JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.	:	SUIT NO.: 651,069 SECTION: 22
	:	19TH JUDICIAL DISTRICT COURT
versus	:	
GROUP RESOURCES INCORPORATED, MILLIMAN, INC., BUCK GLOBAL, LLC. AND IRONSHORE SPECIALTY COMPANY	:	PARISH OF EAST BATON ROUGE
	:	STATE OF LOUISIANA

OPPOSITION MEMORANDUM TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON UNCONSTITUTIONALITY OF LA. R.S. § 22:2043.1(A) AS APPLIED

MAY IT PLEASE THE COURT:

Plaintiff[1] respectfully files this Opposition Memorandum to Defendants' Motion for Partial Summary Judgment on Unconstitutionality of La. R.S. 22:2043.1(A) as Applied ("Motion"), currently set for Zoom hearing before this Honorable Court on Friday, August 20, 2021. Buck filed its Motion first, and Milliman and GRI later filed separate "*ex parte*" motions to join and adopt Buck's Motion; therefore, rather than file three (3) separate opposition memoranda, the Receiver now files this single brief. For all of the following reasons, Defendants' Motion should be DENIED insofar as it seeks a declaration that La. R.S. 22:2043.1(A) is unconstitutional in any way.

In general, defendants argue that La. R.S. 22:2043.1(A) is unconstitutional because it precludes them from arguing comparative fault against "any present or former officer, director, trustee, owner, employee, or agent the insurer [LAHC]" at trial and is a "plainly absurd, unconscionable" expression of legislative will that deprives them of "fundamental due process rights." Buck, memo. p. 1. Defendants do not enjoy a constitutional right to have the fault of all potentially responsible parties allocated by the finder of fact at the trial of a civil suit brought by a Louisiana Receiver. Despite defendants' complaints, for the reasons set forth herein, the clear statement of the Louisiana Legislature found in §2043.1(A) should be recognized and given full effect by this Honorable Court.

[1] James J. Donelon, Commissioner of Insurance for the State of Louisiana in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc.("LAHC"), through his duly appointed Receiver, Billy Bostick ("Plaintiff" or "Receiver").

CONTESTED ISSUES OF MATERIAL FACT

Pursuant to Uniform Local Rule 9.10(b), the Receiver respectfully states:

1. List of material facts that the opponent contends are genuinely disputed

The determination of whether La. R.S. 22:2043.1(A) is unconstitutional as applied is, in general, a matter of law. However, in an abundance of caution, the Receiver responds to the four (4) specific "Undisputed Material Facts" listed by Buck in its supporting memorandum at pp. 4-5 as follows:

(1) The unilateral factual allegations made by the Receiver in his Petition for Damages and Amended Petition for Damages are disputed material facts. According to applicable law, unless admitted by a defendant with authority and capacity to admit any such alleged fact, factual allegations by a plaintiff are not judicial admissions or confessions. To the extent defendants suggest that any of the Receiver's factual allegations constitute "judicial admissions" and are therefore "uncontested material facts," the Receiver rejects this erroneous assertion.

(2) That the Receiver previously settled with some former defendants is correct. See the Receiver's statement (1) above.

(3) That the Receiver moved for partial summary judgment regarding defendants' defenses based upon La. R.S. 22:2043.1 is correct and this prior motion speaks for itself.

(4) Buck's affirmative defenses asserted in its response to the Receiver's fifth amended petition speak for themselves.

2. Reference to relevant documents

Not applicable.

LAW AND ARGUMENT

1. Constitutionality Standards

The Louisiana Supreme Court has spoken many times regarding the standards applicable to determining when the Constitution limits the otherwise plenary power of the Louisiana Legislature to make law. The plenary power of the legislature is the rule; prohibitions on the exercise of particular powers is the exception. *Chamberlain v. State, Through Department of Transportation and Development*, 624 So.2d 874, 878-79 (La.1993); *Board of Commissioners of Orleans Levee District v. Department of Natural Resources*, 496 So.2d 281, 286 (La.1986). "[A] party challenging a statute's constitutionality must articulate a **particular constitutional provision**

that limits the legislature's powers." *Soloco, Inc. v. Dupree*, 97-1256, p. 3 (La. 1/21/98), 707 So.2d 12, 14 (emphasis added).

Unlike the federal constitution which grants powers, the Louisiana constitution, in general, limits powers.[2] Because the provisions of the Louisiana Constitution are not grants of power but instead are limitations on the otherwise plenary power of the people, exercised through the legislature, the legislature may enact any legislation that the constitution does not prohibit.[3] You will search the Louisiana and U.S. Constitutions in vain looking for a statement that parties in civil litigation have a "fundamental" or "substantive" right to demand that comparative fault principles must apply in any given case. Defendants simply do not enjoy a constitutional right to have the fault of all potentially responsible parties allocated by the finder of fact in every civil trial.

Statutes are presumed to be constitutional, and the burden of proving that an act of the legislature is unconstitutional is upon the party attacking the act.[4] A party challenging the constitutionality of a statute must point to a particular provision of the constitution that would prohibit the enactment of the statute and must demonstrate **clearly and convincingly** that it was the constitutional aim of that provision to deny the legislature the power to enact the statute in question.[5]

It is not the role of this Honorable Court to consider the policy or wisdom of the legislature in adopting a statute. It is this Honorable Court's province to determine only the applicability, legality and constitutionality of the statute being challenged. *Reeder v. North*, 97-0239, p. 10 (La.

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[2] *Chamberlain*, 624 So.2d at 878-79; *Board of Commissioners*, 496 So.2d at 286; *Polk v. Edwards*, 93-0362, p. 3 n. 4 (La.8/20/93), 626 So.2d 1128, 1132 n. 4; *World Trade Center Taxing Dist. v. All Taxpayers, Property Owners, etc.*, 2005-0374, pp. 11-12 (La. 6/29/05), 908 So.2d 623, 632; *Caddo–Shreveport Sales and Use Tax Comm'n. v. Office of Motor Vehicles through Dep't. of Public Safety and Corrections*, 97–2233, p. 5 (La.4/14/98), 710 So.2d 776, 779.

[3] *City of New Orleans v. Louisiana Assessors' Retirement and Relief Fund*, 2005-2548, pp. 11-12 (La. 10/1/07), 986 So.2d 1, 10-11; *Louisiana Municipal Association v. State*, 2004-0227, p. 45 (La. 1/19/05), 893 So.2d 809, 842–843; *Polk*, 626 So.2d at 1132; *Board of Commissioners*, 496 So.2d at 286; *Polk*, 626 So.2d at 1132; *World Trade Center Taxing Dist.*, 2005-0374 at. 11-12, 908 So.2d at 632.

[4] *Moore v. Roemer*, 567 So.2d 75, 78 (La.1990); *Soloco,* 97-1256 at p. 3, 707 So.2d at 14; *City of New Orleans*, 2005-2548 at pp. 11-12, 986 So.2d at 10-11; *State v. Citizen*, 04–1841, p. 11 (La.4/1/05), 898 So.2d 325, 334; *Louisiana Municipal Association*, 04–0227 at 45, 893 So.2d at 842; *Board of Commissioners of North Lafourche Conservation, Levee and Drainage District v. Board of Commissioners of Atchafalaya Basin Levee District*, 95–1353, pp. 3–4 (La.1/16/96), 666 So.2d 636, 639.

[5] *City of New Orleans*, 2005-2548 at 11-12, 986 So.2d at 10-11; *World Trade Center* 2005–0374 at 12, 908 So.2d at 632; *Caddo–Shreveport Sales and Use Tax Commission* 97–2233 at 5–6, 710 So.2d at 779; *Polk*, 626 at 1132; *Louisiana Recovery Dist.*, 529 So.2d at 388; *Chamberlain*, 624 So.2d at 878-79; *Board of Elementary and Secondary Education v. Nix*, 347 So.2d 147 (La.1977); *Midboe v. Commission on Ethics for Public Employees*, 94-2270, p. 13 (La. 11/30/94), 646 So.2d 351, 357; *World Trade Center Taxing Dist.*, 2005-0374 at. 11-12, 908 So.2d at 632; *In re American Waste & Pollution Control Co.*, 588 So.2d 367 (La.1991); *Board of Elementary and Secondary Education v. Nix*, 347 So.2d 147 (La.1977); *Midboe v. Commission on Ethics for Public Employees*, 94-2270, p. 13 (La. 11/30/94), 646 So.2d 351, 357; *Board of Directors of Louisiana Recovery Dist. v. All Taxpayers, Property Owners, etc.*, 529 So.2d 384 (La.1988); *State in Interest of J.A.V.*, 558 So.2d 214, 216 (La.1990) (collecting cases).

10/21/97), 701 So.2d 1291, 1297; *Chamberlain*, 624 So.2d at 878-79; *City of New Orleans v. Scramuzza*, 507 So.2d 215, 219 (La.1987) (collecting cases); *Board of Commissioners*, 496 So.2d at 298 n. 5; *Progressive Sec. Ins. Co. v. Foster*, 97-2985, p. 22 (La. 4/23/98), 711 So.2d 675, 688. Or stated another way, "It is not the prerogative of the judiciary to disregard public policy decisions underlying legislation or to reweigh balances of interests and policy considerations already struck by the legislature." *Progressive Sec. Ins. Co. v. Foster*, *supra*; *Soloco, Inc. v. Dupree*, *supra*.

Finally, because it is presumed that the legislature acts within its constitutional authority in enacting legislation, this Honorable Court must construe a statute so as to preserve its constitutionality when it is reasonable to do so. *City of New Orleans v. Louisiana Assessors' Retirement and Relief Fund,* 2005-2548, pp. 11-12 (La. 10/1/07), 986 So.2d 1, 10-11; *State v. Fleury*, 01–0871, p. 5 (La.10/16/01), 799 So.2d 468, 472; *Moore v. Roemer*, 567 So.2d 75, 78 (La.1990). As is discussed below, because La R.S. 22:2043.1(A) is rationally related to Louisiana's significant interest in promoting and increasing the chances of a Louisiana Receiver securing a meaningful financial recovery from defendants whose conduct contributed to the failure of a Louisiana insurance company, La. R.S. 22:2043.1(A) as applied does not violate constitutional principles of substantive due process as alleged by defendants.

2. La. R.S. 22:2043.1(A) Embodies the Sound Public Policy of Louisiana

As a matter of sound public policy, the Louisiana Legislature enacted §2043.1(A) to preclude all parties, including LAHC itself (*i.e.*, its own D&Os, employees, etc.) and third-parties like GRI, Buck, and Milliman, from effectively imputing any prior fault attributable to LAHC to the Receiver in an effort to defeat or in any way limit the Receiver's right of recovery against these allegedly liable parties.[6] According to the clear language of La. R.S. 22:2043.1(A): Third-party defendants accused of wrongful conduct by a Receiver may not reduce their potential liability by allocating fault to the directors, officers, employees, etc. of the failed insurance company.[7] In an effort to promote and increase the chances of recovery for the receivership estate, this positive law favors the rights of the Receiver and the interests he represents over the rights of third-party

[6] It is worth noting that, although defendants complain and argue that they have been completely deprived of their rights to assert the defense of comparative fault at trial, this is not correct. La. R.S. 22:2043.1(A) only precludes an allocation of fault to "any present or former officer, director, trustee, owner, employee, or agent the insurer [LAHC]," while La. R.S. 22:2043.1(B) precludes any allocation of fault against the regulators. The actionable fault of other parties who do not fit into the categories proscribed by sections (A) and (B) may potentially be subject to a comparative fault defense at trial.

[7] Stated differently, §2043.1(A) precludes the imputation of fault by LAHC to the Receiver—whether the Receiver only sues the D&Os of LAHC and/or others like GRI, Buck, and Milliman.

defendants in the context of receivership litigation.[8] In effect, §2043.1(A) does not allow defendants whom the Receiver proves engaged in wrongful conduct that caused damages to a failed insurance company to reduce their liability by pointing to any fault attributable to the failed insurance company. In essence, §2043.1(A) forces defendants like GRI, Buck, and Milliman to defend themselves on the merits of their own conduct. Although GRI, Buck, and Milliman understandably do not like this legislative realignment of rights, there is nothing improper, unconstitutional, or "absurd" about it.[9]

While it is true that, absent a more specific and controlling statute like §2043.1(A), La. C.C. art. 2323 provides that the "comparative fault" of all responsible actors will be taken into account and allocated at trial, this does not mean that defendants have a constitutional right to having "comparative fault" principles apply at trial. Indeed, not that long ago Louisiana was not a pure "comparative fault" state as it is now. Prior to the amendments of La. C.C. arts. 2323 and 2324 in 1996, Louisiana law imposed joint and several (*in solido*) liability on all defendants who caused, however slightly, a plaintiff's damages. During this time, a defendant cast in judgment for causing a mere 1% of the plaintiff's damages would be potentially liable for 100% of the plaintiff's damages. If the other defendants were immune from suit, insolvent, or otherwise judgment proof, then the 1% tortfeasor would effectively have no contribution rights against these other, more "at fault" tortfeasors, and would be liable for 100% of plaintiff's damages. During this time, the Louisiana Legislature placed the economic risk of immunity, insolvency, or unavailability of a given tortfeasor squarely upon defendants whose fault, however slight, caused at least a part of plaintiff's damages.

According to defendants' immediate argument, this prior *in solido* period of Louisiana law was unconstitutional because it, as applied in certain cases, would deprive defendants who were only partially at fault of their right to either seek contribution or benefit from an assertion of comparative fault principles. Of course, this prior law of Louisiana was not constitutionally infirm—either facially or as applied. The Louisiana Supreme Court did not (could not) declare this shifting of economic risk in the form of *in solido* liability as being unconstitutional. Instead,

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[8] The Louisiana Legislature has the plenary authority to realign rights between parties in civil litigation as it deems proper, so long as the law enacted does not deprive a party of a constitutionally protected or vested right. For example, under current Louisiana law, workers cannot sue their employers in tort and victims of medical malpractice may not seek general damages in excess of $500,000. Although Louisiana workers and Louisiana victims of medical malpractice do not like these arguably "unfair" laws, their constitutional rights are not being violated because of them.

[9] Indeed, La. R.S. 22:2043.1 is modelled upon and uses the substantially identical language of a Texas statue, V.T.C.A. Insurance Code § 443.011, which was enacted in 2007 and remains the law of receivership proceedings in Texas.

as we all know, the Louisiana Legislature changed our state's policy of placing economic risk on defendants to placing this economic risk onto to plaintiffs by enacting the current form of Articles 2323 and 2324. Now, as a general rule, a defendant found liable will only be responsible for its percentage of comparable fault as determined by the trier of fact. Whether you prefer the old system or our current one, that the Louisiana Legislature has the plenary power to determine who bears this economic risk is undeniable.

In 2012, the Louisiana Legislature correctly decided to modify the application of our pure "comparative fault" scheme in civil suits brought by a Louisiana Receiver. Once an insurance company is placed into receivership and a Receiver is appointed, the Receiver effectively becomes LAHC.[10] §2043.1(A) prohibits the imputation of LAHC's prior fault to the Receiver—regardless of whether the Receiver only sues the D&Os of LAHC or the Receiver sues other third-parties. §2043.1(A) recognizes the separate existence and purpose of the Receiver: to marshal, manage, and recover all assets belonging to the failed insurance company for the benefit of the general public, policyholders, and creditors of the failed insurance company. Just as §2043.1(A) prevents the D&O's from using their own fault as a defense to bar or limit the Receiver's potential recovery, the clear language of §2043.1(A) prevents third-party defendants, like GRI, Buck, and Milliman, from doing the same thing.

Any argument by defendants that La. C.C. art. 2323 precludes the application of La. R.S. 22:2043.1(A) to bar "D&O Fault" defenses is without merit. Article 2323, which provides, *inter alia*, that the fault of "immune" parties should be considered and allocated by the trier of fact, was last amended in 1996.[11] La. R.S. 22:2043.1(A) was enacted in 2012. Whereas Article 2323 addresses the allocation of fault between parties and non-parties in a general way, §2043.1(A) specifically addresses and provides that any allegations regarding "D&O Fault" shall not be allowed as a defense to claims brought by a Louisiana Receiver. As a matter of hornbook law and statutory construction, "the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character." *LeBreton v. Rabito*, 97-2221, p. 7 (La. 7/8/98), 714 So2d. 1226 (citations omitted). A subsequent statute dealing specifically with a particular

[10] As has been addressed and discussed in several prior briefs in this case, this is not to imply or state that the Receiver stands exactly in the shoes of LAHC; he does not. Once an insurance company fails and is placed into receivership, the court-appointed Receiver assumes not only the responsibility of acting on behalf of the insurance company, but also on behalf of the public at large and the policyholders and creditors of the failed insurance company.

[11] For a more detailed discussion of this issue, please see the Receiver's memorandum in support of its previously filed and decided Motion for Partial Summary Judgment Regarding Officer/Director/Employee/Etc. Fault Defenses or, in the Alternative, Motion to Strike Defenses as a Matter of Law.

subject supersedes and prevails over inconsistent and conflicting provisions in an earlier statute addressing those issues.[12] By enacting §2043.1(A) in 2012 to specifically prevent defendants from using "D&O Fault" as a defense to a receiver's claims, the Louisiana Legislature clearly and deliberately circumscribed the application of Art. 2323 in Receivership cases like the present one.

La. R.S. 22:2043.1(A) clearly and unmistakably prohibits defendants from asserting as a "defense" to any "claim by the receiver" the "prior wrongful or negligent actions of any present or former officer, manager, director, trustee, owner, employee, or agent" of LAHC.[13] Given that "Legislation is a solemn expression of legislative will,"[14] is presumed to be constitutional, and trumps custom, equity, and jurisprudence, defendants have not met their heavy burden of showing how this specific statute, as applied, violates any of their constitutional rights. It does not.

3. Defendants have Not been Deprived of any Vested Due Process Rights

The general "due process" argument advanced by defendants is patently deficient. As discussed above, defendants do not have a constitutional right to have "comparative fault" principles apply at trial. The Louisiana Legislature is free to modify substantive rights of civil litigants prospectively however it reasonably may choose, without violating the constitution. It is only when a substantive modification violates an existing vested right that constitutional concerns may be implicated. *See* La. Civ. Code art. 6; *Segura v. Frank*, 630 So.2d 714 (La. 1994); *Church Mut. Ins. Co. v. Dardar*, 2013-2351 (La. 5/7/14), 145 So.3d 271. Clearly, no rights of any defendant here vested before the enactment of §2043.1(A) in 2012.[15]

When the argument of the challenger is that the statutory change has somehow altered its substantive "rights," rather than based on a particular constitutional guarantee, it is only when the legislation has potential *retroactive* substantive effect that constitutional issues come into play. *See, e.g., Segura v. Frank*, 93–1271, 93–1401 (La. 1/14/94), 630 So.2d 714; *St. Paul Fire &*

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[12] *Macon v. Costa*, 437 So.2d 806 (La. 1983); *State v. St. Julian*, 221 La. 1018, 61 So.2d 464 (1952). If there is a conflict between two statutes, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character. *Pumphrey v. City of New Orleans*, 2005-0979 (La. 4/4/06), 925 So.2d 1202; *Killeen v. Jenkins*, 98-2675 (La. 11/5/99), 752 So.2d 146; *Board of Ethics In re Davies*, 2010-1339 (La.App. 1 Cir. 12/22/10), 55 So.3d 918.

[13] The starting point in the interpretation of any statute is the language of the statute itself. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. La. Civ. Code art. 9; *Red Stick Studio Development, L.L.C. v. State ex rel. Dept. of Economic Development*, 2010-0193, p. 10 (La. 1/19/11), 56 So.3d 181, 187-88; *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007–2371, p. 13 (La.7/1/08), 998 So.2d 16, 27.

[14] La. C.C. arts. 1, 2, 3, & 4.

[15] La. R.S. 22:2043.1(A) was signed into law effective August 1, 2012.

Marine Ins. Co. v. Smith, 92-1043 (La. 11/30/92, 609 So.2d 809; La. Civ. Code art. 6; La. R.S. 1:2. Legislative enactments by their very nature always alter either substantive or procedural rights; it is only when the statutory change alters a *vested* substantive right that the constitution becomes implicated. The instant case does not concern any retroactive application of the solemn expression of legislative will.

In *Aucoin v. State Through Dept. of Transp. and Development*, 97-1938, 97-1967 (La. 4/24/98), 712 So.2d 62, the Louisiana Supreme Court addressed amendments to Louisiana's comparative fault laws, specifical La. Civ. Code art. 2324(B). At the time of the auto accident involved there, those laws provided that the DOTD, though held only 15% at fault, could be responsible to pay 50% of the minor plaintiff's losses regardless of the other liable party's ability to pay. But after the 1996 amendments to art. 2324(B), the DOTD could only be held responsible for its own 15% of the fault. So, the Court in *Aucoin* had to decide if the change to 2324(B) should be applied retroactively or prospectively only.[16] The Court held that since the change to 2324(B) was substantive, it would apply prospectively only; the Court was clear that had the accident happened after the substantive change to 2324(B), the altered statute would have applied, and the DOTD would have been responsible for only 15% of the damages.

Moreover, the cases cited by defendants in support of their "due process" challenge do not address the immediate issue in any meaningful way. The foreign cases cited by defendants are inapposite. *National Union v. City Savings*, 28 F.3d 376 (3rd Cir. 1994), a federal case applying and interpreting 12 U.S.C. 1821, *et al.*, does not involve any discussion or ruling regarding a civil litigant's constitutional right to assert comparative fault as a defense at trial; it merely supports the uncontroversial proposition that an insurance company may urge its policy provisions as a defense in an action brought by an RTC Receiver. Two other FDIC cases cited by defendants, *Placida v. FDIC*, 512 Fed.Appx. 938 (11th Cir. 2013) and *Schettler v. Ralron Capital*, 128 Nev. 209 (Nev. 2012), do not address the immediate constitutional issue in any way. And the two SCOTUS cases cited by defendants do not help. *United States v. Armour & Co.*, 402 U.S. 673, 91 S. Ct. 1752 (1971), merely stated, in passing, that a party generally has a right to litigate claims against it that it waives by entering into a consent decree, so the consent decree must be construed strictly only to matters expressly intended by both parties. Similarly, *Philip Morris v. Williams*, 549 U.S. 346

[16] Note that there was no question about the *prospective* application of the new comparative fault statute.

(2007), addressed the interaction of a defendant's due process rights in the context of punitive damages awards.

And the Louisiana cases cited by defendants are equally off-point. *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992) dealt with determining when statutes could be applied retroactively to divest parties of vested substantive rights; it did not address whether civil litigants have a fundamental, constitutional right to have pure comparative fault principles applied at trial. *Gatlin v. Entergy*, 2004-0034 (La. App. 4th Cir. 5/4/2005); 904 So.2d 31, simply holds that Article 2323 applies to immune parties; again, *Gatlin* has nothing to do with whether a civil litigant has a constitutional right to benefit from a comparative fault defense at trial. *State v. Wilson*, 2017-0908 (La. 12/5/18), 2018 WL 6382169, involved serious infringements on the rights of a criminal defendant to defend himself and is expressly limited to that completely irrelevant context.

4. The Alleged Fault of the D&O's of LAHC has Not been Judicially Admitted

Although Buck and the other defendants repeatedly assert that the Receiver's prior allegations of fault against the D&Os of LAHC constitute "judicial admissions" by the Receiver, this is most assuredly not Louisiana law. According to Louisiana law, a unilateral pleading or allegation in a petition is insufficient, absent an appropriate, binding response to it, to constitute a judicial admission or confession. *See, Wells Fargo v. Washington*, 2019-0392 (La.App. 4th Cir. 10/23/19), 282 So.3d 1176; *Hazelwood Farm, Inc. v. Liberty Oil And Gas Corp.*, 02-266 (La. Ct. App. 3d Cir. 2003), 844 So. 2d 380 (statements in a plaintiff's petition and amending petition are not judicial confessions). All of the former defendants whom have settled with the Receiver denied the Receiver's allegations against them.[17] Moreover, a judicial admission or confession can be revoked for an error of fact. *Id.*; *Barnes v. Riverwood Apartments Partnership*, 43,798, (La.App. 2 Cir. 2/4/09), 16 So.3d 361. As a matter of law and common sense, the Receiver does not have the unilateral power or ability to admit the fault of any defendant he may sue.[18]

[17] It is worth noting that all of the D&O defendants denied any wrongdoing both in their responsive pleadings filed herein and in the respective settlement agreements entered into with the Receiver. No judicial admission of any fault by the D&Os exists. And, in any event, the defendants do not attach as an Exhibit to their Motion pursuant to La.C.C.P. art. 966(B) any answer, responsive pleading, or document of any kind wherein "any present or former officer, director, trustee, owner, employee, or agent" of LAHC admits any wrongdoing as alleged by the Receiver.

[18] If defendants are correct (they are not), has the Receiver judicially admitted the fault of GRI, Buck, and Milliman because he has alleged that each of these defendants engaged in grossly negligent conduct that damaged LAHC? While the Receiver wishes he had this power, he most certainly does not.

CONCLUSION AND PRAYER

For all of the foregoing reasons, the Receiver respectfully requests and prays that Defendants' Motion be DENIED in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished via e-mail to all counsel of record as follows, this 5th day of August, 2021, in Baton Rouge, Louisiana.

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