LANDY CARTER; LEE ARMSTRONG; MARY CARPENTER; MARY ANN TATE DOUGHTY; DEANDREA GRAHAM; MARY HOWARD; CHARLOTTE MCKENNA; BOYD MCLAURIN; BARBARA MCLIN; EVERETTMIXON; SYLVIA NEWKIRK; ANTONIO OATIS; MARY ROBERTSON-OWENS; ROBERT PITTMAN; ET AL.	* *	**NO. 2003-CA-1179** **COURT OF APPEAL** **FOURTH CIRCUIT** **STATE OF LOUISIANA**

VERSUS

THOMAS F. SCHRAGER AND CAMBRIDGE TOXICOLOGY GROUP, INC.

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-19152, DIVISION "C-6"
HONORABLE ROLAND L. BELSOME, JUDGE
* * * * * *

JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge James F. McKay III, Judge Terri F. Love, Judge David S. Gorbaty)

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REVERSED; PETITION DISMISSED WITHOUT PREJUDICE

STATEMENT OF FACTS AND PROCEDURAL HISTORY:

On November 24, 1999, plaintiffs/appellees, filed suit against defendants/appellants seeking a declaratory judgment that the contract between the parties was null and void, and seeking repayment of monies paid under the contract.

Plaintiffs did not have the lawsuit served on the defendants, but instead instructed the Clerk of Court to withhold service. Thereafter, on February 18, 2000, plaintiffs requested issuance of citation and copies of the original petition for service via the Long Arm Statute. The citation and certified copy of the petition were returned to counsel for plaintiffs to be served via certified mail. On March 14, 2000, the citation and petition were mailed pursuant to the Long Arm Statute. The certified mail to the defendants was returned "unclaimed."

Plaintiffs next attempted to have defendants served through the Middlesex Sheriff's Office. Service was never perfected, however, on March 6, 2002, plaintiffs moved for a preliminary default against the defendants. The motion for default incorrectly stated that service had been made on the defendants. On April 15, 2002, a judgment for default was confirmed.

On May 22, 2002, the defendants moved for an order granting them a new trial and dismissing the plaintiffs' suit without prejudice. On August 21, 2002, the trial court granted the motion for new trial based on the lack of service, but did not dismiss the plaintiffs' suit. Instead, the trial court ordered the plaintiffs to obtain proper service on the defendants. In its reasons for judgment, the trial court stated:

> La. C.C.P. art. 1201(C) states that "[s]ervice of the citation shall be requested on all named defendants within ninety days of commencement of the action." This Court finds that the request of service was within ninety days as provided for by La. C.C.P. art. 1201(C). Even though the mailing of the petition and citation was approximately three weeks later, this Court finds the service request was timely.

On September 9, 2003, on motion of the defendants, the trial court designated the judgment of August 21, 2001 as final and appealable pursuant to La. C.C.P. art. 1915. This timely appeal followed.

ARGUMENT:

Defendants argue that the trial court erred in finding that plaintiffs met their obligation under La. C.C.P. art. 1201(C) and the Louisiana Long-Arm Statute, La. R.S. 13:3201-3204, even though plaintiffs mailed service more than ninety days after commencement of the lawsuit. Moreover, defendants submit that the trial court, upon finding that the service was mailed late,

erred in not dismissing plaintiffs' lawsuit without prejudice as required by law. Plaintiffs have not filed an appellee brief in this appeal.

ANALYSIS:

The pertinent facts in this case are undisputed. Plaintiffs failed to mail the citation and petition within ninety days as required by law for service under the Long Arm Statute. The question on this appeal is whether the trial court erred by ordering service on the defendants rather than dismissing plaintiffs' case without prejudice.

The question before us has been recently addressed by this court in Anderson v. Norfolk Southern Railway Company, 02-0230 (La. App. 4 Cir. 3/27/02), 814 So. 2d 659 and Reed v. Norfolk Southern Railway Company, 02-0427 (La. App. 4 Cir. 4/24/02), 817 So. 2d 321, and has been resolved in favor of requiring dismissal. In each of the above-cited cases, service was not mailed within ninety days pursuant to the Long Arm Statute, and the trial courts denied the defendants' motions to dismiss. In both cases, we reversed and concluded that when service is attempted via the Long Arm Statute, the plaintiff must *mail* the

citation and petition to defendant within ninety days of commencement of the action. (emphasis added)

To resolve this issue in Anderson and Reed, we relied primarily on the

rationale of the Fifth Circuit Court in Hugh Eymard Towing, Inc. v. Aeroquip Corp., 00-131 (La. App. 5 Cir. 6/27/00), 776 So. 2d 472. In Eymard, the plaintiff filed suit on April 1, 1998, and on June 10, 1998 requested that the clerk of court issue citations for service on the defendant via the long-arm statute. The clerk's office prepared and sent the documents to plaintiff's counsel; however, counsel did not mail the citation and petition to defendant until July 6, 1999, more than ninety days after commencement of suit. The defendant filed a motion to dismiss on the basis of La. C.C.P. art. 1201(C), which the trial court granted. The plaintiff appealed the dismissal, and the Fifth Circuit affirmed the lower court, stating:

> In suits, where the defendant is a Louisiana resident, once service is requested the Clerk of Court issues the citation and petition to the defendant. In suits, however, where the defendant is a non-resident and jurisdiction is exercised under the long-arm statute (La. R.S. 13:3201), the citation and petition is issued to the plaintiff. Under La. R.S. 13:3204 A, it is the plaintiff's responsibility to mail, by certified or registered mail, the citation and petition to the defendant. This statute states,
> A certified copy of the citation and of the petition in a suit under R.S. 13:3201 shall be sent by counsel for the plaintiff, or by the plaintiff if not represented by counsel, to the defendant by registered or certified mail, or actually delivered to the defendant by commercial courier, when the person to be served is located outside of this state or by an individual designated by the court in which the suit is filed, or by one authorized by the law of the place where the service is made to serve the process of any of its courts of general, limited, or small claims jurisdiction.
> The purpose of requiring that service be requested within ninety days of the suit's commencement is to insure that the defendant receives notice of the suit within a reasonable time after it has

> been commenced. This also gives the defendant the opportunity to preserve evidence for its defense. In the situation in which the plaintiff must serve the non-resident defendant, if the plaintiff was only required to request the citation and petition from the Clerk of Court and was not required to mail it within the ninety days, the purpose of La.C.C.P. art. 1201 would be thwarted. Plaintiffs could delay serving non-resident defendants by not mailing the citation and petition.
>
> Moreover, non-resident defendants would be prejudiced in preparing their defense. Thus, we find that when it is the plaintiff's obligation to issue a certified copy of the citation and petition to the defendant, under La. R.S. 13:3204, the plaintiff must mail the citation and petition within ninety days of commencement of the action. In a La. R.S. 13:3204 situation, the plaintiff's mere request for service to the Clerk of Court is insufficient because in actuality this is merely a request that the certified copy of the citation and petition be issued to the plaintiff. From here, the plaintiff has control over when the non-resident defendant receives notice of the claims against it. Accordingly, we find that, here, the appellant failed to comply with La.C.C.P. art. 1201(C) by not mailing the citation and petition to the appellee within ninety days of commencement of the action. Ergo, we find no error in the trial court's dismissal of plaintiff's claims against the defendant.

We have also addressed the issue of whether the clerk of court's delay in issuing the citation constitutes good cause for serving a defendant untimely. Anderson; Reed. In both cases, the trial court denied the defendant's motion to dismiss because the clerk's office did not timely produce the citation and petition. We reversed, and concluded that in the absence of an explanation for its failure to ascertain the status of the citation so as to insure service of the citation and petition within the ninety-day

statutory period, the plaintiff failed to show good cause for its delay.

In the instant case, plaintiffs argued before the trial court that they made a timely request to the clerk of court, but that they did not receive the citation and petition from the clerk until the 92nd or 93rd day after commencement of the lawsuit. Thereafter, the citation and petition and petition were mailed on approximately the 111th day. Plaintiffs' only claim is that they believed the defendants were dodging service and that they demonstrated good faith in their attempts. Otherwise, no explanation has been given for the late mailing of the citation and petition pursuant to the Long Arm Statute. For the reasons expressed by this court in Anderson and Reed, we find that plaintiffs have not demonstrated good cause for the delay. Accordingly, we find that the trial court erred in failing to dismiss the action.

CONCLUSION:

For the reasons set forth herein, we reverse the judgment of the trial court and dismiss plaintiffs petition without prejudice.

REVERSED; PETITION DISMISSED WITHOUT PREJUDICE