2006-1989 (La. 4/11/07), 953 So. 2d 798,

801. It is well settled that courts will not decide abstract, hypothetical, or moot controversies, or render advisory opinions with respect to controversies. In the Matter of E.W., 2009-1589 (La. App. 1st Cir. 5/7/10), 38 So. 3d 1033, 1036. Cases submitted for adjudication must be justiciable, ripe for decision, and not brought prematurely. A "justiciable controversy" is one presenting an existing actual and substantial dispute involving the legal relations of parties who have real adverse interests and upon whom the judgment of the court may effectively operate through a decree of conclusive character. Women's Health Clinic v. State, 2002-0016 (La. App. 1st Cir. 5/10/02), 825 So. 2d 1208, 1210, writ denied, 2002-2002 (La. 11/1/02), 828 So. 2d 586.

Moreover, even though the requirements of justiciability are satisfied when the suit is initially filed, when the fulfillment of these requirements lapses at some point during the course of the litigation before the moment of final disposition, mootness occurs. In such a case, there may no longer be an actual controversy for the court to address, and any judicial pronouncement on the matter would be an impermissible advisory opinion. Thus, jurisdiction, although once established, may abate if the case becomes moot. In the Matter of E.W., 38 So. 3d at 1037.

However, exceptions to the mootness doctrine have been recognized. Under the voluntary cessation exception, if a defendant voluntarily stops wrongful conduct, then that change alone does not make a case moot unless the defendant shows with assurance that there is no reasonable expectation that the alleged violation will recur. Cat's Meow, Inc. v. City of New Orleans through Department of Finance, 98-0601 (La. 10/20/98), 720 So. 2d 1186, 1194. Where the defendant has voluntarily ceased the complained-of conduct, a court should consider: (1) whether there is any reasonable

expectation that the alleged violation will recur; and/or (2) whether there are unresolved collateral consequences (such as an outstanding claim for compensatory or monetary relief). In the Matter of E.W., 38 So. 3d at 1037.

The corporate resolution in the instant case does prevent IOS from asserting "**any and all claims**" against Williams under the non-compete provision in the Employment Agreement. Thus, IOS would not be able to **sue** Williams under the non-compete provision of the Employment Agreement for any of the business ventures in which he is now involved. However, contrary to the assertions by IOS, the corporation resolution only releases Williams from any **claims** by IOS under the non-compete in the Employment Agreement; it does not release him from his **obligations** under the non-compete provision.

Also, with regard to unresolved collateral consequences, as noted by Williams, the resolution of the extent of his obligations under the non-compete clause is relevant with regard to Williams's fiduciary obligations to IOS assumed pursuant to the Employment Agreement, for which IOS could presumably sue, alleging a violation of Williams's fiduciary duties based on his current business activities. Accordingly, because Williams is still bound by the **obligations** of the non-compete agreement, I conclude that a justiciable controversy remains and he is entitled to have the extent of those obligations judicially determined through his declaratory judgment action.

For these reasons, I would deny IOS's application for supervisory writs of review at IOS's costs, challenging the trial court's July 12, 2011 judgment denying IOS's exception of lack of subject matter jurisdiction.

**THE INSTANT APPEAL**

Turning to the instant appeal, wherein IOS challenges the trial court's June 21, 2011 judgment granting Williams's motion for summary judgment,

in the judgment, the trial court declared that Williams is not prevented by **either** the Employment Agreement or the Operating Agreement from engaging in certain listed business enterprises, which the trial court determined were not prohibited by the provisions of the two agreements.[5]

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[5]With regard to IOS's appeal of the trial court's June 21, 2011 judgment granting Williams's motion for summary judgment, after the record was lodged, this court issued a Rule to Show Cause Order on September 19, 2011, which stated, in pertinent part:

> **The June 21, 2011 judgment on appeal in this matter appears to be a partial summary judgment without the proper designation of finality required by LSA-C.C.Pr. art. 1915. . . .** Therefore, the parties are hereby ordered to show cause by briefs on or before October 19, 2011, why this appeal should not be dismissed by showing that La. C.C.P. art. 1915(B) is not applicable or that there has been a designation of the judgments as final by the trial court under La. C.C.P. Art. 1915(B).

In response to this order, the record in this matter was supplemented with a September 22, 2011 Order, signed by the trial court, which states:

> **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the Judgment signed on June 21, 2011, granting summary judgment in favor of [Mr. Williams], and against [IOS] constitutes a full and final judgment as it grants the relief sought by plaintiff against the defendant and as such is immediately appealable.

The June 21, 2011 judgment, which granted Williams's motion for summary judgment granted him the relief that he prayed for in his motion for summary judgment in that it granted him declaratory relief. The judgment, however, did not grant Williams all of the relief that he prayed for in his original and supplemental petitions in that it did not grant his prayer for all costs and reasonable attorney's fees, and as such, the judgment is not final under LSA-C.C. art. 1915(A). Accordingly, the June 21, 2011 judgment is "a partial summary judgment without the proper designation of finality" required by LSA-C.C.P. art. 1915(B), as set forth in this Court's September 19, 2011 Rule to Show Cause Order. See Joseph v. Ratcliff, 2010-1342 (La. App. 1st Cir. 3/25/11), 63 So. 2d 220, 224.

However, in considering the trial court's September 22, 2011 order in response to this court's show cause order decrees that the June 21, 2011 judgment "constitutes a full and final judgment as it grants the relief sought by plaintiff against the defendant and as such is immediately appealable," while it does not reference LSA-C.C.P. art. 1915 or 1915(B), I would nonetheless consider the language of the order as constituting the appropriate and proper certification of finality required by Article 1915(B), since it refers to the June 21, 2011 judgment as being a "full and final judgment" and "immediately appealable."

Moreover, based on a *de novo* review of the propriety of this certification, see R. J. Messinger, Inc. v. Rosenblum, 2004-1664 (La. 3/2/05), 894 So. 2d 1113, 1122, I find there is no just reason for delaying review of this partial summary judgment in that the issues raised in this appeal are closely aligned with the issues addressed by this court in the related writ applications that were referred to this panel. Accordingly, a review of the June 21, 2011 partial summary judgment at this time would facilitate final resolution of these issues in this case, thereby fostering judicial economy. Moreover, regarding the relationship between the adjudicated and unadjudicated claims, see Messinger, 894 So. 2d at 1122, the remaining issues of costs and attorney's fees before the trial court are distinct from the issues presented in the present appeal such that a final determination may be made as to the issues presently before this court.

Accordingly, I would recall the Rule to Show Cause Order and maintain IOS's appeal of the June 21, 2011 partial summary judgment.

On appeal, IOS again asserts that the trial court erred in: (1) ignoring a binding arbitration clause as to the non-compete provisions in the **Operating Agreement**; and (2) granting the summary judgment as to the renounced non-compete provisions in the **Employment Agreement** (where no justiciable controversy remained because of IOS's waiver of all legal claims related to the non-compete provisions of that agreement).[6] Essentially, IOS again avers that the trial court had no jurisdiction to decide claims arising under the Operating Agreement, contending the arbitration clause therein required those matters to be submitted to an arbitration panel, and further that the trial court lacked subject matter jurisdiction to decide claims relating to the non-compete provision in the Employment Agreement, where IOS, by corporate resolution, agreed not to enforce that provision in the Employment Agreement. Notably, there is no assignment of error challenging the **merits** of the trial court's declarations in the June 21, 2011 partial summary judgment.

With regard to the portion of the June 21, 2001 partial summary judgment declaring that Williams is not prevented or prohibited by the provisions of the **Operating Agreement** from engaging in certain business activities, for the reasons set forth above in our disposition of writ application number 2011 CW 1240, I would affirm the judgment on appeal.

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[6]Although not listed as an assignment of error, IOS argues in its appellate brief that the trial court should have determined whether it had subject matter jurisdiction before it considered Williams's motion for summary judgment. A judgment rendered by a court which has no jurisdiction over the subject matter of the action or proceeding is null. LSA-C.C.P. art. 3; Gisclair v. Louisiana Tax Commission, 2009-0007 (La. 6/26/09), 16 So. 3d 1132, 1133 n.1. However, while the better practice may have been for the trial court to decide the issue of its continuing subject matter jurisdiction prior to ruling on Williams's motion for summary judgment, in disposition herein of IOS's writ application in 2011 CW 1318, I find that IOS's corporate resolution did not deprive the trial court of subject matter jurisdiction over the claims related to the non-compete agreement in the Employment Agreement and, thus, in my view, that the exception of lack of subject matter jurisdiction was properly denied.

With regard to IOS's second assignment of error, wherein it contends that the trial court erred in granting summary judgment as to the terms of the non-compete provision of the **Employment Agreement** because the corporate resolution it passed rendered this claim moot, for the reasons expressed in my analysis of writ number 2011 CW 1318 above, I likewise find no merit to this argument. Because the corporate resolution only releases Williams from any **claims** by IOS under the non-compete in the Employment Agreement but does not release him from his **obligations** therein, Williams was still bound by the **obligations** of the non-compete agreement (in addition to any fiduciary duties assumed through the Employment Agreement). Accordingly, a justiciable controversy remained, and Williams was entitled to have the extent of those obligations judicially determined through his declaratory judgment action.

Moreover, because IOS has not challenged the **substance** or **merits** of the trial court's determination as to Williams's obligations pursuant to the non-compete clause in the Employment Agreement, I note that issue is not before us.

I note, however, that the June 21, 2011 judgment provides in part that Williams is not prevented or prohibited by the Employment Agreement from engaging in "any other business that IOS was not engaged on January 8, 2009..., **as defined by the four categories specifically listed in the non-compete clause.**" (Emphasis added). Louisiana courts require that a judgment be precise, definite, and certain. Vanderbrook v. Coachmen Industries, Inc., 2001-0809 (La. App. 1st Cir. 5/10/02), 818 So. 2d 906, 913. Because these "four categories" are not specified within the judgment, this portion of the judgment lacks specificity and is not precise, definite and certain as required by the jurisprudence. However, the judgment clearly

recognizes that Williams's business activities are limited **only** by those activities in which IOS was engaged at the time the parties entered into the Employment Agreement, and, as stated above, IOS has not challenged the substance of this ruling. Accordingly, I would amend the judgment to expressly state the four categories of business activities in which IOS was engaged at the time of confection of the Employment Agreement, as set forth in the non-compete provision therein. See LSA-C.C.P. art. 2164 and Brister v. Brister, 2010 CU 2278, p. 3 (La. App. 1st Cir. 5/6/11) (unpublished).

For these reasons, I respectfully dissent.