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## Louisiana Civil Procedure

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## LOUISIANA CIVIL PROCEDURE

Howard W. L'Enfant, Jr.\*

### JURISDICTION IN PERSONAM

In *Investor Inns, Inc. v. Wallace*,<sup>1</sup> the plaintiff instituted a summary eviction proceeding and had the defendant served with certified copies of the rule to show cause and a citation by certified mail in accordance with the provisions of the long-arm statute.<sup>2</sup> The defendant objected to the use of the long-arm statute in a summary proceeding, citing the earlier supreme court case of *Clay v. Clay*<sup>3</sup> in which the court had struck down the use of the long-arm statute in a quo warranto proceeding. In *Clay* the defendant had been served with a certified copy of the petition, the order setting the matter for a hearing, the amended petition, and the writ of quo warranto; nevertheless, the supreme court ruled that service of process was insufficient because the defendant had not been served with citation as required by the long-arm statute.<sup>4</sup> Apparently the defendant in *Investor Inns* argued that the long-arm statute, which requires that the defendant be served with a citation, is unavailable in a summary proceeding because no citation is required for a summary proceeding.<sup>5</sup> The court of appeal rejected this argument and read *Clay* as meaning that where a plaintiff in a summary proceeding relies on the long-arm statute to acquire jurisdiction over a nonresident defendant, the requirements of that statute must be followed—the defendant must be served with a citation<sup>6</sup> and must be given thirty days to respond.<sup>7</sup>

The court's decision in *Investor Inns* is clearly correct. Article 2596 of the Code of Civil Procedure provides that "[t]he rules governing ordinary proceedings are applicable to summary proceedings, except as otherwise provided by law." Since no special provisions govern service of process in a summary proceeding,<sup>8</sup> the ordinary provisions for

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1. 408 So. 2d 978 (La. App. 2d Cir. 1981).

2. LA. R.S. 13:3201 (Supp. 1964). The Louisiana long-arm statute is contained in LA. R.S. 13:3201-3207 (Supp. 1964).

3. 389 So. 2d 31 (La. 1979).

4. LA. R.S. 13:3204 (Supp. 1964).

5. LA. CODE CIV. P. art. 2594.

6. LA. R.S. 13:3204 (Supp. 1964).

7. LA. R.S. 13:3205 (Supp. 1964).

8. Article 2594 of the Code of Civil Procedure provides simply that the pleading, whether it be a contradictory motion, a rule to show cause, or some other pleading, shall be served on the defendant.

service of process apply, including the long-arm statute for service on a non-resident defendant. Thus, a plaintiff in a summary proceeding may use the long-arm statute—in fact, he would have no other way of securing jurisdiction over the nonresident defendant—but he must comply with its provisions. No mention was made in *Investor Inns* of the fact that the defendant was served with a rule to show cause along with the citation, whereas the long-arm statute calls for service of the petition. Either this point was not raised or it was considered unimportant in that the rule is functionally equivalent to a petition in informing the defendant of the nature of the action filed against him. It could be argued that a rule to show cause is also the equivalent of a citation. Both order the defendant to appear, and in a summary proceeding a court acquires jurisdiction over a defendant through service of the rule on him within the state, thus eliminating the need for a citation.<sup>9</sup> But in light of *Investor Inns*, the prudent procedure is to have the defendant served with a citation and also to allow for the thirty day delay required by the statute.<sup>10</sup> The length of this delay may prove to be a problem in a summary proceeding, which is designed to be conducted more quickly than an ordinary proceeding;<sup>11</sup> if so, the proper adjustment can be made by the legislature. As for the requirements of due process, the defendant must be given notice sufficient to inform him of the nature of the action filed against him and be given a reasonable time to appear and present his objections.<sup>12</sup> Under this test, a nonresident defendant may have to be given more time than is usually allowed in a rule to show cause, but not necessarily the thirty day delay provided by the long-arm statute.

#### VENUE—OFFENSES AND QUASI OFFENSES

Article 74 of the Code of Civil Procedure provides that “[a]n action for the recovery of damages for an offense or quasi offense may be brought in the parish where the wrongful conduct occurred, or in the parish where the damages were sustained.” It has been established that this article is applicable to an action brought by a purchaser against a seller, who knew<sup>13</sup> or is presumed to have known<sup>14</sup> of the defects in the thing sold since the seller’s liability is both delictual

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9. LA. CODE CIV. P. art. 2594; see *Thompson v. Courville*, 372 So. 2d 579 (La. App. 3d Cir. 1979).

10. LA. R.S. 13:3205 (Supp. 1964).

11. LA. CODE CIV. P. art. 2591.

12. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

13. See *Albritton v. McDonald*, 363 So. 2d 925 (La. App. 2d Cir. 1978).

14. See *Reeves v. Dixie Brick, Inc.*, 403 So. 2d 792 (La. App. 2d Cir. 1981).

and contractual.<sup>15</sup> The first circuit applied this rule in *Thibodeaux v. Hood Enterprises, Inc.*,<sup>16</sup> where the purchaser of a log home building kit sued the seller-manufacturer to recover for property damage, mental anguish, and attorney's fees. The sale took place in Livingston Parish where the defendant was domiciled, and the action was brought in Lafourche Parish where the home was built. The trial court had sustained the defendant's exception of improper venue, but the court of appeal reversed, finding article 74 applicable to plaintiff's *ex contractu-ex delicto* action in redhibition.

The applicability of article 74 was also at issue in *Edmond v. Webre*,<sup>17</sup> where plaintiff-lessee had sued his lessor for damages for breach of a three-year agricultural lease. According to the plaintiff, the defendant had allowed a third party to plow the leased tract, thereby destroying the sugar cane stubble that the plaintiff had planned to use for his second and third year crops; consequently, he sought recovery for the damage to his crops, his losses on sales of equipment, and mental pain and anguish. When the plaintiff filed suit in St. Martin Parish, where the land is located, the defendant responded by filing an exception of improper venue, asserting that the action could be brought only in Lafayette Parish, where the defendant was domiciled.<sup>18</sup> The trial court sustained the exception and the plaintiff appealed. In reversing the decision of the trial court, the court of appeal relied on cases recognizing that the breach of a contract of lease may give rise to delictual liability.<sup>19</sup> The omission of any allegations of intent or negligence from the petition was of no concern to the court because the plaintiff was not required to plead a theory of recovery. The facts in the petition, the court decided, supported a cause of action for damages for a quasi offense—wrongful eviction; therefore, venue was proper in St. Martin Parish under article 74.

The chief concern of the articles on venue is to provide a convenient place for trials. A convenient place for trial in an action for damages clearly is often in the parish where the damages were sustained. Those factors which make it a convenient place for trial apply whether the action be founded in tort, contract, or a mixture of the two. It follows then that article 74 should be amended to provide that an action for damages for offense or quasi offense or for breach of

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15. See *Philippe v. Browning Arms Co.*, 395 So. 2d 310 (La. 1981); *Reeves v. Dixie Brick, Inc.*, 403 So. 2d 792 (La. App. 2d Cir. 1981).

16. 415 So. 2d 530 (La. App. 1st Cir. 1982).

17. 413 So. 2d 306 (La. App. 3d Cir. 1982).

18. See LA. CODE CIV. P. art. 42.

19. *Waller & Edmonds v. Cockfield*, 111 La. 595, 35 So. 778 (1904); *Chronister v. Creole Corp.*, 147 So. 2d 218 (La. App. 4th Cir. 1962).

contract may be brought in the parish where the damages were sustained or where the wrongful conduct occurred.

#### VENUE—SOLIDARY OBLIGORS

Article 42 of the Code of Civil Procedure establishes the basic rule of venue: a defendant is to be sued in the parish of his domicile. The Code does establish exceptions to this basic principle, however, in the interest of providing a convenient place for trial. One exception is that "[a]n action against joint or solidary obligors may be brought in any parish of proper venue, under Article 42, as to any obligor who is made a defendant."<sup>20</sup> The meaning of this article was at issue in *Erdey v. American Honda Co.*,<sup>21</sup> in which the plaintiff brought a products liability action against the manufacturer and the seller of a motorcycle for injuries sustained as a result of a motorcycle accident and a medical malpractice action against other defendants to recover for injuries resulting from his subsequent medical treatment. The accident occurred in Livingston Parish, and the medical treatment was provided in East Baton Rouge Parish. When the action was filed in Livingston Parish, the medical defendants filed objections of improper venue and improper cumulation of actions. The trial court overruled the exceptions; the court of appeal affirmed.

On the issue of improper venue, the court of appeal found that the defendants were solidary obligors because a tortfeasor is responsible for the aggravation of injuries caused by subsequent medical treatment,<sup>22</sup> thus making all defendants liable for the injuries sustained as a result of the malpractice. The court, expressly relying on article 73, reasoned that solidary obligors could be sued in any parish of proper venue as to any defendant; Livingston Parish was proper venue for the products liability defendants because the damages were sustained there;<sup>23</sup> therefore, the medical defendants, as solidary obligors for the damages sustained at the time of treatment, could be sued there.

The concurring opinion disagreed with the majority on the applicability of article 73 on the grounds that the medical defendants were not bound *in solido* with the other defendants for the injuries sustained in the motorcycle accident. But it agreed that Livingston Parish was a proper venue because the plaintiff was domiciled there, and thus the damages from the malpractice were sustained there.

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20. LA. CODE CIV. P. art. 73.

21. 415 So. 2d 449 (La. App. 1st Cir. 1982).

22. The court cited *Hillebrandt v. Holsum Bakeries, Inc.*, 267 So. 2d 608 (La. App. 4th Cir. 1972) and *Hudgens v. Mayeaux*, 143 So. 2d 606 (La. App. 3d Cir. 1962).

23. See LA. CODE CIV. P. art. 74.

The concurring opinion is correct in its conclusion that venue can be sustained in Livingston Parish only on the basis of article 74—where the damages resulting from the accident and from the malpractice were sustained. Venue can not be sustained on the basis of article 73, not only because there is a question of whether the medical defendants can be considered solidary obligors with the other defendants for the injuries sustained in the accident, but also because of the language of article 73. Even under the assumption that all defendants are solidary obligors, article 73 expressly limits venue to any parish of proper venue for any obligor under article 42. The majority apparently interpreted the reference to article 42 to include the exceptions, such as article 74, and concluded that since the products liability defendants could be sued in Livingston Parish under article 74, the medical defendants could be sued there also. It is submitted that the reference to article 42 in article 73 should not be interpreted to include the exceptions for two reasons. First, article 42 establishes the basic right of a defendant to be sued at his domicile, and all exceptions to that right should be strictly construed.<sup>24</sup> And second, article 73 is based on Code of Practice article 165(6) which stated, “[w]hen the defendants are joint or solidary obligors, they may be cited at the domicile of any one of them.”<sup>25</sup> There is no indication that article 73 was intended to change that rule. Article 73’s reference to article 42 therefore should be taken literally; that is, venue is appropriate only under article 42, which provides for suit against an individual at his domicile and gives the equivalent venue for other defendants, such as corporations and partnerships.

#### VENUE—CUSTODY

In *Howard v. Howard*,<sup>26</sup> the husband was granted a separation and the custody of his children by a judgment rendered in Richland Parish, where he was domiciled. The wife subsequently obtained a judgment of divorce in St. John the Baptist Parish, where she was domiciled; the divorce judgment made no mention of custody. When the wife later filed a motion for custody and child support in St. John the Baptist Parish, the husband objected to venue on the grounds that he and the children were domiciled in Richland Parish. The trial court sustained the objection, and the court of appeal affirmed.

On original hearing the court stated that a custody action is incidental to an action for separation or divorce and is usually brought

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24. *Hawthorne Oil & Gas Corp. v. Continental Oil Co.*, 377 So. 2d 285 (La. 1979).

25. LA. CODE OF PRACTICE art. 165(6) (1870), as amended by 1926 La. Acts, No. 130.

26. 409 So. 2d 279 (La. App. 4th Cir. 1981).

in the parish of proper venue for the separation or divorce action;<sup>27</sup> furthermore, once jurisdiction attaches that court remains the proper forum to resolve subsequent custody disputes. On rehearing, the court affirmed its original decision but did so on a different basis. The court interpreted the supreme court's decision in *Lewis v. Lewis*,<sup>28</sup> which held that an action for child support is not incidental to an action for separation or divorce, to apply also to an action for custody. Thus the custody decree rendered by the court in Richland Parish was independent of the separation judgment and unaffected by the divorce decree rendered in St. John the Baptist Parish. Venue for a change of custody action was proper in Richland Parish because that was where the original decree was rendered and also because the children were domiciled there.

The Code of Civil Procedure has no articles governing venue in an action for custody. Although the issue of custody can be resolved in a tutorship proceeding<sup>29</sup> or in a habeas corpus proceeding,<sup>30</sup> each of which is governed by special venue provisions,<sup>31</sup> most questions of custody arise as an incident to a separation or divorce proceeding. These incidental actions have created a troubling and confusing problem for the courts,<sup>32</sup> especially where a motion for change of custody is filed subsequent to a judgment of divorce, as in *Howard*. An earlier case, *Sims v. Sims*,<sup>33</sup> had ruled that such a motion could be filed as an incidental action in the parish where the divorce was rendered or in the parish where the defendant was domiciled. If *Howard's* interpretation of *Lewis* is correct, that is, the action for custody is not an incident of an action for divorce, then venue for the custody action must rest on a basis independent of that for the divorce action. For the same reasons, a custody action brought as part of a divorce or separation proceeding would require an independent basis for venue. Thus, even had the wife filed a motion for change of custody along with her divorce action in St. John the Baptist Parish, the husband's objection to venue should have been sustained because proper venue would have been the parish where the husband could be sued under the general rules of venue, that is, the parish of his domicile.

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27. Article 3941 of the Code of Civil Procedure provides that a separation or divorce action must be brought in the parish where either spouse is domiciled or in the parish of the last matrimonial domicile. This venue is not waivable.

28. 404 So. 2d 1230 (La. 1981).

29. LA. CODE CIV. P. art. 4031.

30. LA. CODE CIV. P. art. 3821.

31. LA. CODE CIV. P. arts. 3822, 4031-4034.

32. See, e.g., *Sims v. Sims*, 388 So. 2d 428 (La. App. 2d Cir. 1980); *Hopkins v. Hopkins*, 300 So. 2d 661 (La. App. 3d Cir. 1974).

33. 388 So. 2d 428 (La. App. 2d Cir. 1980).

The questions raised by *Howard* and *Lewis* make it clear that specific venue provisions for custody actions should be provided. One solution is to provide for venue in an action for custody in the parish of the domicile of either parent or in the parish of the last matrimonial domicile. Such a provision would follow the venue provisions for an action for separation and divorce, thereby enabling the custody action to be properly cumulated with the separation or divorce action even if the custody action were viewed under *Lewis* as an independent action. In an action for a change of custody, venue could be proper in the parish where the original decree was rendered or in the parish where the parent awarded custody is domiciled. If the parent with custody is no longer domiciled in the state, venue would be proper in the parish where the parent seeking custody is domiciled, provided jurisdiction over the other parent could be established under the Uniform Child Custody Jurisdiction Act.<sup>34</sup>

#### PLEADINGS

In *Raley v. Carter*<sup>35</sup> the plaintiff brought an action against four joint-tortfeasors; on the morning of trial he dismissed his action against three of the defendants, reserving his rights against the remaining defendant. Judgment subsequently was rendered against that defendant for the full amount, despite his argument that his liability should be reduced by 75 percent, the virile share of the released defendants. The court of appeal reversed on this point, reasoning that it would be inequitable to shift the burden of proving the liability of the released defendants to the remaining defendant; the release occurred on the morning of trial, when the defendant would not have been prepared to prove their negligence whereas the plaintiff would have been. Since no evidence as to the negligence of the released defendants had been introduced by either party, the court, relying on *Danks v. Maher*,<sup>36</sup> concluded that the plaintiff was bound by the allegation of joint negligence in his petition. In *Danks*, the release had occurred near the end of the trial and the court, noting the unfairness of shifting the burden of proving the negligence of the released defendants onto the remaining defendant at that point in the trial, held that the plaintiff was bound by his allegations of negligence in the petition as to the released defendants. But the supreme court reversed in *Raley*.<sup>37</sup> Characterizing the result in *Danks* as harsh, the court limited its application to cases where settlement is reached after trial begins.

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34. LA. R.S. 13:1702-1707 (Supp. 1978).

35. 401 So. 2d 1006 (La. App. 1st Cir. 1981). *rev'd*, 412 So. 2d 1045 (La. 1982).

36. 177 So. 2d 412 (La. App. 4th Cir. 1965).

37. 412 So. 2d 1045 (La. 1982).

The court reasoned that the defendant in *Raley* could have introduced evidence as to the negligence of the released defendants or he could have asked for a continuance to meet this shift in the burden of proof. Since the defendant did neither, he could not object to the judgment finding him solely liable. More importantly, the court stated that the ruling by the court of appeal would seriously impair pretrial settlement because a plaintiff would be reluctant to accept a settlement offer close to trial if doing so would effectively reduce the judgment by the virile share of the defendant released.

In striking a balance between encouraging pretrial settlement and protecting a defendant from an unfair shift in the burden of proving the negligence of the released defendants, the court determined that the proper point is the commencement of trial. A settlement occurring before then, even on the very morning of trial, shifts the burden of proof to the remaining defendant who can protect himself by requesting a continuance. On the other hand, if a settlement occurs after trial begins, then *Danks* applies and the burden of proof does not shift to the defendant. But the application of *Danks* is unclear in the light of *Raley*. For example, if no evidence as to the negligence of the released defendant has been introduced by the plaintiff, the court in *Danks* would resolve the issue of negligence by stating that the plaintiff is bound by his pleadings. The court of appeal in *Raley* reached a similar result, stating that where no evidence is in the record from which the negligence or nonnegligence of the released defendant can be determined, the plaintiff is bound by his pleadings. But the supreme court in *Raley* ruled that the plaintiff's petition could not be a judicial confession because the allegations were not contrary to the plaintiff's interest; they merely raised issues of fact to be resolved by trial or by the defendant's admission. Even though *Raley* dealt with a pretrial settlement, presumably this rule also would apply in a case where settlement occurred after trial began, as in *Danks*.

While the court is correct in its statement that the plaintiff's allegations do not constitute a judicial confession, a possible solution to the problem would be to hold that in a case like *Danks*, where the burden of proof would not shift to the remaining defendant, the plaintiff's petition could be used as an evidentiary admission establishing a prima facie case as to the negligence of the released defendants but subject to rebuttal by evidence of nonliability offered by the plaintiff at trial. If no such evidence were offered or if it were unpersuasive, the liability of the released defendant could be established through the evidentiary admissions in the plaintiff's petition.

#### EXCEPTIONS

The court was faced with a partial exception of no right of action

in *Cenac Towing Co. v. Cenac*,<sup>38</sup> where the plaintiff sued to enjoin a trustee from voting stock on the grounds that (1) the transfer of the stock was contrary to the articles of incorporation, and (2) the transferor of the stock was incapable of understanding what would be the effect of the transfer. The trial court sustained the defendant's exception of no right of action, which attacked the right of the plaintiff to challenge the validity of the transfer based on the incapacity of the transferor. The plaintiff appealed and applied for supervisory writs. The court of appeal reversed on the grounds that the granting of a partial exception of no right of action creates piecemeal appeals and is a hinderance to the judicial efficiency of appellate courts. The court relied on *Walker v. Western-Southern Life Insurance Co.*,<sup>39</sup> a case involving a partial exception of no cause of action.

Louisiana cases have held consistently that a defendant may not use an exception of no cause of action to eliminate either part of the recovery sought by the plaintiff<sup>40</sup> or one of the theories for recovery asserted in the petition.<sup>41</sup> However, a partial exception of no cause of action is to the defendant's advantage because it reduces the burden of defense and improves his chance of success at trial. It also serves the interests of judicial efficiency by eliminating unnecessary issues from the trial. But the use of the exception of no cause of action in this manner carries with it the major disadvantage of causing piecemeal appeals because the order sustaining an exception of no cause of action is appealable, thus requiring the court of appeal to review only part of the case.<sup>42</sup> To eliminate this problem, the courts have ruled that there can be no partial exception of no cause of action.

In the light of these cases, a defendant who wishes to challenge part of the plaintiff's case in terms of interest, or theory of recovery or demand, could use the motion to strike<sup>43</sup> because an order granting this motion is an interlocutory order which can be reviewed only upon a showing of irreparable injury<sup>44</sup> or through the granting of supervisory writs. This procedure eliminates the problem of piecemeal

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38. 413 So. 2d 1351 (La. App. 1st Cir. 1982).

39. 361 So. 2d 892 (La. App. 2d Cir. 1978).

40. See, e.g., *Walker v. Western-Southern Life Ins. Co.*, 361 So. 2d 892 (La. App. 2d Cir. 1978).

41. See, e.g., *Haskins v. Clary*, 346 So. 2d 193 (La. 1977); *Hero Lands Co. v. Texaco, Inc.*, 310 So. 2d 93 (La. 1975).

42. *Walker v. Western-Southern Life Ins. Co.*, 361 So. 2d 892 (La. App. 2d Cir. 1978).

43. LA. CODE CIV. P. art. 964.

44. LA. CODE CIV. P. arts. 1841, 2083; *Lanham v. Woodward, Wight & Co.*, 386 So. 2d 131 (La. App. 3d Cir. 1980); *Matte v. Continental Casualty Co.*, 185 So. 2d 842 (La. App. 3d Cir. 1966).

appeals by giving the appellate court control over whether it will review the decision, and it serves the interests of judicial efficiency by eliminating unnecessary issues from trial.

#### INCIDENTAL ACTIONS

In *Washington v. Goldate*,<sup>45</sup> the owner of the truck involved in a car-truck collision sought to intervene in the personal injury, wrongful death action brought against the driver of the car and two insurance companies. The accident occurred on July 5, 1978; suit was filed on July 3, 1979; the insurance companies were served on July 10, 1979; the driver was served on September 17, 1979; and the petition of intervention was filed on December 14, 1979. The trial court dismissed the intervention, and on appeal the issues were whether the owner of the truck had a right to intervene, and if so, whether the intervention was barred by prescription.

On the first issue, the fourth circuit, following the broad interpretation of article 1091 of the Code of Civil Procedure given in *Gallin v. Travelers Insurance Co.*,<sup>46</sup> ruled that the owner of the truck had a right to intervene in the action. On the issue of prescription, article 1067 of the Code of Civil Procedure provides that "[a]n incidental demand is not barred by prescription or preemption if it was not barred at the time the main demand was filed and is filed within ninety days of date of service of main demand . . . ." The particular question presented in *Washington* was whether the ninety day period ran from the date service was first made on the defendant insurers (July 10, 1979) or from the date service was made on the defendant driver (September 17, 1979). The court applied the principle that prescriptive statutes should be construed strictly in favor of maintaining the actions<sup>47</sup> and held that an intervention filed within ninety days of the service on any defendant is timely.

#### APPEALS

Article 1971 of the Code of Civil Procedure allows the trial court to order a new trial for some of the parties or on some of the issues; it further provides that "[i]f a new trial is granted as to less than all parties or issues, the judgment may be held in abeyance as to all parties and issues." This language suggests that if the trial court does not order the judgment held in abeyance when it grants a partial new trial, the granting of the new trial will have no effect on

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45. 411 So. 2d 1224 (La. App. 4th Cir. 1982).

46. 323 So. 2d 908 (La. App. 4th Cir. 1975).

47. See *Foster v. Breaux*, 263 La. 1112, 270 So. 2d 526 (1972).

the delays for appealing the judgment insofar as it affects other parties or issues. But this interpretation was rejected by the Louisiana Supreme Court in *Thurman v. Star Electric Supply, Inc.*<sup>48</sup> as unworkable because the issue on which the new trial was granted might affect the outcome of the other issues. The important question for the court in *Thurman* was not whether the trial court had ordered the judgment held in abeyance; it was the severability of the issues—that is, whether the appellate court effectively could decide the issues not covered by the order for a new trial.

This interpretation was followed by the third circuit in *Bantin v. State, Through Department of Transportation*,<sup>49</sup> which was an action for damages sustained in an automobile accident brought against the Department of Transportation and a construction company and its insurer. The defendants were found solidarily liable, and the construction company and its insurer timely applied for a new trial. The state's motion for a devolutive appeal was filed within sixty days of the trial court's denial of that motion for a new trial. The plaintiff moved to dismiss on the grounds that the motion for a new trial filed by one defendant did not affect the delays for filing a devolutive appeal as to the other defendant. In denying the motion, the court reasoned that the granting of a new trial as to one of the defendants cast *in solido* would certainly have affected the other defendant and thus, under the *Thurman* rationale, would have held the judgment as to that defendant in abeyance. The delay for appealing as to that defendant therefore would not begin to run until the trial court ruled on the motion for a new trial.

*Bantin* illustrates the difficulty of applying the *Thurman* rule, which requires a court of appeal to determine the severability of issues and parties in complex cases in order to determine the timeliness of an appeal. This rule adds uncertainty in an area in which it is desirable to have a fixed rule as to when the delays for appealing begin to run. It might be preferable to rule that a timely application for a new trial by one party delays the running of the time for filing an appeal for all parties and that if the trial court grants a new trial as to some of the parties or some of the issues, the judgment as to other issues and parties is held in abeyance only if the trial court so orders. The trial court is in the best position to determine if the issues are severable or if the effect of the judgment should be suspended as to all parties.

In *Robertson v. Parish of East Baton Rouge*<sup>50</sup> the plaintiffs sued

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48. 283 So. 2d 212 (La. 1973).

49. 411 So. 2d 63 (La. App. 3d Cir. 1981).

50. 415 So. 2d 365 (La. App. 1st Cir. 1982).

the city and the parish for damages arising out of a single car accident and the defendants filed a third-party demand against a property owner. The court sustained the defense of "fault of a third person" under article 2317 of the Civil Code and dismissed plaintiff's suit. Plaintiffs appealed, and the court of appeal reversed the judgment of the trial court on the issue of the defense of fault of a third person. The court also considered and dismissed on the merits the defendants' third-party demand, even though the defendants neither appealed nor answered the plaintiffs' appeal. In considering the third-party demand, the court reasoned that the defendants were not required to appeal because the judgment was favorable to them and they were not required to answer the appeal taken by the plaintiffs because the defendants did not desire to have the judgment revised, modified, or reversed in part. The court relied on *Bond v. Commercial Union Assurance Co.*,<sup>51</sup> where the Louisiana Supreme Court had considered a third-party demand even though the defendant-third-party plaintiff had not appealed or answered the appeal.

Although the action of the court of appeal in considering the merits of the third-party demand seems sanctioned by *Bond*, it does appear to be contrary to the intent of article 2133 of the Code of Civil Procedure, which provides that "an appellee may by answer to the appeal, demand modification, revision, or reversal of the judgment insofar as it did not allow or consider relief prayed for by an incidental action filed in the trial court." This practice also could be unfair to the third-party defendant who in reliance on article 2133 would be unaware that the third-party demand was before the appellate court where the third-party plaintiff had not appealed or filed an answer.

#### RES JUDICATA

In *Doyle v. State Farm Mutual Insurance Co.*,<sup>52</sup> plaintiff instituted two actions—one in federal court, the other in state court—to recover for personal injuries sustained in a rear-end collision. The defendant in the federal action, the manufacturer of the plaintiff's vehicle, filed a third-party demand against the driver of the other vehicle and her insurer. On the morning of trial the plaintiff released the third-party defendant upon payment of the policy limits of \$10,000, agreed to give the manufacturer credit for that amount, and reserved his right to proceed against his uninsured motorist insurer. After trial, judgment was rendered in favor of the plaintiff against the manufacturer for \$90,000 subject to a credit for the amount paid by the third-party defendants. No appeal was taken and the judgment was satisfied.

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51. 407 So. 2d 401 (La. 1981).

52. 414 So. 2d 763 (La. 1982).

In the action filed in state court, which had been stayed under an objection of *lis pendens*, the plaintiff had amended his petition to name his insurance company as a defendant under the uninsured motorist provision in his policy. After judgment had been rendered in federal court, the plaintiff's claims against the other driver, her insurer, and the manufacturer of plaintiff's vehicle were dismissed with prejudice; the plaintiff's uninsured motorist insurer then filed a motion for summary judgment. The trial court granted the motion, and the court of appeal affirmed<sup>53</sup> on the grounds that the driver was not an underinsured motorist within the meaning of the statute<sup>54</sup> because "the extent of the plaintiff's injuries had been determined after trial on the merits and the award was fully satisfied."<sup>55</sup>

Reversing, the supreme court ruled that the plaintiff was not barred from relitigating the issue of his damages because: (1) the common law doctrine of judicial estoppel does not apply in Louisiana; (2) *res judicata* was not a bar as the parties were not the same and the "cause" was not the same—there was a delictual obligation in the first action and a contractual obligation in the second, and (3) the plaintiff was not splitting his cause of action as the causes of action were different—one arose out of tort, the other out of contract. The dissent argued that the plaintiff, who had had a full opportunity to present his evidence in the first trial, should have been precluded from relitigating the issue of damages as a matter of fairness and in the interest of judicial economy.<sup>56</sup>

Although the court's ruling on the defenses of *res judicata*, judicial estoppel, and splitting a cause of action is in accord with the very limited scope of those defenses in Louisiana, the opinion did not consider what was apparently the basis for the decision in the court of appeal, that the plaintiff who had received the full amount of his damages from one of the tortfeasors had no cause of action against his insurer under his uninsured motorist coverage. The court of appeal had relied on *Fouquier v. Travelers Insurance Co.*,<sup>57</sup> where the plaintiff had sued two drivers, one insured and one uninsured, and her own insurer under her uninsured motorist coverage. The court in *Fouquier* ruled that this coverage did not apply because the uninsured motorist was liable *in solido* with a motorist whose insurance was sufficient to cover the judgment rendered in favor of the plaintiff. A similar ruling was made in *Gautreaux v. Pierre*.<sup>58</sup> The court

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53. 406 So. 2d 261 (La. App. 3d Cir. 1981).

54. LA. R.S. 22:1406(D) (Supp. 1975 & 1977).

55. 406 So. 2d at 262. The court of appeal relied on *Fouquier v. Travelers Ins. Co.*, 204 So. 2d 400 (La. App. 1st Cir. 1967).

56. 414 So. 2d at 766 (Lemmon, J., dissenting).

57. 204 So. 2d 400 (La. App. 1st Cir. 1967).

58. 254 So. 2d 476 (La. App. 3d Cir. 1971).

of appeal in *Doyle* reasoned that the situation in *Fouquier* was sufficiently similar to that in *Doyle* so as to be controlling. But the supreme court's decision in *Doyle*, even though based on different grounds, raises a question as to the continued validity of the principle stated in *Fouquier* and *Gautreaux* because the result in *Doyle* is to allow the action against the uninsured motorist insurer, whereas *Fouquier* and *Gautreaux* barred the action. Unfortunately, the supreme court did not discuss the merits of the defense raised by the defendant and sustained by the court of appeal: namely, that a plaintiff whose judgment for damages has been fully satisfied by one tortfeasor has no cause of action against the uninsured motorist insurer. In effect, the decision rejects the defense because it allows the plaintiff to relitigate the extent of his damages even though his judgment for damages has been satisfied. The full impact of *Doyle*, however, will have to be determined through future litigation.