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Louisiana Civil Procedure

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I. FORUM NON CONVENIENS

In *Miller v. American Dredging Co.*,[1] the Louisiana Supreme Court held that state law, not federal law, governed whether a Jones Act and maritime law case should be dismissed on *forum non conveniens* grounds. The plaintiff, a Mississippi resident, employed by the defendant, a Pennsylvania corporation with its principal place of business in New Jersey, had been injured on a vessel on the Delaware River and had filed a Jones Act and general maritime claim against the defendant in state court in Orleans Parish where the defendant had a registered agent for service of process. The trial court sustained the exception of *forum non conveniens* subject to the right of the plaintiff to pursue his claim in a competent court in Pennsylvania. The court of appeals affirmed.[2]

In considering this issue, the Louisiana Supreme Court noted that the doctrine of *forum non conveniens* has been a part of admiralty law since 1801[3] and has been applied by federal courts generally since 1947.[4] But in Louisiana the application of the doctrine is controlled exclusively by Louisiana Code of Civil Procedure article 123[5] which expressly states that the provisions of the article shall not apply to claims brought pursuant to the Jones Act or federal maritime law.[6] Thus Louisiana law would not allow this case to be dismissed for *forum non conveniens*. The lower courts had determined, however, that this issue must be decided according to federal law because the defense of *forum non*

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1. 595 So. 2d 615 (La. 1992), *petition for cert. filed*, 60 U.S.L.W. 3844 (U.S. May 29, 1992) (No. 91-1950).

2. Miller v. American Dredging Co., 580 So. 2d 1091 (La. App. 4th Cir. 1991), *rev'd*, 595 So. 2d 615 (La. 1992).

3. *Miller*, 595 So. 2d at 616, citing Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12 (1949).

4. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839 (1947).

5. Fox v. Board of Supervisors, 576 So. 2d 978 (La. 1991) held that Louisiana courts could only dismiss cases for *forum non conveniens* as provided in Louisiana Code of Civil Procedure article 123.

6. La. Code Civ. P. art. 123(C).

conveniens is a fundamental feature of federal maritime law.[7] The supreme court rejected the position that federal law preempted state law for several reasons. First, the supreme court drew support from a United States Supreme Court decision[8] which held that a state could apply its own *forum non conveniens* law to a claim brought under the Federal Employers Liability Act (FELA) because the Jones Act is based upon the FELA[9] and thus the same result should be reached in a Jones Act case. Additional support was found in federal cases which held that federal *forum non conveniens* applied in diversity cases.[10] The court in *Miller* reasoned that if *forum non conveniens* is not considered part of a state's substantive law for purposes of the *Erie*[11] doctrine then federal *forum non conveniens* should not be considered part of federal substantive law for purposes of the "reverse Erie doctrine."[12] Moreover, the court reasoned that the interests in self-regulation, administrative independence and self-management which persuaded federal courts to apply federal *forum non conveniens* in diversity cases are equally applicable to support Louisiana's application of its own *forum non conveniens* law.

The decision by the Louisiana Supreme Court in *Miller* is at odds with the decision by the Fifth Circuit in *Exxon Corp. v. Chick Kam Choo*[13] where the court held that federal *forum non conveniens* preempted state law in a maritime action. In reaching this result, the federal court reasoned that state law jurisdiction over maritime cases is derivative under the "savings to suitors" clause,[14] that *forum non conveniens* is a characteristic feature of maritime law and a uniform application of the doctrine is needed because of the transnational and international nature of maritime commerce; and that the application of state law

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7. Ikospentakis v. Thalassic S.S. Agency, 915 F.2d 176 (5th Cir. 1990); Exxon Corp. v. Chick Kam Choo, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S. Ct. 1684 (1988).

8. Missouri *ex rel.* Southern R.R. v. Mayfield, 340 U.S. 1, 71 S. Ct. 1 (1950).

9. Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S. Ct. 246 (1942).

10. *In re* Air Crash Disaster Near New Orleans, La., 821 F.2d 1147 (5th Cir. 1987), *vacated on other grounds and remanded*, 490 U.S. 1032, 109 S. Ct. 1928 (1988), *reinstated in pertinent part*, 883 F.2d 17 (5th Cir. 1989).

11. Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938), held that federal courts must apply state substantive law in the absence of controlling federal substantive law.

12. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 S. Ct. 2485 (1986), held that the "savings to suitors" clause allows state courts to entertain in personam maritime causes of action, but in such actions the extent to which state law may be used to remedy maritime injuries is governed by federal maritime standards—the so-called "reverse-Erie" doctrine.

13. 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S. Ct. 1684 (1988).

14. 28 U.S.C. § 1333.

interferes with the exercise of federal power over international relations and foreign affairs. This case arose out of the death of the plaintiff's husband in Singapore. In the original action, the federal court had dismissed the federal claims under the Jones Act, Death on the High Seas Act, and general maritime law on the merits and had dismissed claims under Texas law and Singapore law on *forum non conveniens*.[15] After the plaintiff had filed claims under Texas and Singapore law in Texas court, the defendants unsuccessfully tried to remove the case to federal court[16] and then brought an action in federal court to enjoin litigation in state court. After reaching the conclusion that the issue of *forum non conveniens* was controlled by federal law, the district court granted the injunction, and the court of appeals affirmed. The United States Supreme Court did not resolve the issue of whether federal *forum non conveniens* preempted state law in maritime cases. Instead it reversed on the very narrow grounds that an injunction under the relitigation exception to *28 U.S.C. § 2283* was not justified because the issue of whether a Texas court in Houston would be an appropriate forum to try the Singapore law claim which had not been litigated and decided by the federal court in the original action. That court had only decided that a federal court in Houston would not be an appropriate forum.

Therefore, until the United States Supreme Court chooses to resolve the issue of whether federal *forum non conveniens* preempts state law in maritime cases, we have the opposing positions of the Louisiana Supreme Court and the United States Fifth Circuit Court of Appeals. In considering the question of whether federal law should control in this area, it might be helpful to consider the nature and application of the doctrine of *forum non conveniens* in light of the factors relied on by the Fifth Circuit in *Chick Kam Choo*: the need for uniformity and the need to avoid interference with foreign affairs. The United States Supreme Court, in *Gulf Oil Corp. v. Gilbert*,[17] stated that in deciding the issue of *forum non conveniens* a court is to weigh the private interests of the litigants, including ease of access to proof, evidence, and all of the practical problems that make the trial of the case easy, expeditious, and inexpensive and is also to consider the public factors such as court congestion, local interest in the matter, and whether the law of the forum would be applied. Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. Because such a balance must be struck in light of the particular facts of each case, it is hard to see how uniformity will be achieved.

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15. Chick Kam Choo v. Exxon Corp., 699 F.2d 693 (5th Cir.), *cert. denied*, 464 U.S. 826, 104 S. Ct. 98 (1983).

16. Chick Kam Choo v. Exxon Corp., 764 F.2d 1148 (5th Cir. 1985).

17. 330 U.S. 501, 67 S. Ct. 839 (1947).

Even if a state court and a federal court in the same state applied the same factors, the weighing and balancing of these factors could lead to different results. The fact that a federal court might conclude that the case should be tried in Singapore does not necessarily mean that a state court weighing those same factors would reach the same result. If the application of the doctrine of *forum non conveniens* can not achieve uniformity of results, does it matter that lack of uniformity between state and federal courts in the same state may also result from state law rejection of the *forum non conveniens* doctrine?

On the question of interference with foreign affairs, it is difficult to see how a decision by a state court to assert jurisdiction over a wrongful death claim that occurred in a foreign nation in any way interferes with the sovereignty of that country.[18] Choice of law principles accord proper weight to the interest of that country in having its law determine the rights and obligations of the parties. The exercise of jurisdiction by a state court simply relieves the courts of that country of the burden of adjudicating the dispute. Defendants who engage in maritime commerce are concerned about being subjected to litigation in a forum quite distant from the occurrence and the evidence. These concerns are protected by the Due Process Clause of the Fourteenth Amendment, which allows a state to assert jurisdiction over a defendant only if the defendant has minimum contacts with the forum and the assertion of jurisdiction will not offend traditional notions of fair play and substantial justice.[19] Among the factors included in this analysis are: the interest of the forum, the law to be applied, the burden on the defendant, and the interstate judicial system's interest in obtaining the most efficient resolution of controversies.[20] For example, in *Asahi Metal Industry Co. v. Superior Court of California*,[21] the Supreme Court stated, "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."[22] The Court held that assertion of jurisdiction over the defendant, a Japanese company, was constitutionally unfair because the burden was severe and the interests of the forum and the plaintiff was slight. Thus, the defendant is assured that the forum which ad-

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18. *See* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. 937 (1990) for a critique of the Court's reasoning in *Exxon Corp. v. Chick Kam Choo.*

19. *See* Asahi Metal Industry Co. v. Superior Court of California, Solano County, 480 U.S. 102, 107 S. Ct. 1026 (1987).

20. *Id.*

21. *Id.*

22. *Id.* at 114, 107 S. Ct. at 1033 (1987).

judicates the controversy will be a fair forum even if it is not the most convenient forum.

When all of these factors are considered, it would seem that a state should be free to decide how it will expend its judicial resources and whether it wants to exert jurisdiction to the fullest extent permitted by the Due Process Clause of the Fourteenth Amendment or whether it will decline to exercise that jurisdiction in favor of another forum it considers more convenient. Either way, it is a choice the state should be free to make. Defendants have the protection of the Constitution and can choose whether to establish contacts by setting up an office, hiring a registered agent, or by doing business in a forum like Louisiana which has a very limited *forum non conveniens* doctrine. The interests of foreign countries would seem to be adequately protected by choice of law principles, and it has yet to be persuasively demonstrated how Louisiana's assertion of jurisdiction would interfere with any federal interest.

II. JURISDICTION OVER SUBJECT MATTER

In *Sampson v. Wendy's Management, Inc.*,[23] the plaintiff filed an action in state district court alleging that the defendant had fired her because she had filed a claim for worker's compensation benefits and that this retaliatory discharge violated Louisiana Revised Statutes 23:1361. The defendant filed a peremptory exception of lack of subject matter jurisdiction, arguing that the Office of Worker's Compensation had exclusive jurisdiction over the claim. The district court overruled the exception, and the court of appeal granted a supervisory writ. In reversing the district court, the court of appeal concluded that section 1361, which prohibits a retaliatory discharge, is part of the Worker's Compensation Act because even though it is not in the benefits section, it is in the section dealing with the administration of worker's compensation claims. In interpreting the Act, the court found no evidence of legislative intent to treat a claim for penalties for retaliatory discharge differently from a claim for benefits nor could it find any compelling reason to treat such a claim differently.[24] Therefore, the court held that a claim for retaliatory discharge was a claim under the Worker's Compensation Act and controlled by Louisiana Revised Statutes 23:1310.3

23. 580 So. 2d 430 (La. App. 2d Cir. 1991), *rev'd*, 593 So. 2d 336 (La. 1992).

24. In reaching this conclusion, the court relied, in part, on scholarly articles which argued that an action for retaliatory discharge was part of the Worker's Compensation Act and should be included in worker's compensation insurance coverage. *See* Wex S. Malone and H. Alston Johnson, III, *Workers' Compensation Law and Practice* § 362.5, *in* 14 Louisiana Civil Law Treatise (2d ed. 1980); H. Alston Johnson, *Workers' Compensation, Developments in the Law, 1985-1986—Part II*, 47 La. L. Rev. 521 (1987).

which granted jurisdiction over all claims filed pursuant to the Worker's Compensation Act to the Office of Worker's Compensation.

The Louisiana Supreme Court granted writs and reversed.[25] In reaching this decision, the court classified a claim for a retaliatory discharge as a delictual employment action, a statutory exception to employment at will, rather than a worker's compensation matter. The fact that the statute creating the cause of action for a retaliatory discharge was in the chapter on worker's compensation was not persuasive to the court. In addition, the court interpreted Louisiana Revised Statutes 23:1310.3 as giving hearing officers exclusive jurisdiction only over claims for compensation or benefits. The court stated that the Act provides for agency determination of benefits and penalties directly associated with the employee's work-related injury and receipt of worker's compensation benefits.[26] The court drew further support for its position from the fact that a worker is protected from a retaliatory discharge whenever he seeks benefits under the Act or under the law of any state or the United States. In light of this fact, the court concluded that it would be illogical for a worker who had not asserted a claim for benefits under the Louisiana Act to file a claim for retaliatory discharge with the Office of Worker's Compensation Administration, which was created to administer the provisions of the Louisiana Worker's Compensation Act.

Furthermore, the court asserted that the independent nature of a claim for retaliatory discharge is evident in cases where an employer refuses to hire or discharges an employee who had filed a compensation claim against a previous employer. For these reasons, the court held that an action for a retaliatory discharge was not a worker's compensation matter within the exclusive jurisdiction of the Office of Worker's Compensation Administration.

Sampson presents a close question of statutory interpretation. At the time this case was decided by the court of appeal, Louisiana Revised Statutes 23:1310.3 provided: "A. (1) All claims for any compensation or benefits under the Worker's Compensation Act shall be commenced with the filing of a notice of injury with the director."[27] Section A further provided, "All matters pertaining to such injuries shall be presented to the director. . . ."[28] This language, "compensation or benefits," "notice of injury," and "all matters pertaining to such injuries," seems to support the supreme court's interpretation that this provision was not intended to vest exclusive jurisdiction over a claim for a retaliatory discharge in the Office of Worker's Compensation because,

25. Sampson v. Wendy's Management, Inc., 593 So. 2d 336 (La. 1992).
26. La. R.S. 23:1291-1361 (1985).
27. La. R.S. 23:1310.3 (1989).
28. *Id.*

arguably, such an action is not a claim for compensation or benefits. But while the case was pending in the supreme court, section 1310.3 was amended to provide: "A. A claim for benefits, the controversion of entitlements to benefits, or other relief under the Worker's Compensation Act shall be initiated by the filing of the appropriate form with the office of worker's compensation administration."[29] Moreover, section E provides: "[T]he hearing officer shall be vested with original, exclusive jurisdiction over all claims or disputes arising out of this Chapter."[30] The language of the amended section is much broader; use of the phrases, "or other relief" and "or disputes arising out of this Chapter," arguably supports the conclusion that a claim for retaliatory discharge falls within its provisions. But the supreme court did not consider this amendment or whether, as a procedural statute, it could be applied retroactively.

In addition, legislative history reveals that among the factors which prompted the transfer of jurisdiction of worker's compensation matters from district courts to the Office of Worker's Compensation was a desire to provide faster and more economical processing of claims which would lower the costs of worker's compensation and to provide more uniformity in decisions by placing the decisions in the hands of nine hearing officers instead of 260 district judges.[31] Is it in keeping with these aims to give the agency exclusive jurisdiction over actions for a retaliatory discharge? It could be argued that if giving the agency exclusive jurisdiction over claims for benefits would provide for uniform, efficient, economical disposition of these claims, then the same results could be achieved with respect to claims for penalties for a retaliatory discharge. From the employer's point of view, if use of the agency procedure would reduce the cost of processing claims for benefits, it could also reduce the cost of claims for retaliatory discharge. And the uniformity and expertise developed by the agency would be as valuable in resolving retaliatory discharge disputes as in deciding claims for compensation. Finally, it could be argued that the action for a retaliatory discharge is an integral part of the Act because it offers protection for a worker who files a claim for benefits and makes this protection available whether the claim for benefits was filed under the Louisiana statute or under laws of another state or the United States. This furthers the purpose of the Act to provide effective compensation for injured workers by discouraging an employer from taking retaliatory action.

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29. La. R.S. 23:1310.3 (Supp. 1992).

30. *Id.*

31. Minutes of June 10, 1988, hearing of the House Committee on Labor and Industrial Relations as stated in Moore v. Roemer, 560 So. 2d 927, 938 (La. App. 1st Cir. 1990).

III. PRESCRIPTION

In *Maquar v. Transit Management of Southeast Louisiana, Inc.*,[32] a case consolidated with *Sampson* for oral argument and rendered on the same day, the Louisiana Supreme Court held that the filing of a claim for penalties for a retaliatory discharge with the Office of the Worker's Compensation Administration, which had no jurisdiction to hear the claim, interrupted prescription. In reaching this result, the court assumed that the plaintiff had joined his claim for retaliatory discharge with his claim for worker's compensation and that the employer received notice of the claim within one year from the date of discharge. The court found that this case did not fit squarely under Louisiana Civil Code article 3462 which provides, "If action is commenced in an improper court . . . prescription is interrupted only as to a defendant served by process within the prescriptive period,"[33] because, at the time these claims were filed, the Office of Worker's Compensation Administration was not a court. Nevertheless, the purpose of the prescriptive articles had been fulfilled because the defendant had received notice within the one year prescriptive period for delictual actions. The court also noted that there was little guidance in the cases until its decision in the *Sampson* case as to the nature of the claim for retaliatory discharge, and the plaintiff had not been unreasonable or tardy in pursuing his claim.

Since the court seemed to base its decision on general considerations of fairness, how would the court rule if a plaintiff were to file a timely claim with the Office of Worker's Compensation Administration for retaliatory discharge after the decision in *Sampson* that such an action is not within the jurisdiction of that agency? The defendant would have received notice within the year, but now there is a clear statement in case law, and the plaintiff's action in filing the claim with the agency would not be considered reasonable. It is suggested that, in such a case, the court should apply Louisiana Civil Code article 3462 and find that the agency should be considered an incompetent court, that is a court which lacks subject matter jurisdiction,[34] and that prescription is interrupted by notice to the defendant within the year. If timely notice protects a plaintiff who mistakenly files in a court which lacks subject matter jurisdiction, it should also protect an employee who mistakenly files a claim for a retaliatory discharge with the Office of Worker's Compensation Administration.

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32. 593 So. 2d 365 (La. 1992).
33. La. Civ. Code art. 3462.
34. La. Code Civ. P. art. 5251(4).

In *Parker v. Southern American Insurance Co.*,[35] the plaintiff filed a wrongful death action against the liability insurer of her husband's employer, Sheriff Cappel. The death occurred on May 20, 1984, and the dismissal of plaintiff's earlier compensation suit against Sheriff Cappel had been affirmed by the Louisiana Supreme Court[36] on February 12, 1987. This action had been filed on February 24, 1987, and the trial court and court of appeal sustained the defendant's exception of prescription.[37] The supreme court held that prescription had been interrupted by the earlier suit because both the compensation suit and the tort suit were based on liability of the sheriff for the deceased's death; the insurance company had notice through notice to its insured; the parties were closely related; and after the dismissal of the earlier suit on lack of compensation coverage, both the employer and his liability insurer were aware of the potential liability. In addition, the court stated that the sheriff's office and its insurer were solidary obligors and that interruption of prescription against the sheriff by the earlier compensation action also interrupted prescription as to the insurance company.

The supreme court's decision that a timely action for compensation benefits interrupts prescription on a tort claim against the same employer and its liability insurer, in effect, overrules contrary decisions by courts of appeal even though not mentioned by the court. For example, in *Aleem v. Aabco Contractors, Inc.*,[38] the fourth circuit court of appeal held that a timely filed compensation action did not interrupt prescription on a subsequently filed tort action against the same defendant. And in *Chenier v. Vanguard Party Sales, Inc.*,[39] the third circuit court of appeal held that a timely filed tort action did not interrupt prescription on a later asserted compensation claim.

IV. VENUE

In *Chambers v. LeBlanc*,[40] the plaintiff filed a legal malpractice action in Livingston Parish, his domicile, against an attorney who was domiciled in Iberville Parish and practiced in Ascension Parish, for failure to timely file a suit in East Baton Rouge Parish. The trial court overruled the defendant's exception of improper venue, and the defendant applied to the court of appeal for supervisory writs. The supreme

35. 590 So. 2d 55 (La. 1991).

36. Parker v. Cappel, 500 So. 2d 771 (La. 1987). The supreme court held that the Worker's Compensation Act, which excluded coverage for all sheriff's deputies except Orleans Parish sheriff's deputies, was constitutional.

37. Parker v. Southern Am. Ins. Co., 578 So. 2d 1021 (La. App. 3d Cir.), *writ granted*, 581 So. 2d 668, *rev'd*, 590 So. 2d 55 (1991).

38. 422 So. 2d 1293 (La. App. 4th Cir. 1982).

39. 430 So. 2d 367 (La. App. 3d Cir. 1983).

40. 598 So. 2d 337 (La. 1992).

court expedited review by granting the writ. In doing so the court stated that even though the issue of improper venue was an appealable matter, because it could not, as a practical matter, be corrected on appeal after trial, an appellate court need not resolve the issue through the appellate process. Thus, by its action, the supreme court seemed to suggest that, in the future, review of a trial court's decision overruling an exception of improper venue should be through the more expeditious application for supervisory writs than through the slower appellate process.

On the merits, the supreme court had to resolve the question of where damages were sustained for purposes of applying Louisiana Code of Civil Procedure article 74, which places proper venue in the parish where the wrongful conduct occurred or where the damages were sustained. The court held that when damage is sustained in the parish where the wrongful conduct occurred, that parish is the parish of proper venue under Article 74, even if the plaintiff is in the parish of his domicile at the time the wrongful conduct occurred or even if the damage progresses in the parish of the plaintiff's domicile.[41] The court concluded that the wrongful conduct occurred either in Ascension Parish or in East Baton Rouge Parish, but clearly not in Livingston Parish. Although not expressly stated, the court, by implication, must also have concluded that Livingston Parish was also not a parish where damages were sustained. Thus Livingston Parish was not a parish of proper venue under Article 74, and the exception of improper venue was sustained. The court remanded the case for transfer to a parish of proper venue. In support of its decision, the court cited *Belser v. St. Paul Fire & Marine Insurance Co.*,[42] in which the plaintiff had filed a medical malpractice action in St. Helena Parish, his domicile, alleging that his vision had become impaired as a result of by-pass surgery performed in East Baton Rouge Parish and that, as a result, he lost his medical practice in St. Helena Parish. In deciding that St. Helena was not a parish of proper venue, the court held that if any damages were sustained in the parish where the wrongful conduct occurred, that parish and no other was the parish where the damages were sustained for purposes of venue under Article 74. The court reasoned that the article must be strictly construed to minimize forum shopping in actions for the recovery of damages for offenses and quasi-offenses. This view now seems to have been accepted by the supreme court in *Chambers*.

It is interesting to compare the approach taken by Louisiana courts on the question of proper venue in tort actions with that of the federal courts. The Louisiana position is that Article 74 is to be strictly interpreted so that there is only one parish of proper venue. In other words,

41. *Id.*
42. 509 So. 2d 12 (La. App. 1st Cir. 1987).

in a case like *Belser*, if the plaintiff sustained some injury in East Baton Rouge Parish but most of the consequences of the surgery occurred in St. Helena Parish, venue would only be proper in East Baton Rouge Parish. This result, the court reasoned, is necessary to prevent a plaintiff who is seeking damages for pain and suffering from always being able to sue in the parish of his domicile by alleging that is where the pain and suffering occurred. But such an approach, while it does discourage forum shopping, also seems to be somewhat at odds with the general purpose of venue, which is to provide a convenient place for trial in terms of access to evidence. In a case like *Belser*, applying general principles of convenience would make both East Baton Rouge Parish—where the defendant's conduct occurred and some injuries were sustained—and St. Helena Parish—where the injuries increased and the loss of professional activity occurred—parishes of proper venue. In federal courts, the venue statute[43] provides that venue is proper in a judicial district in which a substantial part of the events occurred. Arguably, this would be either the judicial district where East Baton Rouge Parish is located, or the judicial district in which St. Helena Parish is located (assuming they were located in different judicial districts). The problem of forum shopping is addressed by giving the court discretion to transfer the action to any district where it might have been brought for the convenience of parties and witnesses and in the interests of justice.[44] Louisiana has a similar provision in Louisiana Code of Civil Procedure article 123, but it is not effective to solve the court's concern with forum shopping because it prohibits transfer if the action has been brought in the parish of the plaintiff's domicile. It might be a better solution to amend this article to delete that provision. This would enable Louisiana courts to give the venue articles a broader interpretation in keeping with the purpose of securing a convenient place for trial and would also meet the problems of forum shopping by ordering a transfer under Article 123.

V. EXCEPTIONS

In *Labove v. Theriot*,[45] the Louisiana Supreme Court had to resolve issues concerning the proper use of the peremptory exception of res judicata and the proper methods to amend a final judgment. The problems in this case began when the plaintiff submitted a judgment dismissing the action against all parties with prejudice. This was a mistake because the plaintiff did not intend to dismiss all of the defendants. To correct this error, the plaintiff submitted a second judgment, which

43. 28 U.S.C. §§ 1391(a)(2) and (b)(2) (Supp. 1992).
44. 28 U.S.C. § 1404 (1970).
45. 597 So. 2d 1007 (La. 1992).

amended the first judgment, to revive the action against one of the previously dismissed parties. This second judgment was submitted and signed without notice or hearing about five weeks after the first judgment had been signed. Almost two years later, on the morning of trial, the defendant filed an exception of res judicata, which was sustained by the trial judge, on the grounds that the amended judgment was invalid because it had been rendered without a contradictory hearing. The court of appeals affirmed in an unpublished opinion.[46]

The plaintiff first argued that the amended judgment was valid because the defendant had consented to the change. The supreme court noted that an amendment which changes the substance of a judgment can be made by a motion for a new trial, by appeal, or by consent of the parties[47] but found that in this case there was no evidence in the record to support the contention that the defendant had agreed to the amendment of the judgment which reinstated the claim against him.

The plaintiff also argued that the exception of res judicata was not the proper way to attack the amended judgment, and that the defendant should have attacked the judgment by a motion for a new trial, by appeal, or by an action to annul. The court stated that the exception of res judicata was based on the first judgment which had dismissed the action against the defendant with prejudice. When this exception was raised, the burden of going forward with evidence shifted to the plaintiff to attack the judgment. When the plaintiff attempted to meet this burden by arguing that the first judgment was no longer valid because it had been amended, this put at issue the validity of the amended judgment. The court further noted that the absolute nullity of a judgment may be raised at any time and in any proceeding where the validity of such a judgment is asserted[48] and concluded that the issue of the nullity of the amended judgment had been properly raised in this case.

The plaintiff's last argument was that the defendant was barred by the doctrine of estoppel from raising the exception because the defendant had participated in discovery and other preliminary matters and had delayed urging the exception until the morning of the trial, which was almost two years after the signing of the amended judgment. The court refused to consider the defense of estoppel on the grounds that it is contrary to Louisiana Code of Civil Procedure article 928, which provides that the exception of res judicata may be filed at any time prior to submission of the case, and that the doctrine of estoppel would render this article meaningless.

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46. Labove v. Theriot, 587 So. 2d 221 (La. App. 3d Cir. 1991).

47. *See* Villaume v. Villaume, 363 So. 2d 448 (La. 1978); Hebert v. Hebert, 351 So. 2d 1199 (La. 1977).

48. *See* Charia v. Mungoven, 550 So. 2d 939 (La. App. 5th Cir. 1989).

While it may seem harsh to allow the defendant to wait until the day of trial to assert the defense of res judicata, that is what is clearly allowed by the scheme of the Code. The Louisiana Code of Civil Procedure provides that some defenses are waived if not asserted promptly, namely, the declinatory and dilatory exceptions, but that other defenses raised by the peremptory exception may be raised at any time prior to the submission of the case.[49] Moreover, the Code provides that the appellate court may consider the peremptory exception filed for the first time on appeal if pleaded prior to the submission of the case for a decision and if supporting proof appears in the record.[50] In light of the wide latitude given to the defendant as to the timing of raising the peremptory exception, the court was clearly correct in rejecting the plaintiff's argument of waiver or estoppel. Moreover, any harshness of this decision is mitigated by the fact that the plaintiff was aware of the first judgment and must also be held to be aware of provisions of the Code of Civil Procedure which allow the defendant to raise the defense of res judicata at any time before the submission of the case either in the trial court or in the appellate court. Based on this knowledge, plaintiff should have anticipated that this defense would be raised.

VI. Cumulation of Actions

In *Jones v. Arnold*,[51] the plaintiff filed an action to recover for injuries sustained in an automobile accident and then filed a separate action against another defendant for aggravation of injuries caused by a second accident. The trial court first cumulated the actions but then entered a judgment sustaining the exception of improper cumulation. The supreme court granted writs and, in a per curiam opinion, held that even though the cumulation was improper because there was no community of interest between the parties joined, the trial judge had abused his discretion in ordering dismissal of one of the actions instead of ordering separate trials because extensive discovery had been completed during the thirty month delay before the trial court had ruled on the exception. The court set aside the judgment and ordered the trial court to grant separate trials of the improperly cumulated actions.

Even though this is a per curiam decision, it is worthy of comment for several reasons. The first is the court's conclusion that the actions were improperly cumulated because of a lack of community of interest between the parties joined. Does the court mean to say that when a plaintiff sues two defendants for injuries sustained and aggravated in two separate accidents, then cumulation is improper? If so, this is

49. La. Code Civ. P. art. 928.
50. La. Code Civ. P. art. 2163.
51. 589 So. 2d 1 (La. 1991).

unfortunate. The question of cumulation should be left to the discretion of the trial judge who should consider the facts of each case in light of the principles of judicial efficiency, convenience, and fairness which govern whether cumulation is proper. The decision of the trial judge should be reviewed for abuse of discretion. In a case like this, it could be argued that cumulation serves the interest of judicial efficiency because the issues of the extent of plaintiff's injuries and causation would be presented in each case if they were tried separately. These factors need to be weighed against the risk of confusing the jury and possible prejudice to the defendants. Such determinations can only be made on a case by case basis, and it is hoped that the court did not intend to change that.[52]

It may also be important to note that Louisiana Code of Civil Procedure article 463, which requires that there be a community of interest between the parties joined, does not seem to give as much guidance to the courts as does Federal Rule 20.[53] Federal Rule 20 allows joinder when the claims arise out of the same transaction or occurrence or series of transactions or occurrences, and when there is a common question of law or fact. The rule focuses on the practical concerns of efficiency and fairness which should govern questions of cumulation. Moreover, Louisiana Code of Civil Procedure article 1562 allows consolidation of separate suits if there is a common issue of law or fact.

In addition, the court seemed to order separate trials in this case only because of the unfairness caused by the long delay and completed discovery. On this point, it might have been better for the court to state that in cases of improper cumulation for lack of a community of interest, the ordinary remedy should be to order separate trials and that only in extraordinary cases should the court dismiss one of the actions and force the plaintiff to refile it. In a case like this where the plaintiff could have brought separate actions but instead tried to cumulate the actions, if the court decided the joinder was not proper, then logic would suggest that the proper remedy for misjoinder was separate trials. Dismissal of one of the actions only increases delay and adds to the cost.

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52. *See* Mid-South Car & Truck Rental v. Moore, 516 So. 2d 1224 (La. App. 2d Cir. 1987), which held cumulation proper in actions arising out of separate accidents. *See also* Hess v. Sports Publication Co., 520 So. 2d 472 (La. App. 4th Cir. 1988) and Probst v. Wroten, 433 So. 2d 734 (La. App. 5th Cir. 1983), which allowed the actions to be consolidated.

53. Fed. R. Civ. P. 20.