

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2021 CA 0562

SARAH MALLET

VERSUS

LINDSEY RICHARD FAUVEAU, M.D. AND THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND A&M COLLEGE SYSTEM ON BEHALF OF THE LOUISIANA STATE UNIVERSITY – HEALTH AND SCIENCE CENTER

Judgment Rendered: DEC 22 2021

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C689696

The Honorable Wilson E. Fields, Judge Presiding

Lee A. Archer
Lake Charles, Louisiana

Counsel for Plaintiff/Appellant
Sarah Mallet

Scott Webre
Whitney S. Ikerd
Lafayette, Louisiana

Jeff Landry
Attorney General
Jeannie C. Prudomme
Daniel C. Palmintier
Assistant Attorneys General
Lafayette, Louisiana

Counsel for Defendants/Appellees
Lindsey Richard Fauveau, M.D.
The Board of Supervisors of
Louisiana State University and
A&M College System on behalf of
the Louisiana State University –
Health and Science Center

Wm. David Coffey
Assistant Attorney General
New Orleans, Louisiana

BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

PMc by JEW
Mc Clendon Jr. concurs in result without reasons.

Mt.
JEW

THERIOT, J.

Sarah Mallet (“Ms. Mallet”) appeals the judgment sustaining the declinatory exception of insufficiency of service of process in favor of the appellees, the State of Louisiana through Lindsey Richard Fauveau, M.D. and the Board of Supervisors of Louisiana State University and A&M College System, on behalf of the Louisiana State University – Health Sciences Center (sometimes referred to as “the appellees”), granting the motion to dismiss for failure to timely request service in favor of appellees, and dismissing Ms. Mallet’s claims against the appellees with prejudice. For the following reasons, we reverse.

FACTUAL AND PROCEDURAL HISTORY

This case arises out of a medical malpractice claim; however, the issue herein is purely procedural. Prior to filing this lawsuit, Ms. Mallet filed Medical Review Panel (“MRP”) proceedings in compliance with the Louisiana Medical Malpractice Act. Ms. Mallet’s prior counsel presented the issue to the MRP as being a surgical technique failure. On July 17, 2019, the MRP rendered its opinion. The MRP unanimously found in favor of Dr. Fauveau, finding that there were no defects in the surgery performed on April 20, 2016. After receiving the MRP’s opinion and reasons, Ms. Mallet’s prior counsel took no further steps and withdrew from the case. Ms. Mallet subsequently hired new counsel, who sent her medical records to a consulting expert to review. The consulting expert found that the wrong surgery was planned and performed by Dr. Fauveau, and the issue was not a surgical technique failure as previously thought.

Ms. Mallet filed a petition for damages on October 28, 2019. She also filed a new MRP complaint against Dr. Fauveau and the attending physicians who were involved. The petition alleged that Dr. Fauveau committed medical malpractice when she performed surgery on Ms. Mallet. Ms. Mallet requested and paid for personal service on Dr. Fauveau at 9001 Summa Avenue, Baton Rouge, Louisiana

("Summa Avenue") when the petition was filed. Ms. Mallet alleges that the Summa Avenue address was Dr. Fauveau's publicly listed address by the Louisiana State Board of Medical Examiners at the time. The sheriff's office attempted to serve the original petition on Dr. Fauveau on November 4, 2019 but was unsuccessful in making service on her at the Summa Avenue address.¹

On March 10, 2020, Ms. Mallet filed a first supplemental and amended petition for damages. In her first supplemental and amended petition, Dr. Fauveau was named again, individually, as a defendant, and Ms. Mallet added the State of Louisiana, through the Board of Supervisors of Louisiana State University and A&M College, on behalf of LSU Health, LSU Health Sciences Center – New Orleans and/or LSU Health Care Services Division ("State of Louisiana"). On the day Ms. Mallet filed the supplemental and amended petition, she requested that the State of Louisiana be served through (1) the Attorney General of the State of Louisiana, Jeff Landry; (2) the Chairman of the Board of Supervisors of LSU, Mary L. Werner; and (3) the Chancellor and Dean of the LSU Health Sciences Center in New Orleans, Larry H. Hollier, M.D. (collectively referred to as the "state trifecta").² Ms. Mallet also requested service of the supplemental and amended petition on Dr. Fauveau at the Summa Avenue address. The sheriff's office attempted to serve Dr. Fauveau with the supplemental and amended petition on March 17, 2020 at the Summa Avenue address, but that attempt was also unsuccessful.³

Since the sheriff's office was unable to serve Dr. Fauveau with the original petition and the supplemental and amended petition at the Summa Avenue address, Ms. Mallet filed a motion to appoint a private process server on May 11, 2020. The

¹ The sheriff's citation indicates that a "[d]ue and [d]iligent" attempt was made to serve Dr. Fauveau on November 4, 2019.

² The state trifecta consists of the head of the department concerned, the office of risk management, and the attorney general. See La. R.S. 39:1538D.

³ The sheriff's citation indicates that a "[d]ue and [d]iligent" attempt was made to serve Dr. Fauveau on March 17, 2020.

district court granted the motion to appoint a private process server on May 19, 2020, and Diondi Lessard and Infiniti Investigations, LLC were appointed. Jeff Louviere (“Mr. Louviere”) was the employee of Infinity Investigations, LLC tasked with serving Dr. Fauveau. On May 27, 2020, Mr. Louviere located Dr. Fauveau in the parking lot between the surgical center and the medical offices at 17050 Medical Center Drive, Baton Rouge, Louisiana and personally served her with the original petition and the supplemental and amended petition.

On June 16, 2020, the State of Louisiana through Lindsey Richard Fauveau, M.D. and the Board of Supervisors of Louisiana State University and A&M College System, on behalf of the Louisiana State University – Health Sciences Center filed a declinatory exception raising the objection of insufficiency of service and a motion to dismiss for failure to timely request service. The appellees argued that service was not timely made upon the state trifacta, as required by Louisiana Code of Civil Procedure article 1201C, Louisiana Revised Statutes 39:1538D, and Louisiana Revised Statutes 13:5107D. The appellees also argued that service of the original petition was not properly requested upon Dr. Fauveau within ninety days as required under Louisiana Revised Statutes 13:5107D. Ms. Mallet filed an opposition to the appellees’ exception and motion on November 6, 2020.

A hearing was held on the declinatory exception of insufficiency of service and motion to dismiss for failure to timely request service on November 16, 2020. The district court sustained the appellees’ declinatory exception of insufficiency of service and granted the motion to dismiss for failure to timely request service. The district court further dismissed Ms. Mallet’s cause of action against the State of Louisiana through Lindsey Richard Fauveau, M.D. and the Board of Supervisors of Louisiana State University and A&M College System, on behalf of the Louisiana State University – Health Sciences Center, without prejudice, at Ms.

Mallet's sole cost. The judgment for the declinatory exception of insufficiency of service and motion to dismiss for failure to timely request service was signed by the district court on January 5, 2021. It is from this judgment that Ms. Mallet appeals.

ASSIGNMENTS OF ERROR

Ms. Mallet contends that the district court erred in sustaining the appellees' declinatory exception of insufficiency of service of process, granting the motion to dismiss for failure to timely request service, and dismissing the lawsuit. Ms. Mallet asserts that (1) the district court erred in failing to apply the law and well-settled jurisprudence from the Louisiana Supreme Court and this court, which holds that Ms. Mallet was not required to request service upon the state trifecta within ninety days of filing the original petition; (2) the district court erred in failing to recognize that any defects in service were cured in this case, where all members of the state trifecta were requested to be served and were served well before the hearing; (3) the district court erred to the extent that it relied upon the appellees' argument that Ms. Mallet's request for personal service on Dr. Fauveau at an alleged previous work address was ineffective and invalid request for service; and (4) the district court erred in casting costs to Ms. Mallet.

STANDARD OF REVIEW

A district court's ruling on an exception of insufficiency of service of process is reviewed under the manifest error standard. However, when the facts are not disputed and the issue before this court is whether the district court properly interpreted and applied the law, the standard of review for questions of law is simply a review of whether the district court was legally correct or incorrect. *Lathan Company, Inc. v. Division of Administration*, 2017-0396 (La. App. 1st Cir. 1/24/19), 272 So. 3d 1, 4, writ denied, 2019-0331 (La. 4/29/19), 268 So. 3d 1036.

DISCUSSION

In her first assignment of error, Ms. Mallet contends the district court erred in failing to apply the law and well-settled jurisprudence from the Louisiana Supreme Court and this court, which holds that Ms. Mallet was not required to request service upon the state trifacta within ninety days of filing the original petition. Service upon the state trifacta is governed by Louisiana Revised Statutes 13:5107 and Louisiana Revised Statutes 39:1538. As mandated by Louisiana Revised Statutes 13:5107D(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. 13:5107D(2); La. C.C.P. art. 1672C. 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 risk management, and the attorney general, as well as any others required by [Louisiana Revised Statutes] 13:5107.” La. R.S. 39:1538D.

In support of her contention that the state trifacta was properly served, Ms. Mallet cites *Brown v. Chesson*, 2020-00730 (La. 3/24/21), 315 So. 3d 834. The *Brown* decision was rendered on March 24, 2021, after the hearing on the declinatory exception of insufficiency of service of process and motion to dismiss for failure to timely request service had taken place in the district court. Although the appellees argued that service on the state trifacta was not proper in the district court, the appellees now agree that service on the state trifacta was proper pursuant to the Louisiana Supreme Court’s decision in *Brown*.

In *Brown*, a patient sued a state-employed doctor for medical malpractice committed during surgery and post-operative care. *Brown*, 315 So. 3d at 835. The doctor was the only named defendant, and the patient requested service on the doctor within ninety days of filing the petition. *Id.* The doctor filed an exception of insufficiency of citation and service of process, asserting that, because he was a qualified state health care provider, the patient was required to serve the state trifecta within ninety days of filing the petition. *Id.* The district court denied the doctor's exception, and the doctor sought supervisory review. *Brown*, 315 So. 3d at 836. The Fourth Circuit found that service was not proper because in order to effect service on the doctor, at least one of the members of the state trifecta had to have been served within the ninety days, and a dismissal was warranted for insufficiency of citation and service of process. *Id.* The patient then filed a writ application with the Louisiana Supreme Court. *Id.*

The Louisiana Supreme Court found service was sufficient and the Fourth Circuit erred in sustaining the exceptions of insufficiency of citation and service of process. *Brown*, 315 So. 3d at 838. The Supreme Court held that it was sufficient to request service solely on a qualified state health care provider when that individual was the only named defendant in a medical malpractice suit. *Id.* Specifically, the patient's request for service and citation within ninety days from the commencement of the suit on only the doctor satisfied the statutory requirements for service on a state employee. *Id.*

In this case, Ms. Mallet filed the original petition on October 28, 2019, naming only Dr. Fauveau as a defendant. Pursuant to the decision in *Brown*, since Dr. Fauveau was the only named defendant in the original petition, Ms. Mallet did not need to request service on the state trifecta within ninety days of filing the original petition. The State of Louisiana was added as a defendant in the supplemental and amended petition, which was filed on March 10, 2020. On the

date she filed the supplemental and amended petition, Ms. Mallet requested service on the state trifecta by providing the name of each, the address of each, and payment for each service request. By requesting service on the state trifecta on the day the State of Louisiana was added to the lawsuit, service on the state trifecta is deemed to be properly requested. Thus, this assignment of error has merit.

In her second assignment of error, Ms. Mallet contends that the district court erred in failing to recognize that any defects in service were cured in this case, where all members of the state trifecta were requested to be served and were served well before the hearing. As discussed above, Ms. Mallet properly requested service on the state trifecta pursuant to *Brown*. Therefore, this assignment of error is moot.

In her third assignment of error, Ms. Mallet contends that the district court erred to the extent that it relied upon the appellees' argument that Ms. Mallet's request for personal service on Dr. Fauveau at an alleged previous work address was ineffective and an invalid request for service. This assignment of error will not be considered because Dr. Fauveau was not named individually in the declinatory exception of insufficiency of service and motion to dismiss for failure to timely request service. All exceptions shall set forth the name and surname of the exceptor, shall state with particularity the objections urged and the grounds thereof, and shall contain a prayer for the relief sought. La. C.C.P. art. 924. The declinatory exception of insufficiency of service and the motion to dismiss for failure to timely request service were filed by the State of Louisiana through Lindsey Richard Fauveau, M.D. and the Board of Supervisors of Louisiana State University and A&M College System, on behalf of the Louisiana State University – Health Sciences Center. The district court's judgment on the declinatory exception of insufficiency of service and motion to dismiss for failure to timely request service dismissed Ms. Mallet's action only against the State of Louisiana through Lindsey

Richard Fauveau, M.D. and the Board of Supervisors of Louisiana State University and A&M College System.

The declinatory exception of insufficiency of service and motion to dismiss for failure to timely request service did not include Dr. Fauveau, individually, as it was filed by the State of Louisiana through Lindsey Richard Fauveau, M.D. and the Board of Supervisors of Louisiana State University and A&M College System, on behalf of the Louisiana State University – Health Sciences Center. Likewise, the district court’s judgment only dismissed Ms. Mallet’s lawsuit against the State of Louisiana through Lindsey Richard Fauveau, M.D. and the Board of Supervisors of Louisiana State University and A&M College System, on behalf of the Louisiana State University – Health Sciences Center, and it did not dismiss Ms. Mallet’s lawsuit against Dr. Fauveau individually. Since Dr. Fauveau was not individually included in the declinatory exception of insufficiency of service and motion to dismiss for failure to timely request service, it is not appropriate for this court to consider whether service was properly requested upon Dr. Fauveau within ninety days of the filing of the original petition. Therefore, this assignment of error will not be considered.

In her fourth assignment of error, Ms. Mallet contends the district court erred in casting costs to her. This assignment of error is moot, as the judgment is being reversed.

DECREE

The January 5, 2021 judgment sustaining the declinatory exception of insufficiency of service of process and granting the motion to dismiss for failure to timely request service in favor of appellees, the State of Louisiana through Lindsey Richard Fauveau, M.D. and the Board of Supervisors of Louisiana State University and A&M College System, on behalf of the Louisiana State University – Health Sciences Center, and against the appellant, Sarah Mallet, is reversed. All costs of

this appeal, in the amount of \$1,902.00, are assessed to the State of Louisiana through Lindsey Richard Fauveau, M.D. and the Board of Supervisors of Louisiana State University and A&M College System, on behalf of the Louisiana State University – Health Sciences Center.

REVERSED.