STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 0257

MONA WOODS, INDIVIDUALLY AND ON BEHALF
OF HER MINOR SON, D.B.W.

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF HEALTH AND HOSPITALS
AND DEPARTMENT OF SOCIAL SERVICES

JEW
FJD

Judgment Rendered: June 6, 2008

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 558,478

Honorable William A. Morvant, Judge

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Ron S. Macaluso Hammond, LA	Attorney for Plaintiff – Appellant Mona Woods, Individually and on behalf of her minor son, D.B.W.
James D. "Buddy" Caldwell, Attorney General Douglas G. Swenson, Asst. Attorney General Baton Rouge, LA	Attorneys for Defendants – Appellees La. Dept. of Health & Hospitals and La. Dept. of Social Services

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BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ.

WELCH, J.

Plaintiff, Mona Woods, individually and on behalf of her minor son, D.B.W., appeals a trial court judgment maintaining the peremptory exception raising the objection of prescription, thereby dismissing her claims against the State of Louisiana, Department of Health & Hospitals, and the Louisiana Department of Social Services. For the following reasons, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Mona Woods is the mother of D.B.W., a minor. Ms. Woods alleges that her son is a developmentally disabled minor who suffers from autism, ADHD, and mental retardation. At the age of eleven, the State of Louisiana through the Office of Citizens with Developmental Disabilities placed D.B.W. at G.B. Cooley Hospital for Retarded Citizens (G.B. Cooley). G.B. Cooley, located in Monroe, Louisiana, is owned by the Ouachita Parish Hospital Service District, which is owned by the Ouachita Parish Police Jury.

Ms. Woods alleges that at all relevant times D.B.W. was in the legal care of, in custody of, and supervised by the State of Louisiana. She alleges that the State of Louisiana (in all of its capacities including the Department of Social Services (DSS) and the Department of Health & Hospitals (DHH)) had a legal duty to place, care, supervise, and protect her child. Notwithstanding, while a resident at G.B. Cooley, D.B.W. was sexually abused by Freddie Staten[1] and was beaten by Christie Jones,[2] both employees of G.B. Cooley. It is further alleged that the child sustained other physical injuries at the hands of G.B. Cooley employees.

On May 31, 2007, plaintiff filed a complaint in the U.S. District Court for the Western District of Louisiana, naming as defendants the State of Louisiana

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[1] The petition alleges that the sexual abuse committed by Freddie Staten upon D.B.W. began on February 6, 2004, and continued through June 8, 2006.

[2] The petition alleges that Christie Jones beat D.B.W. with a belt on or about May 7, 2006.

(DHH and DSS), Ouachita Parish Police Jury, G.B. Cooley, Ouachita Parish Hospital Service District, Sharon Gomez, and Freddie Staten. DHH and DSS filed a motion to dismiss the federal court proceeding for lack of jurisdiction on the basis of Eleventh Amendment immunity, which motion was granted by judgment dated September 24, 2007. On August 24, 2007, the instant petition for damages was filed against DHH and DSS in the Nineteenth Judicial District Court for the Parish of East Baton Rouge.

On September 24, 2007, DHH and DSS filed the peremptory exception raising the objection of prescription alleging that the latest date that the one-year prescriptive period began to run was June 8, 2006.[3] DHH and DSS further alleged that the petition on its face showed that prescription had run and that the burden then shifted to plaintiff to demonstrate that prescription was suspended or interrupted. Plaintiff opposed the exception of prescription on three bases: (1) the filing of the suit in federal court, although a court of incompetent jurisdiction, interrupted prescription because defendants were served with a waiver of summons within the prescriptive period; (2) a two-year prescriptive period applies herein under La. C.C. art. 3493.10; and (3) under La. C.C. art. 1799, when suit was properly brought against the defendants named in the federal suit, prescription was interrupted as to all *solidary obligors*, including exceptors. The trial court entered a judgment, declaring that plaintiff's claim had prescribed. Plaintiff appeals.

PRESCRIPTION

If a claim is prescribed on the face of the pleadings, the burden is on the plaintiff to show that prescription has not tolled, because of an interruption or a suspension of prescription. **Brister v. GEICO Ins.**, 2001-0179, p. 4 (La. App. 1st Cir. 3/28/02), 813 So.2d 614, 616. On the trial of the peremptory exception pleaded at or prior to the trial of the case, evidence may be introduced to support or

[3] Ms. Woods alleged the abuse against her son became known to her on June 8, 2006.

controvert any of the objections pleaded, when the grounds thereof do not appear from the petition. La. C.C.P. art. 931. **Brister**, 2001-0179 at pp. 3-4, 813 So.2d at 616.

Prescription statutes are strictly construed against prescription and in favor of maintaining the cause of action. **Babineaux v. State ex rel. Dept. of Transp. and Development**, 2004-2649, p. 4 (La. App. 1st Cir. 12/22/05), 927 So.2d 1121, 1124. However, prescription statutes are intended to protect defendants against stale claims and the lack of notification of a formal claim within the prescriptive period. **In re Brewer**, 2005-0666, p. 4 (La. App. 1st Cir. 5/5/06), 934 So.2d 823, 826, writ denied, 2006-1290 (La. 9/15/06), 936 So.2d 1278.

The claims alleged against DHH and DSS are negligence, gross negligence, and egregious failure to protect D.B.W. and violation of D.B.W.'s constitutionally protected rights resulting in his personal injuries, both physical and mental. Ms. Woods, on her behalf, has also asserted a loss of consortium claim.

Louisiana Civil Code article 3447 provides "[l]iberative prescription is a mode of barring of actions as a result of inaction for a period of time." Louisiana Civil Code article 3492 addresses the prescriptive period for personal injury claims,[4] as follows:

> Delictual actions are subject to a liberative prescription of **one year**. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

(Emphasis supplied.)

Plaintiff seeks to establish suspension or interruption of prescription, relying

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[4] We reject plaintiff's contention that the two-year prescriptive period found in La. C.C. art. 3493.10 applies to her claims against DHH and DSS. Louisiana Civil Code article 3493.10 provides a two-year prescriptive period for delictual actions based on a crime. However, the petition contains no allegations that DHH or DSS committed a crime of violence resulting in damage to plaintiff. The only criminal acts alleged are those committed by Freddie Staten, who is not an employee of DHH or DSS or otherwise affiliated with these departments in any capacity.

upon La. C.C. art. 3462, which provides:

> Prescription is interrupted when the owner commences action against the possessor, or when the obligee commences action against the obligor, in a court of competent jurisdiction and venue. **If action is commenced in an incompetent court, or** in an improper venue, **prescription is interrupted only as to a defendant served by process within the prescriptive period.**

(Emphasis supplied.)

Plaintiff argues that a waiver of summons in the federal suit is tantamount to service of process, thereby interrupting prescription. Louisiana Code of Civil Procedure article 1201(A) provides in pertinent part, "[c]itation and service thereof are essential in all civil actions." However, Section B of Article 1201 expressly permits a defendant to "waive citation and service thereof by any written waiver made part of the record." Federal Rule of Civil Procedure article 4(d)(1), in pertinent part, provides that an individual, corporation, or association "has a **duty** to avoid unnecessary expenses of serving the summons" and further requires "[t]he plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons." (Emphasis supplied.)

Plaintiff maintains that "service" was made on DHH and DSS, at least by June 6, 2007, or within the prescriptive period. In support of this contention, at the hearing plaintiff introduced into evidence documentation showing that waivers of service of summons were mailed, via certified mail with return receipts requested, to DHH through the Office of the Governor, through the Office of the Attorney General, and through the Office of the Secretary for DHH, Frederick P. Cerise, M.D., on June 5, 2007. The return receipts demonstrate that the certified mail was accepted, or signed for, at all three offices on June 6, 2007. In addition, plaintiff introduced documentation showing that waivers of service of summons were similarly mailed to DSS, via certified mail with return receipts requested, to the Office of the Governor, through the Office of the Attorney General, and to DSS through its Secretary, Ann Silverberg Williamson, on June 5, 2007. The return

receipts similarly show that the mail was delivered to those offices on June 6, 2007, and were accepted that date by representatives of those offices. The record shows that David E. Verlander, III, attorney for the State of Louisiana, executed the waiver of service of summons on behalf of DSS on June 22, 2007, and on behalf of DHH on June 26, 2007. Accordingly, plaintiff argues that both DHH and DSS were served no later than June 6, 2007.

Moreover, plaintiff contends that prescription was continuously interrupted until a final judgment was signed dismissing DHH and DSS from the federal court proceeding, citing La. C.C. art. 3463. This article provides that an interruption of prescription resulting from service of process within the prescriptive period continues as long as the suit is pending. The comments to this article state that an interruption of prescription resulting *from the service of process* in an action filed in an *incompetent* court continues as long as the suit is pending. Plaintiff contends that service of process was made before the accrual of prescription; moreover, the federal court proceeding was not dismissed until September 24, 2007, and until then, prescription was continuously interrupted. The state court suit was filed on August 24, 2007.

DHH and DSS maintain that the trial court correctly dismissed the suit against them as prescribed. DHH and DSS contend they were neither served with process nor citation as is required to interrupt prescription. In so stating, DHH and DSS contend that it is a long held principle that "[t]he only demand by which prescription is interrupted is citation" (*citing* **Grayson v. Mayo**, 2 La. Ann. 927 (La. 1847)). DHH and DSS also rely on **Achord v. Holmes**, 34 So.2d 807, 808 (La. App. 1st Cir. 1948), which held: "[c]itation to a defendant, which is the judicial notice to him to appear and answer the demand that is being made against him, is the only form of notice which will interrupt prescription. Actual notice will not suffice." In **Achord**, suit was filed against John M. Holmes, erroneously sued

as the father of a minor child responsible for causing the accident resulting in injury to plaintiff. However, the return of citation in the initial suit showed that domiciliary service was made upon M.L. Holmes, the minor child's paternal grandmother. Plaintiff filed a subsequent suit naming the proper defendant, W.M. Holmes (the father of the minor child), more than two years after the accident occurred. This suit was met with an exception of prescription. Because the minor child, W.M. Holmes, and M.L. Holmes, all resided at the same address, plaintiff argued that W.M. Holmes had "actual notice" of the former suit sufficient to interrupt prescription. This court affirmed the judgment of the trial court maintaining the exception of prescription. This court noted that plaintiff's allegation that W.M. Holmes had actual notice of the former suit, even though John M. Holmes was erroneously named defendant, was simply an assumption based on the fact that W.M. Holmes and the person to whom citation was handed in the first suit filed were all members of the same household. Moreover, the court concluded that actual notice does not constitute judicial notice.

We agree, however, with plaintiff that the instant case is distinguishable from **Achord**. In the first instance, the defendant in **Achord** received domiciliary service more than two years after the accident occurred, and there was, at most, only an assumption that he had received actual notice of the prior suit. Defendants in the instant case did, in fact, receive notice because they received copies of the complaint, and they executed waivers of summons.

Moreover, since this court's ruling in **Achord**, the supreme court has addressed the issue in **Breaux v. Vicknair**, 507 So.2d 1242 (La. 1987) (per curiam). In **Breaux**, after an accident on January 11, 1984, plaintiff timely filed suit in federal court on December 3, 1984. Prior to dismissal of the suit in federal court for lack of subject matter jurisdiction, a suit was filed in state court. Defendants filed the peremptory exception of prescription in state court on the

basis that they had never acknowledged service of process in federal court, as required by the federal rules. A signed return receipt was admitted into evidence to show that Nolan Vicknair, defendant, received the federal court pleadings on January 11, 1985, and he and two other defendants filed answers in the federal court proceedings and commenced discovery without excepting to service. The trial court granted the exception of prescription. The Fifth Circuit Court of Appeal affirmed. The supreme court reversed, noting that La. C.C. art. 3462 provides that an action commenced in an incompetent court interrupts prescription as to a defendant served with process within the prescriptive period. Even if process is defective and subject to exception, it interrupts prescription if it is sufficient to inform the persons served of the legal demand made upon them. **Breaux**, 507 So.2d at 1243 (citing **Conner v. Continental Southern Lines, Inc.**, 294 So.2d 485 (La. 1974)).

In the instant case, although DHH and DSS excepted to jurisdiction in federal court, there is no evidence or representation that they ever objected to service of process as improper, and, in fact, the evidence demonstrates that they executed waivers of summons in the federal proceedings. Moreover, there is no doubt that they received notice of the proceedings against them.

DHH and DSS then argue that even if this court believes that a waiver of summons is tantamount to service of process, it is a well-established fact that service of process must be made on the proper defendant to interrupt the running of prescription when the action is filed in an incompetent court, citing **Jinright v. Glass**, 2006-888 (La. App. 5th Cir. 2/27/07), 954 So.2d 174, writ denied, 2007-0570 (La. 5/4/07), 956 So.2d 618 and **Mejia v. Lineas Maritimas De Santo Domingo**, 570 So.2d 548 (La. App. 4th Cir. 1990).

DHH and DSS contend that they were not properly served in accordance

with La. R.S. 39:1538.[5] DHH and DSS allege that this statute gives parties the right to bring suit against state agencies in tort in state courts.[6] The statute states, in pertinent part:

> (1) Claims against the state or any of its agencies to recover damages in tort for money damages against the state or its agencies for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment under circumstances in which the state or such agency, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted in accordance with the provisions specified in this Chapter...
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> ....
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> (4) **In actions brought pursuant to this Section, process shall be served upon the head of the department concerned, the office of risk management, and the attorney general, as well as any others required by R.S. 13:5107.** However, there shall be no direct action against the Self-Insurance Fund and claimants, with or without a final judgment recognizing their claims, shall have no enforceable right to have such claims satisfied or paid from the Self-Insurance Fund.
> (Emphasis supplied.)

DHH and DSS contend that it was improper to effect service upon them through the Office of the Governor, citing **Thorning v. State ex rel. Dept. of Transp and Development**, 2006-57 (La. App. 5th Cir. 6/28/06), 934 So.2d 895, writ denied, 2006-1869 (La. 10/27/06), 939 So.2d 1286; however, we note, as evidenced by the return receipts offered into evidence over defendants' objection, they were actually served through the Governor, the Attorney General, and the

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[5] The general requirement for service upon the State is found at La. R.S. 13:5107(A), which provides:

> In all suits filed against the state of Louisiana or a state agency, citation and service may be obtained by citation and service on the attorney general of Louisiana, or on any employee in his office above the age of sixteen years, or any other proper officer or person, depending upon the identity of the named defendant and in accordance with the laws of the state, and on the department, board, commission, or agency head or person, depending upon the identity of the named defendant and the identity of the named board, commission, department, agency or officer through which or through whom suit is to be filed against.

[6] The Constitution of Louisiana, article 12, § 10(A) grants that right, as follows:

> **No Immunity in Contract and Tort**. Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

secretaries of their respective departments. DHH and DSS additionally contend that the Office of Risk Management, not a named party in the litigation, was not served. Unlike DHH and DSS, the Office of Risk Management was created within the Division of Administration, which is identified as a department under the Office of the Governor. See La. R.S. 36:4(B)(1)(a). Accordingly, the Governor was the proper person to receive service on behalf of the Office of Risk Management.[7]

Service of process was made upon DHH and DSS in federal court, upon the proper person as designated by law, within the prescriptive period, and prescription was continuously interrupted until judgment of dismissal was signed in the federal proceeding.[8] Accordingly, the judgment of the trial court is reversed, and this case is remanded for further proceedings. Costs of this appeal in the amount of $825.88 are assessed to the State of Louisiana, Department of Health & Hospitals and the Department of Social Services, to be borne equally by the two departments.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[7] **Thorning** is the *only* case we are aware of interpreting the provisions of La. R.S. 39:1538, and we question its applicability herein. We agree with the concurring judge in **Thorning** that La. R.S. 39:1538(4) refers to the procedure for *collecting on a claim* against the state or a state agency. In any event, we believe that service was effected in accordance with this statute.

[8] We therefore pretermit a discussion concerning whether DHH and DSS are solidarily liable with the defendants remaining in the federal suit.