

**NOT DESIGNATED FOR PUBLICATION**

<b>LINDER GARTH</b>	*	<b>NO. 2000-CA-1063</b>
<b>VERSUS</b>	*	<b>COURT OF APPEAL</b>
<b>JOHN S. KELLER, JR., NEW ORLEANS MARINE INSTITUTE, INC. AND CIGNA PROPERTY AND CASUALTY COMPANY</b>	* * * *	<b>FOURTH CIRCUIT STATE OF LOUISIANA</b>

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APPEAL FROM  
FIRST CITY COURT OF NEW ORLEANS  
NO. 99-53184, SECTION "B"  
Honorable Angelique Reed, Judge

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**Judge Terri F. Love**

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(Court composed of Judge James F. McKay III, Judge Terri F. Love, Judge  
Max N. Tobias Jr.)

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**VACATED AND  
REMANDED**

Defendants-appellants, John S. Keller Jr., New Orleans Marine Institute, Inc. and Ace American Insurance Company (Defendants), appeal a trial court judgment granted in favor of Plaintiff, Linder Garth (“Plaintiff”). For the following reasons, we vacate the judgment and remand.

**FACTS AND PROCEDURAL HISTORY**

An automobile accident occurred on April 23, 1998 where Plaintiff suffered injuries. Plaintiff filed suit in the First City Court for the City of New Orleans, a court with a jurisdictional limit of \$20,000.

After the filing of the answer, the parties exchanged discovery and the medical records were obtained. Shortly thereafter, Defendants tendered the \$20,000 jurisdictional limit of the court into the court’s registry. Attached to the tender was an order dismissing Plaintiff’s case with prejudice. A copy of the tender was mailed to Plaintiff through her attorney of record, but no notice of the judgment was served upon Plaintiff. The trial court judge

signed the order dismissing the suit on October 28, 1999. Plaintiff did not file a Motion for New Trial or a Motion for Appeal from the judgment dismissing the suit.

On January 28, 2000, Plaintiff filed a Motion to Transfer the case from First City Court to Civil District Court. The Motion to Transfer was set for hearing for March 13, 2000. On February 15, 2000, Plaintiff filed a Motion to Vacate Judgment asserting that Defendants had filed the tender and motion to dismiss *ex parte* and that the motion was signed on October 28, 1999 without a hearing. Plaintiff also filed an opposition to the tender, on February 25, 2000, arguing that her damages greatly exceeded the jurisdictional limits for First City Court.

In response to Plaintiff's motions, Defendants filed exceptions of lack of subject matter jurisdiction, no right of action and res judicata. Defendants argued that the suit had been dismissed and the judgment was final; therefore, a transfer to Civil District Court was not proper. A hearing was held on March 13, 2000, and the trial court took the Motion to Transfer under advisement. Subsequently, on March 21, 2000, Plaintiff filed a Petition to Annul the October 28, 1999 judgment based upon fraud or ill

practices as defined by La. C.C.P. art. 2004.

On March 28, 2000, prior to the delay for answering the petition, the trial court issued a judgment ruling upon the motion heard on March 13, 2000. The court granted the Motion to Vacate Judgment and set aside the Judgment of Dismissal signed on October 28, 1999. The trial court granted Plaintiff's January 28, 2000 Motion to Transfer suit to Civil District Court.

Defendants appeal the March 28, 2000 judgment arguing that the trial court acted improperly in granting the Motion to Vacate Judgment in a summary manner. Defendants further argue that the trial court erred in granting Plaintiff's motion to transfer the suit from city court to district court when the suit had been dismissed and became final on November 8, 1999 pursuant to La. C.C.P. art. 5002.

## **ASSIGNMENT OF ERRORS**

### ***Assignment of Error One:***

#### **The Trial Court Erred in Granting the Petition to Annul Judgment in a Summary, Ex Parte Fashion.**

Defendants argue that the trial court erred in granting the Petition to Annul Judgment. However, in the present case, although a Petition to Annul Judgment was filed on March 21, 2000, a judgment was rendered on March 28, 2000 on the Motion to Vacate Judgment filed on February 15, 2000.

Our law does not permit the use of summary proceedings to set aside

a final judgment. La. C.C.P. art. 2592. In *Brown v. Brown*, 473 So. 2d 851 p.4 (La. 1984), the defendant sought to annul a final judgment by filing a motion for injunction to recall and set aside a garnishment. The court asserted:

Clearly, whether the judgment sought to be annulled is a relatively nullity or an absolute nullity or whether the attack must be direct or may be done collaterally, the attack must be made **via ordinary proceeding**. The summary proceeding instituted in the instant case is clearly inappropriate and unauthorized to attack a final judgment.

Similarly, in *Taylor v. Hixson Autoplex of Alexandria*, 2000-1096, p. 6 (La. App. 3 Cir. 3/28/01), 781 So. 2d 1282, the court stated “An action for nullity of a final judgment alleging fraud or ill practices pursuant to Article 2004 must be brought in an ordinary proceeding; there is no authority in law to bring such an action in a summary proceeding.”

Thus, in the present case, the trial court erred in setting aside the October 28, 1999 judgment upon Plaintiff’s motion.

### ***Assignment of Error Two***

#### **The Trial Court Erred in Granting Plaintiff’s Motion To Transfer.**

Plaintiff filed a Motion to Transfer on January 28, 2000 after the suit had been dismissed with prejudice on October 28, 1999. Plaintiff did not file a Motion for New Trial or an appeal from the judgment. Defendants contested the Motion to Transfer by filing exceptions of lack of subject

matter jurisdiction, no right of action and res judicata. The trial court overruled Defendants' exceptions and granted the Motion to Transfer.

Dismissal with prejudice has the effect of a final judgment. La. C.C.P. art. 1673. A final judgment obtained by fraud or ill practices is a relative nullity and the nullity must be properly decreed. *Roach v. Pearl*, 95-1573 (La. App. 1 Cir. 5/10/96), 673 So. 2d 691, 693. When Plaintiff filed the Motion to Transfer, the October 28, 1999 judgment had not been declared a nullity. The October 28, 1999 judgment was still an effective final judgment when the Plaintiff filed the Motion to Transfer.

Consequently, the trial court erred by transferring a cause of action that had been extinguished by the October 28, 1999 dismissal.

### **DECREE**

Accordingly, we find that the trial court was in error in ruling summarily on the Motion to Vacate Judgment. The judgment is vacated and the case is remanded back to the trial court for hearings consistent with this judgment. Further, the trial court erred in granting a Motion to Transfer a cause of action that had been extinguished by a dismissal; therefore, the judgment granting the Motion to Transfer is vacated.

**VACATED AND REMANDED**

