

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2020 CA 0410

CYNTHIA A. FRANDRIA

VERSUS

JO ANN HOLDEN

Judgment Rendered: DEC 30 2020

On Appeal from the Nineteenth Judicial District Court  
Parish of East Baton Rouge, State of Louisiana  
Docket No. 675588  
The Honorable Trudy M. White, Judge Presiding

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BEFORE: HIGGINBOTHAM, THERIOT AND WOLFE, JJ.

**WOLFE, J.**

Plaintiff-appellant, Cynthia A. Frandria (“Frandria”), appeals the January 10, 2020 judgment of the trial court rendered in favor of defendant-appellee, Susan Gardner (“Gardner”), granting Gardner’s exceptions of prescription and failure to timely request service of process of the amended petition and dismissing the amended petition as to Gardner, and granting Gardner’s exception of improper venue and transferring the remaining causes of action against the remaining defendants to Tangipahoa Parish. For the following reasons, we affirm the trial court’s January 10, 2020 judgment to the extent it granted Gardner’s exception of prescription and exception of failure to timely request service of process, and we dismiss Frandria’s appeal to the extent it seeks review of the granting of Gardner’s exception of improper venue.

**FACTS AND PROCEDURAL BACKGROUND**

On October 30, 2018, Frandria filed a pro se handwritten lawsuit in the Nineteenth Judicial District Court for the Parish of East Baton Rouge against her mother, Jo Ann Holden (“Holden”). Many of Frandria’s claims herein center around her alleged eviction by Holden, her medical treatment (including alleged involuntary treatment) by various providers, and Holden’s alleged surrender of Frandria’s animals, specifically a dog, a guinea pig, and twenty-four cats including a cat named “Auggie.”

Frandria filed various amendments to her original lawsuit. On April 12, 2019, Frandria filed a motion to amend petition, seeking to add new claims and defendants including, but not limited to, Gardner. Frandria alleged that Auggie was lost in transit after being removed from her home, and he allegedly was rescued in St. Helena Parish in February 2018. Frandria contended that Auggie is with Gardner, who resides in Tickfaw, Louisiana and who allegedly had “changed her phone number and deceived me into thinking that she would allow me to see

him.” Frandria alleged that Gardner has stated “she is keeping him [Auggie], though no adoption has taken place.” Frandria sued Gardner for “failure to adhere to verbal agreement as discussed and deception about ... Auggie” and asked that Gardner “be made to return the animals of mine to me unharmed.” She further listed the following claims against Gardner: “avoidance/intentional avoidance,” “deception and betrayal,” “denial of Auggie’s true ownership,” and “buying into fear and rumour [sic] mongering about me.”

Frandria made other filings, appearing to name “North Oaks Hospital” as a defendant and alleging that she was involuntarily taken to the emergency room at North Oaks Hospital in Walker, Louisiana on or about January 11, 2018 and then was transported to another hospital the next day.

On October 4, 2019, Frandria filed a document titled “Service,” which requested service of the petitions filed on October 30, 2018 and April 12, 2019, on various defendants, including Gardner.

Gardner filed a declinatory exception of insufficiency of service of process, specifically the failure to request service of citation within the time prescribed by La. Code Civ. P. art. 1201(C), a declinatory exception of improper venue, and a peremptory exception of prescription.<sup>1</sup> Gardner argued that service on her was not timely requested. Gardner further argued that venue is proper in Tangipahoa Parish as the parish of her domicile under La. Code Civ. P. art. 42(1), Livingston Parish as the parish from which the cat allegedly was removed, or St. Helena Parish as the parish where the cat allegedly was abandoned and rescued. Gardner additionally asserted that Frandria’s claims against her are delictual, subject to a liberative prescriptive period of one year pursuant to La. Civ. Code art. 3492, and

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<sup>1</sup> Gardner also filed a dilatory exception of nonconformity of the petition, a dilatory exception of vagueness and ambiguity of the petition and amended petition, and a dilatory exception of improper cumulation of actions. However, where the trial court’s January 10, 2020 judgment finds these exceptions moot and no appeal addresses the judgment to this extent, we pretermit discussion on these exceptions.

prescribed, where Frandria admitted in her amended petition that the cat was rescued in February 2018—more than fourteen months prior to the filing of the amended petition against Gardner.

Hospital Service District No. 1 of Tangipahoa Parish d/b/a North Oaks Health System and North Oaks Hospital and/or North Oaks Medical Center (“NOMC”) also filed an exception of improper venue, or alternative motion to transfer for *forum non conveniens*, as proper venue against it as a political subdivision was in Tangipahoa Parish, pursuant to La. R.S. 13:5104.

Gardner’s exceptions were set for hearing on December 17, 2019. Frandria appeared at the hearing. As to her alleged failure to timely request service of process, Frandria asserted as follows: she “was in Texas this summer;” her “bank was going through a buyout, [her] debit card was declined;” she was “stranded in Texas for approximately seven weeks;” she was “assaulted at a mechanic shop” for trying to take her car; she went to the emergency room with a sprained knee; she took a job out of state temporarily; and when she came back to Louisiana, she had her car, retrieved her mail, and discovered “that service had not gone through because [she] sent personal checks.” She asserted she then went to the Clerk of Court’s office with cash to pay for service. As to improper venue, Frandria admitted the animals were taken from Livingston Parish and objected to moving the case to Tangipahoa Parish, since she presently lives in Shreveport, Louisiana. She grew up in Tangipahoa Parish and had a relative “murdered in Tangipahoa Parish” and does not “feel comfortable with the judicial system of Tangipahoa Parish that they can be unbiased in this case to move the venue there based on what has happened.” Lastly, when the trial court asked her to address prescription and any other arguments regarding her alleged failure to timely request service of process, Frandria stated, “Well, I did not actually meet prescription. I did not meet

it.” She then again proceeded to address the circumstances that allegedly kept her out of state and delayed her request for service of process.

In open court, the trial court first granted Gardner’s exception of prescription, dismissing the case as to Gardner, and then granted Gardner’s exception of failure to timely request service of process. The trial court then granted Gardner’s exception of improper venue “transferring the case to Tangipahoa Parish.” In response to questions from NOMC’s counsel, the trial court confirmed NOMC’s exception was encompassed within its order to transfer the remaining case to Tangipahoa Parish.

On January 10, 2020, the trial court signed a judgment, stating:

This came before the court ... on declinatory, dilatory and preemptive [sic] exceptions filed on behalf of ... Gardner, in response to the Amended Petition ... After arguments and considering the record as a whole, it appearing to the Court that the exceptions of prescription, improper venue and failure to request service of process timely should be granted and the other exceptions were moot;

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED**, the exception of prescription is granted and the Petition, as amended is hereby dismissed, with prejudice as to ... Gardner; the exception of failure to timely request service of process of the Amended Petition is hereby granted and the Petition, as amended is hereby dismissed as to ... Gardner; the exception of improper venue is hereby granted and the remaining causes of action against the remaining defendants are hereby transferred to the 21<sup>st</sup> Judicial District Court, Parish of Tangipahoa, Louisiana; and the remaining exceptions filed on behalf of ... Gardner are dismissed as moot.

On January 31, 2020, Frandria filed a “notice of appeal,” seeking a “devolutive appeal” and “reversal of judgment” as to Gardner. Frandria further stated “remaining defendants are requested not to be transferred to the 21st Judicial District Court” and “Gardner is not to be transferred to the 21<sup>st</sup> Judicial District Court.” (Emphasis in original.) On February 7, 2020, the trial court granted an appeal<sup>2</sup> from the January 10, 2020 judgment granting Gardner’s exceptions.

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<sup>2</sup> Although the trial court’s signed order states it granted a “suspensive appeal” from the January 10, 2020 judgment granting Gardner’s exceptions, Frandria only requested a devolutive appeal, and the Clerk of Court for the Nineteenth Judicial District Court issued notice that “an order of

On November 3, 2020, counsel for NOMC sent correspondence to this court, advising that Frandria had filed an obtained an order from the trial court dismissing the lawsuit and the instant appeal. Attached to the correspondence was a filing purportedly from Frandria, which bore a filed-stamp from the Clerk of Court for the Nineteenth Judicial District Court dated September 16, 2020, the trial court civil suit number 675588, and the civil appeal number 2020 CA 0410. The filing was captioned “Motion to Dismiss” and Frandria stated, in pertinent part, therein “I am abandoning the civil suit against ... Gardner, et al.” The filing included an order purportedly signed by the trial court on September 17, 2020, “[g]ranted dismissal of civil suit and the appeal of the judgment.” This filing was not contained within the record lodged with this court. Nevertheless, where the jurisdiction of the trial court over all matters in the case reviewable under the appeal was divested on the granting of the order of devolutive appeal herein, La. Code Civ. P. art. 2088, and the Motion to Dismiss was not filed with this court, we are constrained to rule on Frandria’s appeal.

### ANALYSIS

To the extent Frandria appealed the January 10, 2020 judgment granting Gardner’s exception of prescription, she has not briefed any error as to the trial court’s ruling on Gardner’s objection of prescription. Pursuant to Uniform Rules—Courts of Appeal, Rule 2-12.4(B)(4), all assignments of error must be briefed, and this court may consider as abandoned any assignment of error which has not been briefed. *See Shropshire v. ANCO Installation*, 2014-0902 (La. App. 1st Cir. 12/23/14), 168 So.3d 601, 606-07. Because Frandria did not assign, brief, or argue any errors concerning Gardner’s exception of prescription, any potential issues or errors related to that exception of prescription are hereby

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appeal was entered granting a DEVOLUTIVE appeal from the judgment of JANUARY 10, 2010.” (Emphasis in original.) Frandria is proceeding in the trial court *in forma pauperis* and would not be entitled to a suspensive appeal. *See* La. Code Civ. P. art. 5185. Accordingly, we treat this appeal as a devolutive appeal.

deemed abandoned.<sup>3</sup> Therefore, since Frandria has not pointed out any error in the trial court's action of granting the exception of prescription as to Gardner, we conclude that it must be affirmed.<sup>4</sup> See **Franklin v. AIG Casualty Co.**, 2012-1698, 2012-1699 (La. App. 1st Cir. 6/7/13), 2013 WL 2487877, \*2 (unpublished).

As to Frandria's appeal of the January 10, 2010 judgment, granting Gardner's exception of failure to timely request service of process, proper service on the defendant is essential in ordinary proceedings, and without it, all proceedings are absolutely null. La. Code Civ. P. art. 1201. The necessity for a plaintiff's timely request of service is fundamental and warrants strict compliance, just as the fundamental requirements for filing an action must be strictly followed. **Lucien v. Carter**, 2017-1069 (La. App. 1st Cir. 5/31/18), 251 So.3d 540, 543.

Louisiana Code of Civil Procedure article 1201(C) provides in part that "[s]ervice of the citation shall be requested on all named defendants within ninety days of commencement of the action," and "[w]hen a supplemental or amended petition is filed naming any additional defendant, service of citation shall be requested within ninety days of its filing." Furthermore, La. Code Civ. P. art. 1672(C), which is entitled "Involuntary Dismissal," states as follows:

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<sup>3</sup> We are mindful of the supreme court's decision in **Nicholas v. Allstate Insurance Co.**, 99-2522 (La. 8/31/00), 765 So.2d 1017, 1022-23, where it was emphasized that assignments of error are necessary as required by Uniform Rules—Courts of Appeal, Rule 1–3 "*unless the interest of justice clearly requires otherwise*" and that La. Code Civ. P. art. 2129 provides that an assignment of error is not necessary in any appeal. However, a layman assumes responsibility for his own inadequacy and lack of knowledge of both procedural and substantive law. **Johnson v. Department of Health and Hospitals**, 2000-0071 (La. App. 1st Cir. 2/16/01), 808 So.2d 436, 437. Moreover, we find that this case is distinguishable from those where an appellate court considers issues not specified or assigned as error when the "interest of justice clearly requires otherwise." Absolutely no argument was made or implied in Frandria's brief regarding Gardner's exception of prescription that was basically uncontested in the trial court. Thus, even liberally construing Frandria's arguments made in her appeal brief, we do not find that this is one of those instances where the interest of justice clearly requires or compels us to review the propriety of the trial court's actions regarding the exception of prescription. See **Franklin**, 2013 WL 2487877 at \*2, n. 3. Frandria furthermore has offered no additional facts or evidence, showing that the grounds of the objection pleaded by the peremptory exception of prescription may be removed by amendment of the petition. See La. Code Civ. P. art. 934.

<sup>4</sup> "A rule uniformly established in an old line of jurisprudence is that a trial court judgment is presumptively correct, and it is the appellant's duty to point out any error in the judgment appealed; otherwise, the appellate court may rely upon the presumption and affirm." See **Franklin**, 2013 WL 2487877 at \*2, n. 4.

A judgment dismissing an action without prejudice shall be rendered as to a person named as a defendant for whom service has not been requested within the time prescribed by Article 1201(C) or 3955 upon the sustaining of a declinatory exception filed by such defendant, or upon contradictory motion of any other party, unless good cause is shown why service could not be requested, in which case the court may order that service be effected within a specified time.

Pursuant to La. Code Civ. P. art. 1672(C), the trial court was required to make an initial determination of whether Frandria properly requested service upon Gardner within the time prescribed by La. Code Civ. P. art. 1201(C). *See Lucien*, 251 So.3d at 544. The requirement that service on the defendant be requested within the ninety-day time period prescribed by La. Code Civ. P. art. 1201(C) requires an accurate request for service upon the proper agent of the defendant. *Id.*

The ninety-day deadline for Frandria to request service of her April 12, 2019 amended petition expired on July 11, 2019. However, the record demonstrates that Frandria did not request service on Gardner until October 4, 2019—175 days after the filing of the April 12, 2019 amended petition naming Gardner as a defendant. Therefore, Frandria failed to request proper service of citation on Gardner within the time prescribed by La. Code Civ. P. art. 1201(C), and the trial court correctly granted Gardner's declinatory exception asserting the objection of failure to timely request service of process.

Upon sustaining this exception, the trial court was obligated by La. Code Civ. P. art. 1672(C) to dismiss Frandria's lawsuit without prejudice, unless good cause was shown why service could not be requested, in which case the court could order that service be effected within a specific time. *See Lucien*, 251 So.3d at 544. Louisiana courts strictly construe La. Code Civ. P. art. 1672(C)'s good cause requirement. *Id.*; *see e.g. Cutler v. State, Department of Public Safety and Corrections*, 2013-971 (La. App. 3rd Cir. 2/12/14), 153 So.3d 1109, 1111-12 (inmate lacked good cause for failure to request service upon attorney general or the head of the Department of Public Safety and Corrections within ninety days of



commencing lawsuit, where attorney general's address was matter of public record and the inmate's arguments that he could not find the address because he was incarcerated, the prison library was "below standard," and the attorney general's office deliberately concealed its address by using post office box on its letterhead did not excuse his failure to comply with statutory service requirements); **Rollins v. City of Zachary**, 2000-0160 (La. App. 1st Cir. 2/16/01), 808 So.2d 439, 443 (plaintiffs could have sent the service request by certified mail with return receipt requested, hand-delivered the request, or simply placed a telephone call to the Clerk of Court's office before expiration of the ninety-day time period to verify that the Clerk of Court's office received the service request, yet plaintiffs took none of these actions).

In her appeal brief, Frandria argues that she has provided receipts from an automotive shop as proof she was detained out of state and unable to timely request service in person, although she allegedly sent checks by mail to the Nineteenth Judicial District Court. Thus, Frandria appears to argue she had good cause for her delay in requesting service on Gardner. However, Frandria did not offer sworn testimony at the hearing or introduce evidence as to the dates she allegedly was stranded in Texas. It appears that, after the hearing on Gardner's exceptions, Frandria attached to her motion for appeal invoices from a Texas auto repair shop dated July 5, 2019 and August 5, 2019 and personal checks dated July 7, 2019 and July 11, 2019, which purportedly were returned to her, and she filed them into the record. However, the minute entry and the hearing transcript do not reflect that these invoices or checks were introduced into evidence. Evidence not properly and officially offered and introduced cannot be considered, even if it is physically placed in the record. **Denoux v. Vessel Management Services, Inc.**, 2007-2143 (La. 5/21/08), 983 So.2d 84, 88. Documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal. **Id.** Appellate

courts are courts of record and may not review evidence that is not in the appellate record or receive new evidence. **Id.**

Nevertheless, even if we were to consider the Texas repair invoices showing Frandria's vehicle was in Texas as of July 5, 2019 and August 5, 2019, Frandria offered no evidence or sworn testimony as to the date she went to Texas, why she could not have requested service of process prior to her departure to Texas or while in Texas, and/or why she was unable to return to Louisiana and request service prior to the expiration of the ninety-day delay for doing so. In fact, the record reflects that Frandria was filing documents with the Clerk of Court for the Nineteenth Judicial District Court as of July 10, 2019 and July 29, 2019. For these reasons, we find Frandria has not shown good cause for her failure to timely request service of process of the amended petition on Gardner, and we affirm the trial court's granting of Gardner's exception of failure to timely request service of process.<sup>5</sup>

Lastly, as to the portion of the January 10, 2020 judgment, granting Gardner's exception of improper venue and transferring the case against the remaining defendants to Tangipahoa Parish, Frandria argues in her appeal brief that she has "arrived at the conclusion that the Nineteenth Judicial District Court is not a proper venue for this civil suit," though it was "the proper venue at the inception of the civil suit," because "there seems to be no real interest nor enthusiasm on the part of the Nineteenth Judicial District Court for this suit." Frandria further states that she "was opposed to transferring all of the defendants to Tangipahoa Parish." Frandria asks that "perhaps a venue outside of both the Nineteenth and Twenty-First Judicial District Courts can be located and an

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<sup>5</sup> We note that, where a suit is dismissed without prejudice in accordance with La. Code Civ. P. art. 1672(C), no amendment is allowed. See **Lucien**, 251 So.3d at 545, n. 5.

agreeable atmosphere be arrived at without harmful outside and/or inside influences.”

Notably, Frandria has not argued that venue is not proper in Tangipahoa Parish. Instead, she argued to the trial court that venue is inconvenient in Tangipahoa Parish and that she will be unable to receive an unbiased trial in Tangipahoa Parish. Whether Tangipahoa Parish is an inconvenient forum and whether Frandria can receive a fair trial in that venue are separate issues from whether venue is proper. Before this court can review those issues, Frandria must first file a motion and obtain a ruling from the appropriate district court. *See* La. Code Civ. P. arts. 122-23.

Nevertheless, the supreme court has found that an adverse venue ruling as in the instant case, where an exception of improper venue is granted and the matter is transferred to a new venue, is an interlocutory judgment and a threshold inquiry; thus, Frandria is required to seek review *via* supervisory writs. *See Land v. Vidrine*, 2010-1342 (La. 3/15/11), 62 So.3d 36, 39-40; *contra Perniciaro v. McInnis*, 2016-740 (La. App. 5th Cir. 5/31/17), 222 So.3d 987, 990, n. 3 (“In the present case, when the trial court granted defendants’ exceptions of improper venue, it dismissed plaintiffs’ actions against certain defendants without prejudice, unlike in **Land**, where the action was transferred to another jurisdiction. Thus, in the present case, the asserted causes of action are no longer pending in any court. Accordingly, we will review this matter under our appellate jurisdiction.”). Failure to timely file a writ application on a venue ruling amounts to a waiver of any objection thereto. **Land**, 62 So.3d at 40.

Frandria did not file a supervisory writ from the trial court’s ruling on Gardner’s exception of improper venue and has not requested that we review the judgment under this court’s supervisory jurisdiction. Under the circumstances presented in this case, we decline to exercise our discretion to convert the appeal

into an application for supervisory writs and dismiss the appeal for lack of appellate jurisdiction as to Gardner's exception of improper venue. *See Stelluto v. Stelluto*, 2005-0074 (La. 6/29/05), 914 So.2d 34, 39 ("the decision to convert an appeal to an application for supervisory writs is within the discretion of the appellate courts").

### **CONCLUSION**

For the foregoing reasons, we affirm the trial court's January 10, 2020 judgment, granting Susan Gardner's exception of prescription and exception of failure to timely request service of process, and we dismiss Cynthia A. Frandria's appeal to the extent it seeks review of the granting of Susan Gardner's exception of improper venue. Costs of this appeal are assessed against plaintiff-appellant, Cynthia A. Frandria.

**AFFIRMED IN PART; APPEAL DISMISSED IN PART.**