UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3549
Summary Calendar

WALLACE DAVID ARCENEAUX, SR.,

Plaintiff-Appellant,

versus

HOUMA BOWLING CORPORATION, ET AL.,

Defendants,

**HOUMA BOWLING CORPORATION and
STAR INSURANCE COMPANY, ET AL.,**

Defendants-Appellees.

**Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-93-1009 "M" (3))**

(June 8, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

The district court granted summary judgment on grounds of prescription to appellees Houma Bowling Corporation and its insurer Star Insurance Company. Pursuant to a Fed. R. Civ. P. § 54(b)

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

certificate, appellant Arceneaux challenges that determination. We find no error and affirm.

Appellant Wallace Arceneaux asserts that he was injured at the Houma Bowling Alley on January 2, 1992. On December 30 of that year, he filed suit in Lafourche Parish court against Houma and Star. Appellees were not served with process until after the applicable one-year prescriptive period had expired. It is undisputed that Lafourche Parish was not a proper venue against these appellees. Consequently, the prescriptive period was interrupted neither by that filing, nor by service of the lawsuit on the defendants within one year. LSA-C.C. Art. 3462 (West 1994).

Before appellees' exception of improper venue could be heard in state court, appellant amended his pleadings on February 16, 1993, to add as defendants his own medical insurers, American General Life & Accident Insurance Company and Arkansas Blue Cross & Blue Shield. The Secretary of Health and Human Services, acting on behalf of Arkansas Blue Cross, removed the case to federal court.

Appellant contends that the amended petition effectively cured his venue problem because it properly laid venue for the case against appellants' own insurers in Lafourche Parish. Further, under Louisiana law, the amendment filed before appellees had answered on the merits relates back to the date of filing the original lawsuit. La. Civ. Code P. Art. 1153; Ray v. Alexandria Mall, 434 S.2d 1083 (La. 1983).

The district court was unpersuaded by this argument. He held that the fact that American General and Arkansas Blue Cross might properly be sued in Lafourche Parish did not render venue correct as to Houma and Star unless they qualify as solidary obligors with appellant's personal insurers. Louisiana C.C.P. Art. 73 provides that an action against joint or solidary obligors may be brought in a venue that is proper as to any obligor who is made a defendant. McDaniel v. Reed, 613 S.2d 758, 761 (La. App. 4th Cir. 1993). The district court held that Houma and Star are not solidary obligors with American General and Blue Cross based on Louisiana Civ. Code Art. 1794:

> An obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee.

Because the liability of appellant's insurers does not coincide with that of the tortfeasors, they were not solidary obligors and venue would under no circumstances be proper as to Houma and Star even if appellant's complaint against American General and Blue Cross related back to the date of filing suit.

The district court did not consider appellant's strenuously argued point that while Arkansas Blue Cross and American General may not be solidary obligors with Houma and Star, they are joint obligors. Appellant's authority for this proposition lies in Louisiana Civ. Code Art. 1788, a definition of joint obligors which is vague and has been seldom construed by the courts. Because of the uncertainty surrounding the status of joint

obligations, this court will assume arguendo that appellant's insurers were joint obligors with Houma and Star.

Unlike the district court, then, we must reach the question whether appellant's amended petition relate back to the date of filing the lawsuit and, by retroactively creating proper venue, eviscerated appellees' prescription defense. We believe it did not and agree with appellees that appellant's clever procedural move could not breathe life back into a prescribed claim.

Appellant makes two arguments supporting his theory, neither of which is persuasive. First, appellant asserts that under Louisiana C.C.P. Art. 932 he had the right to cure the defect of improper venue by naming his medical insurers as additional defendants before a judgment was rendered sustaining the exception of proper venue. This citation begs the question, for Article 932 states only that declinatory exceptions may be cured by amendment. That avenue may be changed or corrected following a declinatory exception does not, therefore, necessarily mean that another defect in the pleading -- prescription -- is effectively "cured" thereby.

Appellant also makes use of cases that permit liberal relation back of pleading amendments, but he has distorted the principle of these cases. One purpose of such cases is to permit a plaintiff to cure a pleading defect whereby the defendant was initially misnamed in the suit although a related company was sued, and the intended defendant was on notice of the filing. See, e.g. Ray v. Alexandria Mall, supra. In another type of case, the courts have authorized relation back where a new cause of action is added

to the complaint against the original defendant. In such cases, the proper defendant was either timely sued to begin with or was essentially notified of the suit in a timely manner by service on a misnamed party. Here, however, appellant seeks by joining two entirely new parties on a distinct contractual cause of action with a longer prescription period to revive a claim that had clearly prescribed against the original defendants. This is no mere cure of technical pleading defects but an attempt to circumvent Louisiana's carefully drafted one-year prescriptive statute.

Contrary to appellant's contention, we believe two cases cited by appellees clearly foreshadow the result here. In Rasheed v. Pace, 489 So.2d 488 (La. Ct. App. 2d Cir. 1986), the court held that when a defendant was not sued in a court of competent jurisdiction and service of process was executed after the one-year prescriptive period, prescription was not interrupted. Further, in Mayeux v. Martin, 247 So.2d 198 (La. Ct. App. 3d Cir. 1971), the court held that a defendant's alleged waiver of objection to venue did not alter the fact that a lawsuit had been filed in a court of improper venue and that service was not made until after the prescription period had run. Consequently, the plaintiffs' action had prescribed before any such waiver took place. Moreover, the appellate court held, even if the case was transferred to a court of proper venue, defendants could still urge prescription as a defense. In this case, by analogy, Arceneaux's claim against Houma and Star had already prescribed at the time he attempted to add new defendants and state a new cause of action against them.

Appellant's proffered amendment represented an ingenious but ineffective device for reviving a legally dead claim against Houma and Star.

For these reasons, the district court's judgment is **AFFIRMED.**