

Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **24th day of March, 2021** are as follows:

BY Griffin, J.:

2020-CC-00730

DONNA BROWN VS. RALPH CHESSON, M.D. (Parish of Orleans
Civil)

REVERSED AND REMANDED. SEE OPINION.

03/24/21

SUPREME COURT OF LOUISIANA

No. 2020-CC-00730

DONNA BROWN

VS.

RALPH CHESSON, M.D.

*On Writ of Certiorari to the Court of Appeal, Fourth Circuit, Parish of Orleans
Civil*

GRIFFIN, J.

We granted this writ application to determine whether it is sufficient to request service solely on a qualified state health care provider when that individual is the only named defendant in a medical malpractice suit. Specifically, whether the plaintiff's request for service and citation within ninety days from the commencement of this suit on only the defendant physician satisfied the statutory requirements for service on a state employee. For the reasons that follow, we find that the service was sufficient and the court of appeal erred in sustaining the exceptions of insufficiency of citation and service of process.

FACTS AND PROCEDURAL HISTORY

In October 2012, plaintiff Donna Brown filed a complaint with the Division of Administration against Dr. Ralph Chesson. Subsequently, she was notified of Dr. Chesson's status as a qualified state health care provider and a medical review panel was convened. After the medical review panel rendered its opinion in favor of Dr. Chesson, Ms. Brown filed a petition for damages solely against Dr. Chesson on October 9, 2015. In the petition she alleged medical malpractice during a 2011 surgical procedure and requested service on Dr. Chesson at his office.

Dr. Chesson filed declinatory exceptions of insufficiency of citation and service of process arguing that in a claim against a qualified state health care

provider, service is proper pursuant to La. R.S. 13:5107 and La. R.S. 39:1538. The statutes require service on three entities: 1) the head of the department for the Board of Supervisors of the Louisiana State University Agricultural and Mechanical College (“Department Head”); 2) the Office of Risk Management; and 3) the Attorney General. Dr. Chesson also filed an exception of prescription. Following a hearing, the trial court denied all of the exceptions.

Dr. Chesson sought supervisory review. Sitting *en banc*, the court of appeal found that service was insufficient, reversed the trial court’s decision, and dismissed the suit without prejudice. *Brown v. Chesson*, 19-0447 (La.App. 4. Cir. 4/24/20), 299 So.3d 741. Relying on *Velasquez v. Chesson*, 13-1260 (La.App. 4 Cir. 10/8/14), 151 So.3d 812 and *Wright v. State*, 18-0825 (La.App. 4 Cir. 10/31/18), 258 So.3d 846, the court of appeal held that in order to effect service on Dr. Chesson, at least one of the requisite entities (the Department Head, the Office of Risk Management, or the Attorney General) must be served. *Brown*, 19-0447, p. 10, 299 So.3d at 746. Thus, “failure to timely effectuate service on the proper parties warranted dismissal of the suit.” *Id.*, 19-0447, p. 6, 299 So.3d at 744 (quoting *Velasquez*, 13-1260, p. 5, 151 So.3d at 815).

Ms. Brown’s writ application to this court followed, which we granted. *Brown v. Chesson*, 20-0730 (La. 10/14/20), 302 So.3d 1108.

DISCUSSION

The sole issue before this Court is the sufficiency of Ms. Brown’s service on Dr. Chesson. Where, as here, the facts are not disputed, the ruling on exceptions of insufficiency of citation and service of process is subject to a *de novo* standard of review. See *Wilson v. Dep’t of Public Safety and Corrections*, 53,433, p. 3 (La.App. 2 Cir. 4/22/20), 295 So.3d 1274, 1276, writ denied, 20-0717 (La. 9/29/20), 301 So.3d 1176 (citing *Lathan Co., Inc. v. Division of Admin*, 17-0396, p. 4 (La.App. 1 Cir. 1/24/19), 272 So.3d 1, 4, writ denied, 19-0331 (La. 4/29/19), 268 So.3d 1036).

Similarly, our interpretation of the application of La. R.S. 13:5107 and La. R.S. 39:1538 to the facts at hand present a question of law subject to *de novo* review. *See Pierce Foundations, Inc. v. Jaroy Construction, Inc.*, 15-0785, p. 7 (La. 5/3/16), 190 So.3d 298, 303.

As mandated by La. R.S. 13:5107(D)(1),¹ “service of citation shall be requested within ninety days of the commencement of the action or the filing of a supplemental or amended petition which initially names the state, a state agency, or political subdivision or any officer or employee thereof as a party.” Failure to timely request service, absent a showing of good cause, shall result in dismissal without prejudice. *See* La. R.S. 13:5107(D)(2); La. C.C.P. art. 1672(C). For claims against the State or any of its agencies to recover damages in tort for injuries including negligence by any state employee acting within the scope of his employment, “process shall be served upon the head of the department concerned, the office of

¹ In relevant part, La. R.S. 13:5017 provides:

(A)(1) In all suits filed against the state of Louisiana or a state agency, citation and service may be obtained by citation and service on the attorney general of Louisiana, or on any employee in his office above the age of sixteen years, or any other proper officer or person, depending upon the identity of the named defendant and in accordance with the laws of this state, and on the department, board, commission, or agency head or person, depending upon the identity of the named defendant and in accordance with the laws of this state, and on the department, board, commission, or agency head or person, depending upon the identity of the named defendant and the identity of the named board, commission, department, agency, or officer through which or through whom suit is to be filed against.

D. (1) In all suits in which the state, a state agency, or political subdivision, or any officer or employee thereof is named as a party, service of citation shall be requested within ninety days of the commencement of the action or the filing of a supplemental or amended petition which initially names the state, a state agency, or political subdivision or any officer or employee thereof as a party.

(2) If service is not requested by the party filing the action within the period required in Paragraph (1) of this Subsection, the action shall be dismissed without prejudice, after contradictory motion as provided in Code of Civil Procedure Article 1672(C), as to the state, state agency, or political subdivision, or any officer or employee thereof, upon whom service was not requested within the period required by Paragraph (1) of this Subsection.

risk management, and the attorney general, as well as any others required by R.S. 13:5107.” La. R.S. 39:1538(D).

Ms. Brown argues that La. R.S. 13:5017(A) – requiring service on the Department Head and Attorney General – is not applicable to her suit against Dr. Chesson because that section of the statute makes no reference to state employees. In contrast, La. R.S. 13:5107(D) is the only section of the statute to reference state employees and the only provision which regulates the time period in which service is to be requested. Ms. Brown further argues that because La. R.S. 13:5107(D) is silent as to the method of service on a state employee, her request for personal service on Dr. Chesson was proper pursuant to La. C.C.P. arts. 1231 and 1232.

Dr. Chesson counters that because he is a qualified state health care provider, any damages in a medical malpractice suit will be paid by the State. *See* La. R.S. 40:1237.1(G) (“the state shall pay any damages ... in connection with any claim lodged against any state health care provider ... for an alleged act of medical malpractice”); *Detillier v. Kenner Regional Medical Center*, 03-3259, pp. 15-16 (La. 7/6/04), 877 So.2d 100, 110-11. Accordingly, the requirements of La. R.S. 13:5107 and La. R.S. 39:1538 are triggered; thus the service requested by Ms. Brown was not timely because it did not include the Department Head, the Office of Risk Management, and the Attorney General.

In *Whitley v. State ex rel. Bd. of Sup’rs of Louisiana State University Agr. Mechanical College*, this Court observed that while La. R.S. 13:5107(D) mandates service be requested within ninety days of the commencement of the action under penalty of dismissal without prejudice, such penalty is limited to instances where a *named defendant* is not timely served.² 11-0040, pp. 16-17 (La. 7/1/11), 66 So.3d

² Similarly, in *Lathan*, the First Circuit noted the lack of consequence for the failure of a plaintiff to request service on the Attorney General pursuant to La. R.S. 13:5107(A)(2) observing that “the consequence for the failure to timely request service is in subsection (D)(2) and provides the result of the failure to serve a party only under subsection (D).” 17-0396, p. 13, 272 So.3d at 9 (emphasis in original).

470, 480-81 (citing La. C.C.P. arts. 932(A), 1201(C), and 1672(C)); *Wilson*, 54,433, pp. 7-8, 295 So.3d at 1278. Accordingly, this Court interpreted the statute as written and declined to judicially impose requirements not mandated by the legislature. *Whitley*, 11-0040, p. 18, 66 So.3d at 481.

Two dispositive facts are undisputed: 1) Dr. Chesson is the sole named defendant; and 2) Ms. Brown requested personal service on Dr. Chesson pursuant to La. C.C.P. art. 1232. Ms. Brown thus contends that her request for service was sufficient pursuant to La. R.S. 13:5107(D) because that section does not specify the method of service required. We agree. “Although La. R.S. 13:5107(D)(1) clearly requires that service of citation be requested within ninety days of the commencement of the action, it does not specify the manner of making such request or when request is deemed to be made.” *Tranchant v. State*, 08-0978, p. 5 (La. 1/21/09), 5 So.3d 832, 835.

If a medical malpractice plaintiff may name an individual physician state health care provider as a defendant, it is axiomatic that service may be requested on this individual pursuant to La. C.C.P. art. 1232.³ *Cf. Detillier*, 03-3259, pp. 13-14, 877 So.2d at 109. Pursuant to La. R.S. 13:5107(D), Ms. Brown timely requested personal service on the sole named defendant, Dr. Chesson. *See Whitley, supra; Wilson*, 54,333, pp. 7, 295 So.3d at 1278 (observing that “[plaintiff] complied with [La. R.S. 13:5017(D)(1)] when she requested service on the named defendants”). Further, as reasoned by Judge Belsome in his dissenting opinion below, because Ms. Brown’s petition does not assert any “[c]laims against the state or any of its

³ To the extent there is a gap in La. R.S. 13:5107(D) as to the methodology of service on a defendant physician, we construe it in favor of maintaining Ms. Brown’s claim. *See Lathan*, 17-0396, p. 14, 272 So.3d at 10 (citing *Whitley*, 11-0040, pp. 12-13, 66 So.3d at 478).

agencies,” the service requirements of La. R.S. 39:1538 are not applicable.⁴ We therefore find that the court of appeal erred in sustaining the exceptions of insufficiency of citation and service of process.

DECREE

For the foregoing reasons, the court of appeal’s decision to sustain the exceptions of insufficiency of citation and service of process is reversed, the judgment of the trial court is reinstated, and the matter is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

⁴ The court of appeal pretermitted discussion of Dr. Chesson’s exception of prescription. Dr. Chesson re-urges this argument in his brief to this Court. However, as the State is not a named party to this suit, any issue concerning prescription is premature.