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Ray v. Alexandria Mall: Amending the Petition to Name a New Defendant

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RAY V. ALEXANDRIA MALL: AMENDING THE PETITION TO NAME A NEW DEFENDANT

On February 18, 1981, Frances Ray slipped and fell in the Alexandria Mall. She filed a damages suit on February 4, 1982, naming Alexandria Mall as defendant. The sheriff served process on the mall general manager at her mall office. On March 12, 1982, Ray amended her suit to name the Alexandria Mall Company, a partnership, as the defendant because the original suit had named a non-existent legal entity. The defendant filed a peremptory exception of prescription. The trial court sustained this exception, and the court of appeal affirmed. The Louisiana Supreme Court reversed and remanded, holding that the amended petition naming the proper defendant related back to the time of the filing of the original petition. *Ray v. Alexandria Mall.*[1]

Prescription is premised on three policies: to protect the defendant from stale evidence, to free the defendant from the fear of litigation after a certain point in time, and to promote efficient judicial administration by eliminating unnecessarily stale claims and manufactured facts from the courtroom.[2] For prescription to be interrupted, Louisiana Civil Code article 3462 requires the filing of a suit against the defendant, within the prescriptive period, in a court of competent jurisdiction and venue. The article assumes that the defendant will receive notice of the formal claim within a reasonable time through service of process. If the plaintiff has not filed in a court of competent jurisdiction and venue, it is essential that the defendant be served, because service of process is the legal act which interrupts the running of prescription in that situation.[3]

Problems arise when the plaintiff files in a court of competent jurisdiction and venue but names the wrong defendant in the suit. Article 1153 of the Louisiana Code of Civil Procedure provides that "[w]hen the action . . . asserted in the amended petition . . . arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing of the original pleading." Although the defendant is incorrectly named in the petition, the amended complaint will relate back if the proper defendant has in fact been served with process. This relation back is allowed because the proper defendant receives the same notice

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1. 434 So. 2d 1083 (La. 1983).
2. Tate, Amendment of Pleadings in Louisiana, 43 Tul. L. Rev. 211, 233 (1969).
3. Conner v. Continental S. Lines, Inc., 294 So. 2d 485, 487 (La. 1974).

of the claim that he would have received had he been correctly named in the initial petition.

The easy case to which article 1153 applies arises when the plaintiff names the defendant incorrectly but serves process on the agent appointed by the defendant to receive process. *Lunkin v. Triangle Farms, Inc.*,[4] a case decided by the Louisiana Supreme Court, involves such a factual situation. The plaintiff named Evan-Hall Sugar Cooperative in the original petition, instead of the proper defendant, Triangle Farms. However, the same person served as general manager for both corporations, and both corporations had appointed the general manager as agent for service of process. The plaintiff perfected service of process on the general manager. The court held that the amended petition naming Triangle Farms as defendant related back to the original filing because Triangle Farms had notice of the formal claim through service of process on its appointed agent.

The Louisiana courts also allow an amended complaint to relate back where the plaintiff names the wrong defendant but serves an officer or director of the corporation with process. In *Andrepont v. Ochsner*[5] the court of appeal held that service of process on the president of the corporation is sufficient notice to the corporation; therefore, the amended complaint related back. The plaintiff named Dr. Alton Ochsner individually in a malpractice suit, and Dr. Ochsner received service of process. The plaintiff amended his complaint to name the Ochsner Medical Foundation as defendant. As president of the Ochsner Medical Foundation, Dr. Ochsner was an agent of the hospital; therefore, the Foundation had timely notice of the claim by service upon its president.[6]

Louisiana courts do not, however, allow the amended petition to relate back where the plaintiff names the wrong defendant and serves the wrong defendant. In *Majesty v. Comet-Mercury-Ford Co.*[7] the supreme court sustained the defendant's peremptory exception of prescription and refused to allow the amended complaint to relate back to the original filing. In the petition, the plaintiff named a fictitious entity with a fictitious address. The plaintiff attempted to serve process through the Secretary of State on the grounds that the named entity was not qualified to do business in Louisiana and no agent had been designated for service of process. Five months after the statute of limitations had expired, the Secretary of State mailed a copy of the petition to an

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4. 208 La. 538, 23 So. 2d 209 (1945).

5. 84 So. 2d 63 (La. App. Orl. 1955).

6. See McClendon v. Security Ins. Co., 340 So. 2d 426 (La. App. 4th Cir. 1976), disapproved, Ray v. Alexandria Mall, 434 So. 2d 1083 (La. 1983); and Melancon v. Lorde, 435 So. 2d 517 (La. App. 5th Cir. 1983) where the courts held that knowledge to the corporation does not impart knowledge to the president.

7. 296 So. 2d 271 (La. 1974), rev'd, Ray v. Alexandria Mall, 434 So. 2d 1083 (La. 1983).

assembly plant operated by the proper defendant, Ford Motor Company. Ford had in fact qualified to do business in Louisiana and had designated an agent for service of process, the C.T. Corporation. In refusing to allow the petition to relate back, the court stated that "it is now understood in the law that an amending petition to correct a misnomer does not relate back to the filing of the original petition."[8] Many Louisiana courts cite this language when refusing to allow an amended petition to relate back to the original filing date. It should be noted, however, that *Majesty* was not a misnomer case. The plaintiff named the wrong defendant, and the plaintiff never served the defendant's designated agent with process. Therefore, Ford never received the requisite notice of the formal claim. If a suit is not filed in a court of competent jurisdiction and venue, Louisiana's statutory scheme requires that the proper person, as designated by law, be served before service of process will interrupt the running of prescription.[9]

A case factually similar to *Majesty* is a first circuit court of appeal decision, *Small v. Caterpillar Manufacturing Corp.*[10] The plaintiff named Caterpillar Manufacturing in the petition and attempted to serve that defendant through the Secretry of State. The correct defendant was a foreign corporation, Caterpillar Tractor, which had designated C.T. Corporation as its agent for service of process. Louisiana allows timely service of process to be effected after the statute of limitations has expired. The amended petition relates back to the original filing if the defendant is served with process within a reasonable time after the filing. However, the *Small* court held that Caterpillar Tractor Company "had no actual notice of the suit within the prescriptive period since suit was not instituted until the last day of the prescriptive period and service on the Secretary of State made several days thereafter."[11] Although the court reversed and remanded the suit to determine whether prescription was interrupted because of a solidary relationship between Caterpillar and other defendants named in the suit, the court cited *Majesty* and its misnomer language in ruling that the suit was not interrupted in the absence of solidary liability.

Small is factually similar to *Majesty* in that both involved a corporation qualified to do business in Louisiana which had appointed an agent for service of process. In both cases the plaintiff attempted to serve the defendant through the Secretary of State instead of through the designated agent. Additionally, in *Small*, as in *Majesty*, the plaintiff never properly served the proper defendant's designated agent. The first circuit could simply have followed *Majesty* without resort to the "no

8. Id at 273.

9. 294 So. 2d at 488.

10. 319 So. 2d 843 (La. App. 1st Cir. 1975), disapproved, Ray v. Alexandria Mall, 434 So. 2d 1083 (La. 1983).

11. Id at 845.

actual notice within the prescriptive period" language which it used because no valid service of process was made to interrupt prescription.

The Louisiana courts also hold that although a plaintiff names the wrong defendant in a petition, prescription is interrupted by service of process on the defendant's domicile. In *Brooks v. Wiltz*[12] the plaintiff incorrectly named Elsworth G. Wiltz in the petition. The defendant who should have been named was Ellis G. Wiltz, the twin brother of Elsworth A. Both boys were attending college; therefore, the plaintiff served the twins' mother with process at her residence. The Fourth Circuit Court of Appeal deemed service on the domicile to be sufficient to interrupt prescription against Ellis, and the amended complaint related back. By serving the domicile of the mother, the plaintiff, in effect, notified both brothers of the suit; thus, service of process was effective as to both.

The Third Circuit Court of Appeal rendered a similar decision in *Allstate Insurance Co. v. Manemin*.[13] The son, D. C. Manemin, was the tortfeasor, but the plaintiff incorrectly named in the petition the father, C. D. Manemin, as the defendant. The court ruled that the amended petition related back to the original filing because the plaintiff had perfected service of process on the father's home where the son also had his domicile. The son thus had notice of the plaintiff's suit through service of process on his domicile.

The Louisiana statutory scheme requires the filing of a suit in a court of competent jurisdiction and venue to interrupt prescription. However, if the plaintiff's suit is defective, that is, if the plaintiff files in a court of incompetent jurisdiction and venue or names the wrong defendant, prescription is still interrupted if process has been served on the proper defendant. The legal act of service of process interrupts prescription, and Louisiana Code of Civil Procedure article 1153 allows an amended complaint to relate back to the original filing.

The source of article 1153 is Federal Rule of Civil Procedure 15(c).[14] Rule 15(c) was amended in 1966 "to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or a misdescription of a defendant) shall 'relate back' to the date of the original pleading."[15] The last sentence of Rule 15(c) states:

> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will

12. 144 So. 2d 413 (La. App. 4th Cir. 1962).

13. 280 So. 2d 857 (La. App. 3d Cir. 1975).

14. Projet, La. Code Civ. P. art. 1153 & comments (1959).

15. Fed. R. Civ. P. 15(c), Notes of Advisory Committee on Rules, 1966 Amendment. 39 F.R.D. 69 (1966).

> not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Although article 1153 was enacted before the amendment to Rule 15(c) and, therefore, does not include this last sentence, federal jurisprudence interpreting the rule, before and after its amendment, serves as persuasive authority for interpreting article 1153.

Federal decisions both before and after the amendment to Rule 15(c) have allowed the relation back where process was served on an agent of the corporation, partnership, or sole proprietorship which the plaintiff had attempted to name. In a pre-amendment case decided by the U. S. District Court in Delaware, *Williams v. Pennsylvania R.R.*,[16] the plaintiff named E. J. Lavino & Company in the petition as the defendant instead of the proper party, Lavino Shipping Company. Both of the corporations had the same resident agent, the same president and directors, and the same principal place of business. The appointed agent for Lavino Shipping Company received service of process; therefore, the court allowed the amended petition to relate back.

In another pre-amendment case, *Taormina Corp. v. Escobedo*,[17] a farm employee named three individuals and a corporation as defendants in his suit for damages. The farm was actually operated as a partnership. The Fifth Circuit Court of Appeals ruled that the amendment related back because "those who had the liability had notice of the suit."[18] The three individuals who were named and served with process were partners in the partnership. In attempting to discern whether relation back should be allowed, the court noted:

> The test should be whether on the basis of an objective standard, it is reasonable to conclude that the plaintiff had in mind a particular entity or person, merely made a mistake as to the name, and actually served the entity or person intended, or did the plaintiff actually mean to serve and sue a different person.[19]

The farm employee intended to sue the partnership, made a mistake in the name, but actually served an agent of the intended partnership. This is so because a partner is an agent of the partnership for service of process.[20]

In a post-amendment case, *Lockett v. General Finance Loan Co.*,[21] the Fifth Circuit cited *Taormina Corp.* in finding that the amended petition

16. 91 F. Supp. 652 (D. Del. 1950).
17. 1254 F.2d 171 (5th Cir.), cert. denied, 358 U.S. 827 (1958).
18. Id. at 173.
19. Id.
20. Uniform Partnership Act, Sec. 9 (1914).
21. 623 F.2d 1128 (5th Cir. 1980).

related back to the original filing. The plaintiff had named the subsidiary instead of the parent company in the petition and had served the subsidiary with process. The court stated facts indicating the parent company had knowledge of the suit: the parent made a general appearance, and every officer and director of the parent served as an officer and director of the subsidiary. Therefore, the parent company had notice of the formal claim through service of process on its subsidiary company.[22]

The amendment to Rule 15(c) has effected changes in the area of notice to the defendant, as the amendment requires only that the defendant receive reasonable notice of the suit. Since the amendment to 15(c), the federal courts have been quite liberal in finding that the proper defendant had notice of the plaintiff's claim. The courts no longer require that a defendant receive actual notice through service of process. Examples of cases so holding are *Mitchell v. Hendricks*[23] and *Kirk v. Cronvich*.[24]

In *Mitchell*, the U. S. District Court in Pennsylvania ruled that the amended petition related back to the original date of filing because the defendant had informal notice of the suit.[25] The plaintiff named Joseph Maroney, superintendent of the prison, as the defendant when Joseph Brierly held the position of superintendent. The prison records office had accepted service of process. Furthermore, Brierly was represented by the same attorney who had represented all the other state officials involved in the case. Therefore, the court imputed notice to Brierly through his attorney. The court thus did not require actual notice through service of process.

The Fifth Circuit Court of Appeals reached a similar result in *Kirk*. The original petition improperly named the parish and the sheriff's office as defendants. The amended complaint named the sheriff individually and in his official capacity. The plaintiff perfected service of process upon a deputy sheriff. Although the court held that the deputy was an agent for the sheriff, it noted that the sheriff's office, named in the original petition, and the sheriff, named in the amended petition were represented by the same attorneys throughout the litigation. The court stated that "this court and others have held that the requisite

22. See Gifford v. Wichita Falls & Southern Ry., 224 F.2d 374 (5th Cir. 1955), where the subsidiary was named but the proper agent for the parent was served. Such service would constitute legal service upon the parent. See Howitt v. Longines Wittnauer Watch Co., 388 F. Supp. 1257 (S.D.N.Y. 1975) where the parent was incorrectly named as the defendant but the person actually served would have been proper service for the subsidiary.

23. 68 F.R.D. 564 (E.D. Pa. 1975).

24. 629 F.2d 404 (5th Cir. 1980).

25. See Williams v. United States, 405 F.2d 234 (5th Cir. 1968), where fair notice was sufficient; and Talifero v. Costello, 467 F. Supp. 33 (E.D. Pa. 1979) where constructive notice was sufficient.

notice of an action can be imputed to a new defendant through his attorney who also represented the party or parties originally sued."[26] Thus, the federal courts do not require that a defendant receive actual notice of the claim through service of process but are willing to find informal notice and imputed notice to be sufficient.

Another aspect of notice which the 1966 amendment to Rule 15(c) added to the federal cases is that the defendant must receive notice "within the period provided by law for commencing the action against him." The question of what is meant by "within the period provided by law" was addressed by the U. S. District Court of Delaware in *Martz v. Miller Brothers Co.*[27] The plaintiff named Miller Brothers Company in the petition instead of the proper party, Miller Brothers Company of Newark. These were two separate corporations who, with the exception of the secretary, had the same officers. The plaintiff served the secretary of Miller Brothers instead of the secretary of Miller Brothers of Newark, and the court refused to find that such service was valid as to Miller Brothers of Newark. However, the court stated that even if the secretary for Miller Brothers were found to be an agent of Miller Brothers of Newark, this company had no notice of plaintiff's suit until three days after the statute of limitations had expired. The *Martz* court interpreted "within the period provided by law" restrictively, requiring that the proposed defendant receive notice through service of process within the limitations period.

The provision was also interpreted by the Second Circuit Court of Appeals in *Ingram v. Kumar.*[28] The plaintiff brought a medical malpractice suit naming as the defendant a Dr. Vijaya N. Kumar. After the statute of limitations had expired, he amended his complaint to name the proper defendant, a different doctor with the similar name of Vijay S. Kumar. The court held that "the period within which 'the party to be brought in' must receive notice of the action includes the reasonable time allowed under the federal rules for service of process."[29] The *Ingram* court allowed the amended petition to relate back where the plaintiff served the proper defendant four months after prescription had run because the defendant received the same notice that he would have received if he had been named properly. Thus, the federal courts determine "the period provided by law" by examining the service of process requirements of a jurisdiction. If the jurisdiction requires that service of process be effected before the statute of limitations has expired, the proper defendant must be served during the prescriptive period; if service is not effected before that time, the amended complaint will not relate back.[30]

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26. 629 F.2d at 408.

27. 244 F. Supp. 246 (D. Del 1965).

28. 585 F.2d 566 (2d Cir. 1978), cert. denied, 440 U.S. 940 (1979).

29. Id. at 571-72.

30. See Archuletta v. Duffy's, Inc., 471 F.2d 33 (10th Cir. 1972); Simmons v. Fenton, 480 F.2d 133 (7th Cir. 1973).

In *Ray v. Alexandria Mall*[31] the Louisiana Supreme Court attempts to correct two problems which the court perceives in Louisiana's relation back cases. First, the court adopted

> criteria for determing whether art. 1153 allows an amendment which changes the identity of the party or parties sued to relate back to the date of filing of the original petition:
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> (1) The amended claim must arise out of the same transaction or occurrence set forth in the original pleading;
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> (2) The purported substitute defendant must have received notice of the institution of the action such that he will not be prejudiced in maintaining a defense on the merits;
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> (3) The purported substitute defendant must know or should have known that but for a mistake concerning the identity of the proper party defendant, the action would have been brought against him;
>
> (4) The purported substitute defendant must not be a wholly new or unrelated defendant, since this would be tantamount to assertion of a new cause of action which would have otherwise prescribed.[32]

Second, the supreme court noted the language in *Majesty v. Comet-Mercury-Ford Co.*[33] that "an amending petition to correct a misnomer does not relate back to the filing of the original petition"[34] and held that "to the extent that *Majesty* and its progeny hold inconsistently with the views expressed herein, they are overruled."[35]

The supreme court adopted the objective criteria probably for the same reason that the comparable language was added to Federal Rule 15(c)—to provide the Louisiana courts with guidance in determing when an amended complaint should relate back to the original filing date. However, the court adopted the criteria after noting that "review of the federal jurisprudence has uncovered several cases which are strikingly similar to the instant case, particularly *Taormina Corp. v. Escobedo*."[36] The Fifth Circuit Court of Appeals decided Taormina eight years before Rule 15(c) was amended; therefore, the Louisiana Supreme Court could have decided *Ray* by merely applying the objective standard articulated in *Taormina Corp.*, that the plaintiff made a mistake as to the name but sued and served the intended entity. Language to this effect is

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31. 434 So. 2d 1083 (La. 1983).
32. Id. at 1086-87.
33. 296 So. 2d 271 (La. 1974), rev'd, Ray v. Alexandria Mall, 434 So. 2d 1083 (La. 1983).
34. Id. at 273.
35. 434 So. 2d at 1088.
36. Id. at 1086.

contained in the opinion. The court recognized that "the defendants' operating officer, mall manager Ann Shapiro, had been served with a copy of the petition"[37] and that "it is obvious that the plaintiff merely made a mistake as to the proper name of the defendant and that service was ultimately made upon the proper party defendant. No persuasive argument can be made that the plaintiff actually intended to sue someone else."[38] *Ray* is a misnomer case because the plaintiff actually sued and served the correct party, the party she intended to sue, but mistakenly used the wrong name of the defendant. The supreme court went farther than was necessary by adopting this comparable Rule 15(c) criteria, given this fact situation. The court could have held that the amended petition related back to the original filing because the partnership had notice of the suit through service of process on its agent. As mall manager, Ann Shapiro was an agent for the partnership, the Alexandria Mall Company.

Nevertheless, the court was correct to eliminate the erroneous language in *Majesty* that "an amending petition to correct a misnomer does not relate back to the filing of the original petition."[39] A misnomer case is a case in which an amending petition should relate back because the defendant has received notice of the plaintiff's claim through service of process. Thus, the *Ray* court did not need to overrule *Majesty* to eliminate the language because *Majesty* is not a misnomer case. In *Majesty* the plaintiff did not serve the defendant's agent appointed for service of process; thus, prescription was not interrupted because the defendant did not receive the required notice. In the amended petition, the plaintiff attempted to add a *new* party who had not been served with process. The supreme court could have reversed the *Ray* court of appeal decision that Majesty required dismissal of the plaintiff's suit by distinguishing, rather than overruling, *Majesty*.

There are two differences between the criteria adopted in *Ray* and the criteria adopted in Rule 15(c). First, the Louisiana criteria does not include the language "within the period provided by law"; thus, in Louisiana, service of process after the one year prescriptive period has expired should continue to be valid. Second, the Louisiana Supreme Court includes a fourth criteria not found in amended Rule 15(c): the purported substitute defendant must not be a wholly new or unrelated defendant, since this would be tantamount to assertion of a new cause of action which would have otherwise prescribed. This means that it must be clear who the plaintiff intended to sue. For example, if the plaintiff intends to sue defendant A and names and serves A, an amended petition naming B as defendant will not relate back even if B has notice of the suit because the plaintiff is attempting to add a wholly new and unrelated defendant.

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37. Id. at 1087.
38. Id.
39. 296 So. 2d at 273.

The plaintiff intended to sue A, and B is a wholly different defendant.

The objective criteria adopted by the *Ray* court should not have implications for cases that are factually similar to *Ray* where process is served on an agent. Federal cases decided prior to the 1966 amendment to Rule 15(c) recognized that service on the defendant's agent is sufficient notice to the defendant of the suit. Also, service in the domicile cases will not be affected, as Louisiana courts have always allowed the petition to relate back where service is effected at the domicile.

The *Ray* decision will have implications in those cases where, although neither the agent nor the domicile is served, service is such that the proper party had reasonable notice. Actual notice by service of process will not be required; instead, fair notice, informal notice, and constructive notice will be sufficient to allow the amended petition to relate back. *Majesty* would be decided differently today if the plaintiff could show that the right defendant received notice such that he is not prejudiced in maintaining a defense and that he knew that but for a mistake concerning identity, the action would have been brought against him. In *Majesty* the proper defendant answered the plaintiff's original suit, therefore, the plaintiff could argue that the defendant had notice that he was the intended party. Also, the effect of *Ray* will be to expand *Wiltz* and *Manemin* in an *Ingram v. Kumar* factual situation. The amended complaint will relate back even though the petition is not served on the correct domicile of the proper defendant, if the plaintiff can demonstrate that the defendant received actual notice of the suit. The plaintiff is not required to serve process on the defendant to interrupt prescription, but prescription is interrrupted if the defendant received the same notice that he would have received had he been named properly.

Given the facts presented in *Ray*, the Louisiana Supreme Court went farther than was necessary by adopting the objective criteria. Although the court could have arrived at the same result using other cases, the opinion will have important effects on the application of article 1153. The court has successfully eliminated the erroneous "misnomer language" of the *Majesty* opinion, adopted clear criteria that are easy to apply, and provided protection to the Louisiana plaintiff with the liberal notice standard that is embodied in Rule 15(c). Adopting this criteria, Lousiana courts have moved away from requiring formal notice through service of process to requiring only actual notice about the time that the defendant would have received notice. Also, in adopting criteria (4), the court is attempting to distinquish the misidentification case from the situation where the plaintiff is joining a new defendant. Such a distinction is fair because in the latter situation a new cause of action is asserted.

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