

NO. 2008-C-0029

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

NOAH J. ANDRE, ET AL.

VERSUS

A.O. SMITH CORPORATION, ET AL.

IN RE: THE BOC GROUP, INC., ET AL.

APPLYING FOR: EMERGENCY SUPERVISORY WRIT

DIRECTED TO: HONORABLE LLOYD J. MEDLEY, JUDGE
CIVIL DISTRICT COURT, ORLEANS PARISH
DIVISION "D", 2003-11573

**SUPERVISORY WRIT GRANTED IN PART AND DENIED IN PART;
STAY RECALLED.**

From the record before us, including the application for supervisory writs of the defendants/relators and the response of the plaintiffs/respondents, we find the following:

First, the trial court's order of 26 October 2007 was not served upon all parties as required by La. C.C.P. art. 1313C. In pertinent part, La. C.C.P. art. 1313 states:

A. Except as otherwise provided by law, every pleading subsequent to the original petition, and every pleading which under an express provision of law may be served as provided in this Article, may be served either by the sheriff or by:

(1) Mailing a copy thereof to the counsel of record, or if there is no counsel of record, to the adverse party at his last known address, this service being complete upon mailing.

(2) Delivering a copy thereof to the counsel of record, or if there is no counsel of record, to the adverse party.

(3) Delivering a copy thereof to the clerk of court, if there is no counsel of record and the address of the adverse party is not known.

(4) Facsimile transmission of a copy thereof to the counsel of record at his number designated for facsimile transmission, or if there is no counsel of record, to the adverse party at his number designated

for facsimile transmission, this service being complete upon receipt of the transmission.

* * *

C. Notwithstanding Paragraph A of this Article, if a pleading or **order sets a court date**, then service shall be made by registered or certified mail or as provided in Article 1314. [Emphasis supplied.]

La. C.C.P. art. 1314 states:

A. A pleading which is required to be served, but which may not be served under Article 1313, shall be served by the sheriff by either of the following:

(1) Service on the adverse party in any manner permitted under Articles 1231 through 1266.

(2)(a) Personal service on the counsel of record of the adverse party or delivery of a copy of the pleading to the clerk of court, if there is no counsel of record and the address of the adverse party is not known.

(b) Except as otherwise provided in Article 2293, service may not be made on the counsel of record after a final judgment terminating or disposing of all issues litigated has been rendered, the delays for appeal have lapsed, and no timely appeal has been taken.

B. Personal service on a partner or office associate of a counsel of record, in the office of such counsel of record shall constitute valid service under Paragraph A of this Article.

The relators obtained the order on 26 October 2007 in order to facilitate their deposit of the jury bond of \$325.00 required by the Amended Trial Order entered by the trial court on 26 January 2006. Although the language of the order of 26 October 2007 purportedly superseded the Amended Trial Order (the latter of which specifically conflicted with the law as set forth in La. C.C.P. art. 1734.1 insofar as the code required the funds to be deposited not later than 30 days before the scheduled trial date), no one ever complained about the conflict between the two. Thus, the erroneous language in the Amended Trial Order became the law of the case until a subsequent order properly served upon all parties or their counsel was entered. (We note that if the relators had not made their \$11,000 plus deposit, the respondents could have picked up the jury by complying with La. C.C.P. art. 1734.1A which states in pertinent part, "If the deposit is not timely made, any other party shall have an additional ten days to make the required deposit.")

Second, we note the issues, allegations, and attachments to the applications for supervisory writs of the relators filed on 21 December 2007 in numbers 2007-C-1634 and 2007-C-1635 and the responses thereto of the respondents. The parties therein always contemplated that the case would be tried by a jury for no one indicated that the jury fees had not been paid in accordance with the 26 October 2007 order. Rather, the parties were operating under the assumption that the Amended Trial Order of 26 January 2006 was still in effect.

Third, we note that the trial court held hearings in these matters in December 2007, all of which makes it totally clear that everyone intended, understood, and contemplated that these cases were to be tried by a jury. For the trial court to order on the date set for trial, 9 January 2008, that it was striking the jury smacks of a denial of due process of law. When requested by a party, jury trials are favored. If not a violation of law (La. C.C.P. arts. 1734, 1734.1, 1313, and 1314) or of the law of the case, we find that the trial court in this case abused its discretion in striking the jury.

On the record before us and in the precise posture that this case is in at the present, we find the jury bond of \$325 was timely posted in accordance with the Amended Trial Order of 26 January 2006 and the Order of 26 October 2007. We do not embrace the respondents' argument that the receipt for the jury bond of \$325 stamped on the bottom of the 26 October 2007 Order by the clerk of court acknowledging payment of the bond establishes that the new order was properly served upon all parties or their counsel. No evidence in the record before us established that service of the 26 October 2007 order has been perfected on the parties as required by law. (We note that the dissent in part in writ numbers 2007-C-1634 and 2007-C-1635 might be read to have predicted by implication that which has now occurred would occur.)

Accordingly, we grant the writ application of the relators and reinstate the jury trial.

As to the remaining assignment of error, to now assert at this late date, as the relators now do, that the present cases may not properly be before Division D of the Civil District Court smacks of absurdity and an improper effort to delay the trial in the absence of any offer of proof on the matter. We deny the relators' writ in that regard.

Our stay of these proceedings until noon on 10 January 2008 entered on 9 January 2008 is recalled and vacated.

New Orleans, Louisiana this 10th day of January, 2008.



 JUDGE MAX N. TOBIAS, JR.

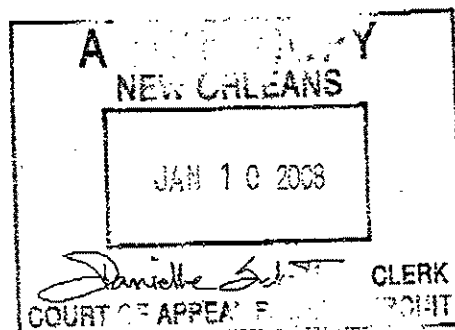
BAGNERIS, J., CONCURS.
 JUDGE DENNIS R. BAGNERIS, SR.



 JUDGE MICHAEL E. KIRBY

LOVE, J., DISSENTS.
 JUDGE TERRI F. LOVE

LOMBARD, J., DISSENTS AND ASSIGNS REASONS.
 JUDGE EDWIN A. LOMBARD



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NO. 2008-C-0029

VERSUS

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**A.O. SMITH CORPORATION,
ET AL.**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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PRB

BAGNERIS, J. CONCURS

I agree with the majority that service was not perfected as per La.C.C. P. art
1313(C).

NOAH J. ANDRE, ET AL.

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TEL **LOVE, J., DISSENTS**

I respectfully dissent for the reasons assigned by Judge Lombard.

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GA LOMBARD, J., DISSENTS AND ASSIGNS REASONS

Contrary to the criminal context, “there is no United States or Louisiana constitutional right to trial by jury in Louisiana courts. *Riddle v. Bickford*, 2000-2408, p. 5 (La. 5/15/2001), 785 So.2d 795, 799 (citation omitted). Accordingly, “[t]he right to jury trials in civil cases is not so fundamental to the American system of justice as to be required of state courts by the due process clause of the fourteenth amendment.” *Id.*

La. Code Civ. Proc. art. 1734.1(A) provides in pertinent part:

When the case has been set for trial, the court may order, in lieu of the bond required in Article 1734, a deposit for costs, which shall be a specific cash amount, and the court shall fix the time for making the deposit, *which shall be no later than thirty days prior to trial*. The deposit shall include sufficient funds for payment of all costs associated with a jury trial, including juror fees and expenses and charges of the jury commission, clerk of court, and sheriff. The required deposit shall not exceed two thousand dollars for the first day and four hundred dollars per day for each additional day the court estimates the trial will last. Notice of the fixing of the deposit shall be served upon all parties. If the deposit is not timely made, any other party shall have an additional ten days to make the required deposit. Failure to post the case deposit shall constitute a waiver of a trial by jury. . . .

La. Code Civ. Proc. 1734.1(A) (emphasis added).

The Amended Trial Order signed on January 26, 2006, by the trial judge provide in pertinent part:

18. In jury cases, the party that requests the jury shall pay the bond of \$325 pursuant to LA C.C.P. 1734, 30 days prior to trial. Failure to follow this instruction will result in the loss of the jury trial.
19. In jury cases, the party that requests the jury, shall pay the jury fee to the Clerk of Court's office prior to the beginning of trial, sufficient for each day that the trial is expected to last. Failure to follow this instruction will result in loss of the jury.

However, the Jury Trial Order signed by the trial judge on October 26, 2007, provides as follows:

Demand for trial by jury having been made, herein, the Court hereby fixed bond required of the party desiring trial by jury in the amount of \$325.00, which shall be posted not less than sixty (60) days prior to this matter pursuant to La. C.C.P. art. 1734.

The trial of this matter is set for:
JAN 9, 2008

In addition to the bond set herein, the party desiring trial by jury must deposit with the Clerk of Court the sum of three hundred dollars (\$300.00) for each day of the trial and an additional twenty five dollars (\$25.00) for each day of any alternate juror, said deposit to be made thirty (30) days prior to trial pursuant to La. C.C.P. art. 1734.1.

IT IS FURTHER ORDERED that any Jury Order previously issued in this proceeding which may conflict with requirements herein be and the same is hereby recalled and set aside.

The jury deposit of \$325.00 was paid by the defendants on October 26, 2007, and the jury fee of \$11,200.00 was paid by the defendants on January 4, 2008.

On January 9, 2008, the trial court denied the defendant's motion to continue and, noting that the jury fee had not been timely filed, struck the jury. In response to defense counsel's argument that defendants had never received the jury trial order of October 26, 2007, the trial judge observed:

My order was entered on October 26. You see, this is what happened. One of your runners came over to get – to pay the [bond of \$325.00]. He comes to my division. We give him this order. He takes it to the clerk's office, he pays the [\$325.00] and they stamp it Barasso, Usdin 10/26.

In the second paragraph, it says all jury costs must be paid 30 days out. You paid it Friday. You are 26 days late. I don't see how you get around that.

Most people try to say, but we didn't know about it. We didn't know about it. There's a stamp on there that Barasso, Usdin paid the [\$335.00], which means you had possession of this. I can't believe you read the first paragraph and you didn't read the second. . . .

In response to counsel's further argument that nothing in the record indicated receipt of notice, the trial judge stated:

Read [La. Code Civ. Proc. art.] 1734. Start – look, go read the case law and –

Number one, this is the order that's in the record. Now, I don't know what they gave you yesterday, but I pulled this from the record.

Okay. It says, there's a stamp that on 10/26 Barasso Usdin took this order because the clerk won't take the money without an order, and he took \$325 from you and stamped that you paid \$325 60 days out, like you were supposed to.

The code says – and I tracked – I've taken this from the code. I tracked it from the code. The second paragraph says, you must pay all jury costs 30 days out, not Friday, like you tried to pay. In addition, it says, if you go read 1734.1, it says you must pay all costs 30 days out. This is set for a two-month trial. This does not account for \$325 for two months.

On application for supervisory writ, the defendants contend that the trial judge's order striking the jury violates their fundamental right to a jury trial. First, there is no fundamental right to a jury trial in civil cases. Although the question of whether the defendants were served with the Jury Trial Order is problematic, the defendants paid the jury bond in a timely manner and, despite their declared reliance on the Amended Trial Order of 2006 which did not specify the amount of the jury costs and their declaration at the hearing on January 9, 2008, that they had never seen the Jury Trial Order, on January 4, 2008, the defendants paid the jury cost amount specified in the Jury Trial Order. Accordingly, in light of Article 1734.1(A), which specifically states that jury costs must be paid 30 days prior to trial, I do not find that the trial court abused its discretion in striking the jury for failure to timely pay the jury costs. *See St. Pe v. McCarty Corporation*, 2005-0511 (la. 3/9/2005), 896 So.2d 46 (reversing judgment of Court of Appeal, Fourth Circuit and reinstating trial court judgment striking jury); *Steen v. Professional Liability Insurance Company of America*, 2004-2205, 2005-0001 (La. 3/17/05),

900 So.2d151, 155 (concluding on application for rehearing that the failure to timely furnish jury bond constitutes waiver of right to trial by jury and that trial judge erred in failing to strike jury).

Finally, the assumptions of the parties in December 2007 pertaining to a jury trial are inapposite. There is nothing in the writ application currently before the court which indicates the parties' assumptions pertaining to a jury trial in December. Moreover, as La. Code Civ. Proc. art. 1734.1 allows a 10 day period after the thirty day deadline for another party to come forward to pay jury costs, until December 20, 2007, an assumption that the trial would be by jury was not incorrect.

I would deny the defendants' application for supervisory and, accordingly, respectfully dissent from the decision of the majority to overturn the ruling of the trial court.

NO. 2008-C-0030

COURT OF APPEAL, FOURTH CIRCUIT

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VERSUS

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IN RE: BOC GROUP, INC., ET AL.

APPLYING FOR: EMERGENCY SUPERVISORY WRIT

DIRECTED TO: HONORABLE LLOYD J. MEDLEY, JUDGE
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DIVISION "D", 2004-873**SUPERVISORY WRIT GRANTED IN PART AND DENIED IN PART;
STAY RECALLED.**

For the reasons assigned in writ number 2008-C-0029 on the docket of this court, we grant the relators' writ in part, deny the relators' writ in part, and recall our stay. Thus, the jury trial is reinstated, the case remains allotted to Division D of the Civil District Court, and the stay of the matter lasting until noon on 10 January 2008 is recalled and vacated.

New Orleans, Louisiana this 10th day of January, 2008.



JUDGE MAX N. TOBIAS, JR.

BAGNERIS, J., CONCURS.

JUDGE DENNIS R. BAGNERIS, SR.



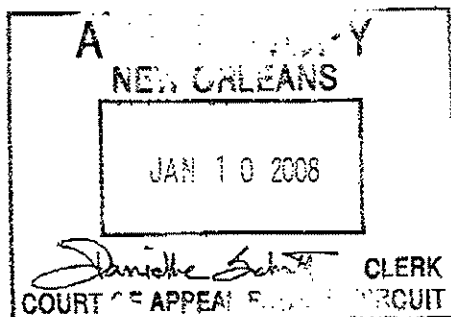
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