# Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **30th day of September, 2021** are as follows:

**BY Griffin, J.:**

2020-CC-01148 J. BENJAMIN ZAPATA AND AMANDA ZAPATA VS. STEPHEN WAYNE SEAL, DIVERSIFIED WELL LOGGING, INC. AND NAVIGATORS INSURANCE COMPANY (Parish of Tangipahoa)

AFFIRMED. SEE OPINION.

Retired Chief Judge Felicia Toney Williams, appointed Justice ad hoc, sitting for Hughes, J., recused in case number 2020-CC-01148 only.

Weimer, C.J., additionally concurs and assigns reasons.
Crichton, J., dissents and assigns reasons.
Genovese, J., dissents and assigns reasons.
McCallum, J., dissents for the reasons assigned by Justice Crichton and Justice Genovese.

**SUPREME COURT OF LOUISIANA**

**No. 2020-CC-01148**

**J. BENJAMIN ZAPATA AND AMANDA ZAPATA**

**VS.**

**STEPHEN WAYNE SEAL, DIVERSIFIED WELL LOGGING, INC. AND NAVIGATORS INSURANCE COMPANY**

*On Supervisory Writ to the 21st Judicial District Court,*
*Parish of Tangipahoa*

**GRIFFIN, J.**[*]

We granted this writ application to examine the interplay between two provisions of the Louisiana Code of Civil Procedure in the context of partial summary judgment. The specific issue presented is whether a trial court, having granted defendants' motion for partial summary judgment based on plaintiffs' failure to timely file an opposition, may later vacate that judgment when the plaintiffs produce an expert affidavit based on evidence that was previously available in advance of the original hearing. For the reasons that follow, we find the trial court was within its discretion in vacating its prior ruling.

## FACTS AND PROCEDURAL HISTORY

The underlying action arose out of a motor vehicle accident in which J. Benjamin Zapata was struck from behind by a vehicle operated by Stephen Wayne Seal and owned by Diversified Well Logging, Inc. (collectively "DWL"). Mr. Zapata and his wife (asserting loss of consortium claims) filed suit against DWL and its insurer alleging both new injuries and aggravation of preexisting lower back injuries sustained in a prior motor vehicle accident. Dr. Olawale Sulaiman, who

[*] Retired Chief Judge Felicia Toney Williams, appointed Justice *ad hoc*, sitting for Justice Jefferson D. Hughes, III.

performed lower back surgery on Mr. Zapata after the subject accident, opined in his deposition that he does not causally relate that surgery to the subject accident. DWL filed a motion for partial summary judgment seeking to dismiss the Zapatas' claim that the lower back surgery was necessitated by the accident.

The Zapatas moved to continue the hearing from June 25, 2018 to September 4, 2018. In the interim, on July 13, 2018, Mr. Zapata underwent an examination by Dr. Mohammad Almubaslat. On August 23, 2018, twelve days before the hearing, the Zapatas filed an opposition attaching a July 13, 2018 report by Dr. Almubaslat to support the assertion that the subject accident aggravated Mr. Zapata's preexisting lower back injuries and necessitated the surgery. DWL filed a reply arguing that because the opposition was untimely, the attachments should be stricken and the Zapatas' counsel precluded from presenting oral argument.[1] At the hearing the trial court agreed with DWL and granted partial summary judgment in its favor ("the September 2018 judgment").

On September 21, 2018, the Zapatas filed a motion to reconsider or, alternatively, a motion for new trial. DWL opposed arguing that a motion for new trial was procedurally improper under La. C.C.P. art. 1915. The trial court denied the motion observing that a party can only request a motion for new trial on a final judgment.

On June 18, 2019, the Zapatas filed a motion to vacate the September 2018 judgment. Attached in support was an affidavit by Dr. Almubaslat executed on May 8, 2019. DWL opposed on the grounds that it would be improper for the trial court to disregard the time limitations set forth in La. C.C.P. art. 966(B) and consider evidence that was previously available to the Zapatas in July 2018, prior to the

[1] DWL also argued Dr. Almubaslat's report was not proper summary judgment evidence under La. C.C.P. art. 966(A)(4).

original hearing on the motion for partial summary judgment. The matter was taken under advisement.

The trial court vacated its prior ruling and, in written reasons, observed the September 2018 judgment was not designated as final pursuant to La. C.C.P. art. 1915(B). The trial court further stated that at the time of DWL's motion for partial summary judgment, the affidavit of Dr. Almubaslat was not available as he was unable to review and sign the affidavit prior to the hearing. The trial court concluded that the Zapatas' motion to vacate was authorized by La. C.C.P. art. 1915(B) and found a genuine issue of material fact existed with respect to the issue of medical causation based on the "newly submitted affidavit of Dr. Mohammad Almubaslat."

DWL's initial request for supervisory review was not considered as it failed to attach a copy of the trial court's judgment.[2] DWL subsequently filed a new, conforming writ application. The writ was denied.

DWL's writ application to this Court followed, which we granted. *Zapata v. Seal*, 20-1148 (La. 12/8/20), 305 So.3d 863.

## DISCUSSION

The issue before this Court is whether the trial court abused its discretion in vacating its prior ruling granting partial summary judgment in favor of DWL on the issue of medical causation. A motion to vacate is reviewed under an abuse of discretion standard. *Narcise v. Jo Ellen Smith Hosp.*, 98-2417, p. 9 (La.App. 4 Cir. 3/10/99), 729 So.2d 748, 753. A trial court necessarily abuses its discretion if its decision is based on an erroneous interpretation or application of law. *See Kem Search, Inc. v. Sheffield*, 434 So.2d 1067, 1071 (La. 1983). Statutory interpretation is a question of law subject to *de novo* review. *Benjamin v. Zeichner*, 12-1763, p. 5 (La. 4/5/13), 113 So.3d 197, 201. The grant or denial of a motion for summary

[2] Dissenting, Judge McDonald found the trial court abused its discretion in granting the motion to vacate as "plaintiffs never sought relief pursuant to La. Code Civ. P. Arts. 966 and 967 in order to timely obtain evidence necessary to their opposition."

judgment is reviewed *de novo*, using the same criteria that governs a trial court's determination of whether summary judgment is appropriate. *See Samaha v. Rau*, 07-1726, pp. 3-4 (La. 2/26/08), 977 So.2d 880, 882-83; *Narcise, supra*.

Partial judgments, including partial summary judgments, are governed by La. C.C.P. art. 1915.[3] When a court renders a partial judgment as to less than all of the claims, demands, issues, or theories against a party, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination there is no just reason for delay. La. C.C.P. art. 1915(B)(1). "In the absence of such a determination and designation, any such order or decision shall not constitute a final judgment for the purpose of an immediate appeal and may be revised at any time prior to the rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties." La. C.C.P. art. 1915(B)(2). Thus, it is "well-settled that prior to final judgment a [trial court] may, at its discretion and on its own motion, change the result of interlocutory rulings it finds to be erroneous." *Vasalle v. Wal-Mart Stores, Inc.*, 01-0462, p. 5 (La. 11/28/01), 801 So.3d 331, 334.

Summary judgment procedure is governed by La. C.C.P. art. 966 *et seq*. Specifically, La. C.C.P. art. 966(B)(2) provides that "[a]ny opposition to the motion and all documents in support of the opposition shall be filed and served in accordance with Article 1313 not less than fifteen days prior to the hearing on the motion."

DWL argues the trial court improperly disregarded the time limitations of La. C.C.P. art. 966(B)(2) in considering the affidavit of Dr. Almubaslat which was based upon his examination and report – evidence available to the Zapatas at the time the summary judgment opposition was due. *See Buggage v. Volks Constructors*, 06-

[3] We note La. C.C.P. art. 1915(A) is inapplicable because the September 2018 judgment did not dispose of the entire case as to DWL. *See* La. C.C.P. arts. 966(E) and 1915(A)(3).

0175 (La. 5/5/06), 928 So.2d 536, 536 (per curiam) ("time limitation established by La. C.C.P. art. 966(B) for the serving of affidavits in opposition to a motion for summary judgment is mandatory"). DWL thus asserts that, in the absence of new evidence previously unavailable in advance of the original hearing, the trial court abused its discretion by interpreting La. C.C.P. art. 1915(B)(2) to permit it to vacate the September 2018 judgment. *See Narcise*, 98-2417, p. 8-11, 729 So.2d at 752-54 (vacating partial summary judgment based on deposition and affidavit of expert, retained after the ruling, which established the existence of a genuine issue of material fact not present at the time the motion was decided).

The Zapatas counter that, as the September 2018 judgment was not designated as final, the unambiguous language of La. C.C.P. art. 1915(B)(2) provides that it was subject to revision at any time prior to the rendition of a final judgment. Notably, the grounds for such revision are not delimited in the article. Thus, DWL's attempt to graft on to La. C.C.P. art. 1915(B)(2) requirements that are contained in La. C.C.P. art. 1972 for seeking a motion for new trial is without merit. *See Keesler v. McHugh*, 44,641, pp. 3-4 (La.App. 2 Cir. 9/30/09), 24 So.3d 933, 935-36 (finding no error in trial's court decision to revise and overturn prior grant of non-final partial summary judgment despite no new evidence being introduced). We agree.

The plain language of La. C.C.P. art. 1915(B)(2) provides that, absent determination and designation as a final judgment, a partial summary judgment adjudicating less than all of the claims at issue "may be revised at any time prior to the rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties." *See* La. C.C. art. 9; *Louisiana Mun. Ass'n v. State*, 04-0227, p. 35 (La. 1/19/05), 893 So.2d 809, 836-37 ("interpretation of a statute starts with the language of the statute itself"); *Vasalle*, 01-0462, p. 5, 801 So.3d at 334. The trial court's astute rulings illustrate how this provision may be harmonized with the time limitations of summary judgment procedure. *See Louisiana Mun. Ass'n*, 04-0227,

p. 36, 893 So.2d at 837 (further observing courts must give effect to all provisions of a statute and not render an interpretation that makes any part superfluous or meaningless). Adhering to La. C.C.P. art. 966(B)(2), the trial court struck the Zapatas' opposition and supporting exhibits and granted partial summary judgment in favor of DWL. It is undisputed that this was not a final judgment – the Zapatas' motion for new trial was denied for this reason. The trial court subsequently exercised its discretion under La. C.C.P. art. 1915(B)(2) in vacating the September 2018 judgment which it was statutorily empowered to do "at any time" because the judgment was not final.

Finality may be achieved by requesting a trial court to designate a partial summary judgment as final.[4] Because the language of the code as written provides such a remedy, we decline to adopt an interpretation of La. C.C.P. art. 1915(B) that would effectively amend the article to include the "new evidence" standard of La. C.C.P. art. 1972(2). See *Whitley v. State ex. rel. Bd. of Sup'rs of Louisiana State University Agr. Mechanical College*, 11-0040, p. 18 (La. 7/1/11), 66 So.3d 470, 481 (declining to judicially impose requirements not mandated by the legislature); *see also Fraternal Order of Police v. City of New Orleans*, 02-1801, pp. 3-4 (La. 11/8/02), 831 So.2d 897, 899 (declining to read the seven-day time delay under La. C.C.P. art. 1974 into La. C.C.P. art. 1915(B) where no such delay exists to file a motion to certify a partial judgment as final). Rewriting statutes is not the role of the courts. *Kelly v. State Farm Fire & Cas. Co.*, 14-1921, p. 20 (La. 5/5/15), 169 So.3d 328, 340. Accordingly, we find the trial court was within its discretion in vacating the September 2018 judgment.

[4] "[T]he decision whether an otherwise partial judgment is final and subject to an immediate appeal is determined by the trial judge and reviewable by an appellate court on an application for supervisory writs; [where] review would be [based] upon whether the trial court abused its vast discretion in not certifying the judgment as final and immediately appealable." *Miller v. Tassin*, 02-2383, p. 12 n. 4 (La.App. 4 Cir. 6/4/03), 849 So.2d 782, 789 n. 4

Dr. Almubaslat's affidavit contradicted Dr. Sulaiman's opinion and causally related Mr. Zapata's lower back surgery to the subject accident.[5] This created a genuine issue of material fact as to the issue of medical causation. *See Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751. Presented with conflicting expert testimony, the trial court did not err in ultimately denying the partial summary judgment. *See Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, p. 16 (La. 2/29/00), 755 So.2d 226, 236 (a trial court cannot make credibility determinations or weigh expert testimony on a motion for summary judgment).

**DECREE**

For the foregoing reasons, the ruling of the trial court vacating its prior grant of partial summary judgment is affirmed.

**AFFIRMED**

[5] Dr. Almubaslat's May 9, 2019 affidavit states, in relevant part:

> I further noted that the February 19, 2014 automobile accident aggravated [Mr. Zapata's] condition; and the accident more likely than not lead to progression of his condition, and lead to earlier repetitive non-surgical modalities of treatment that were not successful in alleviating his symptoms, and the new injury led to surgical intervention which likely occurred earlier than it would have been otherwise, and more specifically to alleviate neuropathic pain that was directly affected by the trauma.
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> ***
>
> Based upon my expert medical opinion, it is more probable than not that J. Benjamin Zapata's aggravation and/or exacerbation of a pre-existing disease is the direct result of the February 19, 2014 accident referenced by Mr. Zapata during the June 4, 2018 visit[.]

**09/30/21**

# SUPREME COURT OF LOUISIANA

**No. 2020-CC-01148**

**J. BENJAMIN ZAPATA AND AMANDA ZAPATA**

**VS.**

**STEPHEN WAYNE SEAL, DIVERSIFIED WELL LOGGING, INC. AND NAVIGATORS INSURANCE COMPANY**

*ON SUPERVISORY WRIT TO THE 21ST JUDICIAL DISTRICT COURT, PARISH OF TANGIPAHOA*

**WEIMER, C.J.**, additionally concurring.

I agree with the majority opinion. I write separately to reiterate that the Code of Civil Procedure is an interrelated body of law subject to the rules of codal interpretation. Laws on the same subject matter must be interpreted in reference to each other. La. C.C. art. 13. As such, "[u]nder our long-standing rules of [codal] construction, where it is possible, courts have a duty in the interpretation of a [codal provision] to adopt a construction which harmonizes and reconciles it with other provisions dealing with the same subject matter." See **Livingston Par. Council On Aging v. Graves**, 12-0232, p. 11 (La. 12/4/12), 105 So.3d 683, 690. Thus, as in this case, where the issue concerns interpretation of two applicable Code of Civil Procedure articles, those laws should be harmonized if possible. It is only when the applicable laws are conflicting that the one more specifically directed to the matter applies over the one more general in character. **State ex rel. Caldwell v. Molina Healthcare, Inc.**, 18-1768, p. 9 (La. 5/8/19), 283 So.3d 472, 479; **Arabie v. CITGO Petroleum Corp.**, 10-2605, p. 5 (La. 3/13/12), 89 So.3d 307, 312-13 (citing

**McGlothlin v. Christus St. Patrick Hospital**, 10-2775, p. 12 (La. 7/1/2011), 65 So.3d 1218, 1228).

In this case, as articulated by the majority opinion, the provisions of La. C.C.P. art. 966(B)(2) and La. C.C.P. art. 1915(B)(2) can easily be harmonized. Thus, I agree with the majority that the district court was within its discretion in vacating the September 2018 judgment.

**09/30/21**

**SUPREME COURT OF LOUISIANA**

**No. 2020-CC-01148**

**J. BENJAMIN ZAPATA AND AMANDA ZAPATA**

**VS.**

**STEPHEN WAYNE SEAL, DIVERSIFIED WELL LOGGING, INC. AND NAVIGATORS INSURANCE COMPANY**

On Supervisory Writ to the 21st Judicial District Court, Parish of Tangipahoa

**Crichton, J., dissents and assigns reasons:**

For the astute reasons set forth by Justice Genovese, I dissent. Judgments subject to reconsideration are generally based on facts or disclosures discovered after the interlocutory judgment was rendered. *See Babineaux v. Pernie-Bailey Drilling Co.*, 261 La. 1080, 262 So. 2d 328, 332 (1972) ("[I]nterlocutory orders overruling peremptory exceptions cannot be binding upon the trial court when it timely—but later—determines error of judgment based upon the matter as submitted or upon subsequent disclosures in the record which require a contrary holding.). In *Oubre v. Louisiana Citizens Fair Plan*, 2011-97 (La. 12/16/17), 79 So. 3d 987, 1004, this Court held that "the time limitation established by La. C.C.P. art. 966(3) for the serving of affidavits in opposition to a motion for summary judgment is mandatory." *See also Buggage v. Volks Constructors*, 2006-175 (La. 5/5/06), 928 So. 2d 536, 536 ("The time limitation established by La. C.C.P. art. 966(3) for the serving of affidavits in opposition to a motion for summary judgment is mandatory."). By reversing the prior judgment based on an affidavit related to evidence that was available to plaintiffs prior to their original opposition deadline, plaintiffs were permitted to circumvent the mandatory requirements of La. C.C.P. art. 966. Finding the district court does not have discretion to thus alter the mandatory opposition deadlines and, accordingly, reconsideration of its prior judgment based on evidence

available at the time of the original hearing was an abuse of discretion, I dissent. *See also Madere v. Collins*, 2016-2011 (La. 1/9/17), 208 So. 3d 370 (Crichton, J., additionally concurring) (expressing concern that district courts are improperly applying La. C.C.P. art. 966(B)(2) and ignoring La. D.Ct. R. 9.9(c)).

**09/30/21**

**SUPREME COURT OF LOUISIANA**

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**STEPHEN WAYNE SEAL, DIVERSIFIED WELL LOGGING, INC. AND NAVIGATORS INSURANCE COMPANY**

**ON SUPERVISORY WRIT TO THE 21ST JUDICIAL DISTRICT COURT, PARISH OF TANGIPAHOA**

**Genovese, J., dissents for the following reasons:**

The issue in this case is whether La.Code Civ.P. art. 1915(B)(2) authorizes a trial court, after having granted Defendants' motion for partial summary judgment based on Plaintiffs' failure to timely file an opposition, to subsequently grant Plaintiffs' motion to vacate the partial summary judgment. In this case, the trial court granted Plaintiffs' motion to vacate, and the court of appeal denied writs. I strongly disagree.

For the reasons that follow, I respectfully dissent from the majority opinion affirming the trial court's grant of Plaintiffs' motion to vacate the partial summary judgment, which it had previously granted in favor of Defendants.

In the instant matter, subsequent to Defendants' filing of a partial motion for summary judgment, Plaintiffs failed to meet the filing deadline of La.Code Civ.P. art. 966(B)(2)(emphasis added), which states:

> B. Unless extended by the court and agreed to by all of the parties, a motion for summary judgment **shall** be filed, opposed, or replied to in accordance with the following provisions:
>
> . . . .
>
> (2) Any opposition to the motion and all documents in support of the opposition **shall** be filed and served in accordance with Article 1313 **not less than fifteen days prior to the hearing on the motion**.

It is not disputed that Plaintiffs filed the affidavit of Dr. Almubaslat only twelve days before the hearing; therefore, this filing was untimely. Consequently, based upon the evidence before it, the trial court appropriately granted partial summary judgment in favor of Defendants.

Thereafter, the trial court erred in granting Plaintiffs' motion to vacate that judgment. The trial court's ruling and the majority opinion in this case clearly disregard the plain, simple, and mandatory language of La.Code Civ.P. art. 966 by considering evidence that was untimely filed. Such an abolition of the La.Code Civ.P. art. 966 timelines defeats the very core and purpose of La.Code Civ.P. art. 966(A)(2), i.e., "The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action[.]"

In reaching its conclusion, the majority relies on La.Code Civ.P. art. 1915(B)(2) to conclude that the partial summary judgment may be reconsidered by the trial court because the judgment was not certified as a final judgment. However, this reasoning ignores the more recent, specific, and mandatory provisions governing motions for summary contained in La.Code Civ.P. art. 966. Moreover, La.Code Civ.P. art. 966 is the latest expression of the will of legislature. This fact alone elevates the requisite timelines governing motions for summary judgment over the general provisions of La.Code Civ.P. art. 1915.

A motion to vacate may not be used as a "back door" means of circumventing the mandatory filing requirements of La.Code Civ.P. art. 966, such that untimely filed evidence may later be used to reverse and defeat a partial summary judgment lawfully granted to a party duly entitled thereto. The reasoning of the majority, applying La.Code Civ.P. art. 1915 due to the lack of final judgment certification in this case, makes the summary judgment timelines indefinite, and results in a de facto abolition of same. Under the majority's reasoning, a prevailing party has no

plausible reason to agree to certification of the judgment as final, since doing so procedurally takes the matter out of the parameters of La.Code Civ.P. art. 1915 and re-establishes the timelines of La.Code Civ.P. art. 966, which would be to his detriment. On the other hand, the unsuccessful party is relegated to having to seek/request certification of the judgment as a final judgment for purposes of appeal, which the trial court may or may not grant, and with no guarantee that the court of appeal will agree as to its finality. Obviously, this will take a longer period of time for resolution, is more expensive, and dilutes the party's right to file a writ in lieu of an appeal. The party may prefer no certification in order to file a writ instead, which is more quickly resolved and less expensive, in order not to leave the matter open for a subsequent motion to vacate to be filed some indefinite time period later. This critically impinges upon the right of the unsuccessful party to freely choose between certifying or not certifying the judgment as final in order to decide whether to take a writ or an appeal.

As stated in my dissent in *Celestine v. Boyd Gaming Corp*., 18-1609, pp. 1-2 (La. 1/14/19), 261 So.3d 762, 762:

> The 2015 amendment to the summary judgment article, specifically La.C.C.P. art. 966(B), requires that an opposition be filed not less than fifteen days prior to the hearing on the motion. This was not done in this case. These timelines have meaning and are not mere suggestions. They are mandatory and not to be arbitrarily ignored. A disregard of any of the timelines in the summary judgment article will thwart the efficacy and core of the procedure. I strongly disagree with the majority's indifference in not holding the line on the filing requirements of the summary judgment procedure.

The majority opinion in this case, affirming the trial court's ruling vacating its prior grant of a partial summary judgment, elevates La.Code Civ.P. art. 1915(B)(2) over La.Code Civ.P. art. 966(B)(2) and effectively negates the requisite time constraints contained therein. Allowing La.Code Civ.P. art. 1915 to override La.Code Civ.P. art. 966 results in a grant of a summary judgment never being a final judgment, and thus, subject to reconsideration and even reversal, as occurred in this

case, unless and until said judgment is certified by the trial court as a final judgment. Summary judgment is the more recent expression of legislative will and stands alone. It is found in a completely different title in Book II of the Code of Civil Procedure. Summary judgment is found in Title I of Book II; whereas, certification of judgments is found in Title VI of Book II. Summary judgment is not a trial nor an ordinary proceeding. It is a summary proceeding with its own rules which differ considerably from those of a trial and thus not subjected to La.Code Civ.P. art. 1915. This erroneous result flies in the face of the express language and intent of La.Code Civ.P. art. 966.

For the foregoing reasons, I find that the trial court erred in vacating its prior ruling granting partial summary judgment in favor of Defendants, and I would reverse the lower courts, and render partial summary judgment on the issue of medical causation in favor of Defendants.