

Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

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

BY Crain, J.:

2020-CC-01409

*BRENDA BERGERON, INDIVIDUALLY AND ON BEHALF OF HER
HUSBAND, DONALD BERGERON VS. DONALD RICHARDSON, M.D.
AND PAUL HUBBELL, III, M.D. (Parish of Jefferson)*

REVERSED AND RENDERED. SEE OPINION.

Weimer, C.J., additionally concurs and assigns reasons.

Crichton, J., additionally concurs and assigns reasons.

06/30/2021

SUPREME COURT OF LOUISIANA

No. 2020-CC-01409

**BRENDA BERGERON, INDIVIDUALLY AND ON BEHALF OF HER
HUSBAND, DONALD BERGERON**

VS.

DONALD RICHARDSON, M.D. AND PAUL HUBBELL, III, M.D.

On Writ of Certiorari to the Court of Appeal, Fifth Circuit, Parish of Jefferson

CRAIN, J.

Plaintiff seeks review of a court of appeal judgment reversing the denial of Defendants' motion for bond for cost. The trial court found the motion untimely. Applying the plain language of Louisiana Revised Statutes 13:4522, we reverse and reinstate the trial court judgment.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Brenda Bergeron, individually and on behalf of her husband, Donald Bergeron, filed a medical malpractice claim against Donald Richardson, M.D. and Paul Hubbell, III, M.D. A medical review panel unanimously found Defendants breached the standard of care. Two of the three panel members found Defendants caused Mr. Bergeron's pain, illness, and death. Plaintiff then filed wrongful death and survival actions against Defendants.

Nearly six years later, Defendants filed a motion for bond for cost pursuant to Louisiana Revised Statutes 13:4522. Plaintiff opposed the motion on several grounds. First, she contended the motion was untimely under the plain language of the statute. Second, she argued the costs claimed by Defendants were expenses, not actual taxable costs. Finally, she challenged the constitutionality of the statute.

After a hearing, the trial court denied the motion for bond for cost, finding it untimely. The trial court concluded Louisiana Revised Statutes 13:4522 precludes a

motion for a cost bond after the defendant's answer is filed. Because the motion was denied, the trial court found the constitutional claim moot.

Defendants' application for supervisory review to the court of appeal was granted. Finding the bond for cost motion timely, the appeals court reversed, citing *Whitson v. American Ice Co.*, 164 La. 282, 113 So. 849 (La. 1927) and *Jones v. Williams*, 191 La. 129, 184 So. 565 (La. 1938), where this court held defendant could demand a cost bond "whenever the necessity might arise." The court of appeal remanded the matter to determine the necessity of a bond. *Bergeron v. Richardson*, 2020-0286 (La. App. 5 Cir. 11/10/20) (unpublished opinion). We granted this writ to consider the proper interpretation of Louisiana Revised Statutes 13:4522. *Bergeron v. Richardson*, 2020-01409 (La. 2/17/21), 310 So.3d 558.

DISCUSSION

Louisiana Revised Statutes 13:4522 provides:

The defendant before pleading in all cases may by motion demand and require the plaintiff or intervenor to give security for the cost in such case, and on failure to do so within the time fixed by the court such suit or intervention, as the case may be, shall be dismissed without prejudice. This section shall not apply to the Parish of Orleans and to cases brought in forma pauperis, nor to the state or any political subdivision thereof.

The statute expressly declares that a defendant's demand for security for costs be filed *before pleading*.¹ Plaintiff argues this temporal condition is clear and unambiguous. Because Defendants answered the petition and litigated the matter for years before filing their motion, plaintiff contends the request is untimely. Conversely, Defendants argue the plain language of the statute does not impose a mandatory requirement to file the motion before filing an answer. Instead, the context of the statute just allows a defendant to file the motion, then wait to answer after the bond is posted. A defendant is not limited or restricted as to when he can

¹ Louisiana Code Civil Procedure article 852 defines "pleadings" as "petitions, exceptions, written motions, and answers."

file the motion. Rather, a bond can be demanded any time because “the defendant cannot require the plaintiff to give a bond for the payment of such costs as the defendant is concerned in until the necessity therefore arises.” *Jones*, 184 So. 565.

“[T]he starting point for the interpretation of any statute is the language of the statute itself.” *Dejoie v. Medley*, 2008-2223 (La. 5/5/09), 9 So.3d 826, 829. When a statute is clear and unambiguous and its application does not lead to absurd consequences, the provision must be applied as written with no further interpretation made in search of the legislature’s intent. *Id.*; La. Civ.Code art. 9; La. R.S. 1:4.

Act 111 of 1926, the predecessor statute to Louisiana Revised Statutes 13:4522, was first addressed by this court in *Whitson v. American Ice Co.*, 164 La. 282, 113 So. 849 (1927). Act 111 of 1926 provided:

Be it enacted by the Legislature of Louisiana, [t]hat the defendant **before pleading** in all cases, the Parish of Orleans excepted, may by motion demand and require the plaintiff, third opponent or intervenor to give security for the cost in such case, and on failure to do so within the time fixed by the Court such suit, third opposition or intervention, as the case may be, shall be dismissed as in case of non-suit; provided this shall not apply to cases brought in forma pauperis, nor to the state or any political subdivision thereof. [emphasis added].

In *Whitson*, the defendant, before filing any pleading, sought a bond for cost, which the trial court fixed at \$1,000. This court annulled the bond order, finding the defendant failed to prove it actually incurred costs. Without explicitly discussing the timeliness of the bond request, this court found the request premature until actual costs were incurred:

The record in this case, a copy of which was sent up in response to the writ of certiorari, does not show that the defendant was about to incur any expense or liability for fees which might ultimately be taxed as costs against the plaintiff. The only record in that respect is a typewritten ex parte order, apparently prepared by the defendant’s attorneys, saying that, on their motion and on their ‘suggesting to the court that plaintiff herein should furnish a bond for costs in this matter, it is ordered that the plaintiff do furnish a bond for costs in this matter in the sum of one thousand (\$1,000) dollars.’ The amount is written in with a pen.

It is not the duty of the plaintiff in such case to show that, as far as the defendant is concerned, there is no necessity for a bond for costs, or to show how small a bond will suffice. The burden is on the party demanding the security to show how large a bond is necessary to protect him. 15 C. J. 207, par. 501. Some discretion in that respect is left with the judge, to be exercised, however, with due regard for the actual necessity for a bond and for the interest or motive of the party demanding it.

The order of the district court requiring the plaintiff in this case to furnish security for \$1,000 of court costs is annulled, reserving to the defendant the right, on a proper showing, to demand, now or whenever the necessity may arise, security for any court costs which the defendant may actually have to incur or be responsible for in advance of a final judgment condemning either party to pay such costs. The respondent, American Ice Company, is to pay the costs of these supervisory proceedings.

Whitson, 113 So. at 851.

This court again discussed Act 111 of 1926 in *Jones*. There, the defendant requested a bond for cost after trial began. This court, relying on *Whitson*, found the request timely:

It was not too late for the defendants in this case to demand the bond for these costs after the trial of the suit on its merits was commenced. The demand for the bond was made promptly when the defendants were informed of the necessity for the bond. On this point the plaintiff cites a per curiam opinion rendered by the Court of Appeal for the First Circuit, in the case of *Burnett v. Johnston*, 19 La. App. 213, 140 So. 48, where it was held that a defendant could not demand a bond for costs after ‘pleading’. The ruling in that case was never brought to this court for review. On the face of the record it is doubtful whether the Court of Appeal had jurisdiction to issue the writ of mandamus. The ruling is in conflict with the ruling made by this court in *Whitson v. American Ice Co.*, 164 La. 283, 113 So. 849. **In that case, the court reserved to the defendant the right to demand, whenever the necessity might arise, security for any court costs that the defendant might incur or be obliged to pay in advance of a final judgment condemning either party to pay the costs. The statute declares that a defendant may demand the bond for costs ‘before pleading’. That means that the defendant may, on a sufficient showing, refrain from entering any plea in the case until the bond is furnished. It does not mean that a defendant’s right to demand a bond for the payment of such costs as he has an interest in securing is forfeited by his entering any plea in the suit. And the reason for that, as explained in *Whitson’s Case*, is that the defendant cannot require the plaintiff to give a bond for the payment of such costs as the defendant is concerned in until the necessity therefor arises.** [italics in original; boldfacing added.]

Jones, 184 So. at 134-136.

Notably, the request for the bond in *Whitson* was made *prior* to any pleadings being filed. *Whitson*, then, did not address the timeliness of the request for security, but the necessity of it, which is a separate and distinct inquiry. Nevertheless, *Jones* relied on *Whitson* to hold that the right to demand a bond does not arise until the costs are actually incurred, regardless of when a pleading is filed. In doing so, the court interpreted “before pleading” to be permissive, not restrictive. Relying on that reasoning, Defendants in the instant case argue Section 4522 authorizes them to demand security for cost at any time, even “before pleading.” They contend at the outset of litigation, before any discovery and before a final judgment fixing costs, it is difficult, if not impossible, to adequately determine costs the defendant might incur or be obliged to pay; thus, it would be nonsensical to read the statute to impose a premature time restraint on filing the motion.

We recognize a defendant seldom, if ever, incurs significant litigation costs before filing an answer, which potentially complicates quantifying the bond amount at that time. But, the statute requires the bond request be made “before pleading.” “It is presumed that every word, sentence or provision in a statute was intended to serve some useful purpose, that some effect be given to each such provision, and that the Legislature used no unnecessary words or provisions.” See *Sultana Corp. v. Jewelers Mut. Ins. Co.*, 2003-0360 (La. 12/3/03), 860 So. 2d 1112, 1119. To give meaning to every word in the statute, we find the demand for a cost bond must be filed before the defendant files any pleadings in the case. This harmonizes *Whitson* with the language of the statute so that the words “before pleading” are not rendered superfluous.

If we adopt Defendants’ logic, we will necessarily read out of the statute the temporal requirement imposed by the legislature. If a defendant can file at any time, there is no need to refer to “before pleading” as it would be just as unnecessary to

include a reference to “during trial,” “after closing arguments,” or any other point during litigation. If the legislature intended to allow a defendant to request a bond any time in the litigation, it would have either said so or eliminated the temporal reference altogether.²

We find further support for our interpretation in the statute’s references to “in all cases,” “in such case,” and the accompanying consequence of dismissal of the “suit or intervention,” in its entirety. Reading these phrases in context provides further evidence that the words “before pleading” refer to the initiation of the suit, whether by petition or intervention, not a particular point during the proceeding. The legislature contemplated the request for security be made from the moment a defendant is brought into the suit. Allowing dismissal of a suit years into litigation for failure to post a cost bond, the result if a defendant is authorized to request security at any time, would waste judicial resources. On the other hand, dismissing a suit without prejudice at its inception because the plaintiff is unwilling or unable to post the bond protects both defendants and the justice system from meritless suits.

We recognize that Section 4522 was enacted after the *Jones* decision; thus, we have never directly interpreted this statute. But, the operative language of Act 111 of 1926 did not change and was incorporated into Section 4522. To the extent *Jones* is still controlling precedent for interpreting Section 4522, it is overruled as it conflicts with the clear language of the statute.

Defendants argue *jurisprudence constante* prevents our current interpretation of the statute. In *Doerr v. Mobil Oil Corp.*, 2000-0947 (La. 12/19/00), 774 So. 2d 119, 128–29, *opinion corrected on reh'g*, 2000-0947 (La. 3/16/01), 782 So.2d 573, this court discussed the doctrine of *jurisprudence constante*:

² Any concern about the bond amount being speculative early in the proceeding is addressed by the rules regarding judicial bonds. See Louisiana Code Civil Procedure article 5123, *et seq.*, relating to testing the sufficiency of bonds, nullifying, and furnishing new bonds or supplemental bonds.

The Civil Code establishes only two sources of law in Louisiana: legislation and custom. See La. Civ.Code art. 1. Within these two categories, legislation is superior to custom and will supercede it in every instance. See La. Civ.Code art. 3. Judicial decisions, on the other hand, are not intended to be an authoritative source of law in Louisiana. See A.N. Yiannopoulos, *Louisiana Civil Law System* § 35, p. 53 (1977). Consequently, Louisiana courts have frequently noted that our civilian tradition does not recognize the doctrine of *stare decisis* in our state. See *Ardoin v. Hartford Acc't & Indem. Co.*, 360 So.2d 1331, 1334 (La. 1978); *Gulf Oil Corp. v. State Mineral Bd.*, 317 So.2d 576, 591 (La. 1975); *Carter v. Moore*, 258 La. 921, 959, 248 So.2d 813, 829 (1971); *Johnson v. St. Paul Mercury Ins. Co.*, 256 La. 289, 296, 236 So.2d 216, 218 (1970), *overruled on other grounds*, *Jagers v. Royal Indem. Co.*, 276 So.2d 309, 312 (La. 1973); *City of New Orleans v. Treen*, 421 So.2d 282, 285 (La.App. 4th Cir. 1982); *State v. Placid Oil Co.*, 274 So.2d 402, 414 (La.App. 1st Cir. 1972).

Instead, a long line of cases following the same reasoning within this state forms *jurisprudence constante*. See *Heinick v. Jefferson Par. Sch. Bd.*, 97–579, p. 4 (La.App. 5 Cir. 10/28/97), 701 So.2d 1047, 1050; *City of New Orleans*, 421 So.2d at 285. As summarized by this court in *Johnson*:

Fundamental and elementary principles recognize that certainty and constancy of the law are indispensable to orderly social intercourse, a sound economic climate and a stable government. Certainty is a supreme value in the civil law system to which we are heirs. In Louisiana, courts are not bound by the doctrine of *stare decisis*, but there is a recognition in this State of the doctrine of *jurisprudence constante*. Unlike *stare decisis*, this latter doctrine does not contemplate adherence to a principle of law announced and applied on a single occasion in the past.

Johnson, 256 La. at 296, 236 So.2d at 218. **Under the civilian tradition, while a single decision is not binding on our courts, when a series of decisions form a “constant stream of uniform and homogenous rulings having the same reasoning,” *jurisprudence constante* applies and operates with “considerable persuasive authority.”** James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 La. L.Rev. 1, 15 (1993). **Because of the fact that “one of the fundamental rules of [the civil law tradition] is that a tribunal is never bound by the decisions which it formerly rendered: it can always change its mind,”** 1 Marcel Planiol, *Treatise on the Civil Law* § 123, (La. State Law Inst. trans.1959) (12th ed.1939), prior holdings by this court are persuasive, not authoritative, expressions of the law. See Yiannopoulos, *supra*, at § 35, p. 5. Thus, it is only when courts consistently recognize a long-standing rule of law outside of legislative expression that the rule of law will become part of Louisiana’s custom under Civil Code article 3 and be enforced as the law of the state. See La. Civ.Code art. 3.

In sum, the chief distinction between *jurisprudence constante* and *stare decisis* is this: “**A single case affords sufficient foundation for the latter, while a series of adjudicated cases, all in accord, form the basis for the former.**” Yiannopoulos, *supra*, at § 35, p. 55. [boldfacing added; footnote omitted].

The only reported case citing *Jones* relative to timeliness is *Raborn v. Donica*, 334 So.2d 471 (La. App. 1 Cir.), *writ refused*, 338, So. 2d 111 (La. 1976). In *Raborn*, the defendant filed his motion for a bond for cost prior to filing his answer. The plaintiff then sought a preliminary default, arguing the defendant failed to timely answer. The trial court granted the default judgment. The defendant sought to nullify the default judgment, but the trial court denied relief. The court of appeal reversed, finding the bond motion allowed the defendant to delay filing his answer. The court stated:

In the instant case, the defendant has not answered the plaintiff’s petition. Therefore, under the literal wording of Article 1701, the plaintiff would be entitled to a default judgment. However, as previously noted, defendant demanded security for costs before the expiration of time in which to answer.

In this regard, we note that LSA-R.S. 13:4522 provides, in pertinent part:

‘The defendant **before pleading** in all cases may by motion demand and require the plaintiff or intervenor to give security for the cost in such case, and on failure to do so within the time fixed by the court such suit or intervention, as the case may be, shall be dismissed without prejudice. * * *’ (Emphasis by the [*Raborn*] court)

In effect, Section 4522 allows a defendant to delay filing any pleading, including his answer, until the plaintiff has met his demand to post security for costs. Since the defendant was not required to answer while the motion was pending, the defendant did not ‘(fail) to answer within the time prescribed by law’ (Article 1701) so as to entitle plaintiff to a default judgment.

The foregoing analysis of Section 4522 is in accord with the Louisiana Supreme Court’s interpretation of the statute’s source, Act No. 111 of 1926. In *Jones v. Williams*, 191 La. 129, 184 So. 565 (1938), the Court said:

‘* * * The statute declares that a defendant may demand the bond for costs ‘before pleading’. That means

that the defendant may, on a sufficient showing, refrain from entering any plea in the case until the bond is furnished. * * *(191 La. at 135, 184 So. at 567)

Raborn, 334 So.2d at 472-73.

While *Raborn* cites *Jones*, the motion for bond in *Raborn* was filed *prior* to any pleadings. Therefore, *Raborn* is consistent with the plain language of the statute and does not support the jurisprudential rule created by *Jones*. Other cases cite *Jones*; however, they address the sufficiency of proof required for the bond, not the timeliness of the request.³ The timeliness rule enunciated in *Jones* appears to be confined to that single case.

We decline to assign *Jones* the status of *jurisprudence constante* or custom. We also note when a statute specifically disposes of an issue, resort to jurisprudence is unnecessary. “[B]ecause of Louisiana’s civilian tradition, Louisiana courts must begin every legal analysis by examining primary sources of law, consisting of constitution, codes, and statutes; jurisprudence, even when it arises to the level of *jurisprudence constante*, is a secondary law source.” *Delta Chemical Corp. v. Lynch*, 2007-0431 (La. App. 4 Cir. 2/27/08), 979 So. 2d 579, 588, *writ denied*, 2008-0683 (La. 5/30/08), 983 So. 2d 898, and *writ denied*, 2008-0761 (La. 5/30/08), 983 So. 2d 904. *See also* Alvin B. Rubin, *Hazards of a Civilian Venturer in Federal Court: Travel and Travail on the Erie Railroad*, 48 La. L. Rev. 1369, 1372 (1988). *Jurisprudence constante* does not preclude us from overruling *Jones* and applying the plain language of Section 4522.

Because we find the cost bond motion was untimely, we pretermitt discussion of either the necessity or amount of the bond. Nor do we reach the constitutionality of the statute. *See Blanchard v. State Through Parks and Recreation Commission*, 1996–0053 (La. 5/21/96), 673 So.2d 1000, 1002. (Courts

³ *See, e.g., Carter v. Phillips*, 337 So.2d 187 (La. 1976) and *Law Offices of Robert C. Lehman v. Rogers*, 2017-0436 (La. App. 1 Cir. 9/18/2017), *writ denied*, 2017-1771 (La. 12/5/2017).

should avoid constitutional rulings when the case can be disposed of on non-constitutional grounds.)

CONCLUSION

The judgment of the court of appeal is reversed and the trial court's judgment denying Defendants' motion for bond for costs as untimely is reinstated.

REVERSED AND RENDERED.

06/30/2021

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VS.

DONALD RICHARDSON, M.D. AND PAUL HUBBELL, III, M.D.

On Writ of Certiorari to the Court of Appeal, Fifth Circuit, Parish of Jefferson

WEIMER, C.J., additionally concurring.

Concurring in the astute analysis of my colleague, I write separately only to point out my agreement with District Judge Scott Schlegel’s assessment that this case demonstrates the “beauty of living in a Civilian jurisdiction.” While the decisions of this court are persuasive authority and, generally, should be followed in the lower courts to ensure consistency and stability, the district judge correctly noted that, ultimately, in a civilian jurisdiction, legislation is the superior source of law. In this case, a re-examination of the decision in **Jones v. Williams**, 191 La. 129, 184 So. 565 (1938), was called for, and the holding by the district judge here proved prescient. When presented with the issue of whether La. R.S. 13:4522 requires that a demand for security for costs be filed before pleadings are filed (and not simply when such costs are actually incurred), the district judge correctly turned to a statutory analysis, drawing from the clear wording of the statute to reach a conclusion. That analysis is vindicated by the court’s decision today. As the opinion in this case correctly notes, the rule announced in **Jones** has been confined to that single case; it has hardly attained the status of *jurisprudence constante* and was properly overruled based on the words of the statute.

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On Writ of Certiorari to the Court of Appeal, Fifth Circuit, Parish of Jefferson

CRICHTON, J., additionally concurs and assigns reasons:

I agree with the majority that this Court is bound primarily to interpret statutes and code articles by their plain meaning, where their meaning is clear. As Judge Alvin Rubin succinctly noted with respect to the Civilian tradition:

In those civilian systems that have adopted a code, the respect due the code and the manner of interpreting it are based on the thesis of legislative supremacy, combined with respect for the inherent qualities of the code and the Romanist tradition. Judges are primarily interpreters of law, without the law-development functions assigned to common law judges.

Alvin B. Rubin, Hazards of A Civilian Venturer in Federal Court: Travel and Travail on the Erie Railroad, 48 La. L. Rev. 1369, 1371 (1988). Where, as here, there is no *jurisprudence constante* to persuade the Court's ruling, the Civil Code's directives on statutory construction must prevail.