

Regular Session, 2008

ACT No. 824

HOUSE BILL NO. 548

BY REPRESENTATIVE FOIL

(On Recommendation of the Louisiana State Law Institute)

1 AN ACT

2 To amend and reenact Code of Civil Procedure Articles 927, 1005, 1354, 1355, 1471,
3 1551(A), 1561(A), 1916, and 2592 and to repeal Code of Civil Procedure Article
4 1913(E), relative to the continuous revision of the Code of Civil Procedure; to
5 provide relative to consolidation of cases; to provide for consent; to provide for the
6 peremptory exception; to provide for affirmative defenses; to provide for subpoenas
7 duces tecum; to provide for service of subpoenas by private person; to provide for
8 the failure to comply with an order compelling discovery; to provide for pretrial
9 conferences and orders; to provide for the preparation of judgments and signing of
10 judgments; to provide for the use of summary proceedings; and to provide for related
11 matters.

12 Be it enacted by the Legislature of Louisiana:

13 Section 1. Code of Civil Procedure Articles 927 and 1005 are hereby amended and
14 reenacted to read as follows:

15 Art. 927. Objections raised by peremptory exception

16 A. The objections which may be raised through the peremptory exception
17 include but are not limited to the following:

18 (1) Prescription.

19 (2) Peremption.

20 ~~(2)~~ (3) Res judicata.

21 ~~(3)~~ (4) Nonjoinder of a party under Articles 641 and 642.

22 ~~(4)~~ (5) No cause of action.

23 ~~(5)~~ (6) No right of action, or no interest in the plaintiff to institute the suit.

1 on such terms as it may prescribe, shall treat the pleading as if there had been a
 2 proper designation.

3 Comments - 2008

4 (a) Arbitration and award and transaction or compromise have been
 5 eliminated from Article 1005 because they are preclusion defenses properly pled
 6 through the peremptory exception of res judicata. See *Montelepre v. Waring*
 7 *Architects*, 787 So.2d 1127, 1130 (La. App. 4 Cir. 2001); *Hamsa v. Hamsa*, 919
 8 So.2d 776, 778 (La. App. 5 Cir. 2005); *Bielkiewicz v. Rudisill*, 201 So.2d 136, 137
 9 (La. App. 3 Cir. 1967).

10 (b) The term "contributory negligence" has been replaced by a broader
 11 reference to the "negligence, or fault of the plaintiff and others".

12 (c) As a result of Louisiana's adoption of comparative fault, assumption of
 13 the risk is no longer a distinct legal concept which acts as a complete bar to the
 14 plaintiff's recovery. Consequently, it has been eliminated from Article 1005.
 15 Instead, the plaintiff's disregard of risk is among the factors to be considered in
 16 assessing percentages of negligence and fault. See C.C. Art. 2323 and *Murray v.*
 17 *Ramada Inns, Inc.*, 521 So.2d 1123 (La. 1988).

18 (d) Discharge in bankruptcy has been deleted and changed to a peremptory
 19 exception.

20 (e) Division has been eliminated as a result of revisions in 1987 to the
 21 suretyship Articles in the Civil Code. See Civil Code Article 3045.

22 (f) The last sentence in the Article has been amended to authorize the court
 23 to consider as an affirmative defense either an incidental demand or a peremptory
 24 exception, if justice so requires. The prior provision in the article which permitted
 25 the court to "treat" an affirmative defense as an incidental demand has been
 26 eliminated as unworkable and in conflict with other Articles. Unlike an affirmative
 27 defense, an incidental demand must allege a demand for relief, meet the other
 28 pleading requirements in Articles 891 through 893 and 1032, the service
 29 requirements of Article 1314, and it requires responsive pleadings in accordance with
 30 Articles 1034 and 1035.

31 * * *

32 Section 2. Code of Civil Procedure Article 1354 is hereby amended and reenacted
 33 to read as follows:

34 Art. 1354. Subpoena duces tecum

35 A. A subpoena may order a person to appear ~~and/or~~ and produce at the trial,
 36 deposition, or hearing, books, papers, documents, ~~or~~ any other tangible things, or
 37 electronically stored information, in his possession or under his control, if a
 38 reasonably accurate description thereof is given; A subpoena may specify the form
 39 or forms in which electronically stored information is to be produced. A party or an
 40 attorney requesting the issuance and service of a subpoena shall take reasonable steps

1 ~~to avoid imposing undue burden or cost on a person subject to that subpoena, but the~~
2 The court in which the action is pending in its discretion may vacate or modify the
3 subpoena if it is unreasonable or oppressive. Except when otherwise required by
4 order of the court, certified copies, extracts, or ~~photostatic~~ copies of books, papers,
5 and documents may be produced in obedience to the subpoena duces tecum instead
6 of the originals thereof. If the party or attorney requesting the subpoena does not
7 specify that the named person shall be ordered to appear, the person may designate
8 another person having knowledge of the contents of the books, papers, documents,
9 ~~or other things, or electronically stored information,~~ to appear as his representative.

10 B. A person commanded to respond to a subpoena duces tecum may within
11 fifteen days after service of the subpoena or before the time specified for
12 compliance, if such time is less than fifteen days after service, send to the party or
13 attorney designated in the subpoena written objections, with supporting reasons, to
14 any or all of the requests, including objection to the production of electronically
15 stored information in the form or forms requested. If objection is so made, the party
16 serving the subpoena may file a motion to compel compliance with the subpoena and
17 may move for sanctions for failure to reasonably comply.

18 C. A person responding to a subpoena to produce books, papers, or
19 documents shall produce them as they are kept in the usual course of business or may
20 organize and label them to correspond with the categories in the demand.

21 D. If a subpoena does not specify the form or forms for producing
22 electronically stored information, a person responding to a subpoena may produce
23 the information in a form or forms in which the person ordinarily maintains it or in
24 a form or forms that are reasonably useable.

25 E. A person responding to a subpoena need not produce the same
26 electronically stored information in more than one form.

27 F. A person responding to a subpoena need not produce books, papers,
28 documents, or electronically stored information from sources that the person
29 identifies as not reasonably accessible because of undue burden or cost. On motion
30 to compel production or to quash, the person from whom production is sought shall

1 service of and return on a citation. When a party is summoned as a witness, service
2 of the subpoena may be made by personal service on the witness' attorney of record.

3 B. Except as otherwise provided by law, when the sheriff has not made
4 service of a subpoena within five days after its receipt or when a return has been
5 made certifying that the sheriff has been unable to make service, any person over the
6 age of majority, not a party and residing within the state, may make service of the
7 subpoena in the same manner as is required by the sheriff. Proof of service by a
8 private person shall be made by filing with the clerk of the court by which the
9 subpoena is issued a notarized return showing the title of the action and the name of
10 the court issuing it, the date and manner of service, and the name of the person
11 served, signed by the person who made the service.

12 Comments - 2008

13 (a) Due to the difficulty in locating and serving some witnesses with a
14 subpoena for trial or depositions, and to expedite the process, the Article has been
15 amended to authorize a private person to serve subpoenas without the need of a
16 motion and order provided that the sheriff has been unable to serve the subpoena
17 within five working days of its receipt or when the sheriff has made a return that he's
18 unable to make service. A notarized return of service signed by the person making
19 service must be filed in the court which issued the subpoena. The change in the
20 Article is intended to apply only to service of subpoenas and does not affect the
21 procedures for serving citations and pleadings.

22 (b) Service of subpoenas in a summary proceeding filed pursuant to Article
23 2592(6) or (8) is provided in Article 1293(B).

24 * * *

25 Art. 1471. Failure to comply with order compelling discovery; sanctions

26 A. If a party or an officer, director, or managing agent of a party or a person
27 designated under ~~Articles~~ Article 1442 or 1448 to testify on behalf of a party fails to
28 obey an order to provide or permit discovery, including an order made under Article
29 1464 or Article 1469, the court in which the action is pending may make such orders
30 in regard to the failure as are just, and among others any of the following:

31 (1) An order that the matters regarding which the order was made or any
32 other designated facts shall be taken to be established for the purposes of the action
33 in accordance with the claim of the party obtaining the order.

1 Art. 1551. Pretrial and scheduling conference; order

2 A. In any civil action in a district court the court may in its discretion direct
3 the attorneys for the parties to appear before it for conferences to consider any of the
4 following:

5 (1) The simplification of the issues, including the elimination of frivolous
6 claims or defenses.

7 (2) The necessity or desirability of amendments to the pleadings.

8 (3) What material facts and issues exist without substantial controversy, and
9 what material facts and issues are actually and in good faith controverted.

10 (4) Proof, stipulations regarding the authenticity of documents, and advance
11 rulings from the court on the admissibility of evidence.

12 (5) Limitations or restrictions on or regulation of the use of expert testimony
13 under Louisiana Code of Evidence Article 702.

14 (6) The control and scheduling of discovery including any issues relating to
15 disclosure or discovery of electronically stored information, and the form or forms
16 in which it should be produced.

17 (7) Any issues relating to claims of privilege or protection of trial
18 preparation material, and whether the court should include agreements between
19 counsel relating to such issues in an order.

20 ~~(7)~~ (8) The identification of witnesses, documents, and exhibits.

21 (9) The presentation of testimony or other evidence by electronic devices.

22 ~~(8)~~ (10) Such other matters as may aid in the disposition of the action.

23 Comment – 2008

24 Paragraph (6) has been amended to allow the discovery of electronically
25 stored information to be taken up at pre-trial and scheduling conferences. Paragraph
26 (7) was added in 2008. It provides for consideration at pre-trial and scheduling
27 conferences of agreements between counsel and court orders relating to protecting
28 attorney-client and work-product privileges from waiver by inadvertent disclosure
29 during discovery. Paragraph (9) was also added in 2008. It directs the court to
30 consider proposals for the use of electronic devices to present evidence (e.g. live
31 televised testimony pursuant to Article 1633.1).

32 * * *

1 Art. 2592. Use of summary proceedings

2 Summary proceedings may be used for trial or disposition of the following
3 matters only:

4 (1) An incidental question arising in the course of judicial proceedings,
5 including the award of and the determination of reasonableness of ~~attorney's~~ attorney
6 fees.

7 (2) An application for a new trial.

8 (3) An issue which may be raised properly by an exception, contradictory
9 motion, or rule to show cause.

10 (4) An action against the surety on a judicial bond after judgment has been
11 obtained against the principal, or against both principal and surety when a summary
12 proceeding against the principal is permitted.

13 (5) The homologation of a judicial partition, of a tableau of distribution or
14 account filed by a legal representative, or of a report submitted by an auditor,
15 accountant, or other expert appointed by the court; and an opposition to any of the
16 foregoing, to the appointment of a legal representative, or to a petition for authority
17 filed by a legal representative.

18 (6) A habeas corpus, mandamus, or quo warranto proceeding.

19 (7) The determination of the rank of mortgages, liens, and privileges on
20 property sold judicially, and of the order of distribution of the proceeds thereof.

21 (8) The original granting of, subsequent change in, or termination of custody,
22 visitation, and support for a minor child; support for a spouse; injunctive relief;
23 support between ascendants and descendants; use and occupancy of the family home
24 or use of community movables or immovables; or use of personal property.

25 (9) An action to annul a probated testament under Article 2931.

26 (10) An action to enforce the right to a written accounting provided for in
27 R.S. 9:2776.

28 (11) An action for dissolution or specific performance of a compromise
29 entered pursuant to Article 1916(B) or by consent judgment.

