NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0282

SAMUEL D. WEAVER AND SUSAN WEAVER, INDIVIDUALLY AND ON BEHALF OF THE MINOR CHILDREN, SAMANTHA AND LUKE WEAVER

VERSUS

THE STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

On Appeal from the 17th Judicial District Court
Parish of Lafourche, Louisiana
Docket No. 114,874, Division "B"
Honorable Jerome J. Barbera, III, Judge Presiding

BJC by TMH
RHP by TMH
TMH

Jerry L. Hermann
Kopfler & Hermann (L.C.)
Houma, LA

Attorney for
Plaintiffs-Appellants
Samuel D. Weaver and
Susan Weaver, et al.

James D. "Buddy" Caldwell
Attorney General
Susan H. Lafaye
Assistant Attorney General
New Orleans, LA

Attorneys for
Defendant-Appellee
The State of Louisiana through the
Department of Transportation and
Development

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered SEP 30 2011

PARRO, J.

Plaintiffs, Samuel D. Weaver and Susan Weaver, individually and on behalf of their minor children, Samantha and Luke Weaver, appeal the judgment of the trial court dismissing their petition for damages, without prejudice. For the reasons that follow, we affirm in part, reverse in part, and remand the matter to the trial court for further proceedings.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This matter involves a single-vehicle accident that occurred in Lafourche Parish on June 1, 2009, while Mr. Weaver was traveling in a westerly direction on U.S. Highway 90 (U.S. 90) at its overpass of La. Highway 182. As Mr. Weaver's vehicle proceeded in a lawful manner in the left lane of the overpass, Mr. Weaver allegedly encountered a large tire tread in his lane. To avoid striking this debris, Mr. Weaver immediately veered to his left and onto the shoulder of U.S. 90. However, the shoulder of U.S. 90 allegedly had a major defect in a tie-in joint, which caused a huge elevation difference from one side of the joint to the other. When Mr. Weaver's left front tire struck the defective tie-in joint on the shoulder, Mr. Weaver lost control of his vehicle, causing the vehicle to veer to the left and strike the barrier on the overpass. As a result of the accident, Mr. Weaver allegedly sustained serious injuries.

On April 27, 2010, the Weavers filed a petition, in which Mr. Weaver sought damages for the injuries he sustained in the accident. In addition, Mrs. Weaver and the Weavers' minor children sought damages for the loss of consortium they sustained as a result of Mr. Weaver's injuries. The petition named the State of Louisiana through the Department of Transportation and Development (DOTD) as the sole defendant and requested service on the DOTD through its secretary, William Ankner and/or Sherry LeBas. Service was perfected on William Ankner on May 4, 2010.

On October 7, 2010, without filing any additional responsive pleadings, the DOTD filed a declinatory exception pleading the objection of insufficiency of service of process, contending that the plaintiffs had failed to request service on the Attorney

General as required by LSA-R.S. 13:5107 and LSA-R.S. 39:1538. Specifically, the DOTD argued that the plaintiffs had failed to request service on the Attorney General within ninety days of the date of the filing of the petition and that their failure to do so required the dismissal of the petition. Once the DOTD raised the issue of insufficiency of service, the plaintiffs allegedly served the Attorney General and the Office of Risk Management; however, there is no evidence of this service in the record. After a hearing, the trial court sustained the exception and dismissed the plaintiffs' petition, without prejudice, apparently because of the plaintiffs' failure to request service on the Attorney General within ninety days of the filing of the petition. The plaintiffs filed a motion for new trial, which the trial court denied. The plaintiffs have appealed.

DISCUSSION

The sole issue in this matter is whether the plaintiffs' failure to request service on the Attorney General within ninety days of the date of the filing of the petition requires dismissal of the petition pursuant to LSA-R.S. 13:5107 and LSA-R.S. 39:1538.[1] This issue was recently addressed by the Louisiana Supreme Court in Whitley v. State ex rel. Bd. of Sup'rs of Louisiana State University Agr. Mechanical College, 11-0040 (La. 7/1/11), 66 So.3d 470.[2]

In Whitley, the plaintiff was a patient at the Louisiana State University Health Sciences Center – Medical Center of Louisiana at New Orleans – University Campus (Medical Center), who received treatment at the Medical Center following an accident that occurred in May 2003. On July 7, 2003, Ms. Whitley delivered a stillborn infant. Thereafter, she filed a petition for medical malpractice against the Medical Center, seeking damages arising from negligence in the medical care provided to her and her unborn child after the accident. At the time of filing, Ms. Whitley requested service only

[1] Although LSA-R.S. 39:1538(4) also provides for service on the Office of Risk Management, the issue of service on that entity was not raised by the DOTD in its exception before the trial court. Furthermore, the plaintiffs and the defendant have not raised the issue in their briefs to this court. Therefore, the issue is not before this court.

[2] The supreme court also dealt with this issue in a companion case, Burnett v. James Const. Group, 10-2608 (La. 7/1/11), 66 So.3d 482. However, the facts of Burnett are different from those of the case before this court; therefore, we will focus on the Whitley case.

on the Chairman of the Louisiana State University Board of Supervisors. More than two years later, Ms. Whitley's counsel faxed copies of the citation and the pleadings to the Attorney General and the Office of Risk Management. The Medical Center then filed a declinatory exception pleading the objection of insufficiency of service of process, seeking the dismissal of Ms. Whitley's suit based on her alleged failure to comply with the service requirements of LSA-R.S. 13:5107 and LSA-R.S. 39:1538. The exception was overruled by the trial court, and the appellate court denied the Medical Center's application for a supervisory review of the trial court's ruling. The supreme court subsequently granted the Medical Center's application for a supervisory writ in order to determine whether the request for service on the Medical Center alone was sufficient under LSA-R.S. 13:5107 and LSA-R.S. 39:1538, or whether service on the Attorney General and the Office of Risk Management was also required. Whitley, 66 So.3d at 470-73.

At the time Ms. Whitley filed her petition and the judgment in her case was rendered by the trial court, LSA-R.S. 13:5107 provided, in pertinent part:[3]

> A. 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.
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> 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. This requirement may be expressly waived by the defendant in such action by any written waiver.
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> (2) If service is not requested by the party filing the action within that

[3] This version of the statute applicable in Whitley was the same version applicable at the time the Weavers filed their petition in this matter on April 27, 2010.

> period, 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, who has not been served.[4]
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> (3) When the state, a state agency, or a political subdivision, or any officer or employee thereof, is dismissed as a party pursuant to this Section, the filing of the action, even as against other defendants, shall not interrupt or suspend the running of prescription as to the state, state agency, or political subdivision, or any officer or employee thereof; however, the effect of interruption of prescription as to other persons shall continue.

After a thorough interpretation of the language of LSA-R.S. 13:5107(A), the Whitley court determined that the phrase, "may be obtained," modified all of the phrases after it, including those appearing after the conjunctive "and." The supreme court therefore concluded that, from a grammatical standpoint, the statute should read that citation and service:

> 1. 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
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> 2. may be obtained by citation and service 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
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> 3. may be obtained by citation and service 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.

Whitley, 66 So.3d at 477. The court further concluded that, "[p]roviding permission to request service on the [Attorney General] and the head of the agency does not impose a requirement that the plaintiff's request for service pertain to both." Id. In support of this conclusion, the court focused on the legislature's use of the permissive term "may,"

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[4] Paragraph (D)(2) has since been amended to provide as follows:

> 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.

Although the earlier version of this paragraph was in effect when the Weavers filed their petition in the matter currently before this court, it was the amended version of the paragraph that was in effect when the judgment at issue was rendered.

rather than the mandatory terms "shall" or "must." Id.

The supreme court also noted that, pursuant to LSA-R.S. 13:5107(D)(2), when service is not requested by the plaintiff within ninety days of the commencement of the action, the action shall be dismissed, without prejudice, after contradictory motion, as provided in LSA-C.C.P. art. 1672(C). When such a dismissal occurs, prescription is not interrupted as to the state defendants. LSA-R.S. 13:5107(D)(3). Considering this harsh consequence and the policy favoring maintaining actions, the court concluded that, if the legislature's word choice made LSA-R.S. 13:5107(A) susceptible to two possible constructions, the statute should be construed in such a manner as to maintain the claim. Id. at 478. Accordingly, the court determined that Ms. Whitley's request for service of citation on the Medical Center satisfied the requirement of LSA-R.S. 13:5107(A) and (D) and afforded the Medical Center an opportunity to request the legal representation to which it was entitled. Id. at 479.

The court then addressed the provisions of LSA-R.S. 39:1538 to determine whether the Medical Center was entitled to dismissal of Ms. Whitley's claim pursuant to LSA-C.C.P. art. 1672(C) for failure to also serve the Attorney General and the Office of Risk Management, as required by LSA-R.S. 39:1538(4), within ninety days of the commencement of her action. See LSA-R.S. 13:5107(D). Louisiana Revised Statute 39:1538 provides:

> (1) Claims against the state or any of its agencies to recover damages in tort for money damages against the state or its agencies for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment under circumstances in which the state or such agency, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted in accordance with the provisions specified in this Chapter. However, immunity for discretionary acts of executive, legislative, and judicial officers within the scope of their legally defined powers shall not be abridged.
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> (2) The state and its agencies shall be liable for claims in the same manner and to the same extent as a private individual under like circumstances.
>
> (3) A judgment may be settled in accordance with R.S. 39:1535(B)(6).

> (4) In actions brought pursuant to this Section, 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 R.S. 13:5107. However, there shall be no direct action against the Self-Insurance Fund and claimants, with or without a final judgment recognizing their claims, shall have no enforceable right to have such claims satisfied or paid from the Self-Insurance Fund.

The Whitley court noted that the legislature used the mandatory term "shall" in LSA-R.S. 39:1538(4), which clearly required that service of process be effected on three entities/persons: (1) the department head, (2) the Attorney General, and (3) the Office of Risk Management. Ms. Whitley initially requested service only on the Medical Center's department head.[5] Therefore, the Medical Center contended that Ms. Whitley's action should have been dismissed because of her failure to request service on the Attorney General and the Office of Risk Management within ninety days from the filing of the petition. Id. at 479.

The supreme court noted that, while the language of LSA-R.S. 39:1538(4) clearly required that all three entities/persons be served, nothing in that statutory provision required that service be requested on them within the ninety-day period immediately following the commencement of the action. Indeed, the court noted that LSA-R.S. 39:1538(4) addressed "service" as opposed to "request for service" and concerned service of "process" as opposed to "service of citation." The court further noted that, unlike the provisions of LSA-R.S. 13:5107(D), LSA-R.S. 39:1538(4) did not mandate that service of citation be requested within ninety days of the filing of the petition or that the failure to do so warranted the dismissal of the action pursuant to LSA-C.C.P. art. 1672(C).[6] Id. at 480-81.

The facts of the matter currently before this court are nearly identical to those in the Whitley case. The Weavers filed a petition naming the DOTD as the sole defendant,

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[5] The Chairman of the Louisiana State University Board of Supervisors was referred to as the "department head" by the supreme court.

[6] The court further noted that the requirement for service, or request for service, within ninety days and the corresponding dismissal for failure to do so, found in LSA-C.C.P. art. 1672(C) and other articles in the Louisiana Code of Civil Procedure, is limited to "named defendants." The Attorney General and the Office of Risk Management were not defendants, and the department head was not a named defendant. Whitley, 66 So.3d at 481.

and properly requested service on the DOTD through its secretary. There is no dispute that this service was properly effected. Only after the ninety-day period had elapsed did the DOTD file any challenge to the lack of service or request for service on the Attorney General. Based on the supreme court's holding in Whitley, it is clear that the Weavers' request for service on the DOTD was sufficient under the provisions of LSA-R.S. 13:5107(A) and (D) and LSA-R.S. 39:1538.

However, while LSA-R.S. 39:1538(4) does not mandate that service be requested on the Attorney General within ninety days following the commencement of the action, the plaintiffs are required to effect service on the Attorney General in this matter. Failure to do so entitles the DOTD to have its declinatory exception pleading the objection of insufficiency of service of process sustained by the trial court, as occurred in this matter. See LSA-C.C.P. art. 925(A)(2). Nevertheless, the trial court erred in dismissing the plaintiffs' action, because LSA-R.S. 39:1538 does not establish a time limit within which service pursuant to the statute must be made, nor does it set forth a sanction for failure to effect such service. Therefore, the DOTD's objection of insufficiency of service of process on the Attorney General may be cured by the plaintiffs' service of process on the Attorney General.[7] Whitley, 66 So.3d at 481.

CONCLUSION

Accordingly, that portion of the trial court judgment sustaining the declinatory exception of insufficiency of service of process as to the Attorney General filed by the State of Louisiana through the Department of Transportation and Development is affirmed, while that portion of the judgment dismissing the plaintiffs' petition, without prejudice, is reversed. This matter is remanded to the trial court for further proceedings. The costs of this appeal in the amount of $368.50 are assessed equally to the parties.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[7] As noted previously, the Weavers contend that they have already served the Attorney General and the Office of Risk Management. While the defendant has not contested this allegation, there is no evidence in the record to support it. Accordingly, we are constrained by the evidence in the record to affirm the judgment of the trial court insofar as it sustained the DOTD's exception of insufficiency of service of process.