

**NOT DESIGNATED FOR PUBLICATION**

**LINDA RIVERS** \* **NO. 2000-CA-2476**  
**VERSUS** \* **COURT OF APPEAL**  
**ERNEST MARCEL AND ABC** \* **FOURTH CIRCUIT**  
**INSURANCE COMPANY** \* **STATE OF LOUISIANA**  
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**APPEAL FROM**  
**CIVIL DISTRICT COURT, ORLEANS PARISH**  
**NO. 1996-12358, DIVISION "F"**  
**Honorable Yada Magee, Judge**  
\* \* \* \* \*  
**Judge Dennis R. Bagneris, Sr.**  
\* \* \* \* \*

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr.,  
and Judge David S. Gorbaty)

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**IN PROPER PERSON, DEFENDANT/APPELLEE**

## **AFFIRMED**

Linda Rivers appeals a trial court judgment of June 4, 1999 annulling and vacating a default judgment she obtained against Ernest Marcelle, Jr. in March of 1997. For the following reasons, we affirm.

On July 31, 1996, Ms. Rivers filed a Petition for Damages against Mr. Marcelle, Jr., alleging that she sustained injuries when she fell down a stairway at a building owned by Mr. Marcelle, Jr. in which Ms. Rivers's son rented an apartment. The sheriff's return on the service of citation shows that Civil Sheriff Deputy Robert Fishel accomplished domiciliary service on Mr. Marcelle, Jr. on August 22, 1996 by serving the petition at Mr. Marcelle's domicile at 5034 Toulon Street upon Mr. Marcelle's adult son, Ernest Marcelle, III.

In September of 1996, Ms. Rivers filed a motion for preliminary default, which the trial court granted. In March of 1997, the trial court confirmed the Preliminary Default after a hearing, issuing an appropriate judgment. In April of 1997, Mr. Marcelle, Jr. filed a petition to annul the judgment, claiming that service of Ms. Rivers's petition was invalid because his son did not reside at the address where the petition was served. After trial on April 19, 1999, the trial court issued its judgment in June of 1999,

annulling and vacating the default judgment from March of 1997. Ms.

Rivers now appeals the trial court's June 4, 1999 judgment.

La.Code Civ.P. art. 1234 provides:

Domiciliary service is made when a proper officer leaves the citation or other process at the dwelling house or usual place of abode of the person to be served with a person of suitable age and discretion residing in the domiciliary establishment.

This article requires that the person of suitable age who accepts service for the domiciliary is a resident of the domiciliary's house. Providing oral reasons for judgment, the trial judge stated:

Reverend Marcelle, Jr. [the plaintiff in the petition to annul] testified that Ernest Marcelle, III had not lived with him since 1993. Ingrid Boutte [Mr. Marcelle III's sister] testified that on the day of the service, 1996, Ernest Marcelle, III lived with her. It is evident from the testimony that Mr. Ernest Marcelle, III has a history of lying to authorities and therefore the court concluded that he is being less than honest in his testimony that this deputy did not ask him whether or not he lived there.

After considering the evidence and the law, the court finds that Ernest Marcelle, III did not live at 5034 Toulon Street in New Orleans, Louisiana at the time . . . the domiciliary service was attempted and therefore service was not good.

At issue in this appeal is whether the person who accepted service of Ms. Rivers's petition, Mr. Marcelle III, resided at the house where service was made, his father's domicile. Based upon the testimony of Mr. Marcelle, Jr. and Ingrid Boutte, Mr. Marcelle III's sister, the trial court found that Mr.

Marcelle III did not reside at his father's house at the time service was made. Concluding that Mr. Marcelle III lied when he testified that the deputy did not ask him if he lived at the address where service was being attempted, the trial court suggested that Mr. Marcelle III told the deputy who served the citation that he did live at the house.

Ms. Rivers argues that a person can have multiple residences and that the evidence showed that Mr. Marcelle had a residence at 5034 Toulon St. at the time service was accomplished. Ms. Rivers claims that to maintain a residence, a person need only have a place to which he may return at his convenience without having to ask permission. Ms. Rivers contends that the testimony that Mr. Marcelle III lived with his sister at the time of service does not determine whether he also had a residence at his father's house.

The evidence relied upon by Ms. Rivers included testimony from the deputy who served the citation that he would have asked Mr. Marcelle III if he lived at the address where he was attempting service and Mr. Marcelle III would have had to answer affirmatively for him to leave the citation. The return of the citation in the record shows that the petition was left with Mr. Marcelle, Jr.'s son whom the deputy had determined was of suitable age and discretion and resided at the house.

Mr. Marcelle III testified that he has continuously provided law

enforcement personnel, court personnel, and judges with the Toulon Street address as his address. Booking sheets, an arrest register, and other documents from criminal court, confirm this. Ms. Rivers's evidence also included Mr. Marcelle's III application to renew his driver's license, submitted one month after the service at issue, on which he swore that his address was 5034 Toulon Street. Moreover, Mr. Marcelle III admitted that the Toulon Street address was the address where he received most of his mail, including during 1996, as well as the address he would have used on his tax returns.

Mr. Marcelle, Jr. testified that he made Mr. Marcelle III move out of his house in 1993, although he did admit that his son's previous bedroom remained intact, which is where he eventually found the citation, and that Mr. Marcelle III retained a key to the house which he used during the day to check his mail and spend time with his siblings.

In Martinez v. Silverman, 288 So.2d 88, 90-91 (La.App. 4 Cir. 1/8/74), this court stated:

The return on a citation must be considered prima facie correct. Moreover, official returns of public officers sworn to properly serve process are given great weight, and the burden rests on those who attack the returns to establish their incorrectness. Our settled law is that the burden of proving such incorrectness can only be met by clear and convincing proof of error in the recitals and that a return cannot be impeached by the uncorroborated testimony of the party upon whom service is stated to have been made by the officer, or by the

uncorroborated testimony of another individual witness.

In Guedry Finance Co. v. Breland, 192 So.2d 884 (La.App. 4 Cir. 12/5/66), this court relied only upon the testimony of the defendant who was supposed to have been served with process and her former roommate who purportedly accepted service to overcome the presumption created by the return on service that service was made on the roommate at the defendant's domicile.

In the case before us, the trial court relied upon the unequivocal testimony of Mr. Marcelle, Jr. and Ms. Boutte that Mr. Marcelle III did not reside at his father's house at the time of service. Significantly, Mr. Marcelle's testimony indicated, using Ms. Rivers's suggested standard, that Mr. Marcelle III would not be able to return without permission. The trial court believed the testimony of Mr. Marcelle, Jr. and Ms. Boutte. The testimony of these two individuals, together, is sufficient to overcome the presumption of correctness of the return by the deputy.

The trial court found that Mr. Marcelle III was not truthful. All of the documentary evidence relied upon by Ms. Rivers simply tends to verify that Mr. Marcelle III did not accurately provide his address to authorities. Considering the trial court's finding regarding Mr. Marcelle III's veracity, we do not consider this documentary evidence compelling in this case as to

the issue of Mr. Marcelle III's residence.

While, as a general proposition, we agree with Ms. Rivers that a person can have multiple residences, we find no error in the trial judge's conclusion that 5034 Toulon Street was not a residence of Mr. Marcelle III at the time of service. The trial court's finding is based on her acceptance of witness testimony.

Ms. River's argument that the trial court erred in finding that Mr. Marcelle III had abandoned his domicile of origin and changed his domicile is without merit; the trial court did not make this finding.

Accordingly, finding no merit in the assigned errors offered by Ms. Rivers, we affirm the judgment of the trial court.

**AFFIRMED**