FIFTH CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

DOCKET NO.: 2011-CA-52

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5TH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

ANNE MARIE VANDENWEGHE

Plaintiff/Appellant

VERSUS

THE PARISH OF JEFFERSON, STEVE THERIOT, IN HIS CAPACITY AS CHIEF ADMINISTRATIVE OFFICER, ET AL

Defendants/Appellees

ON ORDINARY APPEAL FROM THE 24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, DIVISION "O" THE HONORABLE ROSS LADART, JUDGE
DOCKET NO. 693-702

ORIGINAL BRIEF OF PLAINTIFF/APPELLANT, ANNE MARIE VANDENWEGHE

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JURISDICTION OF THE COURT

This Honorable Court has jurisdiction over this civil appeal pursuant to the provisions of Article 5, Section 10 of the Louisiana Constitution and Articles 2087 and 2083 of the Louisiana Code of Civil Procedure.

SUMMARY OF FACTS

The plaintiff/appellant, Anne Marie Vandenweghe, an Assistant Parish Attorney employed by the Parish of Jefferson, was in charge of responding to public records requests ("PRR's"). In the context of responding to numerous PRR's at the behest of the Federal Bureau of Investigation, private attorneys, and various media outlets, Ms. Vandenweghe, a long-time employee of Jefferson Parish, was wrongfully accused by interim Parish President, Steven Theriot, of using her computer for personal reasons, including "blogging." In a very public spectacle, Mr. Theriot placed the plaintiff, Ms. Vandenweghe, on a leave of absence from her position as an Assistant Parish Attorney and forbade her from the use of her office and computer.

Shortly thereafter, Mr. Theriot re-instated Ms. Vandenweghe to her position as an Assistant Parish Attorney, but re-assigned her from the responsibilities of complying with PRR's for the Parish; there was never any acknowledgment by the Parish or Mr. Theriot that the allegations against Ms. Vandenweghe were unfounded. Eventually, Ms. Vandenweghe filed a "whistleblower action." She has since been terminated from her employment with the Parish by the newly-elected Parish President, John Young.

However, prior to her termination as an Assistant Parish Attorney, the plaintiff informally and formally, through her own PRR directed to the Parish, sought the production of her emails which she generated from her computer in her capacity as an Assistant Parish Attorney as well as in her capacity as a private citizen. The PRR was sent to the Parish on September 27, 2010, yet the Parish refused to produce the requested records.

On October 12, 2010, the plaintiff filed a Writ of Mandamus in the 24th Judicial District Court for the Parish of Jefferson seeking an order of the district court

directing the Parish to comply with the PRR. (Record, pgs. 1-9). The matter was allotted to the Honorable Ross Ladart, Judge, and a hearing was held on October 26, 2010. In advance of the hearing, the defendants filed Declinatory, Dilatory, and Peremptory Exceptions to the Writ. (Record, pgs. 42-65).

With respect to their Declinatory Exception of Lack of Personal Jurisdiction, the defendant, Steven Theriot, argued that he was not the "custodian of records" for the Parish of Jefferson such that he could not be sued on a writ of mandamus. Mr. Theriot's counsel argued that, because he had left office by the time of the hearing, he was a "private citizen" who was not amenable to being sued. (Record pgs. 87-89).

The Trial Court incorrectly granted that Exception considering that it is incumbent upon the entity opposing the PRR to prove why it need not comply. In this instance, the defendants made no showing whatsoever as to whom the Parish had designated as the custodian of records pursuant to La. R. S. 44:411 (C). Furthermore, exceptions should be determined as of the time of the filing of the pleading and not as of the time of a later hearing; thus, it was improper for the Trial Court to sustain this Exception and dismiss the recognized head of the Parish government, the interim Parish President, and absolve him of responding to the PRR ; Mr. Theriot presumably would have had access to the records sought and should not have been dismissed.

Perhaps more importantly, the defendants argued that the plaintiff, Ms. Vandenweghe, did not have a "right of action" to pursue the Writ of Mandamus seeking the production of her own emails. In essence, the defendants incorrectly posited that because of the plaintiff's position as an attorney for the Parish, she could not obtain her own email communications due to unsupported fear or suspicion that she might somehow disseminate her own emails, thereby breaching any

attorney-client privilege. [1] The defendants contended that the emails in question might constitute "privileged documents [which] cannot be produced pursuant to the right of privacy," or a PRR. (Record, pgs. 106-108). Yet, the defendants conceded that the plaintiff may be entitled to some emails within the scope of her request which were of a "purely personal nature."(Record, pg. 114). The Trial Court then incorrectly sustained the defendants' Exception ruling that "discretion must be exercised in order to determine whether or not any of these documents represent work product or violate the privilege." (Record, pgs. 125-126).

The fallacy in the defendants' position and the Court's ruling, though, is that the plaintiff, as an attorney for the Parish, is absolutely entitled to a copy of her work product regardless of unfounded fears that the attorney might breach the attorney client privilege. Furthermore, the Court declined to pass on whether the plaintiff might be entitled to any personal emails, to which the defendants readily had conceded she would be entitled.

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[1] Defendants' counsel later conceded in argument that she did not know the reason for which the plaintiff sought the emails in question.

ACTION OF THE TRIAL COURT

The plaintiff/appellant, Anne Marie Vandenweghe, filed a Writ of Mandamus seeking an order of the District Court directed to the Parish of Jefferson commanding compliance with the Public Records Laws. The defendants filed Declinatory, Dilatory, and Peremptory Exceptions to the Writ, which the Trial Court improperly sustained. Judgment was rendered in this matter, however, no Reasons for Judgment were given.

ASSIGNMENTS OF ERROR

The Trial Court committed clear error in sustaining the defendants' Exceptions in that the plaintiff/appellant, Anne Marie Vandenweghe, is clearly entitled to seek the production of her own emails generated during the course of her employment as an Assistant Parish Attorney. This Honorable Court should conduct a *de novo* review of the record and reverse the plainly wrong ruling that the plaintiff/appellant does not have a cause or right of action to seek compliance with the Public Records Laws.

ISSUES PRESENTED FOR REVIEW

1. The Trial Court clearly had personal jurisdiction over the defendants such that it was incorrect for the Trial Court to rule that the then-Parish President was not subject to the court's jurisdiction in the plaintiff/appellant's efforts to obtain compliance with the Public Records Laws.

2. The Trial Court was wrong in holding that the plaintiff/appellant, Anne Marie Vandenweghe, does not have a cause or right of action in filing a Writ of Mandamus to force the defendants to comply with the Public Records Laws.

ARGUMENT

A. The Trial Court was clearly wrong in finding that it did not have "personal jurisdiction" over the interim Parish President for the Parish of Jefferson relative to a Public Records Request and Writ of Mandamus that sought the production of the emails of an Assistant Parish Attorney.

Appellate courts when reviewing a trial court's legal ruling on a declinatory exception of lack of personal jurisdiction apply a *de novo* standard. *See* Dahmes v. Champagne Elevators, Inc., 869 So.2d 904 (La. App. 4 Cir. 2004); Anderson v. Interamerican Mfg., Inc., 693 So.2d 210, 212 (La.App. 4 Cir. 1997); Walker v. Super 8 Motels, Inc., 921 So. 2d 983, 986 (La. App. 4 Cir. 2005). In assessing an exception of personal jurisdiction, the court is concerned with whether the defendant has "minimum contacts" with the forum, that is, whether there be"some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Byers v. Edmondson, 807 So. 2d 283, 286, (La. App. 1st 2001).

In this case, there can be no question that the Trial Court had personal jurisdiction over the defendants who were admittedly employees of the Parish of Jefferson, the very locus of the lawsuit. Yet, the Trial Court sustained this Declinatory Exception holding that the Court did not have "jurisdiction" over Mr. Theriot, the interim Parish President. The defendants cited no case law or facts, in their argument to the Trial Court, that would support a ruling that the court did not have personal jurisdiction over these governmental employees performing work within the Parish of Jefferson. This ruling was plainly wrong and must be reversed. More likely, the defendants intended to assert that Mr. Theriot lacked the procedural capacity to be sued inasmuch as he was allegedly not the custodian of records to whom the plaintiff's PRR should have been directed.

The lack of procedural capacity is a dilatory exception which, like the

declinatory exception of lack of jurisdiction over the person, merely retards the progress of the action rather than tends to defeat it. Louisiana Power & Light Co. v. Ursin, 334 So.2d 559, 560 (La. App. 4th 1976). This exception questions whether the defendant or the plaintiff has the legal capacity to be sued or to sue. Id. Moreover, this exception is determined from the status of the record as of the time of filing of the original petition. Adler v. Castle-Hirsch-Lohmar, Inc., 165 So. 478, 478 (La. Ct. App. 1936); de Reyes v. Marine Mgmt. & Consulting, Ltd., 586 So. 2d 103, 114 (La. 1991).

In this case, the plaintiff filed her PRR for the production of her emails, and when that request was not heeded, she filed a Writ of Mandamus directed, *inter alia*, to the chief executive officer of the Parish of Jefferson as the custodian of the records sought. The defendants argued that the interim Parish President, Steven Theriot, was not capable of being sued since, as of the **date of the hearing**, he was no longer acting as the Parish President, having been replaced by his successor, John Young.

However, the determinative date as to capacity to be sued was the date that the plaintiff filed her Writ of Mandamus, October 12, 2010, on which date Steven Theriot was still the interim Parish President. Thus, insofar as the Trial Court based its ruling dismissing this defendant on that invalid argument, the order sustaining the "Exception of Lack of Personal Jurisdiction" must be reversed.

Furthermore, there was no showing made by the defendants as to whether the interim Parish President was or was not the official custodian of records who could respond to the plaintiff's PRR. In this regard, La. R. S. 44:411 provides as follows:

> C. To insure that the above enumerated reports and notifications are submitted and implemented, **the chief executive officer of each state agency shall designate a records officerto act as liaison between the division and the agency on all matters relating to records management**. (Emphasis added).

Because this right of access to public records is fundamental, access to public records may be denied only when the law specifically and unequivocally denies access. Johnson v. Stalder, 754 So.2d 246, 248 (La. App. 1st Cir.1998), *citing* La. Const. Art. XII § 3, and State v. Mart, 697 So.2d 1055, 1059 (La. App. 1st Cir.1997).

Moreover, the burden is on the party seeking to prevent disclosure to prove that withholding of a public record is justified. Johnson, at 248.In Hilliard v. Litchfield, 822 So. 2d 743, 746 (La. App. 1st 2002), the court addressed the burden of proof issue in the context of PRR's:

> In this case, there was no evidence introduced to show that the sheriff made the inquiries necessary for denying access. Therefore, the trial court committed legal error because it improperly assigned Hilliard the burden of proof and absolved the custodian of the duty to make the necessary inquiries for denying access to a public record.

The error in the Trial Court's ruling is further amplified by the ruling in Common Cause v. Morial, 506 So.2d 167 (La.App. 4th Cir.1987); *see also* Bauer v.Maestri, 676 So. 2d 1096, 1098 (La. App. 5th Cir. 1996).In Common Cause, the defendants, the Mayor and Director of Public Information, sought to avoid compliance with a PRR by certifying, in compliance with La. R. S. 44:34, that they were not in possession of the information sought in the PRR. The Court of Appeal agreed that the exception of no cause of action was properly sustained since the defendants had complied with R. S. 44:34 by making the proper certification; that statute provides:

> If any public record applied for by any authorized person is not in the custody or control of the person to whom the application is made, such person shall promptly certify this in writing to the applicant, and shall in the certificate state in detail to the best of his knowledge and belief, the reason for the absence of the record from his custody or control, its location, what person then has custody of the record and the manner and method in which, and the exact time at which it was taken from his custody or control. He shall include in the certificate ample and detailed answers to inquiries of the applicant which may facilitate the exercise of the right granted by this Chapter. La. Rev. Stat. Ann. § 44:34.

In this case, the defendant, Steven Theriot, made no such certification, in compliance with the applicable statute, that he was not in possession of the requested records or, more germane to the Exception filed by defendants, a representation as to the identity of the person in possession of the requested records and "the manner and method in which, and the exact time at which it [the sought-after information] was taken from his custody or control." Therefore, in the absence of strict compliance with the statute by the defendants, it was plain error for the Trial Court to sustain the defendants' mis-characterized Exception of Personal Jurisdiction.

Furthermore, in this case, logically, the defendants sought to avoid compliance with the plaintiff's PRR by arguing that the interim Parish President was not the proper party to be called upon to respond to the PRR, and by extension the Writ of Mandamus. Yet, the defendants offered nothing more than argument that Mr. Theriot was not the proper individual to respond to plaintiff's request. Because of a complete failure of proof on the part of the defendants, it was clear error for the Trial Court to sustain the defendants' misbranded exception.

B. The Trial Court was plainly wrong in holding that a private citizen, who is also an Assistant Parish Attorney, has no right to seek her work product through a Public Records Request and related Writ of Mandamus.

Appellate review of the trial court's granting of the exception of no right of action is *de novo* review. Aucoin v. Fell, 779 So. 2d 1087, 1089 (La. App. 3 Cir. 2001). The exception of no right of action tests whether the plaintiff has an interest in enforcing or the capacity to bring an action. Sanders v. Gore, 676 So.2d 866 (La. App. 3 Cir. 1996).

The Louisiana Public Records Law was obviously intended to implement the inherent right of the public to be reasonably informed as to the manner, basis, and reasons upon which governmental affairs are conducted. Laws providing for the

examination of public records must be liberally interpreted to extend, rather than restrict, access to public records. Bartels v. Roussel, 303 So.2d 833 (La.App. 1st Cir.1974); Trahan v. Larivee, 365 So. 2d 294, 298 (La. App. 3rd Cir. 1978). Even public employees have the right to seek the release of public records from the Parish and to demand compliance therewith through the writ of mandamus. Bauer at 1098. In Bauer, this Honorable Court recognized that La.R.S. 44:35 provides [that]:

> **Any person** who has been denied the right to inspect or copy a record under the provisions of this Chapter, either by a final determination of the custodian or bythe passage of five days, exclusive of Saturdays, Sundays, and legal public holidays, from the date of his request without receiving a final determination in writing by the custodian, may institute proceedings for the issuance of a writ of mandamus, injunctive or declaratory relief, together with attorney's fees, costs and damages as provided for by this Section, **in the district court for the parish in which the office of the custodian is located.** (Emphasis theirs).

In that case, the Jefferson Parish governmental entity had argued that Bauer was "precluded on the basis he was a civil servant" from obtaining public records, but this Honorable Court disagreed. The Parish has also argued that Bauer, who had civil service claims pending, might seek to use the PRR's in connection with those claims.

However, this Honorable Court rejected the Parish's argument for such a strict application of the Public Records Law, and relying upon Supreme Court precedent, Title Research Corporation v. Rausch, 450 So.2d 933, 936 (La.1984), held as follows:

> The right of the public to have access to the public records is a fundamental right, and is guaranteed by the constitution. La. Const. art. 12, Sec. 3. The provision of the constitution mustbeconstruedliberallyin favorof free and unrestricted access to the records, and that access can be denied only when a law, specifically and unequivocally, provides otherwise. Id. **Whenever there is doubt as to whether the public has the right of access to certain records, the doubt must be resolved in favor of the public's right to see. To allow otherwise would be an improper and arbitrary restriction on the public's constitutional rights.** Bauer at 1100.

Likewise, in the case at bar, the plaintiff, Anne Marie Vandenweghe, was a public employee employed by the Parish of Jefferson who sought the production of

her emails through a PRR; more generally, as a private citizen, under the Public Records Law, she was entitled to obtain public records by virtue of a PRR. When that request was not complied with by the Parish, she then filed a Writ of Mandamus seeking an order of the district court directed to the Parish to force compliance with the Public Records Statutes. This is the procedural relief afforded to a private citizen such as the plaintiff, and the purpose for which the plaintiff might use the requested information, as in Bauer, is not germane to whether the law affords the plaintiff a cause or right of action. Therefore, it was manifest error for the Trial Court to sustain the defendants' exceptions and hold that Anne Marie Vandenweghe does not have the right to seek records through a PRR and Writ of Mandamus.

In essence, the thrust of the defendants' argument as to why the Trial Court should sustain the Exceptions of No Right and Cause of Action was the concern on the part of the defendants that the plaintiff, an Assistant Parish Attorney seeking her own emails generated from her work computer, ***might*** violate attorney-client privilege and disclose those email communications to the public. In this regard, the defendants' counsel advanced the "smokescreen" that "Ms. Vandenweghe, as an Assistant Parish Attorney, is not in a position to waive any privileges, be it an attorney /client privilege or work product immunity privilege on behalf of her client." That argument, though, really begs the question as to whether the plaintiff is entitled to production to her, and her alone, of her own emails that she generated and she received in the course of her employment with the Parish. It is rank speculation for the defendants to advance the argument that the plaintiff ***will*** breach attorney-client privilege once the PRR is complied with, and the Public Records Laws are not conditioned upon supposition that the party seeking production of public records may disclose them upon receipt. Thus, this argument by the defendants was completely fallacious and

should not have served as a basis for the Trial Court to sustain any peremptory exceptions filed by the defendants.

Furthermore, the defendants' argument that the plaintiff, an Assistant Parish Attorney, is not entitled to her own emails which she generated or received, due to the "discretion" involved in the Parish having to decide what documents contained in a potential response to the PRR might contain privileged communications, ignores the fundamental concept that an attorney is entitled to retain a copy of her own work--product. La. R. S. 37:222 provides: "A lawyer may retain a copy of the client's file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding."[2]

The Court's incorrect presumption that all documents which were the subject of the PRR would be covered by the attorney-client privilege also ignores the likelihood that any of the emails which were sent by or to a third party by Ms. Vandenweghe would not be the subject of attorney-client privilege. In this regard, the law is quite clear that the communications by an attorney with non-client, third parties are not automatically cloaked with the attorney-client privilege. *See* State v. Montgomery, 499 So. 2d 709 (La. Ct. App. 1986). There, the Court recognized that "what is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." Id. at 712.

Surely, there would be a plethora of the plaintiff's communications, sent and received, which were made with third parties not affiliated with the Parish of Jefferson, the plaintiff's "client." These emails communications with third parties

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This statute is all the more applicable to the plaintiff considering that her employment with the Parish as an attorney has since been terminated.

would not have been made "for the purpose of obtaining legal advice from a lawyer." Accordingly, the Trial Court's ruling that the plaintiff did not have a "cause or right" to, at a minimum, obtain these emails communications was overbroad and unsupported by the clear law relative to attorney-client privilege.

Finally, it is well-established that an attorney may obtain and utilize otherwise privileged communications in order to support a viable claim or defense; restated, though a privilege exists, a holder may engage in conduct which simply makes it unfair for him to insist on it. Boyd v. St. Paul Fire& Marine Ins.Co.,775 So. 2d 649, 656 (La. App. 3 Cir. 2000). Thus, an affirmative pleading of a claim or defense that inevitably requires the introduction of privileged communications may justify the production of otherwise protected communications. Id.

In the case at bar, the plaintiff specifically argued at the hearing on the Writ of Mandamus that the email communications which she sought might be relevant and germane to her claim for "comp time" associated with overtime spent in responding to the various PRR's and subpoena from the media, public and Federal Bureau of Investigation. (Record, pgs. 115-119). Furthermore, the plaintiff asserted that her email communications would be relevant to the scandalous charge by interim Parish President, Steven Theriot, that she was "blogging" from her personal computer. Yet, the Trial Court dismissed this logical basis for the production of the plaintiff's own emails by stating that these personnel issues "while they may be a matter of concern at a different time and hopefully not in this forum, okay, **are of no consequence to me**." (Emphasis added). (Record, pg. 124). This holding was plainly wrong in the face of the plaintiff's argument that the emails might serve as support for her claim for additional compensation from her employer, the Parish of Jefferson, or in defense of the unsupported assertion that Ms. Vandenweghe acted improperly during the

course of her employment as an Assistant Parish Attorney. The denial of the plaintiff's Writ of Mandamus was error which must be reversed by this Honorable Court.

CONCLUSION

The plaintiff/appellant, Anne Marie Vandenweghe, sought her own email communications generated and received during her time as an Assistant Parish Attorney. Rather than comply with that request, the Parish offered the "smoke screen" that the emails **might** contain attorney work-product or privileged subject matter. The Trial Court incorrectly subscribed to this illogical argument.

As a matter of the Public Records Laws, the plaintiff/appellant is entitled to seek the production of her own emails from the custodian of those records. She clearly has this right and cause of action. Furthermore, it is not a valid basis to deny the PRR on the rank speculation or possibility that the plaintiff may disclose otherwise privileged communications. An attorney has an absolute right to a copy of her own work product, and the denial of this right was error. Additionally, the plaintiff/appellant offered legitimate reasons why she might need these emails, but the Trial Court ignored that well-established exception to the attorney-client privilege. Therefore, this Honorable Court must reverse and direct the Trial Court to grant the Writ of Mandamus.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been duly served on all counsel of record by depositing same into the U.S. Mail, postage pre-paid, and/or by hand and/or by facsimile and/or by electronic means on February 14, 2011.

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF ST. TAMMANY

BEFORE ME, the undersigned authority, personally came and appeared:

JACK E. TRUITT

who, after duly sworn, did depose and state:

That he represents plaintiff/appellant, Anne Marie Vandenweghe, in the captioned litigation; that all of the information contained in the foregoing Brief is true and correct and that he has mailed same via regular mail to the following counsel and Judge:

Maria N. Alessandra, Esq.
PHELPS DUNBAR, L.L.P.
365 Canal Street, Suite 2000
New Orleans, Louisiana 70130

Honorable Ross P. LaDart
200 Derbigny Street
2nd Floor, Division: "O"
Gretna, Louisiana 70053

I hereby certify that I have on February 14, 2011, served a copy of the foregoing on counsel for all parties to this proceeding and the trial court by placing same in the United States Mail, properly addressed and first-class postage pre-paid.

WITNESSES:

JACK E. TRUITT

Sworn to and subscribed before me this 14th day February, 2011.

NOTARY PUBLIC

BARBARA MANTON
NOTARY PUBLIC
STATE OF LOUISIANA
ID # 80490
COMMISSIONED FOR LIFE

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSp
ON

STATE OF LOUISIANA

NO.: 693-702 DIVISION "O"

ANNE MARIE VANDENWEGHE

VERSUS

PARISH OF JEFFERSON, ET AL.

FILED: 10/26/10 Echlise Bourg
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JUDGMENT

This matter came for hearing on October 26, 2010 on defendant's Exceptions of Lack of Jurisdiction of the Person, Unauthorized Use of Summary Proceedings, No Right of Action and No Cause of Action.

Present: Anne M. Vandenweghe, pro se; and

Kim Boyle and M. Nan Alssandra, attorneys for the named defendants.

After considering the argument, pleadings filed, applicable law and for reasons orally assigned.

IT IS ORDERED, ADJUDGED AND DECREED that the Court granted the Declinatory Exception of Lack of Jurisdiction over the persons such that named defendants, Parish of Jefferson, Steve Theriot, and Greg Giangrosso, are dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court granted the Dilatory Exception of Unauthorized Use of Summary Proceeding.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court granted the Peremptory Exception of No Right of Action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court granted the Peremptory Exception of No Cause of Action such that petitioner's Writ of Mandamus is hereby dismissed.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that notice of judgment is hereby waived.

Signed in Gretna, Louisiana this 26th day of October, 2010.

JUDGE

APPROVED AS TO FORM AND CONTENT:

ANNE M. VANDENWEGHE
Pro Se

KIM BOYLE
M. NAN ALESSANDRA
Attorneys for Named Defendants.

IMAGED OCT 27 '10

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