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# Application For Writs

No. '13 -C- 521

## COURT OF APPEAL, FIFTH CIRCUIT

## STATE OF LOUISIANA



JUN 24 2013

Susan Buchholz
Deputy Clerk

VINOD MISTRY AND NITILA MISTRY
VERSUS
DESAI HOLDINGS, L.L.C.

IN RE VINOD MISTRY AND NITILA MISTRY

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE ROSS P. LADART, DIVISION "O", NUMBER 673-592

**Attorneys for Relator:**

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**WRIT GRANTED**

See attached.

Gretna, Louisiana, this 1st day of August, 2013.

**WINDHORST, J. CONCURS WITHOUT REASONS**
See attached.

**LILJEBERG, J. CONCURS WITHOUT REASONS**
See attached.

VINOD MISTRY AND
NITILA MISTRY

VERSUS

DESAI HOLDINGS, L.L.C.

NO. 13-C-521

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

**WRIT GRANTED**

This case involves a claim for unpaid wages, penalties, and attorney fees, which Vinod and Nitila Mistry, plaintiffs, allege are owed them by their former employer, Desai Holdings, L.L.C. It is alleged that plaintiffs were employed by defendant between April of 2007 and December 10, 2008, to clean motel rooms. For most of this period they worked at a facility on Clearview Parkway. However, from November 13 or 14, 2007, until January 13, 2008, they were sent by their employer to clean a motel in Texarkana, Texas.

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In their original petition of May 27, 2009, plaintiffs recited that they were employed in cleaning the Clearview motel, and that they were not paid all of their wages. Although they asserted that their employment ran from April of 2007 through December 10, 2008, no mention is made in that suit of the two months in Texarkana.

On October 28, 2011, plaintiffs filed an amended petition which alleged that during the two months in Texarkana, they were not paid the federal minimum wage in violation of the Fair Labor Standards Act (FLSA), 29 USCA sec. 2155 et seq. Pursuant to 29 USCA sec. 255, "every such action [under FLSA] shall be forever barred unless commenced within two years after the cause of action accrued."



Defendant urged an exception of prescription, arguing that the two year period under FLSA is actually a peremptive one, not subject to interruption or suspension. It asserted that because plaintiffs had not pled the cause of action

under FLSA until the amended petition of October 28, 2011, more than two years after their employment in Texarkana, it came too late. The trial judge agreed and sustained the exception. This writ application followed.

Article 1153 of the Code of Civil Procedure provides that "When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading." It is now established, however, that a perempted claim cannot relate back. *Naghi v. Brener*, 08-2527 (La. 6/26/09) 17 So.3d 919.

In the present case, we do not view the issue as whether the FLSA claim relates back (assuming that the two year time limitation is in fact peremptive), but rather whether the original petition alleged facts, which if proved, would sustain a FLSA cause of action. The statute dealing with res judicata, La. R.S. 13:4231, provides that when the judgment is in favor of the plaintiff, all causes of action arising out of the "transaction or occurrence" are extinguished and merged in the judgment. Here, plaintiffs claim they were not paid wages owed them during their employment with defendant between April of 2007 and December of 2008. Any claim for underpayment of wages under FLSA would be extinguished and merged in the judgment because arising out of the employment "transaction or occurrence." It is therefore evident that the FLSA claim must be construed as a part of the claim for underpayment of wages in the original petition, and therefore that it was timely asserted. To rule otherwise would involve an anomalous situation where the FLSA claim would not be considered to be a part of the original petition for purposes of trial, but would be so considered for purposes of res judicata. We decline to so rule.

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For the foregoing reasons, we grant the writ, set aside the ruling sustaining the exception of prescription on the FLSA claim, and remand the matter for further proceedings consistent with this ruling.

Gretna, Louisiana, this 1st day of August, 2013.

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**JUDGE ROBERT A. CHAISSON**

**WINDHORST, J. CONCURS WITHOUT REASONS**

**LILJEBERG, J. CONCURS WITHOUT REASONS**



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