

**JOHN E. SPELLMAN**

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**NO. 2001-CA-2058**

**VERSUS**

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**COURT OF APPEAL**

**JANE DOE, JOHN DOE AND  
WALMART DEPT. STORE,  
INC.**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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APPEAL FROM  
ST. BERNARD 34TH JUDICIAL DISTRICT COURT  
NO. 93-380, DIVISION "D"  
HONORABLE KIRK A. VAUGHN, JUDGE

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**JUDGE MICHAEL E. KIRBY**

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(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, Judge  
Max N. Tobias, Jr.)

JOHN E. SPELLMAN, #95105

AVC

C-3, A-2

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IN PROPER PERSON, PLAINTIFF/APPELLANT

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Plaintiff/Appellant John E. Spellman (“Plaintiff”) appeals a September 18, 2001 judgment granting defendant Wal-Mart Store, Inc.’s (“Wal-Mart’s”) exceptions of prescription and insufficiency of service of process and dismissing his case against it with prejudice.

On May 21, 2001, plaintiff filed a complaint for damages against Wal-Mart and two of its unnamed security officers. His complaint arose out of a March 26, 2000 incident at the Wal-Mart on Judge Perez Drive in Chalmette, Louisiana, in which he was accused of shoplifting two cartons of cigarettes, resulting in his arrest and his being charged with theft. In that lawsuit, plaintiff claimed damages for false arrest, false imprisonment, and malicious prosecution. In his petition, plaintiff stated that he had been “charged with Theft as a matter of Public record on May 18, 2000 but never convicted for lack of evidence.”

On July 6, 2001, Wal-Mart filed exceptions to plaintiff’s lawsuit on the grounds of prescription and insufficiency of service of process. Wal-Mart claimed that plaintiff’s petition was prescribed on its face, thereby placing on plaintiff the burden of proving why his claim had not prescribed. Wal-Mart also claimed that plaintiff had improperly served it in violation of La. C.C.P. articles 1261 and 1291, because service had not been made on its

designated agent for service of process. Wal-Mart's exceptions were set for contradictory hearing on September 14, 2001.

Plaintiff filed a written opposition to Wal-Mart's exceptions in which he stated that "[t]he offense in which the defendant's maliciously palce (sic) on plaintiff has just been dismissed in plaintiff's favor." Plaintiff is presently incarcerated at the Avoyelles Correctional Center in Cottonport, Louisiana. He was also incarcerated at the time the petition was filed. He filed a "Motion And Order For Writ Of Habeas Corpus, Adtestificandum" in which he asked to be allowed to be present at the hearing on Wal-Mart's exceptions. The trial court denied plaintiff's motion, ordering that "this matter shall be considered on memos and briefs."

Wal-Mart's exceptions came before the court on September 14, 2001, and the matter was submitted on the record. In a judgment dated September 18, 2001, the court granted Wal-Mart's exceptions of prescription and insufficiency of service of process, and dismissed plaintiff's case with prejudice. In written reasons for judgment issued that same date, the trial court wrote:

Plaintiff was detained in a Wal-Mart store for alleged shoplifting and was subsequently arrested. This lawsuit was instituted for false arrest, false imprisonment and malicious prosecution.

This incident occurred on March 26, 2000

and suit was filed May 21, 2000. On the face of the petition, prescription has run against plaintiff. Further, service of process was not made upon a registered agent as required but was made upon an employee of Wal-Mart.

For the reasons stated herein, plaintiff's action is dismissed.

Plaintiff timely appealed the judgment dismissing his suit.

Plaintiff assigns two errors in this appeal. First, he claims that the trial court erred in finding that his claim for malicious prosecution had prescribed. In support of this argument, he asserts that the theft charges against him were dismissed by the District Attorney's office on July 9, 2001. Because his petition, including his claim for malicious prosecution, was filed on May 21, 2001, plaintiff contends that the trial court erred in finding that his claim for malicious prosecution had prescribed. In this regard, plaintiff correctly points out that a suit for malicious prosecution is not actionable until resolution of the underlying civil or criminal proceeding in the plaintiff's favor. *See, e.g. Waguespack, Seago and Carmichael (A PLC) v. Lincoln*, 99-2016 (La. App. 1 Cir. 9/22/00), 768 So. 2d 287; *Johnson v. Pearce*, 313 So. 2d 812 (La. 1975).

Second, he claims that if the service he requested was improper, he should have been allowed to amend to request proper service on the defendants.

In opposition, Wal-Mart asserts that because plaintiff's petition alleged only two dates, both of which occurred more than one year prior to the date plaintiff's petition was filed, plaintiff's petition was facially prescribed and thus the burden shifted to plaintiff to prove that his action had not prescribed. *See* Lima v. Schmidt, 595 So.2d 624 (La. 1992). Wal-Mart claims that plaintiff failed in that burden and thus the trial court was correct in granting its exception of prescription. Wal-Mart points out that it was not until his case arrived in this court, where evidence cannot be taken, that the plaintiff supplied the date, i.e., July 9, 2001, that the theft charges against him were dismissed. It concedes that had plaintiff supplied the trial court with that date in a timely fashion, his claim for malicious prosecution would not be prescribed.

As to its exception of insufficiency of service of process, Wal-Mart asserts that the exception was properly sustained. In addition, Wal-Mart claims that because the court was simultaneously granting its exception of prescription, there was no error in the dismissal of plaintiff's case with prejudice.

The trial court's conclusion that plaintiff's petition had prescribed on its face, with respect to plaintiff's claim for malicious prosecution, was clearly erroneous because such claim is premature until resolution of the

underlying litigation. Johnson, 313 So. 2d at 816. Accordingly, the burden was on Wal-Mart, the party raising the exception of prescription, to prove the facts to support its assertion that all of plaintiff's claims against it had prescribed. Landry v. Blaise, 99-2617 (La. App. 4 Cir. 8/10/00), 774 So.2d 187, writ denied, 2000-2820 (La. 12/8/00), 776 So.2d 469. While it is true that the theft charges against plaintiff were pending when Wal-Mart filed its exceptions with the trial court on July 6, 2001, according to plaintiff's brief filed with this court, those charges were apparently dismissed just three days later and several months prior to the September 14, 2001 hearing on Wal-Mart's exceptions. While the plaintiff should have amended his opposition to supply the trial court with the exact date on which the theft charges against him were dismissed, it was incumbent on defendants to prove that plaintiff's claim for malicious prosecution had prescribed. We have reviewed the memoranda submitted to the trial court on the issue of prescription and nowhere does Wal-Mart affirmatively prove that plaintiff's claim for malicious prosecution has prescribed. Wal-Mart did not meet its burden. As a result, the trial court erred in finding that plaintiff's claim for malicious prosecution had prescribed.

We now turn our attention to the propriety of the trial court's granting of Wal-Mart's exception of insufficiency of service of process. Wal-Mart is

a foreign corporation whose registered agent for service of process is Baton Rouge, Louisiana. La. C.C.P. art. 1261 provides that service of citation on a foreign corporation is made by personal service on any one of its agents for service of process. Here, plaintiff requested that the sheriff serve citation upon Wal-Mart at its store located in Chalmette, Louisiana. The sheriff's return shows that service was made as requested. Accordingly, we cannot say the trial court erred in maintaining Wal-Mart's exception of insufficiency of service.

We do find, however, that the trial court erred in dismissing plaintiff's suit upon its sustaining of Wal-Mart's declinatory exception. La. C.C.P. article 932 provides, in pertinent part:

When the grounds of the objections pleaded in the declinatory exception may be removed by amendment of the petition or other action of plaintiff, the judgment sustaining the exception shall order the plaintiff to remove them within the delay allowed by the court.

If the grounds of the objection cannot be so removed, or if the plaintiff fails to comply with an order requiring such removal, the action shall be dismissed....

Our courts have consistently construed this provision to require the granting of an opportunity to "cure" jurisdictional defects, unless it is clear from the record that the grounds for the defendant's objections cannot be

removed. Mielke v. Health America Louisiana Partners, L.P., 522 So.2d 1209, 1211 (La. App. 4 Cir. 1988). In Mielke, after reviewing the record, we were unable to say that the defendant's objections could not be removed by amendment or by other actions of the plaintiff. Id. Furthermore, we interpreted the legislature's use of the word "shall" in La. C.C.P. art. 932 to mandate that the trial judge afford the plaintiff a reasonable time to cure the jurisdictional defect, if he is able to do so. Id.

That reasoning applies with equal force to the situation before us. We therefore affirm the granting of Wal-Mart's exception of insufficiency of service of process, but amend the judgment to allow plaintiff thirty days from the date this judgment becomes definitive to cure the jurisdictional defects. Should he fail to do so, his suit will be subject to dismissal.

The portion of the trial court judgment sustaining Wal-Mart's exception of prescription as to plaintiff's claims of false arrest and false imprisonment is affirmed. The portion of the judgment sustaining Wal-Mart's exception of prescription as to plaintiff's claim of malicious prosecution is reversed. The portion of the trial court judgment granting Wal-Mart's exception of insufficiency of service of process is affirmed, but the judgment is amended to give the plaintiff thirty days to cure the defects, if he is able to do so.



**AFFIRMED IN PART, AMENDED IN PART; REVERSED IN  
PART AND REMANDED**