FIRST BANK AND TRUST

VERSUS

PROCTOR'S COVE II, LLC, MILTON GAGNON AND MICHAEL J. THOMPSON

NO. 13-CA-802

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 641-536, DIVISION "K"
HONORABLE ELLEN S. KOVACH, JUDGE PRESIDING

September 24, 2014

MARC E. JOHNSON
JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Marc E. Johnson and Robert A. Chaisson

WICKER, J., CONCURS WITH REASONS

CHAISSON, J., CONCURS WITH REASONS

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AFFIRMED IN PART;
REVERSED IN PART
AND REMANDED

Defendants/Appellants, Proctor's Cove II, L.L.C. (hereinafter referred to as "Proctor's Cove"), Michael Thompson, and Milton Gagnon, appeal the March 13, 2013 and May 3, 2013 summary judgments regarding a promissory note on a condominium development in favor of Plaintiff/Appellee, First Bank and Trust (hereinafter referred to as "First Bank"), filed in the 24th Judicial District Court, Division "K". For the following reasons, we reverse the summary judgments and remand the matters to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

This is the second appeal for this matter. The pertinent facts of the lengthy history of this case are recited as follows:

On July 27, 2004, Proctor's Cove executed a promissory note with First Bank in the principal amount of $550,000.00. The promissory note was secured by a mortgage on property owned by Proctor's Cove located in St. Bernard Parish. Milton Gagnon and Michael Thompson each executed a written guaranty of the debts of Proctor's Cove.

On February 9, 2007, First Bank filed its Petition against Proctor's Cove, Milton Gagnon and Michael Thompson, alleging they defaulted on the promissory

note and owed a principal sum of $298,340.45 plus interest, attorney's fees and costs. First Bank amended its Petition on September 8, 2008, alleging the principal sum owed was $70, 706.10 plus interest, attorney's fees and costs.

Defendants filed an Answer on September 22, 2008. They subsequently filed an Amended Answer and a Reconventional Demand against First Bank and its President, Joseph Cannizzarro, on January 13, 2009, alleging they breached a settlement agreement between the parties by failing to extinguish the promissory note after it had been satisfied and by further claiming a balance was still owed. Defendants alleged Mr. Cannizzarro renegotiated the terms of the promissory note and set performance obligations for them to meet in order to have the debt of the promissory note satisfied. An affidavit of Brian Berns, First Bank's Vice President, stating he had knowledge of the settlement agreement between the parties and Defendants had fulfilled their obligations on the note per the agreement, was attached as an exhibit to the reconventional demand. Within that same pleading, Defendants also raised peremptory exceptions of no cause of action and no right of action. First Bank and Mr. Cannizzarro filed their own Exception of No Cause of Action and/or No Right of Action on March 9, 2009.

On March 18, 2009, Jennifer Thompson, Mr. Thompson's daughter, intervened in the matter. In her petition, Ms. Thompson alleged First Bank failed to properly apply payments and payoff amounts on her accounts and failed to properly report payments and a paid in full status to the credit reporting agencies for several years after the account was paid in full. On April 22, 2009, First Bank filed an Exception of No Cause of Action and/or No Right of Action against Ms. Thompson, which included a dilatory exception of improper cumulation of actions. A hearing on the exceptions was held on May 26, 2009.

In a judgment rendered on June 2, 2009, the trial court maintained First

Bank and Mr. Cannizzarro's exception of no cause of action against Defendants and dismissed the reconventional demand with prejudice. The trial court then allowed Defendants 30 days to re-file their reconventional demand with a stated cause of action. On June 18, 2009, Defendants filed an Amended Reconventional Demand. The amended demand added Mr. Berns as a defendant to the lawsuit.

In a judgment rendered on June 23, 2009, the trial court maintained the dilatory exception of improper cumulation[1] filed by First Bank against Ms. Thompson. The intervention was dismissed without prejudice.

On August 3, 2009, First Bank, Mr. Cannizzarro and Mr. Berns, the defendants-in-reconvention, filed an Exception of No Cause of Action and/or No Right of Action, alleging the amended reconventional demand did not state a cause of action. A hearing on the exceptions was held on October 2, 2009. In a judgment rendered on October 22, 2009, the trial court maintained the exceptions and dismissed Defendants' reconventional demand with prejudice. Defendants appealed that ruling. In *First Bank and Trust v. Proctor's Cove II, LLC*, 10-1 (La. App. 5 Cir. 3/16/10); 37 So.3d 1019, *writ denied*, 10-0860 (La. 6/18/10); 38 So.3d 328, this Court dismissed Defendants' appeal with prejudice and remanded the matter to the trial court, holding the judgment was not a final, appealable judgment.

On January 5, 2011, First Bank filed a Motion for Summary Judgment against Milton Gagnon. In response, Milton Gagnon filed a Motion for 863 Sanctions against First Bank. After a hearing, the trial court denied the motions of both First Bank and Milton Gagnon on March 1, 2011.

First Bank filed a Motion to Prohibit Preparation or Filing of Pleadings by Non-Attorney on November 4, 2011. In the motion, First Bank alleged Keith

[1] The trial court found that First Bank's Exception of No Cause of Action and/or No Right of Action against Ms. Thompson was improperly entitled and should have been an exception of improper cumulation.

Gagnon was a non-attorney filing pleadings on behalf of Proctor's Cove and was in violation of La. R.S. 37:213. On December 13, 2011, Proctor's Cove, through Keith Gagnon, filed a Motion to Compel Court to Comply with the Model Code of Judicial Conduct or Motion to Recuse the Trial Judge. The motion alleged the trial judge failed to apply express mandates of law, resulting in a material prejudice against it. Proctor's Cove also filed a Motion to Stay Proceedings pending the resolution of the motion to recuse on December 13, 2011. In a *Sua Sponte* Motion for Contempt and Rule to Show Cause issued on December 19, 2011, the trial court struck all of the pleadings that were filed by Keith Gagnon on December 13, 2011 and advised Proctor's Cove to retain counsel to file the appropriate pleadings. The trial court rendered a judgment on January 11, 2012, granting First Bank's motion to quash subpoena duces tecum and the motion prohibiting the preparation of filing of pleadings by a non-attorney on behalf of Proctor's Cove.

On August 16, 2012, First Bank filed a second Motion for Summary Judgment against Milton Gagnon, asserting that he was liable for the debt owed for the promissory note, and he had no basis to claim there was a misapplication of funds because he was not a member of Proctor's Cove and had no decision making power. Milton Gagnon filed a Motion for Continuance. First Bank also filed a Motion for Summary Judgment against Proctor's Cove and Mr. Thompson on January 24, 2013, asserting they could not establish at trial that a written agreement in their favor existed, which was necessary to prove their defense. None of the defendants filed an opposition memorandum to First Bank's motions for summary judgment. On February 18, 2013, Milton Gagnon filed a Motion for Continuance of the summary judgment hearing.

The motions were heard on February 20, 2013. In a judgment rendered on March 13, 2013, the trial court reset the summary judgment hearing for Proctor's

Cove due to service issues, denied Milton Gagnon's motion to continue, and granted summary judgment against Mr. Thompson and Milton Gagnon. The trial court awarded First Bank $70,706.10, plus interest accrued through August 27, 2008, plus interest from August 28, 2008, until paid at the rate of 21% per annum, late charges in the amount of $4,417.17, attorney's fees and costs. Mr. Thompson and Milton Gagnon were found to be liable *in solido* to First Bank. Mr. Thompson and Milton Gagnon filed a Motion for Reconsideration and/or Motion for New Trial that incorporated a motion for sanctions pursuant to La. C.C.P. art. 863 on March 26, 2013.

Hearings on Mr. Thompson and Milton Gagnon's motions and First Bank's reset Motion for Summary Judgment against Proctor's Cove were held on May 3, 2013. In a ruling rendered on the same date, the trial court denied the motions of Mr. Thompson and Milton Gagnon. The trial court granted summary judgment against Proctor's Cove in the amount of $70,706.10 plus interest accrued through August 27, 2008, in the amount of $105,826.99, plus interest accrued from August 28, 2008, late charges in the amount of $4,417.17, attorney's fees and costs. Proctor's Cove was found to be liable *in solido* with Mr. Thompson and Milton Gagnon. Defendants filed a notice of appeal, appealing the February 20, 2013 and May 3, 2013 judgments. The order granting the appeal was rendered on June 30, 2013. The instant appeal followed.

ASSIGNMENTS OF ERROR

On appeal, Defendants raise the following assignments of error: 1) the trial court erred in failing to apply the law, which included mandated standards of review throughout the proceeding; 2) the trial court was manifestly erroneous by disregarding the recusal motion and remaining on the bench after said motion was filed; 3) the trial court erred in failing to apply the statutory standard of review for

a summary judgment hearing; 4) the trial court erred by failing to grant the Motion for New Trial; and 5) the trial court erred in assigning inaccurate property values in its judgment.

LAW AND ANALYSIS

Assignments of Errors One and Two

Defendants allege the trial court committed manifest error in failing to comply with the mandated recusal procedures and in striking Proctor's Cove's Motion to Recuse from the record. Defendants contend Proctor's Cove had the legislative and jurisprudential authorization to appear and represent itself through Keith Gagnon. Defendants aver that the trial court's striking of the Motion to Recuse without a hearing deprived Proctor's Cove of due process and its legal right to self-representation. Defendants further aver that the trial court's willful misconduct was an improper practice. As such, Defendants contend that all judgments subsequent to the filing of the recusal motion, including the summary judgment, were rendered in violation of the law and are absolutely nullities.

First Bank argues the trial court was proper in striking Proctor's Cove's Motion to Recuse because it was never a proper motion. First Bank contends that as the motion was not filed by a licensed attorney, the trial judge was absolutely correct in striking the pleading.

La. R.S. 37:213(A) provides:

> No natural person, who has not first been duly and regularly licensed and admitted to practice law by the supreme court of this state, no corporation or voluntary association except a professional law corporation organized pursuant to Chapter 8 of Title 12 of the Revised Statutes, and no partnership or limited liability company except one formed for the practice of law and composed of such natural person, corporations, voluntary associations, or limited liability companies, all of whom are duly and regularly licensed and admitted to the practice of law, shall:
>
> (1) Practice law.

(2) Furnish attorneys or counsel or an attorney and counsel to render legal services.
(3) Hold himself or itself out to the public as being entitled to practice law.
(4) Render or furnish legal services or advice.
(5) Assume to be an attorney at law or counselor at law.
(6) Assume, use, or advertise the title of lawyer, attorney, counselor, advocate or equivalent terms in any language, or any phrase containing any of these titles in such manner as to convey the impression that he is a practitioner of law.
(7) In any manner advertise that he, either alone or together with any other person has, owns, conducts, or maintains an office of any kind for the practice of law.

In this matter, Proctor's Cove was not represented by an attorney at the time its Motion to Compel Court to Comply with the Model Code of Judicial Conduct or Motion to Recuse the Trial Judge was filed. The motion was filed through Keith Gagnon, a person who has not been licensed to practice law in this state. The trial court struck all of the pleadings filed by Keith Gagnon. Because Keith Gagnon was not licensed to practice law and violated the provisions of La. R.S. 37:213, we find the trial court was correct in striking the motion to recuse filed through him on behalf of Proctor's Cove. As a result, we also find that the judgments rendered by the trial court subsequent to the striking of the recusal motion are not absolute nullities.

Assignments of Error Three, Four and Five

Defendants allege the trial court erred in granting the summary judgment because there is, at least, one genuine issue of material fact remaining in dispute, and the trial court impermissibly weighed and/or made credibility determinations in violation of summary judgment law. Defendants claim that the validity of the alleged debt is a remaining genuine issue of material fact because the debt presented to the trial court is not valid. Defendants argue that more money was paid by Michael Thompson to First Bank than what was actually due on the promissory note. Defendants maintain that the payments were misappropriated

and/or misapplied by First Bank to the loan of Jennifer Thompson, which caused a remaining balance to be reflected. Defendants also maintain that a genuine issue of material was created as to the existence of a settlement agreement between the parties through Mr. Berns' affidavit and First Bank's internal memoranda between Mr. Cannizzarro and Mr. Berns, which were attached to their reconventional demand. Additionally, Defendants allege the trial court erred in denying Mr. Thompson and Milton Gagnon's motion for new trial/reconsideration.

First Bank argues Defendants failed to show that they would meet their burden of proving a compromise occurred between the parties at trial. First Bank avers that the affidavit of Mr. Berns stating that Mr. Thompson, as sole member and manager of Proctor's Cove, instructed First Bank to pay his daughter's loan and personal debt owed to First Bank with proceeds from Proctor's Cove was not controverted by Defendants with proper summary judgment evidence. As a result, First Bank contends that it was entitled to summary judgment as a matter of law because the trial court was never called upon to weigh evidence or make credibility determinations.

Denial of a motion for new trial is an interlocutory and non-appealable judgment. *Smith v. Smith*, 08-575 (La. App. 5 Cir. 1/12/10); 31 So.3d 453; *Roger v. Roger*, 99-765 (La. App. 5 Cir. 1/12/00); 751 So.2d 354, 356. However, the Louisiana Supreme Court has instructed the courts of appeal to consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits, when it is clear from the appellant's brief that the intent is to appeal the merits of the case. *Id.*; *See, Punctual Abstract Co., Inc. v. U.S. Land Title*, 09-91 (La. App. 5 Cir. 11/10/09); 28 So.3d 459. It is obvious from Defendants' brief that they intended to appeal the merits of the summary judgments rendered on March 13, 2013 and May 3, 2013.

Appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate, asking whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. *Glass v. Home Depot U.S.A., Inc.*, 10-53 (La. App. 5 Cir. 9/28/10); 50 So.3d 832, 834. A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. *Id.* A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Id.* When ruling on a motion for summary judgment, a

> judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law.

La. C.C.P. art. 966(B)(2).[2]

"Only evidence admitted for purposes of the motion for summary judgment shall be considered by the court in its ruling on the motion." La. C.C.P. art. 966(E)(2). The mover of the motion has the burden of proving that summary judgment is appropriate. La. C.C.P. art. 966(C)(2).

In the matter at bar, First Bank filed its Motion for Summary Judgment, alleging Defendants defaulted on payments for their promissory note. In support of its position, First Bank attached an affidavit of Mr. Berns, the deposition of Milton Gagnon, a copy of the commercial guaranty, memoranda between Mr. Cannizzarro and Mr. Berns discussing the loan, and email exchanges between Mr. Berns and Mr. Thompson to its motions. However, a review of the transcripts of the motion hearings reveal that First Bank failed to introduce any of the

[2] It is noted that La. C.C.P. art. 966 was amended by Acts 2013, No. 391 § 1, which became effective on August 1, 2013. The pre-amended version of La. C.C.P. art. 966 was in effect at the time of hearing on the Motion for Summary Judgment in this matter.

documentation attached to its motions. At the time of the motion hearings, La. C.C.P. art. 966 required that only evidence formally introduced and admitted into evidence at the hearings on the summary judgments could be considered by the court. *See*, *Cook v. Asbestos Corp., Ltd.*, 13-9 (La. App. 5 Cir. 5/23/13); 123 So.3d 731, 732, *affirmed on rehearing*, (La. App. 5 Cir. 8/27/13). Evidence, although attached to the motion or filed into the record, could not be considered by the court unless properly admitted at the hearing. *Id.* Consequently, First Bank failed to have any documentation admitted for the purposes of summary judgment. Thus, without having any evidence to consider for summary judgment purposes, we cannot find that First Bank met its burden of proving there are no genuine issues of material fact as to whether Defendants defaulted on the promissory note and owe an outstanding balance.

Therefore, upon *de novo* review of the motions filed by First Bank, we find that summary judgments against Defendants are improper. Accordingly, we reverse the trial court's summary judgments and remand the matter to the trial court for further proceedings. As a result of the reversals, we pretermit review of Defendants' assignment of error number six and First Bank's Answer.

DECREE

For the foregoing reasons, we affirm the trial court's striking of the Motion to Recuse. Additionally, we reverse the summary judgments rendered in favor of First Bank and Trust and against Milton Gagnon, Michael Thompson and Proctor's Cove, II, L.L.C., and remand the matter for further proceedings.

AFFIRMED IN PART;
REVERSED IN PART
AND REMANDED

FIRST BANK AND TRUST	NO. 13-CA-802
VERSUS	FIFTH CIRCUIT
PROCTOR'S COVE II, LLC, MILTON GAGNON AND MICHAEL J. THOMPSON	COURT OF APPEAL
	STATE OF LOUISIANA

WICKER, J., CONCURS WITH REASONS

While I agree with the majority opinion in this case, I write separately to further elucidate upon two issues presented in this appeal.

First, concerning whether the trial court properly struck the pleadings filed by Keith Paul Gagnon on behalf of Proctor's Cove, I agree with the majority opinion that the trial court did not err in doing so but write further to explain my interpretation of the poorly constructed applicable statute.

La. R.S. 37:213(A) provides:

> A. No natural person, who has not first been duly and regularly licensed and admitted to practice law by the supreme court of this state, no corporation or voluntary association except a professional law corporation organized pursuant to Chapter 8 of Title 12 of the Revised Statutes, and no partnership or limited liability company except one formed for the practice of law and composed of such natural persons, corporations, voluntary associations, or limited liability companies, all of whom are duly and regularly licensed and admitted to the practice of law, shall:
>
> (1) Practice law.

The definition of "practice law" is provided in La. R.S. 37:212.[1] Subsection (C) to La. R.S. 37:212 provides an exception to the general

[1] La. R.S. 37:212 provides:
A. The practice of law means and includes:
(1) In a representative capacity, the appearance as an advocate, or the drawing of papers, pleadings or documents, or the performance of any act in connection with pending or prospective proceedings before any court of record in this state; or
(2) For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect;
(a) The advising or counseling of another as to secular law;

restriction provided in La. R.S. 37:212, prohibiting the practice of law by individuals not licensed to do so. La. R.S. 37:212(C) provides:

> C. Nothing in this Section shall prohibit any partnership, corporation, or other legal entity from asserting or defending any claim, not exceeding five thousand dollars, on its own behalf in the courts of limited jurisdiction or on its own behalf through a duly authorized partner, shareholder, officer, employee, or duly authorized agent or representative. No partnership, corporation, or other entity may assert any claim on behalf of another entity or any claim assigned to it.

Preliminarily, the exception provided in La. R.S. 37:212(C) is poorly written, causes confusion, and is subject to different interpretations. However, I interpret the provision to permit an LLC member to represent the entity's interest when the object of the litigation at issue does not exceed $5,000.00. A review of the enactment and amendments to La. R.S. 37:212(C) supports this interpretation.

Subsection (C) was added in 1980 by Act No. 161, which provides that the enactment of Subsection (C) is to "authorize partnerships, corporations, and other legal entities to assert certain claims or enter certain defenses in courts of limited jurisdiction...." The language of Subsection (C), as added in 1980, permitted a legal entity to assert "any

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(b) In behalf of another, the drawing or procuring, or the assisting in the drawing or procuring of a paper, document, or instrument affecting or relating to secular rights;
(c) The doing of any act, in behalf of another, tending to obtain or secure for the other the prevention or the redress of a wrong or the enforcement or establishment of a right; or
(d) Certifying or giving opinions, or rendering a title opinion as a basis of any title insurance report or title insurance policy as provided in R.S. 22:512(17), as it relates to title to immovable property or any interest therein or as to the rank or priority or validity of a lien, privilege or mortgage as well as the preparation of acts of sale, mortgages, credit sales or any acts or other documents passing titles to or encumbering immovable property.
B. Nothing in this Section prohibits any person from attending to and caring for his own business, claims, or demands; or from preparing abstracts of title; or from insuring titles to property, movable or immovable, or an interest therein, or a privilege and encumbrance thereon, but every title insurance contract relating to immovable property must be based upon the certification or opinion of a licensed Louisiana attorney authorized to engage in the practice of law. Nothing in this Section prohibits any person from performing, as a notary public, any act necessary or incidental to the exercise of the powers and functions of the office of notary public, as those powers are delineated in Louisiana Revised Statutes of 1950, Title 35, Section 1, et seq.
C. Nothing in this Section shall prohibit any partnership, corporation, or other legal entity from asserting or defending any claim, not exceeding five thousand dollars, on its own behalf in the courts of limited jurisdiction or on its own behalf through a duly authorized partner, shareholder, officer, employee, or duly authorized agent or representative. No partnership, corporation, or other entity may assert any claim on behalf of another entity or any claim assigned to it.
D. Nothing in Article V, Section 24, of the Constitution of Louisiana or this Section shall prohibit justices or judges from performing all acts necessary or incumbent to the authorized exercise of duties as judge advocates or legal officers.

claim not exceeding twelve hundred dollars or defense pertaining to an open account or promissory note on its own behalf in the courts of limited jurisdiction...." In 1985, the statute was amended by Act No.783, "to increase the amount of any claim...which any partnership, corporation, or other legal entity may assert on its own behalf...." The 1985 amended language to Subsection (C) contained similar language to the pre-1985 version of the statute but raised the amount in dispute to provide that the legal entity could then assert "any claim, not exceeding two thousand dollars...."

The statute was again amended in 1992, by Act No. 673, to "raise the amount in dispute below which a partnership, corporation, or legal entity may assert claims in court through an authorized representative...." The 1992 revised version of Subsection (C) again increased the amount to five-thousand dollars. The 1992 version read as follows:

> C. Nothing in this Section shall prohibit any partnership, corporation, or other legal entity from asserting any claim, not exceeding five thousand dollars, or defense pertaining to an open account or promissory note, or suit for eviction of tenants on its own behalf in the courts of limited jurisdiction on its own behalf through a duly authorized partner, shareholder, officer, employee, or duly authorized agent or representative. No partnership, corporation, or other entity may assert any claim on behalf of another entity or any claim assigned to it.

La. R.S. 37:212(C).

Arguably, one could interpret the above version of La. R.S. 37:212(C) to limit any claim asserted *by* the legal entity to five thousand dollars; however, as to any "*defense* pertaining to an open account or promissory note, or suit for eviction of tenants[,]" the 1992 version could be read to place no limit on the amount at issue, with the exception that the litigation must be filed in a court of limited jurisdiction.

La. R.S. 37:212(C) was again amended in 2010, to delete the "defense pertaining to an open account" language and to add an "or" following "courts of limited jurisdiction[.]" The changes are reflected as follows:

> Nothing in this Section shall prohibit any partnership, corporation, or other legal entity from asserting **or defending** any claim, not exceeding five thousand dollars, on its own behalf in the courts of limited jurisdiction **or** on its own behalf through a duly authorized partner, shareholder, officer, employee, or duly authorized agent or representative. No partnership, corporation, or other entity may assert any claim on behalf of another entity or any claim assigned to it.

I interpret the above amendment to provide that a legal entity may assert *or* defend any claim—not exceeding five thousand dollars—on its own behalf. The entity may assert or defend a claim on its on behalf in a court of limited jurisdiction *or* in any court through a duly authorized representative. The legislature, in the 2010 amended version—in effect at the time the trial court ruled on First Bank's Motion to Disqualify Keith Paul Gagnon—placed the language "asserting or defending any claim" before the language imposing the "five thousand dollar" limitation to the amount in controversy. I interpret the amended language to impose a five thousand dollar limitation to any claim *or* defense asserted by a legal entity on its own behalf, whether filed in a court of limited jurisdiction or in any other court. Therefore, it is my opinion that in order for the exception provided in La. R.S. 37:212(C) to apply—allowing a legal entity to assert or defend a claim on its own behalf—the amount in controversy subject to the litigation may not exceed five thousand dollars.

Because the amount in controversy in this litigation clearly exceeds five thousand dollars, it is my opinion that Keith Paul Gagnon, as a member of Proctor's Cove, is not permitted to defend the LLC under the exception provided in La. R.S. 37:212(C). Accordingly, I agree with the majority opinion that the trial judge did not err in striking pleadings filed by Keith Paul Gagnon on behalf of Proctor's Cove.

Second, I write to elucidate upon the confusion and inconsistency which has arisen in this and other circuits regarding the retroactive effect of the many recent amendments to La. C.C.P. art. 966. For the reasons provided herein, I agree with the majority opinion that the version of La. C.C.P. art. 966 in effect at the time of the summary judgment hearings in this case should apply. Therefore, because the version of La. C.C.P. art. 966 in effect at the time of the hearings in this matter required that parties formally offer and introduce evidence in support of their motions for summary judgment—and because First Bank failed to do so—I agree that the summary judgments must be reversed and the matter remanded to the trial court for further proceedings.

At the time of the hearings on First Bank's motions for summary judgment in this case, La. C.C.P. art. 966 provided that "[o]nly evidence admitted for purposes of the motion for summary judgment shall be considered by the court in its ruling on the motion." Therefore, at the time of the hearings in this case, parties were required to formally introduce evidence into the record to support their motions for summary judgment. However, La. C.C.P. art. 966

was amended in 2013 by Act. No. 391, which added the following language:

> Evidence cited in and attached to the motion for summary judgment memorandum filed by an adverse party is *deemed admitted* for purposes of the motion for summary judgment unless excluded in response to an objection made in accordance with Subparagraph (3) of this Paragraph. Only evidence admitted for purposes of the motion for summary judgment may be considered by the court in its ruling on the motion.

La. C.C.P. art. 966(F)(2). (emphasis added)

Although La. C.C.P. art. 966 is a procedural article contained in the Louisiana Code of Civil Procedure, amendments to the articles therein may be substantive or procedural. It is my opinion that the 2013 amendment to La. C.C.P. art. 966 is a substantive amendment that cannot be retroactively applied.[2] The 2013 amendment, which provides that evidence submitted for purposes of the motion for summary judgment is "deemed admitted[,]" relieves parties of the obligation to formally offer and introduce such evidence—as required under the prior version of the statute—as well as imposes an obligation upon parties—not required under the prior version of the statute—that any objection to the evidence submitted must be made in *writing*.[3]

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[2] The 2013 amendment added the "deemed admitted" language and thus removed a party's obligation to formally offer, file, and introduce evidence submitted in connection with the motion for summary judgment. The 2013 amendment changed the following language, reflected below:
(2) **Evidence cited in and attached to** the motion for summary judgment **or memorandum filed by an adverse party is deemed admitted for purposes of the motion for summary judgment unless excluded in response to an objection made in accordance with Subparagraph (3) of this Paragraph. Only evidence admitted for purposes of the motion for summary judgment may** be considered by the court in its ruling on the motion.

[3]The 2013 amendment added La. C.C.P. art. 966(F)(3), which provides:

> (3) Objections to evidence in support of or in opposition to a motion for summary judgment may be raised in memorandum or written motion to strike stating the specific grounds therefor.

Further, La. C.C.P. art. 966(F)(3) was recently again amended in 2014 to add a service requirement, thereby imposing additional duties upon the parties. The 2014 amendment added language that, "[a]ny such memorandum or written motion to strike shall be served pursuant to Article 1313 within the time limits provided in District Court Rule 9.9."

A review of the jurisprudence reveals that this Circuit has issued conflicting decisions concerning the retroactivity of the 2013 amendment to La. C.C.P. art. 966. In *Midland Funding, LLC v. Urrutia*, 13-459 (La. App. 5 Cir. 12/19/13), 131 So.3d 474, 476, this Court found that the 2013 amendment was procedural in nature and, thus, applied retroactively. This Court stated:

> This amendment to Article 966 is procedural and therefore applies retroactively. La. C.C. art. 6. Accordingly, this Court declines to vacate the judgment and remand for a new hearing on the grounds that Midland's evidence was not formally admitted at the [October 31, 2012] hearing, because after August 1, 2013, there is no longer a requirement to formally admit the evidence at the hearing.

Accordingly, in *Midland*, this Court applied the 2013 amendment retroactively on appeal to the summary judgment hearing that took place prior to the 2013 amendment. See also *Stipp v. Metlife Auto & Home Ins. Agency, Inc.*, 13-507 (La. App. 5 Cir. 12/19/13), 131 So.3d 455, 459 (wherein this Court again retroactively applied the 2013 amendment, stating, "La. C.C.P. art. 966 was amended effective August 1, 2013 to remove the requirement of formal introduction of evidence at the hearing on the motion for summary judgment....This amendment to Article 966 is procedural and therefore applies retroactively").

However, this Court has also declined to retroactively apply the 2013 amendment to La. C.C.P. art. 966 and, rather, has applied the law in effect at the time of the summary judgment hearing. In *Gutierrez v. State Farm Fire & Cas. Ins.*—published subsequent to the 2013 amendment—this Court applied the version of La. C.C.P.

art. 966 in effect at the time of the summary judgment hearing. This Court stated:

> La. C.C.P. art. 966(B) formerly provided, in pertinent part, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions *on file,* together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." (Emphasis added).
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>
> [A]t the time of the [October 29, 2012] hearing on the motion for summary judgment here, La. C.C.P. art. 966 mandated that only evidence formally admitted into evidence during the summary judgment hearing could be considered by the trial court...."

Gutierrez v. State Farm Fire & Cas. Ins. Co., 13-341 (La. App. 5 Cir. 10/30/13), 128 So.3d 509, 512.

Upon finding that no evidence was formally introduced at the October 29, 2012 summary judgment hearing, as required under the version of the statute in effect at the time of the hearing, this Court vacated the granting of summary judgment and remanded to the trial court for further proceedings. *Id.*

The Third Circuit has also issued conflicting decisions concerning the retroactivity of the 2013 amendment to La. C.C.P. art. 966. See *Evans v. Bordelon*, 13-888 (La. App. 3 Cir. 3/19/14), —So.3d—, 2014 WL 1047052 (wherein the Third Circuit, relying on this Court's decision in *Midland Funding*, *supra*, applied the 2013 amendment retroactively to a summary judgment hearing that occurred prior to the amendment's effective date.); but see *Garman v. Serhan*, 13-969 (La. App. 3 Cir. 2/12/14), —So.3d—, 2014 WL 551530; *Bourque v. Transit Mix*, 13-1390 (La. App. 3 Cir. 5/7/14), —So.3d—, 2014 WL 1805368; and *Hooper v. Hodnett*, 13-1026 (La. App. 3 Cir. 2/12/14), —So.3d—, 2014 WL 551574 (wherein the Third Circuit—in

decisions published subsequent to the 2013 amendment—declined to apply the amendment retroactively but rather applied the version of the law in effect at the time of the summary judgment hearing).

The Fourth Circuit, in *Mason v. T & M Boat Rentals, LLC*, 13-1048 (La. App. 4 Cir. 3/19/14), 137 So. 3d 741, 744-45, considered the 2013 amendment to La. C.C.P. art. 966 and found that the amendment is substantive and, thus, cannot be applied retroactively. In *Mason*, the Fourth Circuit conducted the following analysis:

> La. C.C. art. 6 provides that "[i]n the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary." Although La. C.C.P. art. 966 is contained in the Louisiana Code of Civil Procedure, its retroactivity is not presumed. This Court must "engage in a two-fold inquiry." *Cole v. Celotex Corp.*, 599 So.2d 1058, 1063 (La.1992). "First, we must ascertain whether in the enactment the legislature expressed its intent regarding retrospective or prospective application." *Id.* "If the legislature did not, we must classify the enactment as substantive, procedural or interpretive." *Id.* "Substantive laws either establish new rules, rights, and duties or change existing ones." *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d 809, 817 (La.1992). "Interpretive laws, on the other hand, do not create new rules, but merely establish the meaning that the interpretive statute had from the time of its enactment." *Id.* "When an existing law is not clear, a subsequent statute clarifying or explaining the law may be regarded as interpretive, and the interpretive statute may be given retrospective effect because it does not change, but merely clarifies, pre-existing law." *Id.*
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> The version of La. C.C.P. art. 966 in effect at the time of the hearing and the trial court's ruling required that evidence used to support or oppose a motion for summary judgment be "admitted" instead of simply being "on file." Therefore, the statute, at the time, required the mover to offer, introduce, and receive permission from the trial court to admit evidence into the record on a motion for summary judgment. This also placed an onus on the opponent to object to any evidence "admitted" by the trial court. That amendment placed new duties upon both the mover and the opponent of a motion for summary judgment in order to ensure that only "admitted" evidence was in the record as opposed to being "on file." The amendment to La. C.C.P. art. 966 currently in effect provides that "[e]vidence cited in and attached to the motion for summary judgment ... is

> deemed admitted." Thus, the new amendment removed the duties the previous version placed upon both parties and changed the parties' required duties. Accordingly, we find that Acts 2013, No. 391, 1 is substantive in nature and cannot be applied retroactively…[.]

Mason v. T & M Boat Rentals, LLC, 13-1048 (La. App. 4 Cir. 3/19/14), 137 So.3d 741, 744.

It is my opinion that the Fourth Circuit's analysis in *Mason* accurately determines that the 2013 amendment to La. C.C.P. art. 966 is substantive in nature—removing a party's previous obligation to formally introduce evidence into the record (as required under the 2012 version) and imposing the additional duty to object to any evidence "deemed admitted" by only doing so in writing (imposed in the 2013 version)—and, thus, cannot be applied retroactively. Nowhere in the Louisiana evidentiary construct is any evidence "deemed admitted" nor is there any obligation to file a written objection to the admission of evidence presented in connection with a pre-trial motion and, thus, the parties could not anticipate the evidentiary changes required under the amended version of La. C.C.P. art. 966. Further, given that the amendment at issue controls evidentiary issues presented at a summary judgment hearing, it is my opinion that the version of the law in effect at the time of the hearing applies.

Given the conflict within this Circuit (and others) concerning the retroactivity of statutory amendments to La. C.C.P. art. 966 as well as the legislature's continuous revisions to this ever-changing statute, it is my opinion that this issue should be considered and determined by this Court *en banc*.

Accordingly, for the reasons provided herein, I concur with the majority opinion's application of the version of La. C.C.P. art. 966 in effect at the time of the summary judgment hearings rather than the current version

of the article while on appellate review. Further, because First Bank failed to formally introduce evidence submitted in connection with its motions for summary judgment—as required under the version of La. C.C.P. art. 966 in effect at the time of the summary judgment hearings—I agree that the evidence cannot be considered and that First Bank has failed to meet its burden of proof on its motions.

FIRST BANK AND TRUST	NO. 13-CA-802
VERSUS	FIFTH CIRCUIT
PROCTOR'S COVE II, LLC, MILTON GAGNON AND MICHAEL J. THOMPSON	COURT OF APPEAL
	STATE OF LOUISIANA

RAC

CHAISSON, J., CONCURS WITH REASONS

I agree with the majority opinion in this case that First Bank, having failed to formally introduce and have admitted its evidence on the motions for summary judgment, has failed to meet its burden of proof on its motions, and therefore the judgments granting summary judgments must be reversed.

However, regarding the issue of the handling of Proctor's Cove II's motion to recuse, because the official record indicates that there is still an outstanding attachment against Keith Paul Gagnon, I feel compelled to comment further.[1] For the following reasons, I find that the attachment against Mr. Gagnon was improvidently issued and should be recalled.

The trial judge struck the motion to recuse based upon her determination that Keith Paul Gagnon did not fall within the exception provided by La. R.S. 37:212(C), and therefore was not authorized to file any pleadings on behalf of Proctor's Cove II. Without further expounding upon the various possible interpretations of the exception, I strongly echo Judge Wicker's comments that it is poorly written, causes confusion, and is subject to different interpretations. Regardless of the proper interpretation of the exception, appellants failed to timely seek appellate review of the trial court's ruling that Keith Paul Gagnon is prohibited from

[1] Appellants have assigned as error, and objected to, all rulings of the trial court subsequent to the filing of the motion to recuse, presumably including the issuance of the attachment against Keith Paul Gagnon.

filing pleadings on behalf of Proctor's Cove II, and I am therefore of the opinion that they are now precluded from objecting to the striking of the motion to recuse. My concern is that this poorly worded exception is the genesis of the issuance of an attachment for contempt against Keith Paul Gagnon.

Furthermore, it appears that the attachment for contempt was issued against Keith Paul Gagnon for the filing of the motion to recuse and motion to stay proceedings. However, the record does not reflect that any order had been issued prohibiting Mr. Gagnon from filing pleadings prior to his filing the motion to recuse on December 13, 2011. Nor does the record reflect that Mr. Gagnon has filed any pleadings in the district court subsequent to the motion to recuse. Additionally, First Bank asserts in their motion to prohibit, and in the accompanying memorandum, that Mr. Gagnon had been warned ***on the record*** by the trial judge not to file any additional pleadings on behalf of Proctor's Cove II. To the contrary, the record in fact bears out Mr. Gagnon's assertion that, not only had he not been warned against filing any additional pleadings, but when the issue was informally raised by First Bank at an October 2, 2009 hearing, the trial judge allowed him to argue on behalf of Proctor's Cove II.[2] First Bank compounds this apparent misstatement by filing with this Court a memorandum in support of its motion to strike, alleging that the contempt citation against Mr. Gagnon was for "filing pleadings on behalf of Proctor's Cove, *in direct violation of the court's order.*" (emphasis added). The record reflects that no such prior order exists.

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[2] Furthermore, since December 30, 2008, the date that Mr. Gagnon first filed a pleading on behalf of Proctor's Cove II as one of its members, until the January 11, 2012 judgment prohibiting him from doing so (a period of three years), the record is replete with instances of Mr. Gagnon being allowed to file pleadings on behalf of Proctor's Cove II, without objection being made by First Bank, and First Bank in turn serving Proctor's Cove II with pleadings through Mr. Gagnon.

Under these circumstances, and in light of appellants' request that all orders subsequent to the filing of the motion to recuse be vacated, and the fact that Mr. Gagnon's liberty may be at stake should he be arrested on the attachment, I write to express my opinion that the attachment appears to be improvidently issued and should be recalled.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **SEPTEMBER 24, 2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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CLERK OF COURT

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