

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 0257

ON REHEARING

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

Judgment Rendered: SEP - 9 2008

On Rehearing
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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Plaintiff – Appellant
Mona Woods,
Individually and on
behalf of her minor son,
D.B.W.

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Defendants – Appellees
La. Dept. of Health &
Hospitals and La. Dept.
of Social Services

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

*EW
JTP
JTP*

ON REHEARING

PER CURIAM.

The appellees, the State of Louisiana, through the Department of Health and Hospitals and the Department of Social Services (DHH and DSS), have petitioned this court for a rehearing of our June 6, 2008 decision reversing the trial court's judgment granting the peremptory exception raising the objection of prescription in favor of defendants. DHH and DSS allege that our original opinion was in error based upon our reliance in part on **Breaux v. Vicknair**, 507 So.2d 1242 (La. 1987) (per curiam), which was decided under the 1983 version of Federal Rule of Civil Procedure Rule 4 ("Rule 4"). The application for rehearing is granted for the limited purpose of clarifying our opinion and to address the effect of the amendment to Rule 4.

Effective December 1, 1993, Rule 4 was substantially overhauled. Most notably, subsection (d) entitled "Waiving Service" was added and replaced the mail method of service introduced in the 1983 amendment (the former Rule 4(c)(2)(C)(ii)). See Rule 4; 28 U.S.C.A., Practice Commentary C4-1, C4-15. Rule 4(d) now provides in pertinent part:

(1) *Requesting a Waiver.* An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons....

* * *

(2) *Failure to Waive.* If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

Rule 4(j) prescribes the method of serving a Foreign, State, or Local Government as follows:

- (1) **Foreign State.** A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.
- (2) **State or Local Government.** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:
 - (A) delivering a copy of the summons and of the complaint to its chief executive officer; or
 - (B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

Rule 4, 28 U.S.C.A., Practice Commentary C4-28 notes “[t]he waiver-of-service procedure of subdivision (d) of Rule 4 is not applicable to any of the defendants enumerated in subdivision (j), **but there is nothing to prevent the plaintiff from asking the defendant to accept service without a fuss.**” (Emphasis supplied.) In other words, the state is not obligated, or cannot be compelled, or does not have a duty to waive service under the provisions of Rule 4(d); however, there is nothing to prevent the state from waiving service in this manner.¹ Indeed, even a corporation or individual susceptible to the waiver-of-service procedure of subdivision (d) of Rule 4 may refrain from signing and returning a waiver under this section.² As Practice Commentary C4-18 points out “the request for a waiver under the present rule is only that--a request--and does not even purport to be service itself.... The lesson here is therefore addressed to the plaintiff: don't ever turn to the waiver procedure when there isn't substantial

¹ We also note that Louisiana law expressly allows for a waiver of service of citation by the state, a state agency, or political subdivision. See La. R.S. 13:5107(D)(1). Moreover, La. C.C.P. art. 1201(B) provides “[t]he defendant may expressly waive citation and service thereof by any written waiver made part of the record.”

² The only consequence to a defendant that refuses to comply with the waiver procedure is the payment of plaintiff's service costs.

time still left on the statute of limitations ... to enable a process server to make formal service in time in the event that a duly sought waiver is not returned.”

In the instant case, plaintiffs’ counsel requested DHH and DSS to waive service and summons in accordance with the provisions of Rule 4 of the Federal Rules of Civil Procedure. They obliged, as the record shows that David E. Verlander, III, attorney for the State of Louisiana, executed waivers of service of summons on behalf of DSS on June 22, 2007, and on behalf of DHH on June 26, 2007.

We note that both DHH and DSS could have of right refused to acknowledge service in this manner under the Federal Rules of Civil Procedure. Plaintiffs mailed the waivers to defendants dangerously close to the tolling of prescription. The return receipts demonstrate that the certified mail containing the complaint, the summons, and the waivers were received by the respective departments on June 6, 2007. Prescription of plaintiffs’ claims purportedly ran on June 8, 2007. Had the suit been filed in a competent court, this would not have presented a problem for plaintiffs because under Rule 4(m) a plaintiff has 120 days after the complaint is filed within which to serve a defendant. The issue of time only became critical because plaintiff filed suit in an incompetent court. Therefore, under the pertinent language of La. C.C. art. 3462, “prescription is interrupted only as to a defendant served by process within the prescriptive period.” In hindsight, defendants regret waiving service.

On the record before us, it appears that DHH and DSS filed in the federal court only a “Motion to Dismiss for Lack of Subject Matter Jurisdiction, on Grounds of Eleventh Amendment Immunity, and For Failure to State a Claim Upon Which Relief Can Be Granted.” In federal practice, a defendant should be specific about the nature of the jurisdictional objection he wants to raise. See Rule 4, 28 U.S.C.A., Practice Commentary C4-43. The defendant should be explicit

when he wants to raise and preserve the objection of insufficiency of service of process. *Id.* See also **Roque v. U.S.**, 857 F.2d 20, 21-22 (1st Cir. 1988).

We have reviewed all of the federal cases cited by appellees in their application for rehearing. As far as we can discern, none of these cases involved voluntary waivers of summons executed by defendants. As far as our reliance on **Breaux**, that case has not been overruled. Although decided at a time when the old mail-method of service was still available in federal court, we believe that **Breaux** is still good law for the proposition that a defendant cannot rest on its laurels. If a defendant is sued in an incompetent court, it should assert all defenses it has to that proceeding, particularly if defendant has a quarrel with sufficiency of service of process or citation.³

In their application for rehearing, appellees contend that, unlike the defendants in **Breaux**, they did not file an answer or undertake discovery in the federal proceeding but instead objected only to subject matter jurisdiction. However, appellees continue to ignore the fact that they executed waivers wherein they not only acknowledged receipt of a complaint but also expressly acknowledged that they would not require service with judicial process in any other manner. They retained all defenses or objections to the lawsuit and to the jurisdiction or venue of the court “except for objections based on a defect in the summons or in the service of the summons.”⁴ The basis for raising the exception of prescription in this proceeding is that they were not served within the prescriptive period. They waived service in federal court, and we believe they

³ In so ruling, the supreme court noted La. C.C.P. art. 925 indicates that the objections available to a defendant through the declinatory exceptions for such deficiencies as insufficiency of citation and insufficiency of service of process “are waived unless pleaded” by the declinatory exceptions.

⁴ Had defendants refused to execute and return the waivers, the plaintiffs would have still had time under Rule 4(m) to serve defendants in an alternate manner. Having received the express waivers of service of process, plaintiffs were certainly lulled into a belief that service was satisfactorily accomplished upon defendants.

have no right now to complain.

Because defendants executed waivers of summons in the federal proceeding without exception, we affirm our prior ruling that service of process was made upon DHH and DSS in federal court, within the prescriptive period, and prescription was continuously interrupted until the judgment of dismissal was signed in the federal proceeding. The amendment to Rule 4 does not compel a different result.

CONCLUSION

For the foregoing reasons, we maintain our earlier decree, reversing the trial court judgment granting the peremptory exception raising the objection of prescription, and we remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.