

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0129

**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**

Judgment Rendered: November 3, 2006

**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 Presiding

**James Thomas, Sr.
St. Gabriel, LA**

**Plaintiff/Appellant In Proper Person
James Thomas, Sr.**

**Lucille Marie Landry
Gulfport, MS**

**Plaintiff/Appellee In Proper Person
Lucille Marie Landry**

**Stacie Peterson
Gregory G. Gremillion
Gretna, LA**

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

BEFORE: CARTER, C.J., WHIPPLE AND McDONALD, JJ.

WHIPPLE, J.

At issue in this appeal is whether a defendant is entitled to a judgment of involuntary dismissal where plaintiffs requested service within ninety days of the commencement of the action, but did not provide contact information with which to serve the defendant until four months after the lawsuit had been filed. We conclude that the trial court erred in granting the motion under the circumstances of this case and 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, 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, and Jacob also received injuries.

Thomas, who was intoxicated at the time of the accident, was convicted of vehicular homicide and sentenced to 20 years imprisonment at hard labor. See State v. Thomas, 2005-2210 (La. App 1st Cir. 6/9/06), _____ So. 2d _____. While confined to the Lafourche Parish Detention Center, on February 14, 2005, one year after the accident, Thomas filed this lawsuit against the State through the Department of Transportation and Development (DOTD) and Barriere Construction Co., L.L.C. (Barriere), seeking over one million dollars in damages. 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 set forth 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, less than ninety days after the lawsuit had been filed, Thomas' motion requesting service of the petition was filed into the record. 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 by which to serve the defendants. In early June of 2005, Thomas wrote a letter to the clerk's office asking that the petition be served, and noting that he had no way to research procedure because he had been in lockdown since February 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.

On June 6, 2005, Barriere filed a motion seeking dismissal of the lawsuit in accordance with article 1672(C) of the Code of Civil Procedure, averring that plaintiffs failed to request service of the citation within ninety days of the commencement of the action as required by Code of Civil Procedure article 1201(C). Thomas and Landry were served with notice of the hearing on the motion, scheduled for July 19, 2005.

On June 20, 2005, the clerk's office apprised Thomas that it had received and filed his request for service of the petition, but that the case was still being considered for *in forma pauperis* status by the trial court. The letter advised that until the court determined that Thomas could file

pleadings without advance payment of costs, the office would be unable to file any additional pleadings without an advance deposit.

By 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 22, 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 set forth in the service request.

On June 28, 2005, Thomas filed an opposition to the motion for involuntary dismissal, in which he attested that on February 25, 2005, he was transferred to the West Carroll Detention Center, where he was classified as maximum security. He noted that he had been advised in the middle of June that the clerk's office had not served the defendants because he had not provided their addresses. Thomas explained that he was unable to obtain the addresses earlier because he did not have access to a telephone book, could not call information from the prison telephone, and did not have access to the law library until June 15, 2005.

The trial court authorized the filing of the amended petition on July 12, 2005. Also on that day, personal service of the petition was effected on Barriere. Thereafter, on July 19, 2004, the trial court held a hearing on Barriere's motion for involuntary dismissal, at which neither Thomas nor Ms. Landry was present. The court granted Barriere's motion, dismissing plaintiffs' claims without prejudice. Specifically, the court found that service was insufficient because plaintiffs failed to take the necessary steps

to effect service before the statutory ninety-day period lapsed. This appeal, challenging that ruling, followed.¹

DISCUSSION

Citation and service are essential in most civil actions; without them, all proceedings are absolutely null. LSA-C.C.P. art. 1201(A). Article 1201(C) states that “[s]ervice of the citation shall be requested on all named defendants within ninety days of commencement of the action.” Article 1672(C) of the Louisiana Code of Civil Procedure provides 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.

Thomas contends that he complied with the requirement of article 1201(C) because he requested service within ninety days of the filing of the lawsuit. He further claims he should have been allowed a contradictory hearing to show good cause why service could not be requested within ninety days and avers that he was denied his right of access to the court by the prison’s failure to transport him to the hearing and the failure to make alternatives available such as a telephone and/or video conference. Additionally, Thomas urges that he displayed due diligence in filing his motion requesting service, noting that he was not apprised that his service request was deficient for failure to provide the names and addresses for service before the expiration of the ninety-day time limit. Lastly, Thomas claims, he did show good cause as to why service was not requested within

¹Thomas initially filed an application for supervisory review with this court; however, on December 2, 2005, this court denied the writ, observing that the judgment was appealable. The trial court was ordered to grant Thomas an appeal pursuant to Thomas’ pleading notifying the trial court of his intent to seek writs. Thomas v. State of Louisiana, 2005CW2024 (La. App. 1st Cir. 12/2/05). Subsequently, the trial court granted Thomas an appeal.

ninety days, insisting that because he was denied use of the law library and did not have legal assistance, he was precluded from acquiring the full names and addresses of the defendants, and could not access the rules of court on matters such as service.

In response, Barriere submits that Thomas did not request service within the ninety-day period set forth in article 1201. Barriere notes that while Thomas did file a motion requesting service of the petition within the ninety-day period, he did not name Barriere specifically in this service request, and he did not provide the clerk's office with any contact information by which to effectuate service. Barriere insists that a request for service of citation is only proper and valid where service information is provided within the ninety-day time limit, and posits that because Thomas failed to provide Barriere's address in the petition as mandated by article 891 of the Louisiana Code of Civil Procedure, and failed to provide it in his initial request for service, the service request was invalid and ineffective.

In support of its argument, Barriere cites the case of Liberty Mutual v. Noble, 2004-727 (La. App. 5th Cir. 11/30/04), 889 So. 2d 1158. Therein, the plaintiff named Barbara Noble and State Farm as defendants and provided Ms. Noble's address in the first paragraph of the petition. In the final paragraph of the petition, the plaintiff prayed that the defendants be served with a copy of the pleadings, but gave no specific service instructions. Ms. Noble and State Farm were not served with the petition until nearly a year after the lawsuit had been filed, and they filed a motion for involuntary dismissal pursuant to article 1672(C) based on the plaintiff's failure to timely request service as required by article 1201(C). Liberty Mutual, 889 So. 2d at 1159. The appellate court observed that eleven months passed between the filing of the petition and service, and no action had been taken

by plaintiff's attorney to ascertain the status of citation until after the statutory period had run. Therefore, the court held, the claim was properly dismissed pursuant to articles 1201(C) and 1672(C). Liberty Mutual, 889 So. 2d at 1160. A strong dissent, however, pointed out that because dismissal of the petition pursuant to article 1672(C) is in derogation of the plaintiff's rights, it is not favored. The dissent concluded that the plaintiffs requested service sufficiently to comply with articles 891 and 1201 of the Code of Civil Procedure. Liberty Mutual, 889 So. 2d at 1161 (Daley, J., dissenting). Furthermore, we note that in a subsequent case, the fifth circuit ruled that involuntary dismissal was improvidently granted where the plaintiffs requested service on the defendants in their petition filed at the commencement of the action, finding that plaintiffs requested service within the ninety-day period mandated by article 1201(C). Yates v. State Farm Mutual Automobile Insurance Company, 2004-1028 (La. App. 5th Cir. 1/25/05), 894 So. 2d 1157, 1160.

We find nothing in the Noble case supporting Barriere's insistence that a service request must include such sufficient service information as to ensure service at the defendant's address within the ninety-day time limit in order to be considered valid under articles 1201 and 1672. Article 1201 requires that service be requested on the named defendants within ninety days of the commencement of the action. It does not specify that service be perfected on the named defendant within that time period. Moreover, because article 1672 is in derogation of a plaintiff's rights, its application must be interpreted narrowly.

Pretermitted comment on the merits, or lack thereof, of Thomas' claims, under the facts of this case, we find that he complied with article 1201's requirement by requesting service on the named defendants within

ninety days of the commencement of the action. In so doing, he followed the advice given to him by the clerk's office to request service on the defendants, and was seemingly diligent in his efforts to see that the petition had been served. 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 was filed. Service was effected on Barriere on July 12, 2005, less than five months after the suit was 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.

Accordingly, under these particular circumstances, we must find that the trial court erred in granting the motion for involuntary dismissal. We remand the matter to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.