JOSEPH SEAN DAMRON and wife, MRS. JOSEPH SEAN DAMRON,	)	
Plaintiffs/Appellants,	)	Davidson Circuit No. 92C-528
VS.	)	Appeal No. 01-A-01-9511-CV-00502
BIANKA DENISE SADLER,	)	
Defendant/Appellee.	)	

FILED

June 28, 1996

Cecil W. Crowson
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE THIRD CIRCUIT COURT OF DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

HONORABLE BARBARA HAYNES, JUDGE

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REVERSED, VACATED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
SAMUEL L. LEWIS, JUDGE

DISSENTS IN SEPARATE OPINION
WILLIAM C. KOCH, JR., JUDGE

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O P I N I O N

The captioned plaintiffs have appealed from the judgment of the Trial Court sustaining the motion of defendant to dismiss for lack of personal jurisdiction and insufficient service of process.

On April 3, 1992, plaintiffs filed their complaint alleging that they received personal injuries in a collision on April 5, 1991 caused by defendant's negligence, and that defendant was a resident of Rutherford County, Tennessee.

On the same date, April 3, 1992, a summons was issued containing the address, 4701 Lebanon Road #172, Hermitage, Tennessee 37076. On April 8, 1992, the summons was returned: "Does not live here per Apt. Mgr. Not to be found in my county."

The record contains no further proceedings until June 8, 1993, when an order was entered dismissing the suit for lack of prosecution.

On July 2, 1993, plaintiffs moved to set aside the dismissal.

On October 8, 1993, an order was entered setting aside the dismissal.

On December 1, 1993, a summons was issued for service upon defendant at the following address:

> Wikinger Weg 23
> W 7000 Stuttegart 40
> Germany

On December 21, 1993, the Secretary of State reported service of process by registered or certified mail with the notation "see enclosed card." A copy of said card is appended to this opinion as Exhibit A. It is noteworthy that the spaces for date and postmark of destination are blank. It is also noteworthy that the card contains the following instruction:

> This receipt must be signed by the addressee or by a person authorized to do so by virtue of the regulations of the country of destination . . . .

On April 27, 1994, the following document was filed:

> SPECIAL NOTICE OF APPEARANCE
>
> The undersigned counsel files this Special Notice of Appearance on behalf of defendant, Bianka Denise Sadler, for the sole purpose of contesting jurisdiction over the defendant and to assert an insufficiency of process and insufficiency of service of process.
>
> Said defendant resides in Germany and plaintiffs' attempts to serve her in Germany through the Tennessee Secretary of State are insufficient. Defendant is thus not properly before the Court.

On November 18, 1994, the Trial Court issued the following notice:

)	No. 92C528
)	
)	DAMRON, JOSEPH SEAN, ET AL,
)	
)	Plaintiffs,
)	
)	V.
)	
)	SADLER, BIANKA DENISE,
)	
)	Defendant.

N O T I C E

> By Order of the Court, all cases which have been pending for one (1) or more years shall be dismissed unless within the next thirty (30) days the following takes place:
> (1) A motion to set is filed and heard by the Assignment Judge for Jury Cases and for Non-Jury and Divorces to be heard by the Trial Judge; or
> (2) Specific permission is obtained from the Court for this case to be exempted from this one (1) year rule.
> If an Order setting the case for trial is not filed within thirty (30) days, or exempted under paragraph two (2) above, this case shall be dismissed.

On December 19, 1994, plaintiffs filed the following motion:

> Come plaintiffs, Joseph Sean Damron, et al and move this Honorable Court to set this case for trial or in the alternative, to grant specific permission of the Court for this case to be exempted from the one year rule.

On January 20, 1995, the Trial Court entered an order dismissing this suit for lack of prosecution.

On February 15, 1995, plaintiffs moved the Trial Court to set aside the dismissal and to set the case for trial.

On March 31, 1995, the Trial Court entered an order setting aside the dismissal and setting the cause for trial on July 19, 1995.

On April 10, 1995, defendant filed a motion to dismiss for lack of personal jurisdiction and insufficient service of process. The motion states:

> Comes the defendant, Bianka Denise Sadler, solely for the purpose of contesting jurisdiction and the sufficiency of service of process in this case, and moves to dismiss the present complaint for lack of personal jurisdiction pursuant to Rule 12.02(2), insufficiency of process pursuant to Rule 12.02(4), and for insufficiency of service of process pursuant to Rule 12.02(5) of the Tennessee Rules of Civil Procedure. . . . Accompanying this Motion is a Memorandum with argument and citations to authority, and the following materials attached as exhibits:

> Exhibit A Convention On the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention");
>
> Exhibit B Forms to be completed for service of process under the Hague Convention;
>
> Exhibit C Declarations of the Federal Republic of Germany pursuant to the Hague convention;
>
> Exhibit D Copy of opinion in Derso v. Volkswagen of America, Inc., 552 N.Y.S.2d 1001 (N.Y.App. 4 Dep't. 1990);

Neither the Memorandum nor the listed exhibits are cited or found in this record.

Plaintiffs filed a response asserting service of process was good, but requesting additional time to perfect service of process.

On May 25, 1995, the Trial Court entered an order containing the following:

> This case came before the Court on May 19, 1995, for a hearing on the defendant, Bianka Denise Sadler's Motion to Dismiss for Lack of Personal Jurisdiction and Insufficient Service of Process pursuant to Rule 12.02(2), (4) and (5) of the Tennessee Rules of Civil Procedure. After considering the entire record in this cause, including the Memorandum filed in support of the parties' respective positions and the oral arguments of counsel, the Court is of the opinion that the defendant's Motion is well taken in that plaintiff has failed to comply with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention) and further plaintiffs have failed to perfect service of process in a timely manner after the issuance of process under Rule 3 of the Tennessee Rules of Civil Procedure;
>
> It is therefore ordered that the defendant's Motion to Dismiss is granted on the grounds of lack of personal jurisdiction over the defendant, insufficiency of process and insufficiency of service of process. It's thus ordered that plaintiffs' actions are dismissed with prejudice.

Upon appeal, the plaintiffs present the following issues:

> 1. Whether plaintiffs, Joseph Sean Damron and wife, Mrs. Joseph Sean Damron should be deprived of their right to correct their error in having served the defendant, Bianka Denise Sadler, by registered or certified mail through the Secretary of State of Tennessee by the Trial Court Judge, Barbara Haynes, not allowing them a reasonable period of time

to perfect service of process under the terms of the Hague Convention, such as has been allowed in Wilson v. Honda Motor Company, Ltd., 776 F.Supp. 339 (1991 E.D. Tenn., Sixth Circuit Court of Appeals), wherein after ruling service not in compliance with Hague Convention allowed plaintiff forty- five (45) days.

2. Whether trial court's finding set forth in the order on Bianka Denise Sadler's Motion to Dismiss for Lack of Personal Jurisdiction and Insufficient Service of Process that "further plaintiffs have failed to perfect service of process in a timely manner after the issuance of process under Rule 3 of the Tennessee Rules of Civil Procedure," was proper. Nothing concerning Rule 3 of T.R.C.P. was mentioned in the Motion before the court and it was first brought up in oral argument of the motion before the Court. Plaintiff's attorney had no opportunity to prepare and respond to this Rule 3 question prior to the hearing.

3. Whether mistaken understanding from telephoning the Circuit Court Clerk's Office that original summons had been served on Bianka Denise Sadler would excuse failure to reissue summons within six (6) months in accordance with Rule 3 of the Tennessee Rules of Civil Procedure when plaintiff's attorney discovered the mistake and diligent efforts were made to locate and serve Bianka Denise Sadler, who had moved from Davidson County, Tennessee to Rutherford County, Tennessee, to Stuttgart, Germany, where return receipt showed that she received the summons and complaint from the Secretary of State of Tennessee.

4. Whether Rule No. 60.02(1) providing for Mistakes- Excusable Neglect, etc. would allow the alias Summons and Pluries Summons to be within time to be served on defendant in accordance with Hague Convention.

Defendant presents the issues in the following form:

I. Did the trial court err in ruling that appellants failed to comply with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention")?

II. Did the trial court err in dismissing appellants' claim based on the appellants' failure to comply with Rule 3 of the Tennessee Rules of Civil Procedure?

III. Should this appeal be dismissed for appellants' failure to comply with Rule 29© of the Tennessee Rules of Appellate Procedure?

This Court elects to discuss first the defendant's second issue which is based upon plaintiffs' failure to comply with T.R.C.P. Rule 3 which provides:

> . . . If process remains unissued for 30 days or if process is not served or is not returned within 30 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff either: (1) Continues the action by obtaining issuance of new process within 6 months from issuance of the previous process or, if no process issued, within 6 months from the filing of the complaint and summons, or (2) Recommences the action within 1 year from issuance of the original process or, if no process issued, within 1 year from the filing of the original complaint and summons. [As amended July 1, 1979 and January 24, 1992, effective July 1, 1992, and by order adopted January 28, 1993, effective July 1, 1993]

Even though defendant did not move for dismissal on grounds of statute of limitations and violation of Rule 3, it appears that the Trial Court ruled that the suit should be dismissed for this reason.

From the above narration, it appears that the suit is for personal injuries sustained on April 5, 1991; that process was issued on April 3, 1992, and returned unserved on April 8, 1992, and that no further summons was issued within six months thereafter, nor, so far as this record shows, was a new action commenced within one year thereafter. Therefore, according to Rule 3, plaintiffs "cannot rely upon the original commencement to toll the statute of limitations" of one year for actions for personal injury, T.C.A. § 28-3-104.

The plea of statute of limitations is a special plea personal in its nature which may be waived or asserted; and a party relying upon it affirmatively must set it up in his pleadings. *Whittaker v. Monterey Spoke Co.*, 6 Tenn. Civ. App. (Higgins) 26, 1915. *See also Goss v. Hutchins,* Tenn. 1988, 751 S.W.2d 821; *Steed Realty Co. v. Oveisi,* Tenn. App. 1991, 823 S.W.2d 195. The Trial Court was not justified in dismissing the suit on the ground of statute of limitation without an affirmative defense on this ground.

Defendant's first issue challenges the validity of the service of process in Germany. Where the return is proper on its face, the burden is on the defendant to show that he was not properly served. *D.H. May Co. v. Guttman's, Inc.*, 2 Tenn. App. 43 (1925). *See Homer v.*

Duncan, 7 Tenn. App. 43 (1927), wherein the person served brought a separate action to challenge service and was held to have the burden of disproving service.

However, in the present case, defendant argues that the defect in service appears on the face of the return in that it does not bear the signature of the addressee or her duly authorized agent.

As previously stated, the documents exhibited to defendant's Trial Court memorandum were not included in this record. T.C.A. §24-6-207 provides as follows:

> **24-6-207. Judicial notice of foreign law in appellate court. -** It shall not be necessary, in a case carried from an inferior to an appellate court, to have the statutes of a state read as evidence in the inferior court, transcribed into the record, except where it is directed to be done by the inferior court; but the appellate Court may take judicial notice of such laws and statutes. [Code 1858; § 3801 (derive. Acts 1839-1840, ch. 45, § 1); Shan. § 5586; mod. Code 1932, § 9767; T.C.A. (orig. Ed.), § 24-613.]

Appellate courts can take judicial notice of foreign law when included in the record on appeal. *DeSoto Hardwood Flooring Co. v. Old Dominion Table & Cabinet Works,* 163 Tenn. 532, 43 S.W.2d 1069 (1931); *Kaset v. Freedman,* 22 Tenn. App. 213, 120 S.W.2d 977 (1938).

T.R.E. Rule 201 states:

> © A court shall take judicial notice if requested by a party and supplied with the necessary information.

T.R.E. Rule 202 states:

> (b) Optional Judicial Notice of Law. - Upon reasonable notice to adverse parties, a party may request that the court take, and the court may take, judicial notice of (1) all other duly adopted federal and state rules of court, (2) all duly published regulations of federal and state agencies and proclamations of the Tennessee Wildlife Resources Agency, (3) all duly enacted ordinances of municipalities or other governmental subdivisions, (4) any matter or law which would fall within the scope of this subsection or subsection (a) of this rule but for the fact that it has been replaced, superseded, or otherwise rendered

> no longer in force, and (5) treaties, conventions, the laws of foreign countries, international law, and maritime law.

Defendant concedes that international service of process is authorized by Article 1 of The Hague Conventions, but relies upon limiting words therein, "Provided the State of destination does not object." Defendant asserts that the Federal Republic of Germany "has objected." However, defendant offers no satisfactory evidence that the government of Germany "has objected."

Opinions of courts in other cases in other jurisdictions are not satisfactory evidence of the state of statutory law in Germany at the time material to this appeal.

Defendant asserts that she never signed for or received the summons. Under the holdings of our Tennessee courts, cited above, defendant has the burden of introducing evidence that she was not served and did not sign the receipt for service. Defendant has offered no proof in this regard and has thus failed to carry the burden of sustaining her defense of non service of process.

Defendant's third issue seeks dismissal of the appeal for failure of plaintiffs to timely file their brief in this Court. The record was filed with this Court on November 8, 1995. On December 13, 1995, the time for filing appellant's brief was extended to and including January 8, 1996. Appellant's brief was mailed to the Clerk by certified mail on that date. The brief was timely filed. T.R.A.P. Rule 20(a).

Plaintiffs' first issue complains of the Trial Court's refusal of additional time to serve process. Plaintiffs cite no part of the record showing a request to the Trial Court for additional time or refusal of such request, as required by Rule 6(a)(1) of the Rules of this Court. Generally, questions not raised in the Trial Court will not be considered on appeal. *Simpson v. Frontier Community Credit Union*, Tenn. 1991, 810 S.W.2d 147. Moreover, if

the request had been made, the grant of additional time would have rested within the sound discretion of the Trial Court. After setting aside two dismissals for failure to prosecute, the Trial Court could not be held in error for refusing further indulgence even if requested.

Plaintiffs' second issue points out what has already been discussed - Rule 3 is not a basis of dismissal until invoked by proper pleading.

Plaintiffs' third issue relies upon alleged facts of which there is no evidence in the record.

Plaintiffs' fourth issue invokes Rule 60.02(1) which is inapplicable to the facts in this record.

In summary, the Trial Court erred by dismissing under T.R.C.P. Rule 3, because it had not been invoked, and in quashing service of process without sufficient evidentiary showing by defendant. However, the suit is subject to dismissal upon proper presentation of the affirmative defense of statute of limitations.

The judgment of the Trial Court is reversed and vacated. Costs of this appeal are taxed against the appellee. The cause is remanded to the Trial Court for further proceedings.

Reversed, Vacated and Remanded.

_____

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

_____

SAMUEL L. LEWIS, JUDGE

WILLIAM C. KOCH, JR., JUDGE
SEPARATE DISSENTING OPINION