

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 0187

JAMES THOMAS, SR., LUCILLE MARIE LANDRY, JACOB ALLEN THOMAS, CHELSEA MARIE LANDRY, LEXIE LYNN LANDRY

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT AND BARRIERE CONSTRUCTION

*Handwritten signature/initials*

Judgment Rendered: JUN 19 2008

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Appealed from the  
Seventeenth Judicial District Court  
In and for the Parish of Lafourche  
State of Louisiana  
Docket Number 100723

Honorable F. Hugh Larose, Judge

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James Thomas, Sr.  
Angola, LA

Plaintiff/Appellant  
In Proper Person

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Gretna, LA

Counsel for  
Defendant/Appellee  
Barriere Construction  
Co., L.L.C.

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Defendant/Appellee  
State of Louisiana  
through the Department  
of Transportation and  
Development

BEFORE: WHIPPLE, GUIDRY, PETTIGREW, McCLENDON,  
AND HUGHES, JJ.

*Whipple, J. dissents and assigns reasons.*  
*McCleendon, J. dissents*  
*Pettigrew, J. concurs and assigns reasons*  
*Hughes, J. concurs.*

## **GUIDRY, J.**

At issue in this appeal is whether the defendant, State of Louisiana, was entitled to a judgment of involuntary dismissal where plaintiffs requested service within ninety days of the commencement of the action, but did not name the attorney general or proper agent for service pursuant to La. R.S. 13:5107. Based on binding First Circuit jurisprudence, we reverse.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On the evening of February 14, 2004, James Thomas, Sr. was driving his vehicle along Louisiana Highway 1 toward Grand Isle. His daughter, Jade, and his son, Jacob, both minors, were passengers in the vehicle. At some point, Thomas lost control of his vehicle, which left the roadway, struck a utility pole, rolled over, and landed upside down in a body of water. Jade died from injuries sustained during the accident; Jacob also sustained injuries, but survived.

Thomas, who was intoxicated at the time of the accident, was subsequently convicted of vehicular homicide and sentenced to twenty-years imprisonment at hard labor. See State v. Thomas, 05-2210 (La. App. 1st Cir. 6/9/06), 938 So. 2d 168, writ denied, 06-2403 (La. 4/27/07), 955 So. 2d 683. On February 14, 2005, one year after the accident, and while confined to the Lafourche Parish Detention Center, Thomas filed this lawsuit against the State of Louisiana through the Department of Transportation and Development (DOTD) and Barriere Construction Co., L.L.C. (Barriere), seeking damages in excess of one million dollars. Also named as plaintiffs in the lawsuit were: Lucille Landry, Jacob and Jade's mother; Jacob; and two of Landry's children. In the handwritten petition, Thomas alleged that DOTD had its registered office in Lafourche Parish and that Barriere was a contractor for the State of Louisiana. Thomas did not include a service request in the original petition.

On March 7, 2005, the Lafourche Parish Clerk of Court's Office sent Thomas a letter advising him that his petition had been filed because of prescription, but that the petition was being held because the proper motion and order to proceed *in forma pauperis* had not been received. In the letter, the clerk's office informed Thomas that he had ninety days from the date that the lawsuit was filed to request service of the petition, and if he did not do so, the defendants could file a motion and order to dismiss.

On April 28, 2005, however, in response to certain requests from Thomas, the clerk's office sent Thomas another letter acknowledging that he had filed this petition in proper person, and that he was acting as his own attorney. The letter further stated, "[w]e do not have forms to provide to you. We are not aware of the motions, petitions, or writs that need to be filed. You'll have to do the research to determine what needs to be filed." On that same date, less than ninety days after the lawsuit had been filed, Thomas filed a motion requesting service of the petition. In the motion, Thomas asked for service of the petition "upon [the] State of Louisiana and ET, AL defendants," but did not provide any contact information or further instructions for service upon the defendants.

On June 10, 2005, Thomas wrote a letter to the clerk's office asking that the petition be served, and stating that he had no way to research procedure because he had been in lockdown since February 25th of that year and had no access to the law library. In the service request, he listed the defendants' names, but did not provide any contact information or addresses for service.

On June 6, 2005, Barriere filed a motion for involuntary dismissal pursuant

to La. C.C.P. arts. 1201(C)<sup>1</sup> and 1672(C).<sup>2</sup> The matter was heard before the trial court on July 19, 2005, after which the trial court rendered judgment on July 25, 2005, granting Barriere's motion for involuntary dismissal, and thereby dismissing all of plaintiffs' claim against Barriere as a defendant. Thomas appealed the ruling of the trial court, and in Thomas v. State, 06-0129 (La. App. 1st Cir. 11/3/06) (unpublished opinion), this court reversed the trial court's grant of Barriere's motion for involuntary dismissal, finding that Thomas' request that Barriere be served within ninety days of the filing of his petition complied with the requirements set forth in La. C.C.P. arts. 1201 and 1672. See Thomas v. State, 06-0129 (La. App. 1st Cir. 11/3/06) (unpublished opinion).

By a letter dated June 22, 2005, four months after the petition had been filed, Thomas requested service on the Attorney General, DOTD, and Barriere, providing addresses for each of the defendants. The service request was filed into the record on June 27, 2005. On June 27, 2005, Thomas also filed a motion to amend the petition and an amended petition basically reiterating the allegations of the original petition. The amended petition requested service on the Attorney General, DOTD, and Barriere at addresses that were set forth in the service request.

On March 8, 2006, DOTD filed a declinatory exception raising the objection of insufficiency of service of process on the basis that Thomas failed to request service of process within ninety days of the filing of the initial pleading as required by La. R.S. 13:5107(D)(1), which states, "[i]n all suits in which the state, a state

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<sup>1</sup> Louisiana Code of Civil Procedure article 1201(C) states, "[s]ervice of the citation shall be requested on all named defendants within ninety days of commencement of the action."

<sup>2</sup> At the time Barriere filed its motion for involuntary dismissal, Article 1672(C) of the Louisiana Code of Civil Procedure provided as follows:

A judgment dismissing an action without prejudice shall be rendered as to a person named as a defendant for whom service has not been requested within the time prescribed by Article 1201(C), upon contradictory motion of that person or any party or upon the court's own motion, unless good cause is shown why service could not be requested, in which case the court may order that service be effected within a specified time.

agency, or political subdivision, or any officer or employee thereof is named as a party." DOTD additionally contended that La. C.C.P. arts. 1201(C) and 1672(C) both require that proper service of citation be requested on all named defendants within ninety days of the commencement of the action or a judgment dismissing the action shall be rendered.

On April 28, 2006, the trial court held a hearing on DOTD's exception at which Thomas appeared in proper person, purportedly on behalf of the plaintiffs. In opposition to the declinatory exception, Thomas testified that he had been incarcerated and under lockdown from February 25, 2005 through June 15, 2005. He also stated that during that time, he was denied access to a law library and that he was unable to research "the issue of who and how [he] was supposed to request service of process upon the defendants." Thomas further argued that he was not aware that his filing of April 28, 2005 was insufficient to effectuate service of process against the State.

On October 9, 2006, the trial court rendered judgment sustaining DOTD's declinatory exception raising the objection of insufficiency of service of process and dismissing plaintiffs' suit with prejudice. In support of its ruling, the trial court rendered reasons for judgment noting that plaintiffs had failed to request service on DOTD within ninety days as required by La. R.S. 13:5107(D)(1); that DOTD had never waived service of process; and that without a written waiver of service of process by DOTD, a plaintiff must strictly adhere to the requirement that service must be requested within ninety days. The trial court further noted that La. C.C.P. arts. 1201(C) and 1672(C) additionally require that proper service of citation be requested on all named defendants within ninety days of commencement of the action or the suit shall be dismissed without prejudice.<sup>3</sup>

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<sup>3</sup> We note that the trial court's reasons for judgment erroneously state that the State's exception raising the objection of insufficiency of service of process was filed on March 8, 2005, rather than March 8, 2006.

The instant appeal by Thomas followed.

### **MOTION TO DISMISS THE APPEAL**

On April 20, 2007, DOTD filed a motion to dismiss the instant appeal on the basis that plaintiff failed to comply with Rule 2-12.2, 2-12.3, and 2-12.4 of the Uniform Rules of the Courts of Appeal in bringing this appeal. Rule 2-12.2 refers to the requirements for preparing appellate briefs. Rule 2-12.3 refers to the requirements for the cover inscription of appellate briefs. Rule 2-12.4 refers to the specific requirements for an appellant's brief. Whereas the deficiencies of Thomas' brief are in violation of the Uniform Rules of the Courts of Appeal, because appeals are favored and the brief was submitted by the pro se litigant, we decline to grant DOTD's motion to dismiss the appeal. See Washington v. First Choice Trucking, 06-1479, pp. 4-5 (La. App. 3d Cir. 3/7/07), 953 So. 2d 107, 110; Williams v. Fischer, 439 So. 2d 1111, 1112 (La. App. 1st Cir. 1983).

### **DISCUSSION**

Citation and service are essential in most civil actions; without them, all proceedings are absolutely null. La. C.C.P. art. 1201(A). In particular, La. R.S. 13:5107 explicitly governs service of citation and process on a state agency, such as DOTD. As set forth in La. R.S. 13:5107(A), "[i]n 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...."

The requisite period for service upon DOTD, as well as the penalty for the failure to timely request service, are found in La. R.S. 13:5107(D)(1) and (2). Pursuant to La. R.S. 13:5107(D)(1), "[i]n all suits in which the state, a state agency, or political subdivision, or any officer or employee thereof is named as a party,

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**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." (Emphasis added.) The subsection further provides that the defendant may expressly waive this requirement with any written waiver. If service is not requested by the party filing the action within the requisite time period, the action shall be dismissed without prejudice, after contradictory motion as provided in La. C.C.P. art. 1672(C), as to the state, state agency, or political subdivision, or any officer or employee thereof, who has not been served. La. R.S. 13:5107(D)(2).

This court has held that in order to satisfy the requirements of La. R.S. 13:5107(D) that a request for service of process be made within ninety days, the request must be a valid and effective request, naming the proper party or agent for service of process. Thomas v. Louisiana Department of Public Safety and Corrections, 02-0897, p. 7 (La. App. 1st Cir. 3/28/03), 848 So. 2d 635, 639, writ denied, 03-2397 (La. 11/21/03), 860 So. 2d 552. Moreover, in Barnett v. Louisiana State University Medical Center-Shreveport, 02-2576, p. 2 (La. 2/7/03), 841 So. 2d 725, 726, the Louisiana Supreme Court held that the requirement that service upon defendant be requested within the ninety-day period requires (1) an accurate request of service (2) upon the proper agent for defendant.

On April 28, 2005, within ninety days of the filing of the petition, Thomas filed a motion requesting service on the "State of Louisiana and ET, AL defendants." In a prior, unpublished opinion of this court in this same matter, this court held that the trial court erred in granting a motion for involuntary dismissal in favor of DOTD's co-defendant, Barriere, because the April 28, 2005 request for service "complied with article 1201's requirement by requesting service on the named defendants within ninety days of the commencement of the action." Thomas v. State, 06-0129 at 7-8.

Laws on the same subject matter must be interpreted in reference to each other. La. C.C. art. 13. Although the dismissal of DOTD herein is premised on La. R.S. 13:5107(D)(1), rather than La. C.C.P. art. 1201(C), the language of both statutes regarding the requirements for requesting service of process is almost identical. Thus, judicial integrity and consistency mandates that this court follow the same reasoning applied in the previous appeal to determine whether Thomas complied with the almost identical provisions for requesting service under La. R.S. 13:5107(D)(1). See Albright v. Southern Trace Country Club of Shreveport, Inc., 37,725, p. 4 (La. App. 2d Cir. 10/17/03), 859 So. 2d 238, 241 n.1, aff'd, 03-3413 (La. 7/6/04), 879 So. 2d 121.

Because this court in Thomas v. State, 06-0129 (La. App. 1st Cir. 11/3/06) found that the April 28, 2005 filing was sufficient to constitute a request for service within the requisite time period, despite the failure to separately identify the defendant Barriere, we likewise find the filing is sufficient to constitute a request for service within the requisite time period on DOTD. Furthermore, we follow the reasoning of the prior opinion to find that good cause existed for Thomas' failure to provide complete or appropriate service information within the ninety-day period. A request for involuntary dismissal premised on a party's failure to request service within ninety days of the filing of the petition can be denied if the party can show good cause why service could not be requested. See La. R.S. 13:5107(D)(2) and La. C.C.P. art. 1672(C). In the prior opinion, this court observed:

Although we are cognizant that the circumstances of Thomas' confinement were the direct result of his criminal acts, we must nonetheless recognize that his confinement necessarily limited his access to information regarding service of process. Further, he was able to provide the clerk's office with the appropriate service information within four months of the lawsuit [being] filed. ... Moreover, by the time the hearing on the motion for involuntary dismissal was held, the alleged defect arising from the lack of service information had been cured.

Thomas v. State, 06-0129 at 8.



Therefore, in accordance with this court's opinion in Thomas v. State, 06-0129 (La. App. 1st Cir. 11/3/06), we find that Thomas complied with the requirements of La. R.S. 13:5107(D), and as a result, the trial court's judgment dismissing the plaintiffs' suit should be reversed.

### **CONCLUSION**

For the reasons set forth above, the motion to dismiss filed by DOTD is denied, and the October 9, 2006 judgment of the trial court is reversed. Costs in the amount of \$1,052.54 are assessed to the State of Louisiana through the Department of Transportation and Development.

**REVERSED AND REMANDED.**

STATE OF LOUISIANA

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— JAMES THOMAS, SR., LUCILLE MARIE LANDRY, JACOB ALLEN  
THOMAS, CHELSEA MARIE LANDRY, LEXIE LYNN LANDRY AND  
JADE ELAINE THOMAS

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF  
TRANSPORTATION AND DEVELOPMENT AND BARRIERE  
CONSTRUCTION

**WHIPPLE, J., Dissenting.**

I respectfully disagree with the majority herein.

The majority opinion finds that we are bound by this court's opinion in Thomas v. State, 2006-0129 (La. App. 1<sup>st</sup> Cir. 11/3/06) (unpublished opinion). Our analysis therein focused on LSA-C.C.P. arts. 1201 and 1672 in determining whether service was sufficient as to Barriere Construction. On review, we found that LSA-C.C.P. art. 1201(C) required that service be requested on all named defendants within ninety days of the commencement of the action, but that in accordance with LSA-C.C.P. art. 1672(C), a judgment of dismissal would be rendered if service had not been timely requested unless good cause was shown as to why service could not be requested. In our analysis under LSA-C.C.P. art. 1201(C) as to Barriere Construction, we held that Thomas' alleged situation during his confinement constituted "good cause" as to the delay in service.

However, in the instant appeal, where Thomas challenges the trial court's grant of the DOTD's motion for involuntary dismissal, our analysis must center

on whether Thomas' request for service was sufficient as to the DOTD under LSA-R.S. 13:5107. Louisiana Revised Statute 13:5107 explicitly governs service of citation and process on a state agency, such as the DOTD. As to suits against the State or any of its agencies or political subdivisions, LSA-R.S. 13:5107(D)(1) provides that "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." (Emphasis added.)

Louisiana Revised Statute 13:5107(D)(2) further provides that the defendant, with any written waiver, may expressly waive this requirement. If service is not requested by the party filing the action within that period, the action shall be dismissed without prejudice, after contradictory motion as provided in LSA-C.C.P. art. 1672(C), as to the state, state agency, or political subdivision, or any officer or employee thereof, who has not been served. LSA-R.S. 13:5107(D)(2). Thus, although the state may waive service pursuant to the statute by written notice, it undisputedly did not do so in this case.

This court has held that in order to satisfy the requirement of LSA-R.S. 13:5107(D) that a request for service of process be made within ninety days, the request must be a **valid** and **effective** request, naming the **proper party or agent** for service of process. Thomas v. Louisiana Department of Public Safety and Corrections, 2002-0897 (La. App. 1<sup>st</sup> Cir. 3/28/03), 848 So. 2d 635, writ denied, 2003-2397 (La. 11/21/03), 860 So. 2d 552. Furthermore, as the Louisiana Supreme Court set forth in Barnett v. Louisiana State University Medical Center-Shreveport, 2002-2576 (La. 2/7/03), 841 So.2d 725, 726, the requirement under LSA-R.S. 13:5107(D) that service upon defendant be requested within the ninety-day period requires (1) an accurate request of service (2) upon the proper agent for defendant. Confusion as to the proper agent for service of process does not

constitute good cause for failing to request proper service. Thomas v. Louisiana Department of Public Safety and Corrections, 848 So. 2d at 640.

Thomas' April 28, 2005 motion, requesting service of the petition, was the only request for service made within ninety days of the filing of the petition, and asked the clerk of court to serve "the State of Louisiana and ET AL defendants." In my view, this request clearly does not meet the stringent requirements set forth in LSA-R.S. 13:5107(D). Although Thomas did file a "valid and effective request" for citation and service of pleadings naming the attorney general and secretary of the DOTD on June 27, 2005, this request was not made within the requisite ninety-day time period set forth in LSA-R.S. 13:5107(D).

Regarding Thomas' complaints that his failures should be excused because he did not have access to a law library, we note that from February 25, 2005, to May 16, 2005, Thomas was able to generate and file: four letters to the Clerk of Court for Lafourche Parish; a motion and order to proceed in forma pauperis; a motion and affidavit for the appointment of counsel; a petition and order for writ of habeus corpus ad testificandum; a motion and order requesting service of a petition; and a motion for discovery and for production of documents, photographs, videos, and records. Moreover, although Thomas complains in brief that "the Clerk of Court failed to notify [him] that names and addresses were needed to effectuate service," clearly, the clerk of court bears no responsibility to make the request for service of citation on behalf of a party filing an action in which the state is a party. Davis v. Huey P. Long Regional Medical Center, 2002-806 (La. App. 3<sup>rd</sup> Cir. 2/5/03), 841 So. 2d 7, 11.

The wording of LSA-R.S. 13:5107(D) is clear and unambiguous and does not lead to absurd consequences. See LSA-C.C. art. 9. Dismissal without prejudice for failure to serve a governmental defendant within ninety

days of the filing of the petition is mandatory. LSA-R.S.13:5107(D); Chinn v. Mitchell, 98-1060 (La. App. 1<sup>st</sup> Cir. 5/14/99), 734 So. 2d 1263, 1265-1266, writ not considered, 99-1772 (La. 7/2/99), 747 So. 2d 7. Thus, we should not disregard the clear meaning of the statute merely because Thomas elected to proceed in proper person herein. Accordingly, I find no error in the October 9, 2006 judgment of the trial court.

Also, to the extent that Thomas argues that he was denied his constitutional right to access the courts, I note that a prisoner alleging that he has been denied meaningful access to the courts must be able to demonstrate an actionable harm that he wished to bring before the courts. Lay v. Rachel-Major, 99-0476 (La. App. 1<sup>st</sup> Cir. 5/12/00), 761 So. 2d 723, 727 (citing Lewis v. Casey, 518 U.S. 343, 351, 116 S.Ct. 2174, 2180, 135 L.Ed.2d 606 (1996)). Notably, in addition to being allowed to file numerous pleadings and letters into the record during the same period that he claims he was denied access to the courts, Thomas was transported to the district court on April 28, 2006 and was present for the hearing on the DOTD's declinatory exception of insufficiency of service of process.

Moreover, despite his claim that he was denied access to the courts, he was able to file a request for service of process on April 25, 2005. Although this request, in my view, and in actual fact, was insufficient for citation and service of process against the DOTD under LSA-R.S. 13:5107(D), in that it failed to name the attorney general or proper agent for the DOTD, these deficiencies are solely attributable to Thomas. Any claim by Thomas that his fault should be attributed to the clerk of court for failing to advise him or to give further advice as to how he should effectuate service of process should be rejected by this court. The fact that Thomas was able to file a motion

requesting service of process, but did so incorrectly, does not deny him access to the courts. See Lay v. Rachel-Major, 761 So. 2d at 727.

Thus, under this analysis, Thomas' April 28, 2005 "motion" for service is simply not sufficient under this statute and I would affirm the judgment of the trial court. Accordingly, I respectfully dissent.

JAMES THOMAS, SR., LUCILLE MARIE  
LANDRY, JACOB ALLEN THOMAS,  
CHELSEA MARIE LANDRY, LEXIE LYNN  
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BEFORE: WHIPPLE, GUIDRY, PETTIGREW, McCLENDON, AND HUGHES, JJ.

PETTIGREW, J., CONCURS, AND ASSIGNS REASONS.

PETTIGREW, J., concurring.

I am of the opinion that we are compelled to follow our previous case, **Thomas v. State**, 2006-0129 (La. App. 1 Cir. 11/3/06)(unpublished opinion). The dissenters' attempt to make a distinction between proper procedure under La. Code Civ. P. arts. 1201 and 1672 and, in this appeal, La. R.S. 13:5107, dealing with state agencies. There seems to be an inconsistency between **Barnett v. Louisiana State University Medical Center-Shreveport**, 2002-2576 (La. 2/7/03), 841 So.2d 725, and our previous unpublished **Thomas** case, 2006 CA 0129, and this present appeal. The dissenters make the point that the supreme court found that La. R.S. 13:5107(D)(1) provides that service shall be requested within 90 days of the commencement of the action and, moreover, service must be "accurate" and "upon the proper agent for defendant". Louisiana Revised Statutes 13:5107(D)(1) does not contain the language "service must be accurate and upon the proper agent for defendant." That language was utilized in the legal reasoning of the supreme court in the **Barnett** decision, but is not found in La. R.S. 13:5107(D)(1). Further, the **Barnett** decision was not limited strictly to La. R.S. 13:5107. The court was also discussing Articles 1201(C) and 1672(C).

Article 1201(C) provides "Service of the citation shall be requested on all named defendants within ninety days of commencement of the action." Louisiana Revised Statutes 13:5107(D)(1) provides "service of citation shall be requested within ninety days of the commencement of the action." Article 1672(C) provides for dismissal

without prejudice unless good cause is shown why service should not be requested. The same type of dismissal is provided for in La. R.S. 13:5107(D)(2) if service is not timely requested and good cause is not shown for lack of service.

In the previous **Thomas** case, as to Barriere Construction's motion for involuntary dismissal, we held that Thomas' confinement limited his access to information regarding service of process, thus finding "good cause" for the delay in service. I feel we are now compelled to follow this same reasoning in the present case concerning Thomas' requested service upon the State of Louisiana.

Accordingly, for the above and foregoing reasons and based on our holding in our previous **Thomas** case, I concur with the majority.