NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JGW

NUMBER 2009 CA 1768

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MICHAEL ZERLIN AND CRAIG WEBRE

VERSUS

DANIEL T. MORRIS

Judgment Rendered: JUN 11 2010

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Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche, Louisiana
Trial Court Number 109,983

Honorable Jerome J. Barbera, III, Judge

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Donald F. Harang, Jr.
Larose, LA

Attorney for
Plaintiffs – Appellees
Michael Zerlin and
Craig Webre

Daniel T. Morris
Shreveport, LA

In Proper Person
Defendant – Appellant

* * * * * *

BEFORE: WHIPPLE, McDONALD, McCLENDON, HUGHES,
AND WELCH, JJ.

Hughes, J., concurs.
Whipple, J. concurs in part & dissents in part for reasons assigned.
McClendon, J. concurs in part and dissents in part for reasons
assigned by Judge Whipple.

WELCH, J.

Daniel T. Morris appeals a judgment by default entered against him and in favor of Michael Zerlin in the amount of $50,000.00 and in favor of Craig Webre in the amount of $100,000.00. Additionally, Mr. Zerlin and Sheriff Webre have filed a motion to dismiss the appeal and for contempt. In accordance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B), we deny the motion to dismiss the appeal and for contempt, vacate the judgment of the trial court, and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

This matter arises out of a defamation action filed on August 18, 2008, by Mr. Zerlin and Sheriff Webre against Mr. Morris. The petition alleged that Mr. Morris had defamed Mr. Zerlin and Sheriff Webre in a suit brought in a federal district court and in the forums of the Daily Comet and Houma Courier, and that Mr. Zerlin and Sheriff Webre were injured by the defamatory statements, thereby entitling them to damages.[1] On September 29, 2008, the plaintiffs filed a motion to appoint private process server, which the trial court granted on the same date. However, the record before us does not contain a return on the service of process—either by the sheriff or by the private person appointed by the court to make service.

On January 1, 2009, Mr. Morris sent a letter to the clerk of court, along with a pleading captioned "AFFIDAVIT CONCERNING FALSE AND DECEPTIVE STATEMENTS BY OFFICERS OF THE CADDO PARISH SHERIFF'S OFFICE" wherein he complained about and objected to the manner in which the service of the citation and petition were made on him.

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[1] Along with the petition for damages, Mr. Zerlin and Sheriff Webre filed interrogatories and request for production of documents to be served on Mr. Morris. At the confirmation of default, counsel for the plaintiffs offered into evidence requests for admissions that were purportedly filed and served with the petition. However, the record before us does not reflect that requests for admissions were ever filed into the record of these proceedings or that such requests for admissions were ever served on Mr. Morris.

On February 20, 2009, Mr. Zerlin and Sheriff Webre filed a motion for preliminary default, asserting that service of the citation and petition was made on the defendant on December 30, 2008, and that Mr. Morris had failed to appear or file an answer, and therefore, requested that a preliminary judgment by default be entered in the matter. On February 23, 2009, the trial court entered a preliminary judgment by default on the record and in the minutes of these proceedings. The judgment was confirmed on July 10, 2009, through the testimony of both Mr. Zerlin and Sheriff Webre and documentary evidence. Specifically, the judgment rendered by the trial court was against Mr. Morris and in favor of Mr. Zerlin in the amount of $50,000.00 and in favor of Sheriff Webre in the amount of $100,000.00. From this judgment, Mr. Morris has appealed.

MOTION TO DISMISS AND FOR CONTEMPT

The plaintiffs have filed a motion to dismiss Mr. Morris's appeal and for contempt because his appellate brief does not comply with Uniform Rules—Courts of Appeal, Rule 2-12.4[2] because Mr. Morris's brief lacks statements of

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[2] Uniform Rules—Courts of Appeal, Rule 2-12.4 states:

> The brief of the appellant or relator shall set forth the jurisdiction of the court, a concise statement of the case, the ruling or action of the trial court thereon, a specification or assignment of alleged errors relied upon, the issues presented for review, an argument confined strictly to the issues of the case, free from unnecessary repetition, giving accurate citations of the pages of the record and the authorities cited, and a short conclusion stating the precise relief sought.
>
> A copy of the judgment, order, or ruling complained of, and a copy of either the trial court's written reasons for judgment, transcribed oral reasons for judgment, or minute entry of the reasons, if given, shall be appended to the brief of the complaining litigant on appeal. If reasons for judgment were not given, the brief shall so declare.
>
> Citation of Louisiana cases shall be in conformity with Section VIII of the Louisiana Supreme Court General Administrative Rules. Citations of other cases shall be to volume and page of the official reports (and when possible to the unofficial reports). It is recommended that where United States Supreme Court cases are cited, all three reports be cited, e.g., *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). When a decision from another state is cited, a copy thereof should be attached to the brief.

the jurisdiction of the court, a concise statement of the case, the trial court's ruling, specification of errors, issues for review, argument confined to the cases' issues with accurate record citations and authorities, and a short conclusion stating the relief sought and because Mr. Morris's brief purportedly contains language that is insulting, abusive, discourteous, irrelevant, and critical of the trial judge. The plaintiffs seek the dismissal of Mr. Morris's appeal, assessment of costs to Mr. Morris, and a finding of contempt of court by Mr. Morris.

While Uniform Rules—Courts of Appeal, Rule 2-12.4 sets forth a penalty of contempt, it does not provide for the dismissal of the appeal as a penalty for violating the rule. Likewise, Uniform Rules—Courts of Appeal, Rule 2-12.13, which addresses non-compliant briefs, does not set forth the dismissal of the appeal as a penalty; instead it provides that "[b]riefs not in compliance with the Rules may be stricken in whole or in part by the court, and the delinquent party ... may be ordered to file a new or amended brief." Thus, the sanction to be imposed for a non-conforming brief is left to the discretion of the court. See **Williams v. Fischer**, 439 So.2d 1111, 1112 (La. App. 1st Cir. 1983).

While the brief filed by Mr. Morris does not comply with the Uniform Rules—Courts of Appeal, Rule 2-12.4, under the circumstances of this case, we feel that striking the brief and/or dismissal of the appeal would be an

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> The argument on a specification or assignment of error in a brief shall include a suitable reference by volume and page to the place in the record which contains the basis for the alleged error. The court may disregard the argument on that error in the event suitable reference to the record is not made.
>
> All specifications or assignments of error must be briefed. The court may consider as abandoned any specification or assignment of error which has not been briefed.
>
> The language used in the brief shall be courteous, free from vile, obscene, obnoxious, or offensive expressions, and free from insulting, abusive, discourteous, or irrelevant matter or criticism of any person, class of persons or association of persons, or any court, or judge or other officer thereof, or of any institution. Any violation of this Rule shall subject the author, or authors, of the brief to punishment for contempt of court, and to having such brief returned.

unreasonably harsh remedy to impose on Mr. Morris and in deprivation of his right to appeal. Accordingly, we deny the plaintiffs' motion to dismiss and we also decline to strike Mr. Morris's brief. See **Williams**, 439 So.2d at 1112.

As to the plaintiffs' contentions that Mr. Morris's brief contains language that is insulting, abusive, discourteous, irrelevant, and critical of the trial judge, we disagree. In Mr. Morris's brief, he asserts that the trial court judge should have recused himself because he was hostile towards Mr. Morris, sought to retaliate against Mr. Morris, and had a substantial personal interest in the outcome of the case. The remainder of Mr. Morris's brief contains the factual allegations supporting his contention that the trial court judge should have recused himself. Although a motion to recuse should have first been asserted in the trial court prior to being raised on appeal, these allegations of fact, if proven to be true, may warrant the recusal of the trial judge. Therefore, we deny the plaintiffs' motion seeking to have Mr. Morris held in contempt of court for the contents of his brief.

JUDGMENT BY DEFAULT

Pursuant to La. C.C.P. art. 1001, a defendant shall file his answer within fifteen days after service of citation upon him, except as otherwise provided by law. If the defendant fails to answer within the time prescribed by law, judgment by default may be entered against him. La. C.C.P. art. 1701(A); **Mitchell v. Bass**, 2001-2217, p. 3 (La. App. 1st Cir. 11/8/02), 835 So.2d 778, 780. It is well-settled that a default judgment may not be taken against a person who has not received citation and service thereof. **Mitchell**, 2001-2217 at p. 3, 835 So.2d at 780.

The record before us contains no evidence that Mr. Morris was ever served with a copy of the petition prior to the filing of the motion for preliminary default; however, Mr. Morris did file a pleading into the record.

Although this pleading was captioned as an "affidavit," our courts look beyond the caption, style, and form of pleadings to determine from the substance of the pleading the nature of the proceeding. Thus, a pleading is construed for what it really is, not for what it is erroneously called. **Rochon v. Young**, 2008-1349, p. 3 (La. App. 1st Cir. 2/13/09), 6 So.3d 890, 892, writ denied, 2009-0745 (La. 1/29/10), 25 So.3d 892.

Reviewing the allegations contained in Mr. Morris's pleading, it is clear that he was objecting to the manner in which service of the citation and petition were made on him. An objection to insufficiency of citation or service of process under La. C.C.P. art. 925 "is properly leveled at the form of the citation" and also "focuses on the person to whom citation is delivered or on the manner in which delivery is made." **Filson v. Windsor Court Hotel**, 2004-2893, p. 3 (La. 6/29/05), 907 So.2d 723, 726 (quoting Maraist, Frank L. and Lemmon, Harry T., Louisiana Civil Law Treatise, Vol. 1, § 6.5, p. 108). As such, Mr. Morris's pleading—objecting to the manner in which the service of the citation and petition were made on him—should have been treated as a declinatory exception raising the objections of insufficiency of citation and/or insufficiency of service of process.

The declinatory exception must be pleaded prior to or along with the answer. See La. C.C.P. art. 928. In this case, although Mr. Morris did not file an answer, his exception was filed prior to the motion for preliminary default and the confirmation of default. Therefore, the exception should have been tried and decided prior to the entry of a preliminary default and the confirmation of the default. See La. C.C.P. art. 929. However, the trial court failed to do so. Since a default judgment may not be taken against a person who has not received proper citation and service of the suit and because Mr. Morris filed an objection to the sufficiency of service of the suit—the merits of which is still

pending[3]--we must vacate the judgment of the district court and remand for further proceedings.[4]

CONCLUSION

For all of the above and foregoing reasons, Mr. Zerlin and Sheriff Weber's motion to dismiss appeal and for contempt is denied, the July 10, 2009 judgment by default is vacated, and this case is remanded for further proceedings consistent with the views expressed in this opinion.

All costs of this appeal are assessed to the plaintiffs/appellees, Michael Zerlin and Craig Webre.

MOTION TO DISMISS APPEAL AND FOR CONTEMPT DENIED; DEFAULT JUDGMENT VACATED AND MATTER REMANDED FOR FURTHER PROCEEDINGS.

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[3] Although Rule 9.8 of the Rules for Louisiana District Courts requires that all exceptions contain an order setting the exception for hearing, and although Mr. Morris's pleading did not contain the requisite order, the rule provides that the penalty for failing to comply is that the court may either strike the exception or set the matter for hearing on its own motion. In this case, the trial court did neither. Therefore, the exception is still pending.

[4] Although the only assignment of error raised by Mr. Morris was the failure of the trial court judge to recuse himself, that issue was never properly raised in a motion before the trial court. See La. C.C.P. art. 154. However, because we are vacating the judgment of the trial court based on a procedural flaw in obtaining the default judgment, as detailed herein, and have remanded this matter for further proceedings, should Mr. Morris continue to maintain that the trial court judge should be recused, he should file the appropriate pleading with the trial court.

MICHAEL ZERLIN AND CRAIG WEBER

VERSUS

DANIEL T. MORRIS

STATE OF LOUISIANA

COURT OF APPEAL

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WHIPPLE, J., concurring in part and dissenting in part.

VGW by JAW

I agree with the majority's analysis and denial of the plaintiffs' motion to strike the brief and to dismiss the appeal as well as the rejection of the plaintiffs' motion for contempt. However, I respectfully dissent from the disposition ordered in the remainder of the opinion, which, in my view, is not clearly warranted on the record before us, nor raised by any party to the appeal.

At the outset, I recognize that as a reviewing court, we are obligated to recognize our lack of jurisdiction, **if it exists**. Avants v Kennedy, 2002-0830 (La. App. 1st Cir. 12/20/02), 837 So. 2d 647, 653, writ denied, 2003-0203 (La. 4/4/03), 840 So. 2d 1215. Thus, if there were a clear indication in the record that the judgment on appeal is an absolute nullity, I would likewise agree that this court lacks jurisdiction to review the judgment, and thus, I would also concur in the result reached by the majority herein vacating an absolutely null judgment. See Starnes v. Asplundh Tree Expert Company, 94-1647 (La. App. 1st Cir. 10/6/95) 670 So. 2d 1242, 1248-1249.[1] However, I am unable to do so in the instant case because the record, as it stands, does not provide a sufficient basis to resolve these issues in either party's favor.

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[1]Pursuant to LSA-C.C.P. art. 1701(A), a judgment of default or preliminary default may be entered if the defendant in the principal or incidental demand fails to answer within the time prescribed by law. This judgment of default may be confirmed two days exclusive of holidays after entering of the judgment of default, by proof which establishes a prima facie case, if no answer is filed. LSA-C.C.P. art. 1702(A). Thus, a final default judgment obtained without a valid preliminary default is an absolute nullity. Livingston Parish Police Jury v. Patterson, 589 So. 2d 9, 10 (La. App. 1st Cir. 1991); Glessner v. Hyatt, 380 So. 2d 222, 223 (La. App. 3rd Cir. 1980).

Although the **sole** issue raised by the defendant on appeal is the purportedly improper failure of the trial judge to recuse, **likewise an issue which apparently was never raised or considered in the proceedings below**, the majority relies on the cursory record furnished by the appellant to conclude (1) that there is a fatal lack of evidence of proper service and therefore no service, and (2) that a rambling letter and affidavit from the defendant to the local clerk of court (in which he complains that although he was in fact served, the service was obtained by "trickery" because he was served at the Caddo Parish Sheriff's Office while there on another matter) was tantamount to a pleading or exception raising the objections of insufficiency of citation and/or insufficiency of service of process. Based on my review of the record, the majority errs in so concluding.

While the majority is correct that in the instant case, a letter and attached affidavit sent by the defendant to the clerk of court was filed into the record prior to the filing of the motion for preliminary default by Mr. Zerlin and Sheriff Webre, I am unable to find that this correspondence should be *sua sponte* recognized as a declinatory exception raising the objections of insufficiency of citation and/or insufficiency of service of process. Moreover, even if this letter could clearly be so construed, it is equally clear that the record does not establish that the trial court failed to consider, strike or otherwise rule on (or refer to the merits) its ruling on the "issues" raised in the defendant's letter.

In my view, the prudent course would be to remand the matter with instructions to supplement the record, as appropriate, to document: (1) the type, manner and service made herein (which the defendant acknowledges did occur, but nonetheless wants set aside as unfair trickery) and (2) whether, given the clerk of court's certification appearing of record herein that no answer or other pleadings were filed by the defendant, the "exception" was disposed of prior to entry of the

preliminary and confirmatory judgments by default. Thus, while I agree with the majority that the matter should be remanded, in my view, at a minimum, the trial court should be allowed to respond to these issues raised *sua sponte* by this court prior to our taking any further action on the appeal.

For these reasons, I respectfully concur in part and dissent in part.