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January 11, 2023

Senator Patrick Page Cortez
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

RE: SENATE CONCURRENT RESOLUTION NO. 18 OF THE 2022 REGULAR SESSION

Dear Mr. President and Mr. Speaker:

The Louisiana State Law Institute respectfully submits its report to the legislature relative to summary judgment.

Sincerely,


Guy Holdridge
Director

GH/pc
Enclosure

cc: Senator Patrick Connick

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.gov

Secretary of State, Mr. R. Kyle Ardoin
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**LOUISIANA STATE LAW INSTITUTE
CODE OF CIVIL PROCEDURE COMMITTEE**

**REPORT TO THE LEGISLATURE IN RESPONSE TO
SCR NO. 18 OF THE 2022 REGULAR SESSION**

Relative to summary judgment

Prepared for the
Louisiana Legislature on

January 11, 2023

Baton Rouge, Louisiana

**LOUISIANA STATE LAW INSTITUTE
CODE OF CIVIL PROCEDURE COMMITTEE**

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Judge Guy Holdridge, Reporter
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SENATE CONCURRENT RESOLUTION NO. 18

BY SENATOR CONNICK

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study and make recommendations relative to the filing of additional documents in the form of rebuttable evidence with a reply memorandum in response to a motion for summary judgment.

WHEREAS, Louisiana Code of Civil Procedure Article 966(B)(3) provides that any reply memorandum shall be filed and served not less than five days prior to the hearing on the motion; and

WHEREAS, Louisiana Code of Civil Procedure Article 966(B)(3) further provides that no additional documents may be filed with the reply memorandum in response to a motion in opposition to a motion for summary judgment; and

WHEREAS, the Code of Civil Procedure has been revised over the years with the goal of ensuring relevance and maintaining efficiency and fairness in provisions of law regarding civil procedure; and

WHEREAS, the necessity, fairness, and efficiency in allowing the courts to consider additional documents in the form of rebuttable evidence to be filed with the reply memorandum in response to a motion in opposition to a motion for summary judgment promotes both judicial efficiency and legal representation of a client's interest; and

WHEREAS, the Louisiana State Law Institute's general duties include examining and studying the civil law and statutes of the state with a view of discovering defects and inequities, and of recommending needed reforms; and

WHEREAS, studying the feasibility of amending Code of Civil Procedure Article 966(B)(3) to allow the court to consider rebuttable evidence in response to a motion for summary judgment would promote fairness.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to study and make recommendations for the revision of Code of Civil Procedure Article 966(B)(3) to authorize the filing of additional documents in the form of rebuttable evidence with a reply memorandum in response to a motion for summary judgment.

BE IT FURTHER RESOLVED that a copy of the Louisiana State Law Institute report and recommendations for revising state law in the form of proposed legislation to effect such recommendations in a statutorily consistent and coordinated manner shall be submitted to the House of Representatives and the Senate of the Legislature of Louisiana not later than February 15, 2023.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the Louisiana State Law Institute.

PRESIDENT OF THE SENATE

SPEAKER OF THE HOUSE OF REPRESENTATIVES

January 11, 2023

To: Senator Patrick Page Cortez
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

Representative Clay Schexnayder
Speaker of the House
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**REPORT TO THE LEGISLATURE IN RESPONSE TO SENATE CONCURRENT
RESOLUTION NO. 18 OF THE 2022 REGULAR SESSION**

Senate Concurrent Resolution No. 18 of the 2022 Regular Session urges and requests the Louisiana State Law Institute to study and make recommendations pertaining to Code of Civil Procedure provisions regarding summary judgment proceedings. Specifically, the resolution asks the Law Institute to determine whether Article 966 of the Code of Civil Procedure concerning Summary Judgment should allow for the filing of additional documents in the form of rebuttable evidence with a reply memorandum in response to a motion for summary judgment.

In fulfillment of this request, the Louisiana State Law Institute created the Summary Judgment Subcommittee and assigned this project to that subcommittee, which operates under the leadership of Reporter, Judge Guy Holdridge. Prior to discussing Senate Concurrent Resolution No. 18 with the members of the Summary Judgment Subcommittee, subcommittee leadership asked for input on the matter to ascertain general amenability from legal practitioners relative to the possible revision. Subcommittee leadership then presented the responses from the legal community, its own research, and proposed revisions to the whole of the Subcommittee. After thorough study of the legislative history resulting in the current iteration of Article 966, consideration of the intent predicated the current law, and evaluation of potential consequences relative to other articles of the Code of Civil Procedure, the Subcommittee's findings are provided herein.

The Subcommittee first examined the potential revision relative to the burden of proof in summary judgment proceedings. Under Article 966 of the Code of Civil Procedure, "The burden of proof rests with the mover."¹ This burden of proof requires the mover to show that there are no genuine issues of material fact and that he is entitled to summary judgment as a matter of law. La.C.C.P.art. 966(A) (3) "The *mover's* supporting documents must [therefore] prove the essential facts necessary to carry the mover's burden."² Furthermore, "because the mover has the burden of proving a lack of a genuine factual issue, any inferences to be drawn from the underlying facts are

¹ La. Code Civ. Proc. Ann. Art 966 (2022).

² Successions of Millet, 340 So. 3d 252, 257 (La. App. 1st Cir. 2021).

viewed in the light most favorable to the nonmoving party.”³ Likewise, the court in deciding a motion for summary judgment must first determine whether the mover’s supporting documents are sufficient to resolve all material factual issues.⁴ Through previous revision and as a result of the United States Supreme Court’s approach in *Celotex Corp. v. Catrett*,⁵ Article 966 provides that “mover’s burden does not require him to negate all essential elements of the adverse party’s claim... but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party’s claim” should he not bear the burden of proof at trial on the issue.⁶ It follows that, after the mover meets his initial burden, the burden is shifted and the adverse party must bear the burden. The adverse party must produce factual support sufficient to establish the existence of a genuine issue of material fact or showing that mover is not entitled to judgment as a matter of law.⁷ The adverse party must also make timely objections in his opposition, with the moving party making the same in his reply memorandum.⁸ Moreover, the granting of a motion for summary judgment entails grave consequences relative to the adverse party – that is, “the court’s ruling on the motion for summary judgment has “the same effect as if a trial had been had upon evidence regularly adduced.”⁹ Thus, the mover must necessarily satisfy the requisite burden of proof when pursuing victory in summary judgment proceedings such that the court is convinced he is entitled to the relief sought.

Proponents for the inclusion of additional documents with reply memoranda assert that “mover is left to anticipate the non-mover’s opposition arguments and evidence[,] and is effectively required to attach every piece of documentary evidence to his motion—irrespective of its direct relevance to the arguments in the motion... [and] ‘show all of his cards’ when filing the motion.”¹⁰ However, this assertion merely illustrates what is required of the mover in prevailing in a motion for summary judgment. With his initial motion, the mover must file proper documentary evidence to carry his burden of proving that there are no genuine issues of fact. The notion that mover may elect not to “show all of his cards” is contrary to Article 966 that deliberately contemplates that “mover and non-mover each [have] once chance” to file their evidence in support or in opposition and “one chance to make all of their objections.”¹¹ Accordingly, courts have deemed the first determination when adjudicating motions for summary judgment to be “whether the supporting documents ... are sufficient to resolve *all* material fact issues.”¹² Procedure mandates that the adverse party should then file his opposition and the court is left to determine whose evidence defeats or supports the existence of a genuine dispute of material facts. Because the purpose of summary judgment procedure is to assess whether there exists the genuine need for trial, mover should, without reservation, submit the documents thoroughly proving to the court that his burden is satisfied. Coupled with the possibility of

³ *Id.*

⁴ *Jenkins v. Hernandez*, 305 So. 3d 365, 370-371 (La. App. 1st Cir. 2020), writ denied, 303 So.3d 315 (La. 2020).

⁵ *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986); *see also* La. Code Civ. Proc. Ann. Art. 966 Official Revision comment (j) (2015).

⁶ La. Code Civ. Proc. Ann. Art. 969 (2022).

⁷ *Davis v. A Bar and Grill with a Bite, Inc.*, 294 So. 3d 1051, 1052 (La. 2020).

⁸ La. Code Civ. Proc. Ann. Art 966 (2022).

⁹ La. Code Civ. Proc. Ann. Art. 968 (2022).

¹⁰ Taylor E. Brett, *Another Call to Amend Louisiana Code of Civil Procedure Article 966 to Promote Efficiency, Practicality, and Alignment with the Explicit Purpose of Summary Judgment Procedure*, 68 LOY. L. REV. 241 (2022).

¹¹ *Id.*

¹² *Jenkins v. Hernandez*, 305 So. 3d 365, 371 (La. App. 1st Cir. 2020), writ denied, 303 So. 3d 315 (La. 2020).

dismissal as a result of summary judgment proceedings, the revisionist “one-chance” assertion supports the policy of excluding additional documents, requiring mover to satisfy the burden exclusively within the parameters of the *initial motion*, and is consistent with the burden of proof, existing function, and intent of the present language of Article 966. Permitting the inclusion of additional documents with reply memoranda would offend the framework in which mover carries this heavy burden.

The Subcommittee also considered the necessity of further revisions to Article 966 should additional documents be allowed with the reply. Through these efforts, the Subcommittee found that permitting the attachment of additional documents would run afoul of the mandatory legal deadlines that were added in the law. Article 966 specifically provides that: “A motion for summary judgment and all documents in support of the motion shall be filed and served on all parties in accordance with Article 1313 not less than sixty-five days prior to the trial,” and the hearing must be held “not less than thirty days after the filing and not less than thirty days prior to the trial date.”¹³ Consequently, because “[a]ny reply memorandum shall be filed *and served* . . . not less than *five days prior to the hearing*,” the inclusion of additional documents with the reply would create a very limited opportunity in which to set the hearing on summary judgment.¹⁴ The opposing party would have to be allowed an opportunity to object to the documents that were added a mere five days before the hearing. Also, the trial court would have a shorter period of time to review the new documents as well as considering any objections to those documents raised by the opposing party. Under this time constraint, requiring further revision of Article 966 to afford an opportunity for additional documents to be filed with a reply and sur-reply, would create a cycle of summary judgment proceedings with no definitive end, contrary to judicial efficiency. This would require that all deadlines be revised and would create a system wherein parties withhold evidence and documents in attempts to gain an advantage.

Under Article 966 the mover *may* circumvent the apparently restrictive deadline in which to serve the reply and additional documents by filing the motion for summary judgment much earlier than the statutory deadline. The mover may either dismiss his summary judgment and re-file a new motion with all of the documentary evidence needed or may ask to supplement his motion if the party opposing the motion has the required time to file a new opposition to the new documents filed by the mover with his supplemental motion.¹⁵ However, when considered broadly, this solution would lower the utility of summary judgment proceedings since effective use would be limited. In the vast majority of summary judgment cases, the motion is not filed until all discovery is completed in the event newly unearthed material evidence is found that would support or defeat the motion. The Subcommittee found little support for requiring summary judgments to be filed months before the trial date to allow time for additional evidence to be filed with a reply memorandum and the necessity of allowing the opposing party an opportunity to file objections and maybe offer new evidence of their own. Additionally, the “stricter and substantially narrower evidentiary requirements” promote judicial efficiency by focusing the material facts and evidence to those only supporting or controverting the salient issues.¹⁶ Indeed, and as a practicality,

¹³ La. Code Civ. Proc. Ann. Art. 966 (2022).

¹⁴ *Id.*

¹⁵ Adolph v. Lighthouse Prop. Ins. Corp., 227 So. 3d 316, 320 (La. App. 1st Cir. 2017) at fn. 6.

¹⁶ Taylor E. Brett, *Another Call to Amend Louisiana Code of Civil Procedure Article 966 to Promote Efficiency, Practicality, and Alignment with the Explicit Purpose of Summary Judgment Procedure*, 68 LOY. L. REV. 241 (2022).

the Subcommittee found that if a moving party is allowed to supplement his evidence after his initial offering is deemed insufficient, perhaps consideration is warranted as to whether the motion for summary judgment was unlikely to succeed in the first place or was premature. Many members of the Subcommittee are of the opinion that if factual issues are established by opposing documents, then, ostensibly, mover's additional documents would not defeat those issues but would create more disputed material issues of fact. By narrowing the pleadings in summary judgment procedure to the initial motion, opposition, and reply, the article creates a system that allows all parties an opportunity to meet their burdens but also allows the court to focus on the precise issues raised in the supporting and opposing documents. Rather than probing through the record for supporting and opposing documents, Article 966 mandates a clear and concise procedure that promotes judicial economy to determine if a genuine issue of material fact exists and whether the party is entitled to summary judgment or a trial on the merits.

Furthermore, the Subcommittee found that the inclusion of documents with a reply memorandum raises several evidentiary issues. Particularly, allowing the mover to withhold evidence in his initial motion only to play his "trump card" in a reply brief five days before the hearing is a strategy contrary to both the satisfaction of the burden of proof and judicial economy. Moreover, such a rule would require a subsequent revision to permit the adverse party an opportunity to object to the documents being filed with the reply, thus initiating the aforementioned "cycle of summary judgment proceedings with no definitive end." A revision permitting new document in a reply memorandum, objections to those documents in a sur-opposition and a new sur-reply would be necessary to afford both parties fairness and equity. To make these changes, would substantially lengthen the summary judgment practice and procedure and would inevitably beg the question as to whether the procedure was a speedy and inexpensive determination of an action. With every increase in required filings of documents in a summary judgment procedure, the cost increases and the speed decreases. Delays in hearing a motion for summary judgment was one of the main reasons for the mandatory filing requirements. The current Article 966 that requires all documents supporting a motion be served contemporaneously with the motion ensures that the adverse party has adequate notice of and opportunity to fully respond to mover's contention. Therefore, the Subcommittee concluded that the filing of any additional documents with the reply would impede current procedural mechanisms designed for efficient adjudication.

Ultimately, the Subcommittee concluded that there are more problems and changes that would be required to allow documents to be filed with a reply memorandum. Even though permitting the attachment of additional documents in the form of rebuttable evidence with reply memorandum may seemingly promote fairness and judicial efficiency, the removal of the statutory proscription relative to additional documents with reply memoranda is conceptually inconsistent with the burden of proof required of the mover in the summary judgment proceeding, contrary to notions of judicial efficiency, evidentiarily problematic, and is thus inappropriate as to Louisiana's unique procedural framework. The Subcommittee does not recommend that Louisiana law allow for the filing of additional documents in the form of rebuttable evidence with a reply memorandum in response to a motion for summary judgment.