

Louisiana Law Review

Volume 54 | Number 3

January 1994

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Louisiana State University Law Center

Repository Citation

Howard W. L'Enfant, *Louisiana Civil Procedure*, 54 La. L. Rev. (1994)

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Louisiana Civil Procedure

Howard W. L'Enfant*

JURISDICTION IN PERSONAM

In *Lemke v. Lemke*,¹ the parties had been married in Louisiana in the early 1960s and had been divorced in Alabama in 1982, where they were living at the time. The plaintiff moved back to Louisiana and in 1985 filed an action to make the Alabama judgment executory and also sought back-due child support and alimony based on an agreement incorporated in the Alabama judgment. Service of process was made under the Long-Arm statute² on the defendant in Georgia. The defendant's exception of lack of jurisdiction was overruled, and a default judgment was confirmed. On appeal, the court of appeal affirmed that the trial court had personal jurisdiction over the defendant based on R.S. 13:3201(A)(6), which provides that a Louisiana court may exercise personal jurisdiction over a nonresident as to a cause of action arising from the nonresident's "[n]on-support of a child, parent, or spouse . . . domiciled in this state to whom an obligation of support is owed and with whom the non-resident formerly resided in this state."³ The trial court had based its finding that the parties had formerly resided in this state on the plaintiff's testimony that there had been two occasions when they had lived in Louisiana for several months and that during one of these stays their children had been enrolled in Louisiana schools. The court of appeal held that these facts were sufficient to uphold personal jurisdiction under the statute.

Although the result reached by the court of appeal may be correct, the approach used to reach that result raises some questions. The determination of whether Louisiana can assert jurisdiction over a nonresident involves a double inquiry: the facts of the case must fit within the provisions of the Long-Arm statute,⁴ and the assertion of jurisdiction must comply with the due process standards of the Fourteenth Amendment.⁵ The court in *Lemke* complied with the first requirement but not the second. There was no discussion of whether the assertion of jurisdiction over a nonresident defendant would violate traditional notions of fair play and substantial justice.⁶ Such an inquiry would focus on the plaintiff's interest in litigating these issues in Louisiana, the state's interest in

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1. 616 So. 2d 852 (La. App. 3d Cir.), *writ denied*, 619 So. 2d 1066 (1993).

2. La. R.S. 13:3201, 3204 (1991).

3. La. R.S. 13:3201(A)(6) (1991).

4. This applies when the court is using subsection A of the statute as the court did in this case. The assertion of jurisdiction under subsection B would involve only a due process analysis.

5. U.S. Const. amend. XIV; *See International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945); *McBead Drilling Co. v. Kremco, Ltd.*, 509 So. 2d 429 (La. 1987).

6. *International Shoe*, 326 U.S. 310, 66 S.Ct. 154; *McBead Drilling*, 509 So. 2d 429.

providing a forum to adjudicate these issues based on the domicile of the parent and children in this state, and the possible burden on the defendant of presenting a defense in Louisiana.⁷ But even if the plaintiff's interest is strong, and the state's interest is strong, and the burden on the defendant is slight, the state still cannot assert jurisdiction unless it finds that the defendant has the requisite minimum contact with the state in the form of deliberate, purposeful activity whereby he invoked the privilege and protection of the state, thereby allowing the state to impose the burden of defending the action upon the defendant.⁸ It may be that an analysis of the facts of this case would show that the assertion of jurisdiction would comply with the requirements of due process, but the important point is that such an analysis must be made. To illustrate that it is not enough to determine whether the facts fit within the terms of the statute, let us examine two hypothetical situations. In the first, let us assume that the Lemkes had married in Louisiana in the 1960s and had lived the twenty years of their married life in Louisiana before the defendant moved to Georgia. In the second case, let us assume that the Lemkes were married in Louisiana in the 1960s, spent a couple of months in Louisiana right after their marriage, and then spent the rest of their twenty years of married life in Georgia before the wife returned to Louisiana. Both of these cases fit the statute because in each case the former spouse is domiciled in Louisiana and the defendant had formerly resided with the spouse seeking support in Louisiana, but the results under a due process analysis arguably could be different. The first presents a strong case for jurisdiction, but the second does not.⁹

VENUE

In *Succession of Harvey*,¹⁰ the trial court sustained the defendants' exceptions of improper venue, no right of action, and no cause of action as to claims filed by the succession representative. On appeal, the court affirmed the trial court's finding of improper venue, but found that it was an abuse of discretion for the trial court not to transfer these claims to a court of proper venue.¹¹ And the court also ruled that once the trial court had granted the defendant's exception of improper venue, it was without authority to rule on the other exceptions; therefore, the appellate court reversed the judgment of the trial court on the exceptions of no right of action and no cause of action. It is this aspect of the court's decision that deserves comment because it contains serious implications for efficient trial procedures. For this particular case it means that

7. *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980).

8. *Id.*

9. *See Kulko v. Superior Court of California*, 436 U.S. 84, 98 S.Ct. 1690 (1978).

10. 616 So. 2d 1281 (La. App. 4th Cir. 1993).

11. La. Code Civ. P. art. 121 provides that "[w]hen an action is brought in a court of improper venue, the court may dismiss the action, or in the interest of justice, transfer it to a court of proper venue."

after the case is transferred to the proper venue, the defendants will refile their exceptions of no right of action and no cause of action. If the trial court sustains one or both of the exceptions and the grounds of the objection cannot be removed by amendment, then the action shall be dismissed,¹² and the case will be back in the court of appeal for a final determination of the same issues that were before the court on the first appeal. In support of its position, the court cited *Favorite v. Alton Ochsner Medical Foundation*¹³ in which the defendants had raised exceptions of improper venue and no cause of action. There, the trial court did not rule on the venue issue, but sustained the exception of no cause of action and dismissed the action on the grounds that the plaintiff's exclusive remedy was under the Worker's Compensation Law. The court of appeal reversed and ruled that an exception of improper venue should always be ruled on before the court rules on the exception of no cause of action.

The result of the decision in *Favorite* is that the case is remanded to trial court for a ruling on venue. If the trial court found that venue was proper, it would then rule on the exception of no cause of action again and, assuming that it would follow the prior decision, the exception would be sustained, and the case would be back before the court of appeal. If the trial court ruled that venue was improper, could it also rule on the exception of no cause of action? Apparently not, for the court in *Favorite*, anticipating the holding in *Succession of Harvey*, indicated that the case should be transferred, and that the transferor court should not rule on the exception of no cause of action because this would create a situation in which the transferee court might feel bound to follow a ruling by a co-equal court. The court in *Favorite* based its decision on what seemed to be the logical sequence of ruling on the exceptions. The court in *Succession of Harvey* went further and held that once the court ruled on improper venue it lacked authority to rule on the other exceptions. Both of these conclusions need to be examined.

It is true that there is a logic in the sequence of the exceptions. The exception that must be filed first is the declinatory exception, which raises objections such as lack of jurisdiction over subject matter, lack of jurisdiction over the defendant, and improper venue; its purpose is to test whether the action has been filed in the proper court.¹⁴ The next exception, the dilatory exception, raises objections as to capacity or cumulation, which may delay but not dismiss the action.¹⁵ The third exception, the peremptory exception, raises objections such as prescription, no right of action, no cause of action, and res judicata, which would dismiss the action.¹⁶ It could be argued that the exceptions should be raised one at a time; that is, the court should consider objections that delay the action only after it has determined the jurisdictional issues. It could also be

12. La. Code Civ. P. art. 934.

13. 537 So. 2d 722 (La. App. 4th Cir. 1989).

14. La. Code Civ. P. art. 925.

15. La. Code Civ. P. art. 926.

16. La. Code Civ. P. art. 927.

argued that the jurisdictional objections should be raised one at a time, that is, the court should first determine if it has subject matter jurisdiction, and if it decides that it does, then it should consider objections to jurisdiction over the defendant and then the issue of venue. But such logic exacts a heavy price in terms of time and expense. Let me illustrate. Suppose the plaintiff files suit in city court against a non-resident defendant. The defendant would first object to subject matter jurisdiction. If it is sustained and the case transferred to a court with subject matter jurisdiction,¹⁷ the defendant would object to venue. And again, after transfer, he would object to in personam jurisdiction. The delay and expense would be further increased by the fact that an appeal could be taken by the plaintiff from each adverse ruling. To avoid such a result, the Louisiana Code of Civil Procedure requires that all objections that can be raised in the declinatory exception must be raised at the time the declinatory exception is filed¹⁸ and reinforces this requirement by refusing to allow the declinatory exception to be amended to raise new objections.¹⁹ The clear implication of the requirement that all declinatory objections must be raised at the same time is that the court must have the authority to rule on all of them. Thus, in our hypothetical, the city court would rule on all of the objections—lack of subject matter, lack of in personam jurisdiction, and venue—and a single appeal would bring all of these issues before the court of appeal for final disposition.

The Code of Civil Procedure also deviates from a strict logical sequence, again in the interests of judicial efficiency, by requiring that all objections must be raised together in the dilatory exception²⁰ and that the dilatory exception must be filed at the same time as the declinatory exception.²¹ Further, if the interests of judicial efficiency are to be served, the trial court should be expected to rule on all of the objections. The Code of Civil Procedure allows, but does not require, the peremptory exception to be filed with the declinatory exception or with the dilatory exception or both.²² Suppose the defendant files a declinatory exception of improper venue and the peremptory exception of prescription based on the grounds that service of process occurred after the prescriptive period. To rule on the objection of prescription, the court must first determine whether venue is proper because, if venue is proper, filing the action interrupts prescription; if it is not proper, service of process interrupts prescription. But under the decision in *Succession of Harvey*, once the court determines that venue is improper, the court cannot rule on the issue of prescription. There would also be two appeals in this case, one from the ruling on venue and another from the ruling on prescription. The matter is complicated by the the supreme

17. La. Code Civ. P. art. 4841.

18. La. Code Civ. P. art. 925.

19. La. Code Civ. P. art. 1152.

20. La. Code Civ. P. art. 926.

21. La. Code Civ. P. art. 928.

22. *Id.*

court's holding in *Foster v. Breaux*²³ that a defendant must file his objection to venue along with his objection to prescription because if he does not, he waives his objection to venue, and with venue now proper, filing interrupts prescription. The implication of such a requirement is that the trial court has the authority to rule on both issues. The court in *Foster* also held as to a co-defendant that the trial court was no longer competent to try a plea of prescription after it had sustained an objection to venue. This would seem to support the decisions in *Succession of Harvey* and *Favorite*, but *Foster* is distinguishable. In *Foster*, after the trial court had sustained the objection of venue and the court of appeals had affirmed that decision, this had the effect of dismissing the suit against that defendant, and it was the dismissal, not the ruling on venue that deprived the trial court of its authority to rule on the subsequently filed exception of venue.²⁴

Succession of Harvey is clearly contrary to the intent of the Code of Civil Procedure to promote judicial efficiency and to dispose of cases economically and expeditiously and, hopefully, will not be followed by other courts.

TIME OF PLEADING, DECLINATORY EXCEPTIONS, AND WAIVER BY GENERAL APPEARANCES

The Louisiana Code of Civil Procedure provides that the declinatory exception (and the dilatory exception) shall be filed prior to answer²⁵ and further provides that when a defendant makes a general appearance, he waives all objections that may be raised through the declinatory exception (except lack of jurisdiction over the subject matter) unless pleaded therein.²⁶ In *Bickham v. Sub Sea International, Inc.*,²⁷ the defendant filed an answer that included in the same pleading a declinatory exception of improper venue. Before the court ruled on the exception, the defendant propounded interrogatories to the plaintiff and requested the production of documents. The trial court sustained the exception of improper venue, and on appeal the plaintiff argued that the defendant had waived its objection to venue by (1) filing it in the same pleading as its answer and (2) making a general appearance through its discovery requests. The court of appeal rejected the first argument reasoning that the phrase "unless pleaded therein" in Article 925 allowed the declinatory exception to be pleaded in the answer (the general appearance).²⁸ But it upheld the second argument, holding that the discovery sought by the defendant went to the merits of the case and constituted a general appearance under Article 7 and a waiver of the exception of venue.²⁹ The supreme court, in a per curiam opinion, affirmed the ruling of

23. 270 So. 2d 526 (La. 1972).

24. *Id.* at 530.

25. La. Code Civ. P. art. 928.

26. La. Code Civ. P. arts. 925, 27.

27. 617 So. 2d 483 (La. 1993).

28. 614 So. 2d 115 (La. App. 4th Cir. 1993).

29. *Id.*

the court of appeal that filing the declinatory exception in the answer was not a waiver of the exception, but reversed the ruling that seeking discovery was a general appearance that waived the exception.³⁰ The supreme court agreed that the defendant's discovery requests constituted a general appearance that would have waived any objections raised by the declinatory exception if the actions had occurred before the venue exception had been filed. The court reasoned that judicial efficiency is served by the requirement that all declinatory and dilatory exceptions must be filed prior to answer or general appearance, but found no useful purpose in extending this requirement to include a general appearance made after the exception had been filed. The court concluded that its decision that a subsequent general appearance does not constitute a waiver of a pending declinatory exception was consistent with the appellate court's decision (with which it agreed) that the subsequent filing of an answer, before trial of the exception, does not waive the exception.

This decision is important because it gives a clear rule for defendants to follow to avoid waiving a declinatory exception. After *Bickham*, once a defendant files a declinatory exception, he may file an answer and take other actions such as filing a peremptory exception without waiving the declinatory exception. And, maybe more importantly, the defendant may now engage in discovery without having to wait for the court to rule on the exception.

In *Rodrigue v. East Jefferson General Hospital*,³¹ the victim was treated at East Jefferson General Hospital for injuries sustained in an automobile accident. After a few days she was released to the care of her parents who lived in Terrebonne Parish. Shortly thereafter, she was hospitalized in the Terrebonne General Medical Center where she died following liver surgery. A wrongful death action was filed in Terrebonne Parish against both hospitals and the treating physicians. The trial court overruled the objection of improper venue filed by East Jefferson General Hospital and the treating physician there and the hospital appealed. The court of appeal found that since East Jefferson General Hospital was a hospital service district, venue was proper at its domicile.³² And the court further considered whether venue was proper under the statute governing suits against a political subdivision, which provides that all suits against a political subdivision shall be brought in the judicial district where the political subdivision is located or where the cause arises.³³ The court found that all of the wrongful acts by the East Jefferson General Hospital and the treating physician—the negligent treatment of the patient's heart and liver condition—occurred in Jefferson Parish and did not give rise to a cause of action against the hospital in Terrebonne Parish. The court further found that the malpractice of Terrebonne General Hospital arose from acts that were separate

30. 617 So. 2d 483 (La. 1993).

31. 615 So. 2d 1056 (La. App. 1st Cir. 1993).

32. La. R.S. 46:1063 (1982).

33. La. R.S. 13:5104(B) (1991).

and distinct from those committed by East Jefferson General Hospital, and that the two hospitals did not act in concert to cause the death of the victim. The court concluded that venue for the plaintiff's action against East Jefferson General Hospital was in Jefferson Parish.

In reaching its conclusion that the cause did not arise in Terrebonne Parish, the court did not seem to consider the fact that the victim died from a ruptured liver and delayed rupture of cardiac contusion and that the petition had alleged that the Jefferson Parish defendants had negligently failed to properly diagnose, monitor, and treat those same conditions. Furthermore, the last event necessary to give rise to the plaintiff's cause of action for wrongful death did not occur until the victim died and, since the death occurred in Terrebonne Parish, it is reasonable to conclude that the cause of action arose in Terrebonne Parish. The court of appeal relied on *Belser v. St. Paul Fire & Marine Insurance*,³⁴ which held that if any damages are sustained by the plaintiff in the parish where the wrongful conduct occurred, that parish and only that parish is the parish of proper venue. Arguably, the case is distinguishable on two grounds. First, in *Belser*, a personal injury action, the plaintiff had sustained some injury in East Baton Rouge Parish, and his condition had worsened in St. Helena Parish over time. This case is for a wrongful death that occurred in Terrebonne Parish, and no cause of action existed for these plaintiffs until death occurred. Secondly, the court in *Belser* was interpreting the meaning of Louisiana Code of Civil Procedure article 74, which places venue where the wrongful conduct occurred or where the damages were sustained, and the court wanted to prevent forum shopping. In this case, the issue is the meaning of the phrase "in the parish in which the cause arises,"³⁵ and forum shopping is not a concern because a cause of action for wrongful death can arise only in the parish where the death occurred. Judicial efficiency and economy would best be served by deciding the plaintiff's claims against the two sets of defendants in one trial; because much of the evidence for each claim would be the same, there is a common issue of causation, and separate trials would create the risk that the absent defendants would be found to be the cause of the victim's death, thus leaving the plaintiffs with conflicting and inadequate decisions. It is unfortunate that under the court's strict reading of the statute, a single trial is not possible in this case. These concerns were expressed in the concurring opinion, which concluded that this may be a good case for a legislative exception to the general rules of venue.³⁶

PRESCRIPTION

In *Sonnier v. Norwood Construction Co.*,³⁷ the plaintiff filed suit on August

34. 509 So. 2d 12 (La. App. 1st Cir. 1987).

35. La. R.S. 13:5104(B) (1991).

36. *Rodrigue v. East Jefferson Hosp.*, 615 So. 2d 1056, 1059 (La. App. 1st Cir. 1993) (_____, J., concurring).

37. 617 So. 2d 580 (La. App. 3d Cir. 1993).

3, 1990, against Norwood Construction Company (NCC) to recover for injuries sustained in an accident on August 4, 1989. The defendant was served and filed an exception of no cause of action. Service was then made on Norwood Industrial Painting, Inc. (NIPI), which filed an answer. On November 27, 1990, the plaintiff filed an amended petition to change the name of the defendant to Norwood Industrial Painting Company, Inc., which was served. In its answer, the defendant alleged that its proper name was Norwood Industrial Painting, Inc. On August 9, 1991, the defendant filed a peremptory exception of prescription, which was sustained on January 30, 1992. The issue before the court of appeal was whether the amended petition naming the correct defendant related back to the filing of the original petition. If it did, then prescription would have been interrupted. In applying the four factors set forth in *Ray v. Alexandria Mall*,³⁸ the court found that the amended claim arose out of the same occurrence set forth in the original petition—the industrial accident—and that the correct defendant had received notice so as not to be prejudiced in maintaining a defense and knew that but for a mistake the action would have been brought against it originally. In this case, the president of NIPI had been served with the original petition against NCC and knew that it was a suit against NIPI and stated that he was not prejudiced by the untimely notice. But the trial court found that the fourth requirement—the substitute defendant must not be a wholly new or unrelated defendant since this would be tantamount to the assertion of a new cause of action—had not been met because NCC and NIPI were totally unrelated corporations. The court of appeal disagreed and reversed. The court of appeal found that the plaintiff had intended to sue NIPI, and that this was a misnomer case because the petition recites that the defendant is the employer of the sandblasters, who had caused the accident by failing to remove sand and debris.

This case is a very good example of the problem that courts have in interpreting the *Ray* requirement that “the substitute defendant must not be a wholly new and unrelated defendant since this would be tantamount to the assertion of a new cause of action.” The trial court focused on the fact that the defendants were unrelated corporations, and the court of appeal concentrated on the fact that the plaintiff was asserting a claim against the employer of the workers who caused his injury. Under the trial court’s reasoning a plea of prescription would be sustained even if the substitute defendant had been given notice and would suffer no prejudice, and under the court of appeal’s interpretation a plea of prescription would almost always be overruled because the plaintiff always wants to sue the defendant responsible for his injuries.

In considering the correctness of the court’s interpretation in *Sonnier*, it might be helpful to compare it with *Ray* to see if the decisions are in accord. At first it would seem that they are not because the plaintiff in *Ray* wanted to sue the owner of Alexandria Mall and named the defendant Alexandria Mall as a corporation, whereas in fact it was a partnership. The plaintiff’s mistake went

38. 434 So. 2d 1083 (La. 1983).

to the legal status of the owner—corporation versus partnership—and the plaintiff had named a nonexistent entity. These facts seem to be distinguishable from those in *Sonnier*, where the plaintiff intended to sue Norwood Construction Company and did in fact sue and serve that defendant. The plaintiff's mistake went not to the legal status of the named defendant, but to the fact that the named and served defendant was not the employer of the workers who had caused plaintiff's injuries. Furthermore, the plaintiff's mistake in *Sonnier* had not been caused by any "smokescreen of legalistic maneuvering"³⁹ on the part of the defendant as it had been in *Ray*. But, on the other hand, in both cases the proper defendant had received notice through the service of process of the original petition, in *Ray*, because service had been made on the mall manager, and in *Sonnier* because service had been made on the owner of both Norwood Construction Company and Norwood Industrial Painting, Inc. And this seems to be a much important point of focus because it is in accord with the purpose of prescription, which is to give defendant timely notice of the suit so that he can prepare a defense.⁴⁰ If the court finds that the proper defendant received notice of the action through the service of process⁴¹ of the original petition so that he is not prejudiced in preparing a defense, then it should not matter whether the original defendant was a nonexistent entity as in *Ray* or an existing but incorrect entity as in *Sonnier*.

INCIDENTAL ACTIONS

In *Moore v. Gencorp., Inc.*,⁴² plaintiff filed a timely wrongful death action on May 20, 1988, on behalf of her children who were the acknowledged illegitimate children of the deceased who had been killed in an accident on June 2, 1982. After an answer had been filed, the plaintiff filed an amended petition on August 2, 1990, to name the defendant's liability insurer, and on the next day, an intervention was filed asserting a wrongful death claim and survivor actions on behalf of the intervenor and her children. The trial court dismissed the intervention on an exception of prescription. On appeal the intervenor argued that the intervention was timely because it was an incidental action, and was filed within ninety days of the amended petition as allowed by Louisiana Code of Civil Procedure article 1067.⁴³ The court of appeal rejected this argument and

39. *Id.* at 1086.

40. *See Allstate Ins. Co. v. Theriot*, 376 So. 2d 950 (La. 1979).

41. It should be noted that service of process of the original petition may be sufficient to give notice to the proper defendant for purposes of prescription even though it is not valid for purposes of obtaining personal jurisdiction over the proper defendant. This was the case in both *Ray* and *Sonnier*.

42. 615 So. 2d 1092 (La. App. 4th Cir. 1993), *writ granted*, 619 So. 2d 556 (La. 1993).

43. La. Code of Civil Procedure article 1067 provides, "An incidental demand is not barred by prescription or peremption 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 or in the case of a third party defendant within ninety days from service of process of the third party demand."

held that Article 1067 was intended to enable a defendant (or third party defendant), brought into an action after prescription would ordinarily have run, to assert his claim against the party who had brought the action against him, as well as against other parties. The court reasoned that the article was not intended to allow a third party with no interest in the pending action to assert claims that are independent of the original claims, even though those claims may have arisen out of the same event.

The court found support for its interpretation of Article 1067 in the legislative history of that article. As originally enacted, it referred only to reconventional demands and was enacted to put an end to the practice of plaintiffs' waiting until the last day of the prescriptive period to file their actions in order to prevent the defendants from being able to assert a reconventional demand.⁴⁴ The article was amended to answer criticism that it did not adequately deal with third party demands, and although the article used the word "incidental," the purpose of the amendment was to allow only defendants or third party defendants additional time to file their incidental actions.⁴⁵ The court concluded from this history that Article 1067 was not intended to extend the time limits for parties who had not been sued as defendants or third party defendants even though the article uses the broad phrase "incidental demand." As additional support for its decision, the court found that the intervention was not an incidental action but an independent cause of action because it was not dependent upon, and not collateral, accessory, or ancillary to the principal action (citing the *Black's Law Dictionary* definition of "incidental"). But on this point the Code of Civil Procedure defines an intervention as an action filed by a third person having an interest in a pending action to enforce a right related to or connected with the object of the pending action against one or more of the parties to the action.⁴⁶ If the action asserted meets the definition of an intervention, then it is an incidental action within the meaning of the Code of Civil Procedure.⁴⁷ Although the decision of the court of appeals seems to be in accord with the intent of Article 1067, it remains to be seen whether the supreme court, which granted writs in this case, will affirm or whether it will apply the broad language of the article and hold that it is applicable to any incidental demand, including an intervention.

EXCEPTIONS

In *Everything on Wheels Subaru v. Subaru South*,⁴⁸ the Louisiana Supreme Court clarified when an exception of no cause may be granted in a case

44. 1970 La. Acts No. 472; see *Gruber v. Perkins*, 192 So. 2d 222 (La. App. 4th Cir. 1966).

45. 1974 La. Acts No. 86.

46. La. Code Civ. P. art. 1091.

47. La. Code Civ. P. art. 1031 defines incidental demands as reconvention, cross-claims, intervention and the demand against third parties.

48. 616 So. 2d 1234 (La. 1993).

involving multiple causes of action. In that case, the plaintiff had asserted four causes of action arising out of the termination of an automobile franchise agreement. The trial court granted the defendant's exception of no cause of action as to two of the causes of action, and the court of appeals affirmed.⁴⁹ The supreme court stated that where two or more items of damages or theories of recovery arise out of the facts of a single transaction or occurrence, there is only one cause of action and an exception of no cause of action should not be granted as to part of that single cause of action. But where actions are based on separate and distinct transactions or occurrences, then there are separate causes of actions properly cumulated,⁵⁰ and an exception of no cause of action that dismisses a separate cause of action may be granted. Having determined when an exception of no cause of action may be granted, the court then considered whether a judgment maintaining such an exception was appealable. On this question, the court held that under Louisiana Code of Civil Procedure article 1915,⁵¹ a final judgment may be rendered if it dismisses some but not all of the parties, or if the court grants a motion of summary judgment or motion for judgment on the pleadings.

Thus a judgment sustaining an exception of no cause of action is not an appealable final judgment unless it results in the dismissal of a party, but such a judgment may be subject to review through an application for supervisory writs. This decision is important because it makes it clear when a partial disposition of a case is a partial final judgment that must be appealed or the right of review is lost, but it also raises the question whether Article 1915 should be amended to include a judgment sustaining an exception of no cause of action in the enumeration of appealable partial final judgments now that the supreme court has made it clear that such an exception can only be used to dismiss separate causes of action.

AMENDMENT OF JUDGMENTS

In *Derouen v. Quintana Petroleum*,⁵² plaintiffs filed an action against three defendants: Quintana Petroleum (USA), Inc.; Quintana Petroleum Corporation; and Quintana Production Company. Quintana Petroleum Corporation filed a motion for summary judgment on the grounds that it was the employer of one of the plaintiffs. The trial court granted the motion and signed a judgment dismissing claims against Quintana Petroleum (USA), Inc., on September 20, 1991. The plaintiffs dismissed their appeal on March 20, 1992, and in April 1992 Quintana Petroleum Corporation moved to amend the judgment to correct the name of the defendant dismissed by the judgment. After a hearing, the trial

49. 593 So. 2d 1269 (La. App. 1st Cir. 1992).

50. La. Code Civ. P. art. 461 allows unrelated actions to be cumulated between a single plaintiff and a single defendant.

51. La. Code Civ. P. art. 1915.

52. 618 So. 2d 1238 (La. App. 3d Cir. 1993).

court signed an amended judgment dismissing all claims against Quintana Petroleum Corporation. Plaintiffs appealed, arguing that the trial court could not amend the judgment because the change was an alteration of substance. Louisiana Code of Civil Procedure article 1951⁵³ provides that a final judgment may be amended to alter the phraseology but not the substance of the judgment. The court of appeals held that this was not a change of substance within the meaning of Article 1951 and affirmed the judgment. The court found that there was never any question as to which of the defendants had filed the motion and was entitled to be dismissed on that motion. The court considered the original judgment to be a misnomer. This was similar to the reasoning of the trial court that amendment of the original judgment was similar to correcting a spelling error. But the court of appeals further stated this was not really a case of amending a judgment because the party named in the judgment—Quintana Petroleum (USA), Inc.—was not a party to the lawsuit, and so there was really no judgment at all. Thus, under this reasoning, the judgment rendered on July 17, 1992, from which the appeal was taken, was the only judgment rendered on the motion for summary judgment. The dissent considered the change of the name of a party in a judgment to be a change of substance that could be made only on a motion for new trial or by appeal.

Although there was disagreement as to whether this was a change of substance, there was agreement that the original judgment did not reflect the trial court's intention of granting the motion of the Quintana Petroleum Corporation for a summary judgment. And it seems to be in accord with the intent of Article 1951 to find that where the judgment signed does not embody the decision of the court through error or oversight, then the court should be allowed to correct its mistake. There is no prejudice and no surprise because, as in this case, all parties are aware of the mistake. On the other hand, if the judgment correctly reflects the decision of the court, then the party seeking to change that judgment must move for new trial or take an appeal.

MOTION FOR NEW TRIAL

Code of Civil Procedure article 1974⁵⁴ provides that the delay for applying for a new trial begins to run on the day after the judgment is signed, unless notice is required. In *Delay v. Charbonnet*,⁵⁵ the plaintiff filed a motion for new trial after the trial court gave oral reasons for judgment but before a judgment was signed dismissing the suit for lack of personal jurisdiction. The motion for a new trial, which had been filed on October 5, 1992, was denied on December 12, 1992, and the plaintiff took an appeal. The defendant moved to dismiss the appeal on the grounds that the motion for a new trial was untimely,

53. La. Code Civ. P. art. 1951.

54. La. Code Civ. P. art. 1974.

55. 617 So. 2d 952 (La. App. 4th Cir. 1993).

and that the delays for appeal began to run from the expiration of the period for applying for a new trial.⁵⁶ The court of appeals denied the motion to dismiss for several reasons. First, it stated that the concept of rendition of a judgment had not been merged entirely into the signing of the judgment and was an event sufficiently separate from the signing of a judgment to serve as a basis for the filing of a motion for a new trial.⁵⁷ Next, the court concluded from the fact that there had been a hearing on the motion for a new trial that the trial court and all the parties had considered the motion for a new trial to have been made timely. The court also found that the defendant had waived its objection by failing to raise the issue of the timeliness of the motion for a new trial. The court considered the possibility that the defendant had remained silent on the issue to trap the plaintiff. The court rejected this because the implication would have been that the defendant had intended to put the trial court to the considerable but pointless effort of ruling on the motion for new trial (the court noted that it looked with a jaundiced eye at any attempt to trifle with the resources of the judicial system).⁵⁸

The result reached by the court may be correct, but the court's reasons for its judgment raise serious questions. It is true, as the court stated, that the Code of Civil Procedure in some of its official comments speaks of rendering a judgment, but it is also true that the Code makes it very clear that the important act is the signing of a final judgment. Article 1911 states that every final judgment shall be signed, and that no appeal may be taken until the judgment is signed.⁵⁹ The signing of the final judgment, or notice of the signing, begins the delays for applying for a new trial⁶⁰ and for an appeal.⁶¹ The use of the concept of rendition of judgment as an alternative starting point for these delays creates uncertainty in an area that should be clear if the rights of the parties are to be protected. There are also questions about the court's reasoning that the defendant waived his right to object or had lulled the plaintiff into believing that the delays for an appeal had not run. The implication of this is that the defendant has a duty to warn the plaintiff that his motion for new trial was untimely and that the delays for taking an appeal are running. It is to be noted that this situation was not the result of any action taken by the defendant, and that the defendant is entitled to rely on the belief that the plaintiff knows the law and will follow its requirements. Furthermore, any action by the defendant to warn the plaintiff would raise the very serious question of whether the defendant's attorney had breached his duty toward his client. Under our adversary system a party is not obligated to correct the mistakes of his opponent.

56. La. Code Civ. P. art. 2087.

57. In its discussion of the concept of rendition of judgment, the court cited La. Code Civ. P. art. 1038, cmt. (b); La. Code Civ. P. art. 1915, cmt. (a); and, La. Code Civ. P. art. 1911, cmt. (a).

58. *Delay*, 617 So. 2d at 955.

59. La. Code Civ. P. art. 1911.

60. La. Code Civ. P. art. 1974.

61. La. Code Civ. P. arts. 2087, 2123.

Surely the court is not suggesting that if the plaintiff's motion had been filed too late, the defendant would have an obligation to notify him of that fact so that he could take an appeal timely. But this seems to be the implication of the court's statements about waiver and lulling the plaintiff into believing that the delays had not begun to run.

Although there are problems with the reasoning of the court, was the decision correct, and is there a way to harmonize the result with the requirements of the Code? It does seem harsh to dismiss an appeal where the court gave its oral reasons for judgment on Friday, October 2; the plaintiff moved for a new trial on Monday, October 5; and the judgment was signed on Wednesday, October 7. Perhaps the court should treat a premature motion for a new trial the same way it treats a premature motion for an appeal. The Code provides that no appeal may be taken before a final judgment has been signed,⁶² and the supreme court has held that a motion for an appeal granted before the judgment is signed is subject to dismissal until the judgment is signed.⁶³ And the same could be done with a motion for new trial made before the judgment is signed. It too would be subject to dismissal until the judgment is signed.

RES JUDICATA

In *Jenkins v. State of Louisiana*,⁶⁴ plaintiff filed an action in state court seeking damages under state law⁶⁵ and federal law⁶⁶ for fraudulent conviction of murder in 1957 and wrongful incarceration for thirty years. The case was removed to federal court and the plaintiff's motion to remand was denied. The plaintiff filed a second suit in state court on the same grounds while the federal suit was pending. The federal suit was subsequently dismissed for failure to prosecute, which had the effect of an adjudication on the merits,⁶⁷ and based on that judgment, the defendant filed an exception of res judicata in the state suit. The trial court overruled the exception and the court of appeal affirmed. The court held that exceptional circumstances justified relief from the res judicata effect of the judgment.⁶⁸ The court found those exceptional circumstances in the plaintiff's allegations that he had been the victim of a horrendous injustice and concluded that the plaintiff's interest in proceeding with his suit outweighed any interest in the strict application of res judicata, especially considering the fact that this dismissal was the result of the attorney's conduct and not his own. The concurring opinion noted that the exceptional circumstances exception should be applied sparingly, but that this was a case for its application to avoid a legalistic

62. La. Code Civ. P. art. 1911.

63. *Overmier v. Traylor*, 475 So. 2d 1094 (La. 1985).

64. 615 So. 2d 405 (La. App. 4th Cir.), writ denied, 617 So. 2d 932 (1993).

65. La. Civ. Code art. 2315.

66. 42 U.S.C. § 1983 (1988).

67. Fed. R. Civ. P. 41(b).

68. La. R.S. 13:4232 (1991).

nightmare in which the arcane procedural technicalities of the legal system prevent the plaintiff from seeking redress for an outrageous injury inflicted on the plaintiff by that same legal system. The dissent found no exceptional circumstances and no injustice. The plaintiff knew that an action asserting a claim under federal law could be removed to federal court.

This case raises some interesting questions. The first is whether the court correctly interpreted the language of the res judicata statute that provided that "a judgment does not bar another action by the plaintiff (1) When exceptional circumstances justify relief from the res judicata effect of the judgment."⁶⁹ The court found these "exceptional circumstances" in the facts that gave rise to plaintiff's cause of action—his wrongful conviction and incarceration for thirty years—but the statute seems to call for the court to focus on the circumstances under which the judgment was rendered and to determine whether these circumstances are so exceptional as to justify an exception to the application of the principle of res judicata. The comments under the statute direct attention to Federal Rule of Civil Procedure 60(b) for an application of a principle similar to that expressed in the statute and this Rule lists factors which seem to be concerned with the rendition of the judgment, not the underlying cause of action (e.g., mistake, newly discovered evidence, misconduct of adverse party, fraud, judgment is void).⁷⁰ This would seem to be the proper concern because the issue is whether the judgment should be given its normal effect, not whether the plaintiff has a cause of action that arises out of exceptional circumstances. But the more serious question is whether this issue is to be decided by Louisiana law. The first judgment was rendered by a federal court on a federal cause of action, and in such a case the res judicata effect of a federal judgment is to be decided by federal law.⁷¹

69. *Id.*

70. Fed. R. Civ. P. 60(b).

71. See *Reeder v. Succession of Palmer* Nos. 92-C-2965, 92-C-3002, 1993 WL 335330 (La. 1993), and cases cited therein.

