

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 2262

TONYA DAVIS AND SHELBY DAVIS INDIVIDUALLY AND ON
BEHALF OF THE ESTATE OF THE MINOR CHILD JOSEPH DAVIS

VS.

CLECO CORPORATION AND WELDON FOXWORTH, JR.

JUDGMENT RENDERED: NOV 15 2006

ON APPEAL FROM THE
TWENTY-SECOND JUDICIAL DISTRICT COURT
DOCKET NUMBER 2004-15705, DIVISION E
PARISH OF ST. TAMMANY, STATE OF LOUISIANA

HONORABLE WILLIAM J. BURRIS, JUDGE

MARTI TESSIER
MANDEVILLE, LA

COUNSEL FOR PLAINTIFFS/APPELLANTS
TONYA DAVIS AND SHELBY DAVIS,
INDIVIDUALLY AND ON BEHALF OF THE
MINOR CHILD, JOSEPH DAVIS

LAMAR M. RICHARDSON, JR.
MANDEVILLE, LA

COUNSEL FOR DEFENDANTS/APPELLEES
WELDON FOXWORTH, JR. AND CLECO
CORPORATION

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

*C. J. Carter with reason
Whipple, J. concurs for reasons assigned by
C. J. Carter*

MCDONALD, J.

Tonya Davis and Shelby Davis filed suit in Washington Parish, individually and on behalf of the estate of their minor child, Joseph Davis, against Cleco Corporation and Weldon Foxworth, Jr., for damages arising from an automobile accident that occurred in St. Tammany Parish on December 3, 2002. On January 22, 2004, Cleco and Mr. Foxworth filed a declinatory exception raising the objection of improper venue. After a hearing, the Washington Parish trial court granted the exception, and the suit was transferred to St. Tammany Parish by judgment dated April 7, 2004. The Davises filed a motion for new trial, which was denied. The Davises did not appeal or apply for supervisory writs from the April 7, 2004 judgment.

On April 27, 2005, defendants filed a peremptory exception raising the objection of prescription, asserting that neither Cleco nor Mr. Foxworth received service of process of the suit within the one-year prescriptive period. After a hearing, the trial court signed a judgment on July 27, 2005, granting the exception of prescription and dismissing the suit. The Davises are appealing that judgment.

Louisiana Civil Code article 3462 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.

The Davises admit that the defendants were served with the suit several days past the one-year prescriptive period, but argue that the Washington Parish trial court erred in granting the declinatory exception of improper venue.

In **H.R.10 Profit Sharing Plan v. Mayeaux**, 03-0691 (La. App. 1 Cir. 9/17/04), 893 So.2d 887, on rehearing, writ denied, 2005-0868 (La. 5/13/05), 902 So.2d 1031, this court determined that although the parties did not seek immediate review of an interlocutory judgment granting the exception of improper venue, this court still had the authority to review that decision on review of a later judgment sustaining an exception of no cause of action based on preemption.

Having reviewed the underlying decision granting the exception of improper venue in this case, we find that it was a fact-sensitive determination by the trial court subject to the manifest error-clearly wrong standard of review. After a thorough review of the record, we cannot say it was clearly wrong or manifestly erroneous for the trial court to grant the exception of improper venue.

Further, after a thorough review of the record herein, we find that the record does not demonstrate that the trial court was clearly wrong or manifestly erroneous in granting the exception of prescription and dismissing the suit. Accordingly, finding no error, we affirm the July 27, 2005 judgment in accordance with Uniform Rules – Court of Appeal, Rule 2-16.1.B. Costs are assessed against the appellants, the Davises.

AFFIRMED.

TONYA DAVIS AND SHELBY
DAVIS, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE
OF THE MINOR CHILD
JOSEPH DAVIS

STATE OF LOUISIANA

COURT OF APPEAL

VERSUS

FIRST CIRCUIT

CLECO CORPORATION AND
WELDON FOXWORTH, JR.

2005 CA 0377

 CARTER, C.J., concurring.

I disagree with the procedure of collaterally reviewing the judgment sustaining the venue exception in connection with review of the judgment sustaining the exception of prescription. However, such is the procedure that was set forth by this court in **H.R.10 Profit Sharing Plan v. Mayeux**, 03-0691 (La. App. 1 Cir. 9/17/04), 893 So.2d 887 (on rehearing). Since **Mayeux** has yet to be overturned by our supreme court or reconsidered by this court *en banc*, we are constrained to follow it and conduct review of the venue judgment. I therefore concur in the result reached, but am of the opinion that this court should reconsider this issue and ultimately follow the reasoning of the second and third circuits, which deem the venue exception waived once the case proceeds in the subsequent judicial district court. Cf. **M&L Industries, L.L.C. v. Hailey**, 05-940 (La. App. 3 Cir. 3/1/06), 923 So.2d 869; **Danny Weaver Logging, Inc. v. Norwel Equipment Co.**, 33,793 (La. App. 2 Cir. 8/23/00), 766 So.2d 701