

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

CARL CAVALIER

CIVIL ACTION NO: 3:21-cv-00656

VERSUS

JUDGE: JOHN W. deGRAVELLES

**STATE OF LOUISIANA:
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONS: PUBLIC SAFETY
SERVICES; OFFICE OF STATE POLICE;**

**MAGISTRATE JUDGE: RICHARD L.
BOURGEOIS, JR.**

MEMORANDUM IN OPPOSITION TO RULE 12(B) MOTION TO DISMISS

MAY IT PLEASE THE COURT:

FACTS:

On September 30, 2021, plaintiff, Mr. Cavalier, filed his Petition in the 19th Judicial District, in proper person. Rec. Doc. 1-2. Defendant LSP was served October 12, 2021. He subsequently filed, also in proper person, and Amended Petition on October 25, 2021. Rec. Doc. 1-2. Defendant LSP was served November 3, 2021. Defendant LSP removed this matter on November 10, 2021, based upon Mr. Cavalier's original assertion of claims arising under Federal law (federal question jurisdiction) and his claims arising under State law (supplemental jurisdiction).

Mr. Cavalier subsequently retained undersigned counsel who formally enrolled December 10, 2021. Thereafter, on January 14, 2022, Mr. Cavalier's Second Supplemental, Amending, and Restated Complaint was filed of record.

In the interim and following its removal to this Court, defendant LSP filed a Rule 12(b) Motion to Dismiss contending: 1) lack of service under Fed.R.Civ.P. Rule 4; 2) lack of jurisdiction (even though this matter was removed by the defendant to this Court); and, 3) failure to state claims

under 42 U.S.C. §§1981 and 1983 and La. R.S. 23:967. It is respectfully submitted defendant's Motion is moot, particularly as it stands with the current record.

LAW AND ARGUMENT:

Legal Standard

Fed.R.Civ.P. 12(b)(6) permits a party to move for a dismissal for failure to state a claim upon relief can be granted.¹ These motions are viewed with disfavor and rarely granted.² The Court must take the allegations as true and evaluate the facts in a light most favorable to the non-moving party.³ All doubts as to the sufficiency of the claim must be resolved in favor of the plaintiff.⁴

To survive the instant Motion, Mr. Cavalier need only set forth a claim for relief which is plausible on its face.⁵ A claim has facial plausibility when the pleaded factual content allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged.⁶ As evident on the face of the pleadings, Mr. Cavalier sets forth facially plausible claims.

1. Service of Process

Defendant LSP argues Mr. Cavalier did not "timely serve" LSP and that service on LSP was otherwise improper. This case was originally filed in State Court on September 30, 2021. At the time of filing, Mr. Cavalier requested service on the following:

Louisiana State Police
Colonel Lamar Davis
7979 Independence Boulevard
Office of Legal Affairs, Suite 307
Baton Rouge, LA 70806

State of Louisiana
through Attorney General Jeff Landry
1883 North 3rd Street
Livingston Building
Baton Rouge, LA 70802

¹ Fed. R. Civ. P. 12(b)(6).

² *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

³ *Id.* at 1051.

⁴ *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 383, 387 (5th Cir. 2001).

⁵ *Bell Atlantic Corp., v. Twombly*, 550 U.S. 544, 555 (2007).

⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Louisiana law, specifically, La. C.C.P. Art. 1201 provides, in pertinent part:

C. Service of the citation shall be requested on all named defendants within ninety days of commencement of the action. . .

D. If not waived, a request for service of citation upon the defendant shall be considered timely if requested on the defendant within the time period provided by this Article, **notwithstanding insufficient or erroneous service**. (emphasis added)

Very clearly, Mr. Cavalier requested service on defendant LSP contemporaneously with filing this lawsuit and it was/is therefore timely. Indeed, La. C.C.P. Art. 1201 which governed this action as originally filed in State Court, also provides that even if Mr. Cavalier had requested service on LSP by an insufficient or otherwise erroneous means, the fact that he made the service request within ninety (90) days renders it timely.

Pursuant to La. R.S. 13:5107,

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 **upon 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 identify of the named board, commission, department, agency, or officer through which or through whom suit is to be filed against. (emphasis added)

* * *

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

Mr. Cavalier contemporaneously requested service on the State of Louisiana, Department of Public Safety and Corrections, Public Safety Services, Office of State Police, through the Head of the Office of State Police, Colonel Lamar Davis. In addition, and as provided at La. R.S. 13:5107, Mr. Cavalier requested (and obtained) service upon the attorney general, Mr. Landry. According to the law, service on Attorney General Landry of this lawsuit constitutes proper service coupled with service on the Agency Head for State Police, Superintendent Davis.

Here, LSP argues that service should have been requested and made upon Department of Public Safety and Corrections Secretary James LeBlanc instead of LSP Superintendent Davis. Aside from the fact service is proper, it is important to note that this same defendant, represented by identical counsel, recently argued entirely to the contrary. In the matter entitled, “*James White, et al. v. Jordan Ward, et al.*”, Docket No. 708,628, Section 22, defendant State of Louisiana, Department of Public Safety and Corrections, Office of State Police (same defendant as in this lawsuit) argued that service in the *White* case made upon Secretary LeBlanc was “improper” and, instead, service should have been made on Superintendent Davis because the claims were against State Police.⁷

Under the law, Mr. Cavalier timely (and contemporaneously) requested service on Superintendent Davis, the Head of the Louisiana State Police, an Agency of the State of Louisiana and on Attorney General Landry. Service is both timely and proper.

Regarding defendant’s contentions that service was improper under Fed.R.Civ.P. Rule 4(j)(2) and (m), 28 U.S.C. §1448 provides,

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court. . .

Rule 4(j)(2) bespeaks service on a state or “other state-created governmental organization” by service in a manner prescribed by state law. Rule 4(m) merely provides for service within ninety

⁷ Attached hereto and made part hereof are the Exceptions (and Incorporated Memorandum in Support Thereof) to Plaintiffs’ Petition and Motion to Strike filed by this same defendant, represented by identical counsel. As noted at pages 3-4 this same defendant and its counsel argued that service of the *White* suit asserting claims against State Police was insufficient because service had been requested upon: State of Louisiana, Department of Public Safety and Corrections, Office of State Police, through Secretary James LeBlanc (see fn 4 at p. 4). Yet, here, this same defendant argues service is somehow “not proper” and/or is “insufficient” because it was served on Superintendent Lamar Davis – the exact contrary to what this defendant and counsel argued only a few months ago. These Exceptions in *White* have not been decided.

(90) days after a complaint is filed. In this removed action, defendant LSP was served in accordance with the applicable provisions of Louisiana law and service was requested contemporaneously with the original State Court filing. In addition to service upon the Agency through LSP Head, Lamar Davis, Mr. Cavalier also served Attorney General Landry.

Since enrollment by counsel, Mr. Cavalier additionally served Attorney General Landry (again), Rec.Doc. 10, and the State of Louisiana Office of Risk Management, Rec.Doc. 9. Pursuant to La. R.S. 39:1538D, service was requested and made on the Louisiana Office of Risk Management. Service has also been requested and Summons issued for Superintendent Davis. Therefore, service in this matter is not only timely, but proper.

2. Failure to State a Claim under §§ 1981 and 1983

On January 14, 2022, plaintiff's Second Supplemental, Amending, and Restated Complaint was filed of record. Plaintiff removed reference to 42 U.S.C. §1981 and makes no claim thereunder. Defendant's Motion in that regard is moot.

By virtue of his recent amendment, Mr. Cavalier added, as a party defendant, Lamar Davis, individually and in his official capacity as the §1983 defendant. In the Second Supplemental, Amending, and Restated Complaint, Mr. Cavalier makes the following allegations for the purposes of his §1983 claims against defendant Davis:

16.

On November 23, 2021, Complaint received a document from defendants, dated November 18, 2021, stating that defendants, through defendant Davis, 'ordered' the 'termination' of Complainant. Defendants admitted in the November 18, 2021, document that they were firing Complainant because Complainant exercised his Constitutional Right(s) by speaking publicly about defendants' violations of law and matters of public concern on June 9, 2021, June 22, 2021, July 25, 2021, July 28, 2021, and August 26, 2021.

...

** *

19.

At all times pertinent hereto, defendant Davis was as (sic) person acting under color of authority within the meaning and intent of 42 U.S.C. §1983, as Complainant's 'Appointing Authority' and as Superintendent of LSP. Complainant shows at all times pertinent hereto, he enjoyed the clearly established rights to write his book, to speak, and to express as contained in his book, to speak to the press and express his opinions, to protest and oppose unlawful race-based discrimination, harassment, and retaliation in the workplace, racism, assault, battery, false imprisonment, and excessive force pursuant to the 1st Amendment to the United States Constitution. Complainant shows that he was subjected to retaliation/reprisal for exercising his 1st Amendment Rights. Complainant shows that defendant Davis violated his clearly established rights as set forth herein and is liable unto him pursuant to 42 U.S.C. §1983, for which he sues for herein.

** *

22.

Complainant contends defendant Davis is liable unto him for attorney fees pursuant to 42 U.S.C. §1988. . .

23.

Complainant contends the actions and/or inactions of defendant Davis were deliberate and in reckless disregard for his clearly established rights and therefor, defendant Davis is liable unto Complainant for punitive damages under 42 U.S.C. §1983.

The §1983 claims are posited solely and only against defendant Davis. As supplemented, amended, and restated, Mr. Cavalier's Complaint makes that clear.⁸

In accord with *Iqbal* and *Twombly*, Mr. Cavalier sets forth his 1st Amendment retaliation claim cognizable under §1983 with facial plausibility. First Amendment retaliation claims arise where, as here, the state actor retaliates against the public employee on account of the employee's assertion of rights protected under the 1st Amendment. Mr. Cavalier claims defendant Davis threatened him, harassed him, placed him on forced annual leave, subjected him to false accusations, stripped his job duties, reassigned him to an undesirable position, reduced his overtime pay, suspended him, and terminated him. ¶¶7-14. Mr. Cavalier contends defendant Davis subjected him to retaliation because Mr. Cavalier publicly spoke out about and against specifically identified violations of law (¶¶5, 12, 20) violations of law on several, specifically

⁸ Defendant's references to *Monell* liability are similarly moot as Mr. Cavalier makes no claim for "municipal"/respondeat superior liability in the present action. Instead, Mr. Cavalier's §1983 claims against defendant Davis arise solely as a result of his acts, as alleged by the plaintiff, and not derivative of the acts of others.

identified occasions (¶16), and he wrote a book – the contents of which were “highly critical of defendant DPSC” (¶¶10, 14, 16, 19).

It is well-settled that a State may not condition public employment on a basis that infringes upon the employee’s constitutionally-protected freedom of expression.⁹ While *Garcetti* ultimately held the protection may not extend where a public employee speaks as required by or pursuant to his official duties, that is not a consideration present here (and, indeed, not one considered on a Rule 12(b)(6) Motion to Dismiss confined to the face of the pleadings). In this case, Mr. Cavalier plausibly alleges he was retaliated against for exercising his First Amendment rights. A First Amendment retaliation claim arises where: 1) one engages in protected activity; 2) adverse/tangible action occurs; 3) a causal connection exists between the two.

Mr. Cavalier alleges defendant Davis, a state actor, retaliated against him because he engaged in activities protected by the 1st Amendment. In his Complaint, Mr. Cavalier sets forth facts establishing causation, in addition to alleging causation, which include direct threats by defendant Davis and others at Davis’ direction because of the protected speech. On analysis pursuant to Rule 12(b)(6), Mr. Cavalier plausibly sets forth his §1983 claim against defendant Davis.

Among the protected activities by Cavalier were his protests and speech concerning “excessive force, assault, battery, false imprisonment, and violations of Constitutional Rights by LSP employee(s) against a civilian(s), including Ronald Greene which resulted in Mr. Greene’s death, and malfeasance in office and/or abuse of office by LSP employee(s) and supervisors resulting from attempts to and an actual cover up of the events leading to and causing the death of Mr. Greene.” ¶5. Aptly stated by the Supreme Court, “[G]overnment employees are often in the

⁹ *Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Garcetti v. Ceballos*, 547 U.S. 410, 413, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006)

best position to know what ails the agencies for which they work.”¹⁰ In *Kinney v. Weaver*, 367 F.3d 337, 369 (5th Cir. 2004), the Court stressed, “[G]iven that it is well-established in the jurisprudence of both the Supreme Court and this court that official misconduct is of great First Amendment significance, and that this court has repeatedly emphasized the need to protect speech regarding police misconduct in particular, see, e.g. *Browner*, 855 F.2d at 192, it would have been objectively unreasonable for an officer to conclude that [the testimony/speech regarding police misconduct] was anything other than **highly valuable speech.**” (emphasis added) Not only was Mr. Cavalier’s speech “highly valuable”, but it is precisely the nature and kind of speech for which 1st Amendment protections exist. Here, although not a consideration at this stage, the evidence will show that but for Mr. Cavalier’s speech regarding the death of Ronald Greene, Mr. Greene’s death would have remained classified as a “single car accident” and not the vicious beating it actually was.

In addition to speech by Mr. Cavalier exposing government misconduct and corruption, Mr. Cavalier alleges he spoke about and opposed racial discrimination within the ranks of State Police. This, too, is the kind of speech for which the 1st Amendment exists and is among the very ilk likewise considered “highly valuable.”

On the face of the Complaint, as Supplemented, Amended, and Restated, Mr. Cavalier sets forth his engagement in activities protected under the 1st Amendment.

Mr. Cavalier alleges defendant Davis took tangible actions against him as a result of (causation) his protected activities. Not only does Mr. Cavalier allege defendant Davis terminated him on account of his speech, but also that defendant Davis threatened him, denied him leave, removed overtime, job duties, reassigned him to an undesirable reassignment with significantly

¹⁰ *Waters v. Churchill*, 511 U.S. 661, 674, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994)

different duties and for which he had no training or experience, suspended him, and harassed him. These actions are “materially adverse” and, here, resulted in not only the loss of his job, but significant instances of loss of pay, including suspensions, restricted overtime, and forced leave.

On the face of the Complaint, as Supplemented, Amended, and Restated, Mr. Cavalier sets forth the actionable instances of retaliation by defendant Davis.

Mr. Cavalier alleges causation. Factually, Mr. Cavalier cites several actions by defendant Davis, including at ¶6, Davis’ response to the racial complaints with threats and directing him to read a book about blindly following orders and that defendant Davis responded to Cavalier’s protected activities with punishments, terminating him precisely because of Cavalier’s speech.

On the face of the Complaint, as Supplemented, Amended, and Restated, Mr. Cavalier sets forth causation on the part of defendant Davis.

3. Claims under La. R.S. 23:967

Mr. Cavalier alleges defendant LSP, his employer, engaged in unlawful reprisal in violation of La. R.S. 23:967. It is parenthetically noted that defendant LSP could not ordinarily be directly sued in Federal Court for this State law violation but for the fact the State defendant removed (and therefore consented) this matter – supplemental jurisdiction notwithstanding. Enacted in 1999, La. R.S. 23:967, entitled “Employee protection from reprisal; prohibited practices; remedies”, provides, in pertinent part:

A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:

- (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
- (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.
- (3) Objects to or refuses to participate in an employment act or practice that is in violation of law.

...

C. For the purposes of this Section, the following terms shall have the definitions ascribed below:

(1) “Reprisal” includes firing, layoff, loss of benefits, or any discriminatory action the court finds was taken as a result of an action by the employee that is protected under Subsection A of this Section; however, nothing in this Section shall prohibit an employer from enforcing an established employment policy, procedure, or practice or exempt an employee from compliance with such. . . .

Each subpart under (A), operates as self-defined. In this case, Mr. Cavalier asserts his protected activities under La. R.S. 23:967 fall within the ambit of subparts (1), (2), and (3). He alleges he disclosed and threatened to disclose unlawful racism within LSP, police abuse, and ensuing coverup(s) (subpart A(1)) to LSP, the media, and others. He alleges he reported race-based discrimination, harassment, and retaliation, police abuse, and ensuing coverup(s) (subpart A(2)) to Louisiana State Legislative Representative(s) and the Governor. He alleges he objected to employment acts and practices in violation of law (subpart A(3)).

Not only does Mr. Cavalier set forth details of the illegal acts which serve as the predicate for relief, but also, at paragraph 20, specifically sets forth the State and Federal laws which were violated. Mr. Cavalier alleges as a result of his protected activities under La. R.S. 23:967, he was subjected to acts of “reprisal”, “including retaliatory harassment, threats to his job, forcing him out on leave although Complainant was fit for duty and able to work , falsely accusing him of violating policy, stripping his significant and material job duties, transferring him to an undesirable position and department, reducing his ability to earn overtime pay, restricting his ability to accrue annual leave, suspending him for two hundred (200) hours, and firing him for false reason(s)”. ¶20.

In short, on the face of his Complaint, as Supplemented, Amended, and Restated, Mr. Cavalier plausibly sets forth his claim against his employer, defendant LSP, under La. R.S. 23:967.

CONCLUSION:

Defendant's Motion should be denied. Very clearly, proper and timely service of defendant LSP has occurred and, even after removal, Mr. Cavalier secured service of Summons and process upon the Louisiana Office of Risk Management within ninety (90) days. In his Complaint, as Supplemented, Amended, and Restated, Mr. Cavalier sets forth his §1983 1st Amendment retaliation claim against defendant Davis and his La. R.S. 23:967 reprisal claim against his employer, defendant LSP.

Respectfully submitted,

By: ___/s Jill L. Craft_____
Jill L. Craft, T.A., La. Bar Roll #20922
W. Brett Conrad, Jr., La. Bar Roll #37639
Jill L. Craft, Attorney at Law, LLC
329 Saint Ferdinand Street
Baton Rouge, Louisiana 70802
(225) 663-2612

CERTIFICATE OF SERVICE

I hereby certify that I filed the above and foregoing Memorandum in Opposition using the Court's electronic filing system, CM/ECF and that service has been made upon trial counsel of record for all parties hereto via electronic means and, in the instance of newly added defendant Davis, by delivering a copy by mail via First Class United States mail, properly addressed with sufficient postage affixed thereto.

Baton Rouge, Louisiana, this 20th day of January, 2022.

_____/s/Jill L. Craft_____
Jill L. Craft

EAST BATON ROUGE PARISH
Filed Jul 22, 2021 8:38 AM
Deputy Clerk of Court
E-File Received Jul 21, 2021 3:04 PM
C-708618
22

JAMES WHITE, JR., ET AL. * 19TH JUDICIAL DISTRICT COURT
*
VERSUS * DOCKET NO. 708618 SEC 22
*
JORDAN WARD, ET AL. * EAST BATON ROUGE PARISH, LOUISIANA

**EXCEPTIONS (AND INCORPORATED MEMORANDUM IN SUPPORT THEREOF)
TO PLAINTIFFS’ PETITION AND MOTION TO STRIKE**

Defendants, Louisiana Department of Public Safety & Corrections (Office of State Police) (“DPSC”) and Trooper John Sims (“Sims”), Trooper Randall Thomas (“Thomas”), Trooper Sam Lorio (“Lorio”) & Trooper William Beasley (“Beasley”) (collectively referred to herein as “the Trooper Defendants”), submit these exceptions to Plaintiffs’ petition and this motion to strike Plaintiffs’ request for *in solido* relief:

In accordance with the requirements of Rule 9.8(a) of the Louisiana District Court Rules, undersigned counsel hereby notifies the Clerk of Court that: (1) this case is not set for trial; and (2) no testimony will be presented at the hearing on these exceptions.

**LSA-C.C.P. ART. 925(A)(1) & (2) – INSUFFICIENT PROCESS/SERVICE OF PROCESS AND/OR
INSUFFICIENT CITATION**

Plaintiffs failed to properly serve the Trooper Defendants. After all, the Trooper Defendants are individuals who could have been served through one of two means: personal service or domiciliary service.¹ Yet service in this case on the Trooper Defendants was achieved through neither means. Therefore, service of the original petition on them is challenged as improper and/or insufficient.

As evidenced by the court record, citations were issued for service as follows:

Trooper John Sims
At his place of employment
Louisiana State Police, Troop I
121 E Pont Des Mouton Road,
Lafayette, Louisiana 70507

Trooper Sam Lorio
At his place of employment
Louisiana State Police, Troop I
121 E Pont Des Mouton Road,
Lafayette, Louisiana 70507

Trooper William Beasley
At his place of employment
Louisiana State Police, Troop I
121 E Pont Des Mouton Road,
Lafayette, Louisiana 70507

¹ See LSA-C.C.P. art. 1231.

Trooper Randall Thomas
 At his place of employment
 Louisiana State Police, Troop I
 121 E Pont Des Mouton Road,
 Lafayette, Louisiana 70507

The returns of service in the record as to the Trooper Defendants reflect as follows:

1. Beasley

Requesting Attorney: CONRAD, W BRETT, JR
 (225) 463-2612

*The following documents are attached:
 PETITION, VERIFICATION

SERVICE INFORMATION

Executed on the 21 day of June, 2021, and on the 24 day of June, 2021, served on the above named party at
 his/her residence:
 DEFENDANT SERVICE: On the party herein named as V. BEASLEY
Beasley
 DOMESTIC ABUSE SERVICE: On the party herein named as _____ by filing the same at the District Clerk's office in the hands of
 a person of suitable age and discretion residing in the parish wherein the
 SECRETARY OF STATE: By sending same to the addressee named, by handing same to
 DEFENDANT SERVICE: After diligent search and inquiry, was unable to find the addressee named _____ at his domicile, or at any
 legally authorized representative.

RETURNED: Parish of East Baton Rouge, the _____ day of _____, 2021

SERVICES: 30
 MILEAGE: 0
 TOTAL: 30

Conrad Brett
 Deputy Sheriff
 Parish of East Baton Rouge

CITATION 1001

L.S.O. Return 1196
 ACTUAL SERVICE MILEAGE: 0

RECEIVED
 JUN 24 2021
 BY: JP

2. Lorio

Requesting Attorney: CONRAD, W BRETT, JR
 (225) 463-2612

*The following documents are attached:
 PETITION, VERIFICATION

SERVICE INFORMATION

Executed on the 21 day of June, 2021, and on the 24 day of June, 2021, served on the above named party at
 his/her residence:
 DEFENDANT SERVICE: On the party herein named as V. LORIO
Lorio
 DOMESTIC ABUSE SERVICE: On the party herein named as _____ by filing the same at the District Clerk's office in the hands of
 a person of suitable age and discretion residing in the parish wherein the
 SECRETARY OF STATE: By sending same to the addressee named, by handing same to
 DEFENDANT SERVICE: After diligent search and inquiry, was unable to find the addressee named _____ at his domicile, or at any
 legally authorized representative.

RETURNED: Parish of East Baton Rouge, the _____ day of _____, 2021

SERVICES: 30
 MILEAGE: 0
 TOTAL: 30

Conrad Brett
 Deputy Sheriff
 Parish of East Baton Rouge

CITATION 1001

L.S.O. Return 1196
 ACTUAL SERVICE MILEAGE: 0

RECEIVED
 JUN 24 2021
 BY: JP

3. Sims

Requesting Attorney: CONRAD, W BRETT, JR
 (225) 463-2612

*The following documents are attached:
 PETITION, VERIFICATION

SERVICE INFORMATION

Executed on the 21 day of June, 2021, and on the 24 day of June, 2021, served on the above named party at
 his/her residence:
 DEFENDANT SERVICE: On the party herein named as V. SIMS
Sims
 DOMESTIC ABUSE SERVICE: On the party herein named as _____ by filing the same at the District Clerk's office in the hands of
 a person of suitable age and discretion residing in the parish wherein the
 SECRETARY OF STATE: By sending same to the addressee named, by handing same to
 DEFENDANT SERVICE: After diligent search and inquiry, was unable to find the addressee named _____ at his domicile, or at any
 legally authorized representative.

RETURNED: Parish of East Baton Rouge, the _____ day of _____, 2021

SERVICES: 30
 MILEAGE: 9.2
 TOTAL: 39.2

Conrad Brett
 Deputy Sheriff
 Parish of East Baton Rouge

CITATION 1001

L.S.O. Return 1196
 ACTUAL SERVICE MILEAGE: 9.2

RECEIVED
 JUN 24 2021
 BY: JP

4. Thomas

Requesting Attorney: CONRAD, W. BIETT, JR.
(225) 663-2612

The following document is a PETITION, VERIFICATION

SERVICE INFORMATION:
 Received on the 21 day of June, 2021, and on the 24 day of June, 2021, served on the above named party at
 address: DPSC (State party being served at) ✓ R-C-536
 DOMICILIARY SERVICE: On the within named _____ by sending the same to the _____ in the hands of
 a person of legal age and discretion residing in the parish of _____
 SECRETARY OF STATE: By sending same to the _____ by _____
 CARE AND INTEREST: A fee of _____ was made to find the within named _____ or his domicile, or assign
 a party authorized to represent him.
 RETURNED: _____ of _____ Parish, _____
 SERVICES: 39
 FEE: 0
 TOTAL: 39
 CITATION: 000

ACTUAL SERVICE BILLAGE: 1196

RECEIVED
 JUN 24 2021
 BY: MP

Despite the service requests and returns in the record, service on the Trooper Defendants was insufficient because none of them were personally served with citation.² Citations for each instead were left with a secretary at Troop I. Hence, service of the petition on the Trooper Defendants is challenged as improper under the Louisiana Code of Civil Procedure.

Additionally, the purported service requests related to, citation to/for and/or service of citation on DPSC is insufficient if not obtained and/or effected in the manner proscribed in LSA-C.C.P. art. 1231, et seq., LSA-R.S. 13:5107(A) and/or LSA-R.S. 39:1538(D).³ Specifically,

² Exhibit A – Affidavit of Vanessa Polotzola (and Exhibit A-1, *in globo* attached thereto).

³ LSA-R.S. 13:5107(A) provides as follows:

- (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.
- (2) Service shall be requested upon the attorney general within ninety days of filing suit. This shall be sufficient to comply with the requirements of Subsection D of this Section and also Code of Civil Procedure Article 1201(C). However, the duty of the defendant served through the attorney general to answer the suit or file other responsive pleadings does not commence to run until the additional service required upon the department, board, commission, or agency head has been made.

LSA-R.S. 39:1538(D) provides as follows:

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

service should have been requested on DPSC, as well as the Office of Risk Management (“ORM”) and the Attorney General (“AG”). Here, although DPSC’s Superintendent works and maintains his office at 7919 Independence Boulevard, Baton Rouge, LA 70806, Plaintiffs requested service on DPSC elsewhere.⁴ Consequently, Plaintiffs have failed to satisfy the requirements of Section 5107 in terms of making a timely request for service.⁵ They likewise have failed to satisfy the requirements of Sections 5107 and 1538 in terms of effecting proper service on the AG, DPSC and ORM.⁶

This exception is asserted given the appearance that responsive pleadings on behalf of DPSC are now due, yet all service requests, citations and/or proof of proper service remain to be received by undersigned counsel. More specifically, this exception is urged to avoid waiver of any viable ground for dismissal under LSA-C.C.P. art. 1672 and/or waiver of any viable exceptions related to service of process and/or citation available to DPSC.⁷

recognizing their claims, shall have no enforceable right to have such claims satisfied or paid from the Self-Insurance Fund.

⁴ See “Sections of Louisiana State Police,” <http://www.lsp.org/sections.html> (last visited 7/19/2021), “Contact Information,” <http://www.lsp.org/contact.html> (last visited 7/19/2021) and “Louisiana State Police Headquarters,” <http://www.lsp.org/map.html> (last visited 7/19/2021).

See also LSA-Const. Art. 10 § 41(creating Louisiana State Police Service or “LSP”); LSA-R.S. 36:4 (characterizing DPSC as part of the State’s executive branch of government); and LSA-R.S. 36:403 (providing for a secretary of DPSC).

Colonel Lamar Davis is the Deputy Secretary of DPSC and the Superintendent of LSP. He has worked for LSP for more than 23 years and currently serves as the 26th Superintendent of LSP. See “Sections of Louisiana State Police →Superintendent,” <http://www.lsp.org/superintendent.html> (last visited 7/19/2021).

Yet, the service instructions provided on the last page of the petition direct service to be made as follows:

State of Louisiana,
Through the Department of Public Safety and Corrections, Office of State Police
Through Secretary James M. LeBlanc
504 Mayflower Street
Baton Rouge, Louisiana 70802

⁵ After all, unless service is made on an authorized recipient, it will be deemed insufficient and improper. *Tranchant v. State*, [20]08-0978, p. 10 (La. 1/21/09), 5 So.3d 832, 837 (citing *Barnett v. Louisiana State Univ. Med. Ctr.—Shreveport*, [20]02-2576, p. 1 (La. 2/7/03), 841 So.2d 725, 726) (“[P]laintiffs are strictly held to the obligation of serving the correct agent for service of process, [] as well as to the obligation of serving the named state defendants within the time period specified by La. R.S. 13:5107(D)(1).”).

⁶ LSA-R.S. 39:1538(D) provides that in actions brought against the state or any of its agencies to recover damages in tort for money damages against the state or its agencies for injury caused by the negligent or wrongful act or omission of any employee of the agency while 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 LSA-R.S. 13:5107.

⁷ LSA-C.P. art. 1672(C) provides:

In the event that Plaintiffs failed to satisfy the requirement to properly serve each of the requisite individuals/offices/entities under the laws governing service of process on the state and/or its agencies and because proper citation is the foundation of all actions, DPSC submits that knowledge of the legal action and/or receipt of the petition fails to satisfy the requirement of citation and service under Louisiana law.⁸ Therefore, the claims against DPSC should be dismissed.⁹

LSA-C.C.P. ART. 925(A)(5) – LACK OF PERSONAL JURISDICTION

Service of process is critical to the exercise of personal jurisdiction over a defendant.¹⁰ Therefore, to the extent that service of process is deemed to have been improper or otherwise deficient as to one or both of them, DPSC and the Trooper Defendants maintain that the court lacks jurisdiction to proceed as to it and/or them.

LSA-C.C.P. ART. 925(A)(4) – VENUE

In the interest of judicial efficiency and to avoid duplication, DPSC and the Trooper Defendants adopt as their own and incorporate herein *in extenso*, the exception of venue (and supporting legal memorandum and/or legal authorities cited therein) filed by Iberville Parish Sheriff Brett Stassi.

LSA-C.C.P. ART. 926(A)(5) – VAGUENESS AND/OR AMBIGUITY AND/OR
LSA-C.C.P. ART. 926(A)(4) – NONCONFORMITY OF THE PETITION

The petition fails to identify or otherwise describe the legal duty that DPSC and/or the Trooper Defendants – all of whom are entitled to discretionary immunity under LSA-R.S.

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) or 3955 upon the sustaining of a declinatory exception filed by such defendant, or upon contradictory motion of any other party, 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.

⁸ See *Naquin v. Titan Indemnity Company*, 2000-1585 (La. 2/21/01), 779 So.2d 704, 710 (recognizing that “it is well-accepted that even a defendant’s actual knowledge of a legal action cannot supply the want of citation because proper citation is the foundation of all actions . . .” and holding that “[t]he argument that the defendants’ knowledge of the plaintiff’s] suit can somehow fill the role of service of citation lacks merit.”) (citations omitted); *Way v. Mueller Brass Co.*, 840 F.2d 303, 306 (5th Cir. 1988); and *McGuire v. Sigma Coatings, Inc.*, 48 F.3d 902, 907 (5th Cir. 1995).

⁹ E.g. *Weaver v. State ex rel. Dept. of Transp. And Development*, 2011-0282 (La. App. 1 Cir. 9/30/11), 2011 WL 4544024, at *5.

¹⁰ *Duhon v. Brouillette*, 2016-82 (La. App. 3 Cir. 6/1/16), 195 So.3d 658, 661.

9:2798.1– allegedly owed to Plaintiff(s) to ensure that the eventuality that occurred would not happen, much less any legal duty that DPSC and/or the Trooper Defendants owed to Plaintiff(s).

LSA-C.C.P. ART. 927(A)(5) – NO CAUSE OF ACTION

Plaintiffs neither allege nor set forth facts or circumstances to establish that any of the alleged decisions made and/or actions taken by DPSC and/or the Trooper Defendants were non-discretionary and/or that DPSC and/or the Trooper Defendants were grossly negligent. Under the circumstances, the petition discloses no cause of action against DPSC and/or the Trooper Defendants – all of whom are entitled to discretionary immunity.

Even accepting Plaintiffs’ allegations as to DPSC and the Trooper Defendants as true for purposes of this exception only, Plaintiffs cannot establish the existence of a duty owed to them and/or that the breach of any such duty and/or the actions of DPSC and/or the Trooper Defendants were a legal cause of their alleged damage.¹¹ Therefore, DPSC and the Trooper Defendants are entitled to judgment in their favor, dismissing all of Plaintiffs’ claims against them.

MOTION TO STRIKE

As a result of amendments to LSA-C.C. art. 2324 in 1996, a tortfeasor only is liable for its/his share of fault. Consequently, DPSC and each of the individual Trooper Defendants maintain that it/he cannot be held liable for damages beyond its/his degree of fault and cannot be solidarily liable with any other person for damages attributable to the fault of that other person. More specifically, DPSC and the Trooper Defendants maintain that it/they are not solidarily liable with unintentional tortfeasors.¹² Nevertheless, because Plaintiffs pray for judgment “jointly and in solido” against DPSC, the Trooper Defendants and any and all other defendants, DPSC and the Trooper Defendants move to strike that request/demand.

WHEREFORE, DPSC and the Trooper Defendants pray that after all due proceedings are had herein there be judgment in its and/or their favor and against Plaintiffs, sustaining DPSC and

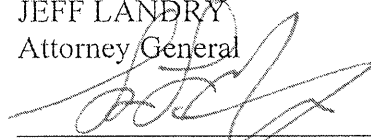
¹¹ See *Lazard v. Foti*, 2002-2888 (La. 10/21/03), 859 So.2d 656, 660-661, *reh’g denied* (La. 12/12/03) (“The essence of a scope of duty inquiry is whether the risk and harm encountered by the plaintiff fall within the scope of protection of the statute. Where the rule of law upon which a plaintiff relies for imposing a duty is based on a statute, the court attempts to interpret legislative intent as to the risk contemplated by the legal duty, which is often a resort to the court’s own judgment of the scope of protection intended by the legislature.”) (internal citations omitted).

¹² See *Dumas v. State of Louisiana, Dept. of Culture, Recreation and Tourism*, 2002-0563 (La. 10/15/02), 828 So.2d 530.

the Trooper Defendants' exceptions and granting its/their motion. DPSC and the Trooper Defendants further pray that an order of dismissal be entered and/or that Plaintiffs be required to cure the deficiencies charged in these exceptions. DPSC and the Trooper Defendants also pray for all other general and equitable relief, etc.

Respectfully Submitted,

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Safety & Corrections (Office of State Police),
Trooper John Sims, Trooper Randall Thomas,
Trooper Sam Lorio and Trooper William Beasley*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Exceptions (and Incorporated Memorandum in Support Thereof) to Plaintiffs' Petition and Motion to Strike on behalf of the Louisiana Department of Public Safety & Corrections (Office of State Police) ("DPSC") and Trooper John Sims, Trooper Randall Thomas, Trooper Sam Lorio and Trooper William Beasley (collectively referred to herein as "the Trooper Defendants") was forwarded on the 21st day of July, 2021 to:

- Counsel for the plaintiffs by United States mail, properly addressed and postage prepaid;
- All remaining counsel by United States mail, properly addressed and postage prepaid;
- Counsel for the plaintiffs by Registered United States mail, return receipt requested, properly addressed and postage prepaid;
- All remaining counsel by Registered United States mail, return receipt requested, properly addressed and postage prepaid;
- Counsel for the plaintiffs by facsimile transmission with confirmation;
- All remaining counsel by facsimile transmission with confirmation;
- Counsel for the plaintiffs by hand delivery;
- All remaining counsel by hand delivery;
- Counsel for the plaintiffs by electronic transmission; and/or
- All known counsel by electronic transmission.



COUNSEL