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NEWS RELEASE # 86

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **12th day of December, 2003**, are as follows:

BY KNOLL, J.:

2003-CA-0732 UNWIRED TELECOM CORP., FORMERLY KNOWN AS UNWIRED, INC. AND SUCCESSOR IN INTEREST BY MERGER TO MERCURY CELLULAR TELEPHONE COMPANY v. PARISH OF CALCASIEU, LOUISIANA; THE CALCASIEU PARISH SCHOOL BOARD; THE CALCASIEU PARISH POLICE JURY; THE CALCASIEU PARISH SCHOOL SYSTEM; THE TREASURER OF THE CALCASIEU PARISH SCHOOL BOARD; AND THE TREASURER'S DESIGNATED AGENTS, INCLUDING RUFUS R. FRUGE, JR., IN HIS CAPACITY AS DIRECTOR OF THE CALCASIEU PARISH SCHOOL SYSTEM, SALES AND USE TAX DEPARTMENT (Parish of Calcasieu)
For the foregoing reasons, the judgment of the Court of Appeal, Third Circuit, is vacated and set aside. This matter is remanded to the trial court for the filing of pleadings to assert the unconstitutionality of 2002 La. Acts No. 85, §3 and to conduct further proceedings in conformity with the views expressed herein. If the taking of evidence is required, the parties may be given the opportunity to introduce evidence in the district court for a determination of the constitutionality of the statute at issue.
VACATED AND CASE REMANDED TO TRIAL COURT

CALOGERO, C.J., dissents for reasons assigned by Weimer, J.
VICTORY, J., dissents for the reasons assigned by Justice Weimer.
WEIMER, J., dissents and assigns reasons.

12/12/03

SUPREME COURT OF LOUISIANA

NO. 03-CA-0732

UNWIRED TELCOM CORP., FORMERLY KNOWN AS UNWIRED, INC. AND SUCCESSOR IN INTEREST BY MERGER TO MERCURY CELLULAR TELEPHONE COMPANY

Versus

PARISH OF CALCASIEU, LOUISIANA; THE CALCASIEU PARISH SCHOOL BOARD; THE CALCASIEU PARISH POLICE JURY; THE CALCASIEU PARISH SCHOOL SYSTEM; THE TREASURER OF THE CALCASIEU PARISH SCHOOL BOARD; AND THE TREASURER'S DESIGNATED AGENTS, INCLUDING RUFUS R. FRUGE, JR., IN HIS CAPACITY AS DIRECTOR OF THE CALCASIEU PARISH SCHOOL SYSTEM, SALES AND USE TAX DEPARTMENT

ON APPEAL FROM THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF CALCASIEU

KNOLL, Justice

Unwired Telecom Corp., formerly US Unwired, Inc. and the successor by merger with Mercury Cellular Telephone Company (hereafter Unwired), is a wireless telecommunications services provider that operates a retail business in Calcasieu Parish, Louisiana. Unwired invokes the appellate jurisdiction of this Court pursuant to LA. CONST. ANN. art. V, § 5(D), on the ground that the appellate court declared 2002 La. Acts No. 85, § 3 unconstitutional. For reasons that follow, we find the parties failed to raise the constitutionality of 2002 La. Acts No. 85, § 3 in a pleading. Accordingly, we find the appellate court improperly reached the constitutional issue. Therefore, we vacate and set aside that judgment and remand the case to the trial court to properly raise the issue of the constitutionality of 2002 La. Acts No. 85, § 3 and to conduct further proceedings consistent with this opinion.

FACTS AND PROCEDURE

Prior to Mercury and Unwired's merger, the Collector of the Calcasieu Parish sales and use taxes (the Collector)[1] successfully collected a use tax from Mercury Cellular for the period of January 1, 1993 through December 31, 1995, on cellular telephones Mercury regularly furnished its customers when they also contracted cellular telecommunications services with Mercury. That collection was affirmed in the trial court after Mercury paid the use tax assessment under protest.[2]

In Mercury, the appellate court affirmed the trial court's grant of summary judgment in favor of the Collector on the ground that Mercury was properly assessed a use tax for the cellular telephones it furnished its customers at a price less than Mercury's wholesale cost.[3] Mercury Cellular Telephone Co. v. Calcasieu Parish, 00-0318 (La. App. 3 Cir. 12/13/00). The basis of the appellate court's reasoning was that Mercury's transfer of the cellular telephones was "an incentive invariably . . . as a conduit for marketing its cellular service." Mercury, 773 So. 2d at 919. Simply stated, the appellate court held that Mercury was liable for a use tax because it used the cellular telephones as marketing tools rather than reselling them. On March 15, 2001, this Court denied Mercury's writ application. Mercury Cellular Telephone Co. v. Calcasieu Parish, 01-0126 (La. 3/16/01), 787 So. 2d 314.

Between January 1, 1996 and December 31, 1999, Unwired, like its predecessor Mercury, continued to regularly sell cellular telephones below its actual

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[1] As provided in various ordinances of the Calcasieu Parish School Board, the Parish of Calcasieu Parish Police Jury, and various tax districts, the Tax Director for the School Board of the Parish of Calcasieu is designated as the Collector of Calcasieu Parish sales and use taxes.

[2] Local Ordinance § 11.01 and LA. REV. STAT. ANN. § 47:1576 set forth the requirements for a payment of taxes under protest and the procedure applicable thereto.

[3] Although the lower courts approved a use tax on Unwired's use of cellular telephones as part of its merchandising of its telecommunication business, LA. REV. STAT. ANN. § 47:301(14)(i)(v)(aa) prohibits political subdivisions from levying a use tax on telecommunication services not in effect on July 1, 1990. The tax at issue does not fall within this prohibition.

wholesale cost to those customers who contracted cellular telecommunications services from Unwired for a specified period of time. Unwired, as did Mercury before it, collected applicable sales tax only on the price it charged its customers and remitted these sums to the Collector.[4] At no time did Unwired collect and remit a use tax to the Collector on its use of cellular telephones in the marketing of its telecommunication services.

The Collector audited Unwired's financial records for the above-referenced time frame. It determined that, based on its tax ordinances, Unwired's transfer of discounted cellular phones as part of a sale of a cellular telecommunications package is not a "sale at retail" in the regular course of business. Rather, the Collector asserted that Unwired "uses" the cellular phones in its business and thus it should have paid use tax, not sales tax, based on the wholesale prices of the cellular phones. Accordingly, the Collector assessed Unwired a use tax of $650,786.94, related interest of $295,310.59, and penalties in the sum of $162,696.94. On March 21, 2001, Unwired paid the use tax assessment under protest and timely filed suit for a refund on April 20, 2001.

Relying on Mercury, 773 So. 2d 914, the Collector moved for summary judgment, contending Unwired is required to pay use tax on the total price it pays for each cellular telephone. Unwired opposed the motion for summary judgment, arguing its transfer of cellular telephones at discounted prices as part of its sales of cellular telecommunication packages is not subject to use tax. To the contrary, Unwired argued its transfers of these discounted phones constitute "sales at retail" under the applicable ordinances and are excluded from the use tax. Assuming arguendo that the

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[4] To avoid double taxation, Unwired presented a "resale certificate" to the entity(ies) from whom it acquired the cellular telephones, certifying that it intended to resell the telephones and collect sales taxes from its customers.

tax assessment was correct, Unwired further argued under the provisions of LA. REV. STAT. ANN. § 33:2746 and this Court's holding in Elevating Boats, Inc. v. St. Bernard Parish, 00–3518 (La. 9/5/01), 795 So. 2d 1153, that the Collector could only hold it liable for no more than the 15% interest penalty.

The trial court granted the Collector's motion for summary judgment and ordered Unwired to pay all taxes and interest assessed for the taxable period beginning January 1, 1996 and ending December 31, 1999. In reaching that conclusion, the trial court found the present case factually indistinguishable from Mercury. However, based upon this Court's holding in Elevating Boats, the trial court dismissed the Collector's assessment of penalties, denied its request for attorney's fees, and ordered a refund to Unwired of $152,696.94, the amount of the delinquency penalties Unwired previously paid under protest.

Unwired and the Collector appealed the trial court's judgment on May 1 and May 7, 2002 respectively. After the appeal was perfected, but before oral argument, the Legislature enacted 2002 La. Acts No. 85, to provide new definitions of "retail sale" or "sale at retail," "sales price," and "use" in LA. REV. STAT. ANN. § 47:301(10)(v), (13)(g) and (h), and (18)(i). This legislation purported to legislatively change the law as to the Mercury holding. In stating that 2002 La. Acts No. 85 was interpretative and applicable retroactively, § 3 of the act specified:

> The provisions of Section 1 of this Act are interpretative of R. S. 47:301(10), (13), and (18) for all taxable periods that ended prior to January 1, 2001, and are intended to explain and clarify their original intent, notwithstanding the contrary interpretation given in "Calcasieu Parish School Board v. Mercury Cellular Telephone Company", 2000–0318 (La. App. 3 Cir. 12/13/00), 773 So. 2d 914, writ denied, 2001-0126 (La. 3/16/01), 787 So. 2d 314, and all cases consistent therewith. Therefore, the provisions of Section 1 of this Act shall be applicable to all claims existing or actions pending for any taxable period prior to January 1, 2001, and to all claims arising or actions filed on and after its effective date.

At this stage in the appellate process, the Collector attacked the constitutionality of 2002 La. Acts No. 85, § 3 *in its brief* to the court of appeal.[5] In its reply brief, Unwired addressed the three assertions brought by the Collector and in a footnote urged that the appellate court notify the Attorney General of the Collector's objection to the constitutionality of Act 85.[6] The appellate record reflects that the Attorney General filed an amicus brief with the appellate court, urging the constitutionality of Act 85.[7]

Addressing the briefs of Unwired and the Collector, the Court of Appeal, Third Circuit, noted "but for the passage of Act 85, this court would find that summary judgment in favor of the School Board was appropriate based on Mercury." Unwired Telecom Corp. v. Parish of Calcasieu, 02-0839 (La. App. 3 Cir. 2/5/03), 838 So. 2d 854, 857. Nevertheless, questioning whether the Legislature acted properly in declaring Act 85 interpretive and applicable retroactively, the appellate court

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[5] The Collector urged three grounds upon which the appellate court could find 2002 La. Acts No. 85, § 3 unconstitutional. The Collector argued that Act 85 could not be applied retroactively to extinguish any obligations Unwired owed prior to the enactment of the law, that the provisions of Act 85 impermissibly altered established prescriptive periods, and Act 85 violated the constitutional provisions relative to due process, contract or equal protection rights.

[6] "Before adjudicating the constitutionality of the Act, this Court must notify the Attorney General of this proceeding and afford him an opportunity to be heard. La. R.S. 13:4448; La. Code Civ.P. art. 1880."

[7] Specifically, LA. REV. STAT. ANN. § 13:4448 provides that:

> Prior to adjudicating the constitutionality of a statute of the state of Louisiana, the courts of appeal and the Supreme Court of Louisiana shall notify the attorney general of the proceeding and afford him an opportunity to be heard. The notice shall be made by certified mail. No judgment shall be rendered without compliance with the provisions of this Section; provided where the attorney general was not notified of the proceeding, the court shall hold adjudication of the case open pending notification of the attorney general as required herein.

Although the Attorney General's Office filed an appellate brief on this issue, there is nothing to indicate if service was made by certified mail as required by statute or what documentation was provided when notification was made.

addressed the Collector's argument presented in brief that Act 85 was unconstitutional.

In its resolution of this issue, the appellate court reasoned that the interpretation of the law is a judicial function, not legislative. The court further stated the Legislature cannot create a new substantive law in the guise of interpretive legislation to give retroactive effect "because it does not like the result of its legislation as it stands." Unwired, 838 So. 2d at 858. On this basis, the appellate court determined Act 85 was clearly substantive law because the Legislature altered existing tax obligations when it redefined "sales" and "use," a violation of LA. CONST. ANN. art. VII, § 15 (providing that "[t]he legislature shall have no power to release, extinguish, or authorize the releasing or extinguishing of an indebtedness, liability, or obligation of a corporation or individual to the state, a parish, or a municipality"). Accordingly, the court of appeal held Act 85 cannot be applied retroactively to extinguish any debts that Unwired owed prior to the enactment of the new law. Unwired, 838 So. 2d at 859. The appellate court held that the trial court properly granted summary judgment in favor of the Collector on the authority of its earlier decision in Mercury. Id.

In addition, the court of appeal, relying on Elevating Boats, concluded that the trial court properly determined the combined interest, penalties, and attorney's fees cannot exceed the 15% penalty provided in LA. REV. STAT. ANN. § 33:2746. Accordingly, the appellate court agreed that the trial court correctly dismissed the Collector's assessment of penalties against Unwired, denied its request for attorney's fees, and ordered a refund of the penalties. Unwired, 838 So. 2d at 859-60.[8]

[8] See infra n17.

DISCUSSION

This matter was docketed in this Court as a direct appeal from the Third Circuit because the court of appeal's ruling represents a sufficient declaration of unconstitutionality to justify the exercise of this court's appellate jurisdiction under LA. CONST. ANN. art. V.[9]

The longstanding jurisprudential rule of law in Louisiana is that litigants must raise constitutional attacks in the trial court, not the appellate courts, and that the constitutional challenge must be specially pleaded and the grounds for the claim particularized. Vallo v. Gayle Oil Company, Inc., 94-1238 (La.11/30/94), 646 So. 2d 859, 864. Although several exceptions to this general rule have been recognized,[10] germane to the present case is that an appellate court may entertain a plea of

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[9] LA. CONST. ANN. art. V, § 5(D) states, in pertinent part, that "a case shall be appealable to the supreme court if (1) a law or ordinance has been declared unconstitutional . . . ." In the present case, the appellate court held:

> Unwired and the attorney general argue that this court's definition of a use tax as applied to wireless communication companies is not a correct interpretation of the law at the time Mercury was decided so the enactment of Act 85 did not release or extinguish an existing obligation because none existed. We disagree. This court did not create the tax in Mercury as suggested by Unwired. We simply interpreted the law as it was written by the Legislature as it is the judiciary's function to do. The Legislature cannot create a new substantive law under the guise of interpretative legislation in order to give it retroactive effect because it does not like the result of its legislation as it stands. Interpretation of the law is a judiciary function.
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> We find that Act 85 is clearly substantive law because it altered existing tax obligations when it redefined "sales" and "use". This was clearly a violation of La. Const. art. 7, § 15. McNamara v. Bayou State Oil Corp., 589 So.2d 1099 (La.App. 2 Cir.1991), writ denied, 592 So.2d 1335 (La.1992). Therefore, we find that Act 85 cannot be applied retroactively to extinguish any debts that Unwired owed prior to the enactment of new law which redefined "sales" and "use" for tax purposes as it is in violation of La. Const. art. 7, § 15. We also find that any attempt to effectuate a compromise in Section 3 pursuant to the "Amnesty Program" found in Section 4 is invalid because the new law cannot be applied retroactively, so there is nothing to compromise.

[10] As we observed in Mosing v. Domas, 2002-0012 (La. 10/15/02), 830 So. 2d 967,

> Several exceptions to this general rule have been recognized: (1) when a statute attempts to limit the constitutional power of the courts to review cases; (2) when the statute has been declared unconstitutional in another case; . . . or (4) when an act which is the basis of a criminal charge is patently unconstitutional on its face and the issue is made to appear as an error patent on the face of the record. State v. Wright, 305 So. 2d 406, 409 (La.1974).

unconstitutionality when the statute applicable to the specific case becomes effective after the appeal is perfected.[11] Vallo, 646 So. 2d at 864 n. 9; State v. Wright, 305 So. 2d 406, 409 (La. 1974) (Summers, J., dissenting); Summerell v. Phillips, 247 So. 2d 542, 546 n. 5 (La. 1971); In the Matter of Rubicon, 95-0108 (La. App. 1 Cir. 2/14/96), 670 So. 2d 475. When a statute becomes effective after an appeal is perfected, it is impossible for the claimant to plead its unconstitutionality in the lower court. Under such circumstances, it would be unreasonable for an appellate court to refuse to consider a plea of unconstitutionality which was necessarily raised for the first time on appeal. Id. at 478. Thus, in the present case, the Collector could properly question the constitutionality of Act 85 on the appellate level.

Notwithstanding, the jurisprudence is equally clear that a constitutional challenge must be specially *pleaded* and the grounds for the claim particularized. Vallo, 646 So. 2d at 864.

> Our Code of Civil Procedure does not require a single procedure or type of proceeding for challenging or assailing the constitutionality of a statute. However, the long-standing jurisprudential rule of law is: . . . the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized. Johnson v.

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[11] The cited jurisprudence stated that it was appropriate for a party to raise a constitutional issue in the appellate court when the statute applicable to the specific case becomes effective after the appeal is *lodged* in the higher court. In the present case, the trial court signed the orders granting appeal on May 7 and May 8, 2002. Act 85 became effective on June 27, 2002. The record was lodged in the appellate court on July 17, 2002. For reasons that follow, we find no error in the viability of the constitutional issue at the appellate level even though Act 85 became effective before the appeal record was lodged.

LA. CODE CIV. PROC. ANN. art. 2088 provides:

> The jurisdiction of the trial court over all matter in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the granting of the order of appeal and the timely filing of the appeal bond, in the case of a suspensive appeal or on the granting of the order of appeal, in the case of a devolutive appeal.

Thereafter, article 2088 provides the trial court with jurisdiction in ten particular instances. None of those instances are applicable in the present case. Accordingly, no authority existed under LA. CODE CIV. PROC. ANN. art. 2088 to allow the litigants to raise the constitutional issue in the trial court because it was divested of jurisdiction. Therefore, the appellate court was the appropriate place to raise the constitutional issue.

> Welsh, 334 So.2d 395, 396-397 (La.1976); State ex rel. McAvoy v. Louisiana State Bd. of Medical Examiners, 115 So.2d at 836 [the unconstitutionality of a statute cannot be asserted in the appellate court unless it has been pleaded and made an issue in the court of first instance]; Becker v. Allstate Ins. Co., 307 So. 2d 101, 103 (La. 1975); Summerell v. Phillips, 247 So. 2d 542, 546 (La. 1971); State v. de St. Romes, 26 La. Ann. 753, 754 (1874), on rehr'g; De Blanc v. De Blanc, 18 So. 2d 619, 623 (La. App. Orleans, 1944).

Id.; see also Lanthier v. Family Dollar Store, 2002-2663 (La. 11/27/02), 836 So. 2d 5.

The pleadings allowed in civil actions are petitions, exceptions, written motions and answers. LA. CODE CIV. PROC. ANN. art. 852. Therefore, when the unconstitutionality of a statute is specifically pled, the claim must be raised in a petition (the original petition, an amended and supplemental petition or a petition in an incidental demand), an exception, a motion or an answer.[12] It cannot be raised in a memorandum, opposition or brief as those documents do not constitute pleadings. Williams v. State, Dept. of Health and Hospitals, 95-0173 (La. 1/26/96), 671 So. 2d 899, 902; Vallo, 646 So. 2d at 865. Applying the foregoing legal precepts to this case, we find the issue of the constitutionality of 2002 La. Acts No. 85, § 3 is not in the proper posture for this court's review.

From the outset we note the Collector's plea of unconstitutionality was raised in an appellate brief and not in a pleading. Although it is well established that an appellate court is a court of record,[13] it is equally clear that an appellate court is

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[12] LA. CODE CIV. PROC. ANN. art. 852 states that pleadings in civil actions "consist of petitions, exceptions, written motions, and answers." Although petitions are not filed in appellate courts, exceptions, written motions, and answers are routinely authorized.

[13] Various appellate courts have stated that they are limited in their review to the evidence in the record before it because they are courts of record. Ventura v. Rubio, 2000-0682, (La. App. 4 Cir. 3/16/01), 785 So. 2d 880, 885, writ denied, 2001-1065 (La. 5/4/01), 791 So. 2d 662; Lewis v. Texaco Exploration and Production Co., Inc., 96-1458 (La. App. 1 Cir. 7/30/97), 698 So. 2d 1001, 1008. Stated another way, generally an appellate court is not a court of first impression and cannot review evidence that was not before the trial court. Ventura v. Rubio, 00-0682 (La. App. 4 Cir. 3/16/01), 785 So. 2d 880, 885. The record on appeal includes the pleadings, court minutes, transcript, judgments, and other rulings in the trial court. Titlesite, L.C. v. Webb, 36,437 (La. App.

authorized to receive motions and pleadings, e.g., Uniform Rules – Courts of Appeal, Rule 2-7.2 (requirements of motions or pleadings),[14] Rule 2-7.3 (procedure for filing a motion or pleading).[15]

In the present case, the record shows that the Collector raised the issue of the constitutionality of 2002 La. Acts No. 85, § 3, only in its brief to the appellate court. Under well established jurisprudence, too myriad to recite, it is clear a brief is not a pleading. Williams, 671 So. 2d at 902. Even though one of the reasons usually enunciated in favor of finding a case in an improper procedural posture to reach a constitutional issue is not present, i.e., "so that the parties are given sufficient time to brief and prepare arguments regarding their position on a constitutional question,"

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2 Cir. 12/11/02), 833 So. 2d 1061; Ventura, 785 So. 2d at 885. In like vein, it is well accepted that appellate briefs are not a part of the record on appeal, and thus courts of appeal have no authority to consider facts or exhibits attached thereto, if those facts or exhibits were not part of the trial record. Littlejohn v. Quiram, 01-0075 (La. App. 4 Cir. 10/24/01), 800 So. 2d 73, 74; Augustus v. St. Mary Parish Sch. Bd., 95-2498 (La. App. 1 Cir. 6/28/96), 676 So. 2d 1144, 1156. As a corollary to that precept, it is likewise well accepted that a court of appeal cannot receive new evidence. Board of Directors of Indus. Dev. Bd. of City of New Orleans v. Taxpayers, Property Owners, Citizens of City of New Orleans, 03-0827 (La. App. 4 Cir. 5/29/03), 848 So. 2d 733. Because appellate courts do not take evidence, we can envision instances where the interjection of a constitutional issue may be inappropriate for appellate consideration if the parties would have to introduce evidence to prove/disprove the constitutional issue. In such instances, it would be appropriate to remand the case to the trial court for the taking of evidence and the adjudication of such issue.

[14] Uniform Rules – Courts of Appeal, Rule 2-7.2 provides:

> All other motions or pleadings (e.g., peremptory exceptions and answers to appeals) filed originally in a Court of Appeal shall be typewritten and double-spaced on white paper of legal size, with proper margins, and shall bear the number and title of the case in the appellate court, the nature of the motion or pleading, the name of counsel filing the motion or pleading, and the name of the party on whose behalf it is filed. Unless the motion or pleading bears a certificate showing that a legible copy thereof has been delivered or mailed to opposing counsel of record, and to each opposing party not represented by counsel, and showing the date of service thereof, it shall not be filed or docketed. All motions filed in a Court of Appeal shall include a proposed order.

[15] Uniform Rules – Courts of Appeal, Rule 2-7.3 provides:

> Unless made in open court, an original and 4 copies of each motion or pleading shall be filed, numbered, and docketed in the clerk's office for the clerk to present to the court for consideration. Unless previously filed, numbered, and docketed, such motion or pleading will not be considered by the court.

State v. Schoening, 2000-0903 (La. 10/17/00), 770 So. 2d 752,[16] we find the interjection of issues of constitutional import in an appellate brief nonetheless does not comport with the jurisprudential mandate that such a significant issue be initiated in a properly filed pleading. Because the briefs do not constitute a pleading, the constitutional issue was not properly presented to the court of appeal. Cf. Marchese v. New Orleans Police Dept., 77 So. 2d 742 (La. 1955); Ward v. Leche, 179 So. 52 (La. 1938) (holding that where the plea of unconstitutionality was not raised below, attacks on constitutionality raised in brief or orally will not be considered); Sholars v. Davis 127 So. 36 (La. 1930); and J. J. Clarke Co. v. Petivan, 109 So. 913 (La. 1926)(holding an issue of statute's constitutionality could not be raised for the first time on appeal "and then only [raised] by means of argument in his brief and orally," Marchese, 77 So. 2d at 744); Hillman v. Akins, 614 So. 2d 234, 237 (La. App. 3 Cir. 1993) (holding that plea of unconstitutionality raised for the first time on appeal and then only in a supplemental brief did not properly place the issue before the court).

In Vallo we recognized our Code of Civil Procedure does not require a single procedure or type of proceeding for challenging or assailing the constitutionality of a statute. Vallo, 646 So. 2d at 864. Indeed, although the use of a declaratory judgment is perhaps the most widely used procedural vehicle used to challenge the constitutionality of a statute, cases have stated various bases upon which to raise such an issue.[17] Our review of LA. CODE CIV. PROC. ANN. arts. 1871-83 does not show

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[16] We cannot determine if and how the Attorney General was notified as required in LA. CODE CIV. PROC. ANN. art. 1880 and LA. REV. STAT. ANN. § 13:4448. The record only shows that the Attorney General filed an amicus brief addressing the constitutional issue.

[17] Other cases have identified sundry other procedural vehicles to raise the issue of the unconstitutionality of a statute. A party may assail the constitutionality of a statute through the use of a mandamus action. Summerell v. Phillips, 247 So. 2d 542, 546 (La. 1971). The unconstitutionality of a statute is an affirmative defense that must be specifically pleaded. Stoval v. City of Monroe, 5 So. 2d 547 (La. 1947); State v. Great Atlantic & Pacific Tea Co., 183 So. 219 (La. 1938), cert. denied, 305 U.S. 637 (1938);Simon v. Jefferson Davis Parish Sch. Bd., 289 So. 2d 511, 513 (La. App. 3 Cir. 1974); Mouton v. Bourque, 253 So. 2d 689 (La. App. 3 Cir. 1971).

that the seeking of a declaratory judgment is limited to the trial court. See Louisiana Supreme Court Committee v. Roberts, 00-2517 (La. 2/21/01), 779 So. 2d 726.[18] To the contrary, art. 1871 of the Louisiana Code of Civil Procedure provides that "[c]ourts of record within their respective jurisdictions may declare rights, status, and other legal relations . . . ." Subject to the limitation noted above that an appellate court does not receive evidence, courts of appeal are "courts of record." n13, supra. It is an instance such as that presently before us to which LA. CODE CIV. PROC. ANN. art. 2164 is directed. "The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal." Id. The purpose of this article is to give the court of appeal complete freedom to do justice on the record "irrespective of whether a particular legal point or theory was made, argued, or passed on by the court below." Comment (a), LA. CODE CIV. PROC. ANN. art. 2164. Considering the chronology of the enactment of 2002 La. Acts No. 85, § 3 just as this case began its course in the appellate process, it may have been appropriate to have the Collector initiate the use of a declaratory judgment on the appellate level.

It has also been stated the plea of unconstitutionality is tantamount to an exception of no cause of action. City of New Orleans v. Grosch, 49 So. 2d 435, 442 (La. App. Orl. 1950); State ex rel. Huggett v. Montgomery, 167 So. 147 (La. App. Orl. 1936).[19] Under the explicit provisions of LA. CODE CIV. PROC. ANN. art. 2163,

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[18] Notwithstanding the fact that this Court did not utilize a declaratory judgment, the case illuminates our present thinking on the appropriateness of a declaratory judgment under the facts presented herein. Invoking this Court's original jurisdiction in matters involving bar proceedings, the Committee on Bar Admissions requested a declaratory judgment. Louisiana Supreme Court Committee, 779 So. 2d at 727. Like that case which involved the use of a declaratory judgment before us because we were the court of first instance, the appellate court in the present case was the court of first instance in which the Collector could raise the constitutional issue because the issue only became viable when that case was on appeal. Even though it may have been appropriate for the litigants to seek a declaratory judgment from the appellate court under these rather unique facts, if evidence would have been required the appellate court could have remanded the matter to the trial court for the taking of evidence. See n13, supra.

[19] Even though an peremptory exception of no cause of action may be noticed by either the trial or appellate court of its own motion, LA. CODE CIV. PROC. ANN. art. 927(B), and a party may,

a party may file a peremptory exception for the first time in the appellate court. Although we do not suggest that these are the only means to raise a constitutional challenge, we use these examples to illustrate that there were procedural means available to the Collector to assail the constitutionality of the statute in a pleading before the appellate court.

As illustrated above, although a constitutional challenge may be made on the appellate level when such an issue only becomes viable while the case is on appeal, it is nonetheless evident that the trial court is the preferable forum for the adjudication of such an issue. In the trial court the filings of pleadings are not so restrictive and the taking of evidence is permitted. In the present case, the parties could have filed a motion in the appellate court to remand the matter to the district court to challenge the constitutionality of the statute at issue. Because we must remand this case to properly raise the constitutional challenge, we remand this case to the district court for the litigants' ease of utilizing available procedural devices and, if need be, the taking of evidence.

DECREE

For the foregoing reasons, the judgment of the Court of Appeal, Third Circuit, is vacated and set aside. This matter is remanded to the trial court for the filing of pleadings to assert the unconstitutionality of 2002 La. Acts No. 85, § 3 and to conduct

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under LA. CODE CIV. PROC. ANN. art. 2163, file a peremptory exception for the first time in the appellate court, it is equally well established that courts of this state may not supply a plea of unconstitutionality. Lanthier v. Family Dollar Store, 02-2663 (La. 11/27/02), 836 So. 2d 5, 7; State v. Schoening, 2000-0903 (La. 10/17/00), 770 So. 2d 762, 764; Summerell v Phillips, 247 So. 2d 542, 546 (La. 1971) (holding specifically that a court of appeal may not rely upon LA. CODE CIV. PROC. ANN. art. 2164 to declare a statute unconstitutional if the pleading requirement for unconstitutionality has not been met). Thus, under the facts of the present case, the Collector may have chosen to plead the peremptory exception of no cause of action to raise the constitutionality of 2002 La. Acts No. 85, § 3, but it would have been inappropriate for the court of appeal to raise such an issue sua sponte because of this state's jurisprudential requirement that the litigants raise such an issue in a pleading.

further proceedings in conformity with the views expressed herein.[20] If the taking of evidence is required, the parties may be given the opportunity to introduce evidence in the district court for a determination of the constitutionality of the statute at issue.

VACATED AND CASE REMANDED TO TRIAL COURT

[20] On remand, the attention of the parties and the court is called to our recent decision in Anthony Crane Rental, L. P. v. Rufus Fruge, Jr., et al., 2003-0115 (La. 10/21/03), ___ So. 2d ___. If the appellate court finds 2002 La. Acts No. 85, § 3 unconstitutional, this decision may affect the court's resolution of the issue of penalties, interest and attorney's fees.

12/12/03

SUPREME COURT OF LOUISIANA

No. 03-CA-0732

UNWIRED TELECOM CORP., FORMERLY KNOWN AS UNWIRED, INC. AND SUCCESSOR IN INTEREST BY MERGER TO MERCURY CELLULAR TELEPHONE COMPANY

versus

PARISH OF CALCASIEU, LOUISIANA; THE CALCASIEU PARISH SCHOOL BOARD; THE CALCASIEU PARISH POLICE JURY; THE CALCASIEU PARISH SCHOOL SYSTEM; THE TREASURER OF THE CALCASIEU PARISH SCHOOL BOARD; AND THE TREASURER'S DESIGNATED AGENTS, INCLUDING RUFUS R. FRUGE, JR., IN HIS CAPACITY AS DIRECTOR OF THE CALCASIEU PARISH SCHOOL SYSTEM, SALES AND USE TAX DEPARTMENT

**ON APPEAL FROM THE COURT OF APPEAL,
THIRD CIRCUIT, PARISH OF CALCASIEU**

CALOGERO, C. J., dissents for the reasons assigned by Weimer, J.

12/12/03

SUPREME COURT OF LOUISIANA

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**ON APPEAL FROM THE COURT OF APPEAL,
THIRD CIRCUIT, PARISH OF CALCASIEU**

VICTORY J., dissents for the reasons assigned by Justice Weimer.

12/12/03

SUPREME COURT OF LOUISIANA

NO. 2003-CA-0732

UNWIRED TELCOM CORP., FORMERLY KNOWN AS UNWIRED, INC. AND SUCCESSOR IN INTEREST BY MERGER TO MERCURY CELLULAR TELEPHONE COMPANY

v.

PARISH OF CALCASIEU, LOUISIANA; THE CLACASIEU PARISH SCHOOL BOARD; THE PARISH POLICE JURY; THE CALCASIEU PARISH SCHOOL BOARD SYSTEM; THE TREASURER OF THE CALCASIEU PARISH SCHOOL BOARD; AND THE TREASURER'S DESIGNATED AGENTS, INCLUDING RUFUS R. FRUGE, JR., IN HIS CAPACITY AS DIRECTOR OF THE CALCASIEU PARISH SCHOOL SYSTEM, SALES AND USE TAX DEPARTMENT

ON APPEAL FROM THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF CALCASIEU

WEIMER, J., dissents and assigns reasons.

None of the parties complained about the failure to raise the constitutional issue in pleadings. This matter presents itself in a unique posture because the constitutional issue did not arise until the matter was in the appellate court. However, the constitutional issue was thoroughly briefed and argued in the court of appeal and in this court. It is ripe for resolution.

The parties will now return to a lower court, presumably file a pleading, and return to this court with the same arguments, but after a costly delay. Procedure should be the handmaiden of substance. See, **Erath Sugar Company v. Broussard**, 240 La. 949, 953, 125 So.2d 776, 777.

I would decide the case on the merits.