APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

APPENDIX TABLE OF CONTENTS (Cont.)

OTHER DOCUMENTS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (NOVEMBER 8, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

J CORY CORDOVA,

Plaintiff-Appellant,

v.

LOUISIANA STATE UNIVERSITY AGRICULTURAL; MECHANICAL COLLEGE BOARD OF SUPERVISORS; KAREN CURRY; NICHOLAS SELLS; KRISTI ANDERSON; UNIVERSITY HOSPITAL ; CLINICS, INCORPORATED; LAFAYETTE GENERAL MEDICAL CENTER, INCORPORATED; LAFAYETTE GENERAL HEALTH SYSTEM, INCORPORATED,

Defendants-Appellees.

No. 21-30239

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:19-CV-1027

Before: CLEMENT, HO, and OLDHAM,
Circuit Judges.

PER CURIAM:*

Plaintiff appeals both the district court's March 24, 2021 final order dismissing all claims against the LSU Defendants and Lafayette General Defendants and its April 14, 2021 final order granting in part the LSU Defendants' motion for attorney's fees and costs.

Federal Rule of Civil Procedure 4(a)(1)(A) provides that a notice of appeal must be filed in the district court within 30 days after entry of the judgment or order appealed from. Rule 4(a)(4)(A)(iii), however, provides that in the event a party timely files a motion for attorney's fees under Rule 54, and if the district court extends the time to appeal under Rule 58, the 30-day clock does not begin to tick until the district court's entry of the order disposing of the motion for attorney's fees.

"A timely filed notice of appeal is an absolute prerequisite to this court's jurisdiction." *Moody Nat. Bank of Galveston v. GE Life & Annuity Assur. Co.*, 383 F.3d 249, 250 (5th Cir. 2004) (citing *Browder v. Dir., Dep't of Corrs.*, 434 U.S. 257, 264 (1978)). "[P]ost judgment motions addressing attorney's fees can only extend the time for appeal if (1) the motion is filed before the delay for appeal expires and (2) the court orders that the motion be considered as a Rule 59 motion." *Id.*; *see also Kleinman v. City of Austin*, 749 F.App'x 294, 295 (5th Cir. 2019) (unpub.) (quoting Moody for the proposition that "[m]otions addressing costs and attorney's fees . . . are considered collateral

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

to the judgment, and do not toll the time period for filing an appeal.").

Though Plaintiff filed a motion for attorney's fees and costs, the order respecting which was not issued until April 14, 2021, there is no order from the district court extending the time for Plaintiff to appeal its March 24, 2021 order dismissing Plaintiff's claims on the merits.[1] Plaintiff's deadline to appeal that order was April 23, 2021. Because he did not file his notice of appeal with respect to the district court's March 24, 2021 merits order until April 27, 2021, his appeal was untimely. As such, the court lacks jurisdiction to review Plaintiff's appeal of the district court's March 24, 2021 order dismissing his claims against the LSU Defendants and Lafayette General Defendants.

His appeal of the district court's April 14, 2021 order granting the LSU Defendants' motion to tax costs, though timely filed, fares no better. Plaintiff dedicates his entire brief to arguing that the district court lacked subject matter jurisdiction in the first instance. But he does not even attempt to press, let alone substantiate, his argument that the district court erred in taxing costs against him. His failure to do so is fatal to his appeal. *Davis v. Maggio*, 706 F.2d 568, 571 (5th Cir. 1983) ("Claims not pressed on appeal are deemed abandoned.").

Plaintiff also argues that new evidence discovered on appeal reveals a conflict of interest that deprived him of due process in the proceedings in the district

[1] The district court denied the LSU Defendants' request for attorney's fees, but it granted their request for costs in the amount of $1,068.80.

court and thus justifies relief under Rule 60(b). He asserts that, because the conflict of interest was brought to light during the pendency of this appeal, he had no opportunity to request Rule 60(b) relief from the district court. Thus, Plaintiff requests that this court grant relief under Rule 60(b) and vacate the underlying "judgment [of the district court] dismissing his case on the merits." This court's jurisdiction is limited to appeals from the "final decisions of the district courts of the United States" and certain interlocutory orders and decrees. 28 U.S.C. § 1291. Plaintiff does not dispute that he did not file this Rule 60(b) Motion with the district court. Rule 60(b) does not equip this court with jurisdiction. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990) (holding that "Rule 11 does not apply to appellate proceedings," because "Federal Rule of Civil Procedure 1 . . . indicates that the Rules only 'govern the procedure in the United States district courts'"); *Sheldon v. Khanal*, 502 F.App'x 765, 773 (10th Cir. 2012) (rejecting request on appeal for Rule 60(b)(2) relief because "the Federal Rules of Civil Procedure apply to the district courts, not to the courts of appeals"). Plaintiff was required to either bring this Motion before the district court under Rule 62.1 or raise this issue in his briefing on appeal. He did neither.

We DISMISS Plaintiff's appeal of the judgment and AFFIRM the costs award.

We DENY Plaintiff's Motion for Relief from Judgment Pursuant to Rule 60(b).

MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAFAYETTE DIVISION (APRIL 14, 2021)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

J. CORY CORDOVA

v.

LOUISIANA STATE UNIVERSITY AGRICULTURAL & MECHANICAL COLLEGE BOARD OF SUPERVISORS, ET AL.

Case No. 6:19-CV-01027

Before: James D. CAIN, JR., United States District Judge, Patrick J. HANNA, Magistrate Judge.

MEMORANDUM OPINION

Before the court are a Motion for Attorney Fees and Costs [doc. 87] and Motion to Tax Costs [doc. 100] filed by defendants Karen Curry, Kristi Anderson, and the Louisiana State University Agricultural & Mechanical College Board of Supervisors ("LSU") (collectively, "LSU defendants"). The motions are opposed by plaintiff J. Cory Cordova [docs. 93, 106] and have now been fully briefed.

I. Background

This suit arises from Dr. J. Cory Cordova's non-renewal from the LSU "house officer" (residency) program at Lafayette General Hospital in Lafayette, Louisiana. Cordova was non-renewed from the program after one year, after being placed on probation by program director Dr. Karen Curry. Following his non-renewal, he filed suit against Curry, department head Dr. Nicholas Sells, director of graduate medical education Ms. Kristi Anderson, and LSU, as well as the Lafayette General defendants.[1] He alleged, in relevant part, that Curry, Sells, Anderson, LSU, and the Lafayette General defendants violated his right to due process under the federal and state constitutions, in violation of 42 U.S.C. ¶ § 1983, and committed a breach of contract by non-renewing him from the house officer program and then sabotaging his efforts to apply to other programs. Doc. 1, att. 2, pp. 192-93. He also filed state law claims against his former attorney, Christopher C. Johnston and the Gachassin Law Firm, based on allegations of malpractice during his representation.

On Rule 12(b)(6) motions to dismiss filed by the LSU defendants, the court dismissed the breach of contract claims as to the individual defendants and dismissed many of the due process claims. This left only the substantive due process claim against Curry with the issue of qualified immunity deferred until summary judgment along with the breach of contract claim against LSU. Docs. 30, 43. On motions for sum-

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[1] He also named as defendants the attorney and law firm who had represented him through the non-renewal process. alleging that they had operated under an undisclosed conflict of interest. Those claims are still pending.

mary judgment brought by the LSU and Lafayette General defendants, the court dismissed all remaining claims as to both groups of defendants. Does. 76, 77.

Cordova then brought Motions to Remand, asserting that the court had never had federal question jurisdiction despite his repeated references to due process claims against the LSU and Lafayette General defendants. Docs. 90, 109. The undersigned accepted the Report and Recommendation of the Magistrate Judge [doc. 125], rejecting plaintiff's argument but agreeing that the court should decline to exercise supplemental jurisdiction over the remaining claims against plaintiff's former attorney and his firm. Doc. 131. Pursuant to requests by the LSU and Lafayette General defendants, the court has certified its rulings on the Motions for Summary Judgment as final under Federal Rule of Civil, Procedure 54(b). It now considers the LSU defendants' Motion for Attorney Fees and Costs [doc. 87] and Motion to Tax Costs [doc. 100].

II. Legal Standard

As one of a few statutory exceptions to the "American Rule," requiring each party to bear its own litigation expenses, 42 U.S.C. § 1988 allows the award of reasonable attorney fees to a prevailing party in a civil rights action brought under 42 § 1983. *Fox v. Vice,* 563 U.S. 826, 832-33 (2011). This award may be made to a defendant when the court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation," *id.* at 833 (internal quotation omitted) or that the plaintiff" continued to litigate after it clearly became so." *Hughes v. Rowe,* 449 U.S. 5, 15 (1980). In determining whether the suit was frivolous, the court should focus not on the outcome hut instead on

"whether . . . the case is so lacking in arguable merit as to be groundless or without foundation[.]" *G&H Dev., LLC v. Penwell,* 2016 WL 5396711, at *3 (W.D. La. Sep. 27, 2016) (citing *Jones v. Texas Tech Univ.,* 656 F.2d 1137, 1145 (5th Cir. 1981)). To this end the court can consider factors such as whether the plaintiff established a prima facie case, whether the defendant offered to settle the suit, and whether the court held a full trial—but these factors remain "guideposts" and frivolousness must be judged on a case-by-case basis. *Id.* (citing *Doe v. Silsbee Indep. Sch. Dist.,* 440 F.App'x 421, 425 (5th Cir. 2011) (per curiam)). Generally, the Fifth Circuit regards an award of attorney fees for defendants as appropriate when the plaintiff's claim "lacks a basis in fact or relies on an [indisputably] meritless legal theory" or when the "plaintiff knew or should have known the legal or evidentiary deficiencies of his claim." *Doe,* 440 F.App'x at 425 (internal quotations omitted).

III. Application

Plaintiff spends most of his opposition focused on his subject matter jurisdiction argument, which the court has already rejected and finds frivolous in itself. But this does not mean that the constitutional claims were frivolous. Here, as the court's prior opinions describe, there were inadequate allegations to support some of plaintiff's constitutional claims and records provided in support of the summary judgment motion showed that there was no basis for holding the remaining defendants liable for a due process violation based on their academic judgments or evaluations of plaintiff. But plaintiff did provide grounds for opposing the motion for summary judgment, including letters of recommendation from providers cited

as sources for his negative evaluations, which support a reasonable belief in his theory that the proceedings against him were somehow unfair. Furthermore, plaintiff's opposition to the motions for summary judgment made clear that he had not taken any opportunity to conduct discovery since the court had let some of his claims survive the motion to dismiss. It is therefore difficult to determine that he continued to litigate the claims after discovering their lack of merit. For these reasons, the court declines to make an award of attorney fees under § 1988.

As for the Motion to Tax Costs, the LSU defendants seek taxable costs in the amount of $1,068.80 (or $2,738.36 if the court deems Westlaw research and postage as included under such costs rather than part of an attorney fee award) under Federal Rule of Civil Procedure 54(d). Doc. 100. Plaintiff objects on the grounds that (1) no final judgment has been entered under Federal Rule of Civil Procedure 54(b) and (2) legal research and postage are not taxable as costs. Doc. 106. He also cursorily asserts that an award of costs is discretionary and should not be made in this case. *Id.*

Rule 54(d) provides that, unless a federal statute, rule, or court order provides otherwise, costs should be awarded to the prevailing party following a final judgment. This rule applies to a victory on summary judgment and "contains a strong presumption that the prevailing party will be awarded costs." *Pacheco v. Mineta,* 448 F.3d 783, 793 (5th Cir. 2006). Indeed, the denial of such an award has been described as "in the nature of a penalty." *Id.* at 793 94 (internal quotations omitted). Since plaintiffs response was filed, the court has certified the judgment as final.

Plaintiff provides no specific reason why costs should not be awarded, and the court now determines that the LSU defendants are entitled to the award. The court agrees, however, that there appears to be no support for taxing research costs or postage. *See* 28 U.S.C. § 1920 Accordingly, the motion will be granted in part and denied in part, with costs taxed in the amount of $1,068.80.

IV. Conclusion

For the reasons stated above, the Motion for Attorney Fees [doe. 87] is DENIED and the Motion to Tax Costs [doc. 100] is GRANTED IN PART and DENIED IN PART, with costs awarded under Rule 54(d) in the amount of $1,068.60.

THUS DONE AND SIGNED in Chambers on this 14th day of April, 2021.

/s/ James D. Cain, Jr.
United States District Judge

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAFAYETTE DIVISION (MARCH 24, 2021)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

J. CORY CORDOVA

v.

LOUISIANA STATE UNIVERSITY HEALTH SCIENCE CENTER ET AL.

Case No. 6:19-CV-01027

Before: James D. CAIN, JR., United States District Judge, Patrick J. HANNA, Magistrate Judge.

JUDGMENT

Before the court is a Report and Recommendation [doc. 125] of the Magistrate Judge, recommending that plaintiff's Motion to Remand [doc. 90] and Amended Motion to Remand [doc. 109] be granted. The court has conducted an independent review of the record, as well as the objections and responses filed by the parties, and finds that the Report and Recommendation is correct under applicable law. The undersigned agrees that, in light of the resolution of the claims arising under federal law, the court should decline to

exercise supplemental jurisdiction over the remaining claims arising under state law between plaintiff and defendants the Gachassin Law Firm and Christopher C. Johnston. Accordingly,

IT IS ORDERED that the Report and Recommendation [doc. 125] be ADOPTED and that the Motion to Remand and Amended Motion to Remand [docs. 90, 109] be GRANTED, resulting in the remand of plaintiff's claims against the Gachassin Law Firm and Christopher C. Johnson to the 15th Judicial District Court, Lafayette Parish, Louisiana. As noted in the Report and Recommendation, the remaining claims in this matter have been resolved through prior dispositive motions and the court hereby GRANTS the Motion for Entry of Judgment under Rule 54(b) [doc. 83] as to its rulings on those claims.

THUS DONE AND SIGNED in Chambers on this 23rd day of March, 2021.

/s/ James D. Cain, Jr.
United States District Judge

REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAFAYETTE DIVISION (MARCH 1, 2021)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

J. CORY CORDOVA

v.

LOUISIANA STATE UNIVERSITY HEALTH SCIENCE CENTER ET AL.

Case No. 6:19-cv-01027

Before: James D. CAIN, JR., United States District Judge, Patrick J. HANNA, Magistrate Judge.

REPORT AND RECOMMENDATION

Pending before the court is the motion to remand, which was filed by the plaintiff, J. Cory Cordova. (Rec. Docs. 90, 109). The motion is opposed. The motion was referred to the undersigned magistrate judge for review, report, and recommendation in accordance with the provisions of 28 U.S.C. § 636 and the standing orders of this court. Considering the evidence, the law, and the arguments of the parties, and for the reasons fully explained below, it is recommended that the motion should be GRANTED, and this matter should

be REMANDED to the 15th Judicial District Court, Lafayette Parish, Louisiana.

BACKGROUND

The plaintiff, J. Cory Cordova, alleged that he entered into a contract with Louisiana State University ("LSU") to be a "House Officer" or first year internal medicine resident physician in LSU's residency training program from July 1, 2017 through June 20, 2018. During his residency, the plaintiff worked at University Hospital and Clinics ("UHC") in Lafayette, Louisiana. He alleged that he was placed on probation from November 10, 2017 through February 28, 2018 and that his contract was not renewed for the following year. He sued The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, Dr. Karen Curry (the program director at UHC), Dr. Nicholas Sells (the head of UHC's medicine department), and Kristi Anderson (LSU's director of graduate medical education) (collectively referred to hereinafter as "the LSU Defendants"). He also sued UHC, Lafayette General Medical Center, Inc., and Lafayette General Health System, Inc. (collectively referred to hereinafter as "the Lafayette General Defendants"). In general terms, he alleged that the LSU Defendants and the Lafayette General Defendants imposed unwarranted discipline upon him, denied him contractual and statutory due process, breached the contract, and sabotaged his efforts to apply to other residency programs. Finally, he sued his former legal counsel, Christopher C. Johnston, and Mr. Johnston's law firm, Gachassin Law Firm, for legal malpractice and return of the money he paid them,

alleging that they had an impermissible conflict of interest.

The plaintiff filed suit in Louisiana state court, and the LSU Defendants removed the action with the consent of the other defendants. Motion practice ensued, and all of the claims asserted in the lawsuit except for the claims against Mr. Johnston and Gachassin Law Firm have been resolved. The plaintiff now seeks remand of the action, arguing that the court lacks subject-matter jurisdiction.

LAW AND ANALYSIS

"Federal courts are courts of limited jurisdiction. Absent jurisdiction conferred by statute, district courts lack power to consider claims."[1] Federal courts have subject-matter jurisdiction only over civil actions presenting a federal question[2] and those in which the amount in controversy exceeds $75,000 and the parties are citizens of different states.[3] A suit is presumed to lie beyond the scope of federal-court jurisdiction until the party invoking federal-court jurisdiction establishes otherwise.[4] Similarly, any doubts regarding whether removal jurisdiction is proper

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[1] *Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994). See, also, *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994); *Howery v. Allstate Ins. Co*., 243 F.3d 912, 916 (5th Cir. 2001).

[2] 28 U.S.C. § 1331.

[3] 28 U.S.C. § 1332.

[4] *Kokkonen v. Guardian Li*fe, 511 U.S. at 377; *Howery v. Allstate*, 243 F.3d at 916.

should be resolved against federal-court jurisdiction.[5] The party invoking the court's subject-matter jurisdiction has the burden of establishing the court's jurisdiction.[6] Thus, when a lawsuit has been removed from state court, as this suit has, the removing party must bear that burden.[7] Remand is required "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction."[8]

In this case, the removing defendants alleged that the court had subject-matter jurisdiction because the plaintiff stated a federal question when he alleged that the LSU Defendants and the Lafayette General Defendants violated his 14th Amendment due process rights. There is no allegation that the parties are diverse in citizenship; indeed, the jurisdictional allegations in the plaintiff's original and amended petitions indicate that the parties are not diverse in citizenship. Thus, there is no basis for subject-matter jurisdiction other than the federal question presented by the plaintiff's due process claims.

Whether a claim arises under federal law so as to confer federal-question jurisdiction is governed by the well-pleaded complaint rule, which provides that "federal jurisdiction exists only when a federal question

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[5] *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000).

[6] *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998); *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252, 253 (5th Cir. 1961).

[7] *Shearer v. Southwest Service Life Ins. Co.*, 516 F.3d 276, 278 (5th Cir. 2008); *Boone v. Citigroup, Inc.*, 416 F.3d 382, 388 (5th Cir. 2005).

[8] 28 U.S.C. § 1447(c).

is presented on the face of the plaintiff's properly pleaded complaint."[9] Under that rule, "there is generally no federal jurisdiction if the plaintiff properly pleads only a state law cause of action."[10] The well-pleaded complaint rule makes the plaintiff the master of his complaint, allowing him to avoid federal-court jurisdiction by relying exclusive on state law.[11]

It is axiomatic that, when a lawsuit is removed from state court to federal court, subject-matter jurisdiction is evaluated on the basis of the claims set forth in the state court complaint as it existed at the time of removal.[12] For that reason, post-removal events generally do not deprive the court of jurisdiction.[13] In support of his motion to remand, the plaintiff in this case argued that removal was improper because his original and amended state court petitions "did not invoke the federal jurisdiction of

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[9] *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). *See, also*, *Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796, 803 (5th Cir. 2011); T*errebonne Homecare, Inc. v. SMA Health Plan, Inc.*, 271 F.3d 186, 188 (5th Cir. 2001).

[10] *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 490 (5th Cir. 2002). See, also, *Hart v. Bayer Corp.*, 199 F.3d 239, 244 (5th Cir. 2000).

[11] *Caterpillar Inc. v. Williams*, 482 U.S. at 392; *Settlement Funding, L.L.C. v. Rapid Settlements, Limited*, 851 F.3d 530, 535 (5th Cir. 2017).

[12] *Manguno v. Prudential Property and Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002); *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 264 (5th Cir. 1995); *Brown v. Southwestern Bell Telephone Co.*, 901 F.2d 1250, 1254 (5th Cir. 1990)

[13] *Louisiana v. American Nat. Property Cas. Co.*, 746 F.3d 633, 636 (5th Cir. 2014).

this Honorable Court."[14] Thus, he contends that subject-matter jurisdiction did not exist at the time of removal. However, a review of the allegations set forth in the original and amended petitions, both of which were filed before removal,[15] reveals that the plaintiff did allege a constitutional due process violation sufficient to support federal question jurisdiction.

In Paragraph 10 of the original petition, the plaintiff alleged that the defendants imposed unwarranted discipline on him in violation of the due process rights created in his residency contract and also in violation of "his constitutional Due Process rights."[16] In Paragraph 20, the plaintiff alleged that Dr. Curry "violated Petitioner's procedural and substantive due process rights."[17] One section of the original complaint was, titled "Causes of Action as to" the then-named defendants.[18] Immediately below the section heading is a sub-heading, reading "Violation of Due Process."[19] Paragraphs 39 through 42 follow. Paragraph 39 expressly realleged the factual allegations listed earlier in the petition. Paragraph 40 quoted the due process provision of the 14th Amendment to the United States Constitution and the corresponding

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[14] Rec. Doc. 109-1 at 6.

[15] The original petition was filed on March 29, 2019 (Rec. Doc. 1-2 at 2); the amended petition was filed on July 22, 2019 (Rec. Doc. 1-2 at 183); and the action was removed on August 7, 2019 (Rec. Doc. 1).

[16] Rec. Doc. 1-2 at 4.

[17] Rec. Doc. 1-2 at 6.

[18] Rec. Doc. 1-2 at 10.

[19] Rec. Doc. 1-2 at 10.

provision of the Louisiana Constitution. Paragraph 41 cited a Louisiana Supreme Court decision for the proposition that medical residents "possess a due process 'property' and/or 'liberty' [interest] in their positions and potential for future earnings." Paragraph 42 stated that the defendants' actions "violated Dr. Cordova's due process rights established in the federal and state constitutions." Consequently, the original petition included a due process claim under the United States Constitution.

The due process contentions in the plaintiff's amended petition are similar. In Paragraph 14 of the amended petition, the plaintiff alleged that the defendants imposed unwarranted discipline in violation of the due process rights created in his residency contract and also in violation of "his constitutional Due Process rights."[20] Paragraph 25 of the amended petition alleged that Dr. Curry violated the plaintiff's procedural and substantive due process rights.[21] Like the original petition, the amended petition contains a section titled "Causes of Action as to" the defendants.[22] Immediately below the section heading is a subheading, reading "Violation of Due Process."[23] Paragraphs 45 through 49 are included in that section.[24] Paragraph 45 expressly realleged the factual allegations set forth earlier in the petition. Paragraph 46 quoted the due process provision of the 14th Amend-

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[20] Rec. Doc. 1-2 at 186.

[21] Rec. Doc. 1-2 at 188.

[22] Rec. Doc. 1-2 at 192-193.

[23] Rec. Doc. 1-2 at 192.

[24] Rec. Doc. 1-2 at 192-193.

ment to the United States Constitution and the corresponding provision of the Louisiana Constitution. Paragraph 47 cited a Louisiana Supreme Court decision for the proposition that medical residents "possess a due process 'property' and/or 'liberty' [interest] in their positions and potential for future earnings." Paragraph 48 stated that the defendants' actions "violated Dr. Cordova's due process rights established in the federal and state constitutions." Consequently, the amended petition set forth a due process claim under the 14th Amendment to the United States Constitution.

The fact that neither petition contains a reference to 42 U.S.C. § 1983 is immaterial. Section 1983 does not create substantive rights; instead, it is a procedural vehicle that provides a remedy for the violation of federal constitutional or statutory rights.[25] Therefore, when a plaintiff fails to mention Section 1983 but alleges violations of rights protected by the United States Constitution, he states a federal question claim that supports removal, and his suit cannot be remanded for lack of subject-matter jurisdiction.[26]

This Court finds that the plaintiff's petitions, both in the original format and also as amended, included a claim that the LSU Defendants and the Lafayette General Defendants violated the due process rights guaranteed to the plaintiff by the 14th Amend-

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[25] *Hernandez ex rel. Hernandez v. Texas Dept. of Protective and Regulatory Services*, 380 F.3d 872, 879 (5th Cir. 2004); *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997); *Jackson v. City of Atlanta, Tex.*, 73 F.3d 60, 63 (5th Cir. 1996).

[26] *See, e.g., Tobacco and Wine, Inc. v. County of Dallas*, 456 F.Supp.3d 788, 792-93 (N.D. Tex. 2020).

ment to the United States Constitution. This Court further finds that this due process claim was sufficient to support federal question jurisdiction. Thus, at the time of removal, the court had subject-matter jurisdiction, and no subsequent events deprived the court of its jurisdiction.

The claims that remain to be resolved are state-law claims grounded in Louisiana law and cognizable by this court under its supplemental jurisdiction. When there is a post-removal "narrowing of the issues such that the federal claims are eliminated and only pendent state claims remain, federal jurisdiction is not extinguished."[27] "Instead, the decision as to whether to retain the pendent claims lies within the sound discretion of the district court."[28] In deciding whether to exercise such discretion, courts are guided by 28 U.S.C. § 1367(c), which states that "district courts may decline to exercise supplemental jurisdiction over a claim . . . [when] (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional

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[27] *Spear Marketing, Inc. v. BancorpSouth Bank*, 791 F.3d 586, 592 (5th Cir. 2015) (quoting *Brown v. Southwestern Bell Telephone Co.*, 901 F.2d 1250, 1254 (5th Cir. 1990)).

[28] *Brown v. Southwestern Bell Telephone Co.*, 901 F.2d at 1254 (citing *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980), cert. denied, 450 U.S. 949 (1981) ("When a subsequent narrowing of the issues excludes all federal claims, whether a pendant state claim should be remanded to state court is a question of judicial discretion, not of subject matter jurisdiction.")).

circumstances, there are other compelling reasons for declining jurisdiction."

The remaining claims are legal malpractice claims. While legal malpractice claims may not raise novel or complex issues of state law, such claims have been recognized as falling with the traditional domain of state law.[29] Therefore, it is arguable that they should be decided in state court rather than federal court.

More important, in the Fifth Circuit, the general rule is that a court should decline to exercise jurisdiction over remaining state-law claims when all federal-law claims are eliminated before trial.[30] Although this rule is neither mandatory nor absolute,[31] the United States Supreme Court has repeatedly cautioned that federal courts should avoid making "needless decisions of state law."[32] Furthermore, when federal claims have been eliminated from the litigation, the district court has "a powerful reason to choose not to continue to exercise jurisdiction."[33]

In this case, the resolution of the federal-law claims asserted against the LSU Defendants and the Lafayette General Defendants left only the legal mal-

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[29] *Singh v. Duane Morris LLP*, 538 F.3d 334, 339 (5th Cir. 2008)

[30] *Brookshire Bros. Holding, Inc. v. Dayco Prod. Inc*., 554 F.3d 595, 602 (5th Cir. 2009); *Parker & Parsley Petroleum Co. v. Dresser Indus*., 972 F.2d 580, 585 (5th Cir. 1992).

[31] *Brookshire Bros. Holding, Inc. v. Dayco Products, Inc*., 554 F.3d at 602.

[32] *Enochs v. Lampasas County*, 641 F.3d 155, 161 (5th Cir. 2011) (quoting *Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)).

[33] *Enochs v. Lampasas County*, 641 F.3d at 161 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988)).

practice claims asserted against the plaintiff's former counsel and his law firm to be decided. Those claims are governed by Louisiana state law. There are no federal-law claims remaining. Accordingly, it is recommended that this Court should exercise its discretion and decline to exercise jurisdiction over the remaining state-law claims. It is further recommended that this case should be remanded to state court–not because the court lacks subject-matter jurisdiction, but because all federal-law claims have been decided and the court, in its discretion, should decline to exercise jurisdiction over the remaining claims.

CONCLUSION

For the foregoing reasons,

IT IS RECOMMENDED that the plaintiff's motion to remand (Rec. Docs. 90, 109) should be GRANTED, and this matter should be REMANDED to the 15th Judicial District Court, Lafayette Parish, Louisiana.

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen days from service of this report and recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within fourteen days after being served with of a copy of any objections or responses to the district judge at the time of filing.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in the report and recommendation within fourteen days following the date of its service, or within the time frame authorized by Fed. R. Civ. P. 6(b), shall bar an aggrieved party from attacking either

the factual findings or the legal conclusions accepted by the district court, except upon grounds of plain error.[34]

Signed at Lafayette, Louisiana, this 1st day of March 2021.

/s/ Patrick J. Hanna
United States Magistrate Judge

[34] *See Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996) (en banc), superseded by statute on other grounds, 28 U.S.C. § 636(b)(1).

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING (DECEMBER 16, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

J CORY CORDOVA,

Plaintiff-Appellant,

v.

LOUISIANA STATE UNIVERSITY AGRICULTURAL; MECHANICAL COLLEGE BOARD OF SUPERVISORS; KAREN CURRY; NICHOLAS SELLS; KRISTI ANDERSON; UNIVERSITY HOSPITAL ; CLINICS, INCORPORATED; LAFAYETTE GENERAL MEDICAL CENTER, INCORPORATED; LAFAYETTE GENERAL HEALTH SYSTEM, INCORPORATED,

Defendants-Appellees.

No. 21-30239

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:19-CV-1027

Before: CLEMENT, HO, and OLDHAM,
Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.[1]

[1] Judge James L. Dennis did not participate in the consideration of the rehearing en banc.

APPELLANT'S POST-DECISION MOTION TO AMEND JUDGMENT BASED ON NEW CONTROLLING CASE LAW AND NEW EVIDENCE (JANUARY 13, 2022)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

J CORY CORDOVA,

Plaintiff-Appellant,

v.

LOUISIANA STATE UNIVERSITY AGRICULTURAL & MECHANICAL COLLEGE BOARD OF SUPERVISORS; KAREN CURRY; NICHOLAS SELLS; KRISTI ANDERSON; UNIVERSITY HOSPITAL & CLINICS, INCORPORATED; LAFAYETTE GENERAL MEDICAL CENTER, INCORPORATED; LAFAYETTE GENERAL HEALTH SYSTEM, INCORPORATED,

Defendants-Appellees.

No. 21-30239

On Appeal from United States District Court
for the Western District of Louisiana
6:19-CV-1027

Submitted by:

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[* * *]

MAY IT PLEASE THE COURT:

Pursuant to Federal Rule of Appellate Procedure Rule 27, this Court's Internal Operating Procedures, and Federal Rule of Procedure Rule 59, Plaintiff/Appellant, Dr. J. Cory Cordova ("Dr. Cordova"), files this Post Decision Motion to Amend Judgment for three (3) mutually exclusive reasons:

1.) There is an intervening change in controlling law because of the January 7, 2022, Louisiana Supreme Court decisions involving the Lafayette General/UHC Defendants preclusive to the issues of Dr. Cordova's employer and implicating the jurisdiction of this Honorable Court.[1]

2.) Inconsistent and/or contrary statements made by the Lafayette General/UHC Defendants in the Louisiana Supreme Court case and the instant case implicate the doctrine of judicial estoppel.

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[1] *See* Exhibit A.

3.) Recently obtained public records supports that the district court's dismissals

were predicated on misleading and/or false statements and Affidavits. Pursuant to Fifth Circuit Rule 27.4, counsel for all of the Defendants/Appellees in this matter were contacted prior to filing this motion. However, the Defendants reserved their right to object as this motion was filed after the close of business.

Pursuant to Federal Rule of Civil Procedure 59(e), this Court has authority to review matters in the period immediately following entry of judgment where a party shows a need to: 1.) correct a clear error of law or prevent manifest injustice; 2.) present newly discovered evidence; or 3.) reflect an intervening change in controlling law.[2] Further, this Honorable Court has identified two important judicial imperatives relating to the filing of this motion: 1.) the need to bring litigation to an end; and 2.) the need to render just decisions on the basis of all the facts.[3] Moreover, final judgment has been stayed in this matter and new controlling case law/evidence have been discovered that render the Court's decision in this matter incomplete and unequitable.

Dr. Cordova respectfully requests that this Honorable Court vacate the district court and panel's decision and remand this matter in its entirety to

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[2] *See Rosenzweig v. Azurix Corp*., 332 F.3d 854, 863–64 (5th Cir. 2003); *In re: Benjamin Moore & Co*., 318 F.3d 626, 629 (5th Cir. 2002). *White v. New Hampshire Dept. of Emp't Sec*., 455 U.S. 445, 450 (1982).

[3] *Templet v. HydroChem Inc*., 367 F.3d 473, 479 (5th Cir. 2004).

state court pursuant to 28 U.S.C. § 1447. Dr. Cordova also reserves his right to request attorney's fees and costs pursuant to 28 U.S.C. § 1447(c) and Rule 11 should this Court determine that this motion supports remand for lack of subject matter jurisdiction.

I. There is an intervening change in controlling law affecting this case.

The Louisiana Supreme Court's January 7, 2022 decisions in the consolidated matters of *Hays v. University Health Shreveport,* 21-1601 (La. 1/7/22), __ So.3d ___, consolidated with *Nelson v. Ocshner Lafayette General,* 21-1453 (La. 1/7/22), ___ So.3d ___,[4] are preclusive to the issue of Dr. Cordova's true employer as a resident at University Hospitals & Clinics (UHC). The Louisiana Supreme Court has judicially determined that Lafayette General/UHC is a private actor under Louisiana state law implicating the jurisdiction of this Court.

In ruling for Lafayette General/UHC, the Louisiana Supreme Court noted "[t]here is no allegation or even the barest insinuation that Employer is a state actor; indeed, the parties in this case stipulated that Employer is a private actor." Further, the Louisiana Supreme Court stated that Lafayette General/UHC as a private actor could not present issues of federal law and solely state law applied. Moreover, the *Hays* court held that constitutional

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[4] *See* Exhibit A. It is important to note that James Gibson, the attorney for the Lafayette General Defendants in this matter, was the attorney of record for the defendants (University Health Shreveport and Lafayette General Health Systems) in both matters recently decided by the Louisiana Supreme Court in the consolidated action.

claims may not be brought against private actors and the court declined the invitation to extend the scope of the Louisiana constitution to restrict private actors. This decision is preclusive to the instant matter as Dr. Cordova, a resident at UHC, was employed by a private actor and federal jurisdiction does not apply.

The Louisiana state court decision should be afforded full faith and credit by this Court as it raises an identical issue and involves the same Defendant represented by the same attorneys. Therefore, Dr. Cordova's case should be remanded back to state court in light of the Louisiana Supreme Court's ruling and this Court's lack of subject matter jurisdiction. Dr. Cordova moves for reconsideration of this Honorable Court's December 16, 2021 decision based on preclusion law and the Full Faith and Credit Act, 28 U.S.C. § 1738, which requires this Court to give the same preclusive effect to a state court judgment as another court of that State would give.[5]

II. The contrary and/or inconsistent statements made by the Lafayette General/UHC Defendants in related litigation implicate the doctrine of judicial estoppel.

The doctrine of judicial estoppel prevents the Lafayette General/UHC Defendants from taking a contrary position. In the Louisiana Supreme Court case, the Lafayette General/UHC Defendants neither denied that residents (like Dr. Cordova) were their

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[5] *Parsons Steel, Inc. v. First Alabama Bank*, 474 U. S. 518, 523 (1986); accord *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 373 (1996); *Marrese v. American Academy of Orthopedic Surgeons*, 470 U. S. 373, 380–381 (1985).

employees nor attempted to distinguish the medical residents (like Dr. Cordova) from any other employee under their control. The Lafayette General/UHC Defendants further stipulated that it was a private employer rather than a state actor.[6] In the instant matter, on October 22, 2021, the Lafayette General/UHC Defendants filed a Response to Dr. Cordova's Rule 60(b) Motion which raised inconsistent arguments with this Court. Moreover, in this matter, the Lafayette General/UHC Defendants further claimed they did not employ Dr. Cordova or administer the residency program.[7] Dr. Cordova was unaware of the concurrent inconsistent positions advanced by the Lafayette General/UHC Defendants until the release of the recent Louisiana Supreme Court decision.

Irrespective of the Louisiana Supreme Court's decision, the Lafayette General/UHC Defendants' inconsistent positions in two separate cases invoke the application of the doctrine of judicial estoppel. Accordingly, the Lafayette General/UHC Defendants should be estopped from now arguing that the UHC residents are not their employees. Under the doctrine of judicial estoppel, absent any good explanation, a party is not be allowed to gain an advantage by litigating an issue in one court and then seek an inconsistent advantage by pursuing an incompatible issue before another court.[8]

The United States Supreme Court has recognized the purpose of equitable estoppel and delineated sev-

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[6] *See* Exhibit B.

[7] Document 00516065873, p. 14-15.

[8] *New Hampshire v. Maine*, 532 U.S. 742 (2001).

eral factors to apply in a particular case. First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Third, whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.[9] In this case, applying these nonexclusive factors, Lafayette General/UHC's argument before this Court should be barred to prevent inconsistent rulings and the unwarranted dismissal of Dr. Cordova's case.

III. Dismissal of Dr. Cordova's case would result in manifest injustice.

Recently obtained public records support that the district court's dismissal of Dr. Cordova's case was predicated on misleading and/or false Affidavits and statements made by the Defendants.[10] These statements persisted in briefing before this Honorable Court when the Defendants argued that the district court granted summary judgment because the Lafayette General/UHC Defendants: 1.) did not employ or administer the residency program; 2.) were not parties to Dr. Cordova's House Officer Agreement or House Officer Manual which governed his residency; 3.) did not coordinate, supervise, or evaluate Dr. Cordova's performance during his residency; 4.) had no authority

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[9] *New Hampshire v. Maine*, 532 U.S. 742 (2001).

[10] ROA. 965-970.

over or involvement in the procedure for and decision to renew Dr. Cordova's House Officer Agreement; 5.) are not state actors; and 6.) did not conspire with the LSU Defendants to violate Dr. Cordova's rights.[11] The latter statements—with the exception of the fact that the Lafayette General Defendants/UHC are not state actors—are misrepresentations antithetical to the public records recently produced to Dr. Cordova by the Defendants over one year after they were originally requested. *See Exhibit C.*

Additionally, on December 14, 2021, the public records were furnished to counsel for Lafayette General/UHC with a request that the misrepresentations made to this Court be immediately corrected.[12] To date, none of the Defendants have corrected the misrepresentations made to the district court and this Honorable Court. These misrepresentations are material as they led to the inequitable dismissal of Dr. Cordova's case.

WHEREFORE, Appellant, J. Cory Cordova, respectfully requests that this Honorable Court vacate the district court and panel's decision and remand this matter in its entirety to state court pursuant to 28 U.S.C. § 1447. Dr. Cordova also reserves his right

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[11] Document 00516065873, p. 14-15. On November 5, 2021, the LSU Defendants adopted the misrepresentations made by the Lafayette General Defendants in their untimely Response to Dr. Cordova's Rule 60(b). *See Exhibit D.*

[12] Exhibit C. The billing entries submitted by the LSU Defendants in support of their Motion for Attorney's Fees confirm their knowledge that Lafayette General/UHC had authority and supervision over the residents. ROA. 1174-1171. ROA 1222. ROA. 1227. ROA.1242-1244. ROA. 1267-1268. ROA. 1273. ROA. 1291-1292.

to request attorney's fees and costs pursuant to 28 U.S.C. § 1447(c) and Rule 11 should this Court determine that this motion supports remand for lack of subject matter jurisdiction. Dr. Cordova further requests that this motion be granted and/or all alternative relief be provided to ensure that due process and the ends of justice are appropriately served in this matter.

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LOUISIANA SUPREME COURT DECISION IN *NELSON ET AL. v. OSCHNER LAFAYETTE GENERAL* (JANUARY 7, 2022)

SUPREME COURT OF LOUISIANA

THERESA NELSON, ET AL.,

v.

OCHSNER LAFAYETTE GENERAL.

No. 2021-CD-01453

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Lafayette

Before: WEIMER, C.J.

This matter arises from a suit challenging a COVID-19 vaccine mandate, which allows medical and religious exceptions, implemented by a private employer healthcare provider. The issue presented is whether the employees of the private healthcare provider stated a cause of action for constitutional and statutory violations entitling the employees to injunctive and declaratory relief.

For the reasons assigned in *Hayes v. University Health Shreveport, LLC*, 21-1601 (La. 1/7/22), ___ So.3d ___, the trial court's judgment sustaining the employer's exception of no cause of action, dismissing the employees' suit with prejudice since "the grounds of the objection raised through its exception cannot

be removed by amendment," and denying the employees' request for preliminary injunction (as moot) is affirmed.

AFFIRMED.

LOUISIANA SUPREME COURT DECISION IN *HAYES, ET AL. v. UNIVERSITY HEALTH SHREVEPORT, LLC ET AL.* (JANUARY 7, 2022)

SUPREME COURT OF LOUISIANA

JASON HAYES, ET AL.

v.

UNIVERSITY HEALTH SHREVEPORT, LLC D/B/A OCHSNER LSU HEALTH SHREVEPORT AND OCHSNER LSU HEALTH SHREVEPORT-ST. MARY MEDICAL CENTER, LLC.

No. 2021-CC-01601

On Writ of Certiorari to the Court of Appeal, Second Circuit, Parish of Caddo

Before: WEIMER, C.J.

WEIMER, C.J.

At issue is a COVID-19 vaccine mandate implemented by an employer-healthcare provider. This matter is resolved by the application of the employment-at-will doctrine, which is rooted in Louisiana Civil Code article 2747.[1] This provision has been uniformly held

[1] Utilizing archaic language, La. C.C. art. 2747 provides: "A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause."

to reflect employment at will—which means an employer is at liberty to dismiss an at-will employee and, reciprocally, the employee is at liberty to leave the employment to seek other opportunities. However, these rights are tempered by federal and state provisions, both statutory and constitutional, but no such exceptions apply here. Employees have no statutory claim under La. R.S. 40:1159.7 because there is no healthcare provider-patient relationship alleged here. Employees likewise have no constitutional claim under La. Const. art. I, § 5 because the employer is a private actor, and this constitutional provision only limits governmental actors.[2] Accordingly, the decision of the court of appeal is reversed, and the judgment of the trial court is reinstated.

FACTS AND PROCEDURAL HISTORY

In the latter part of August 2021,[3] University Health Shreveport, LLC d/b/a Ochsner LSU Health Shreveport and LSU Health-St. Mary Medical Center,

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Louisiana courts began citing this article in the early 1960s in applying the employment-at-will doctrine. *See Baker v. Union Tank Car Co.*, 140 So.2d 397, 402 (La. App. 1 Cir. 1962). The doctrine was previously jurisprudentially recognized in *Russel v. White Oil Corp.*, 162 La. 9, 110 So. 70 (1926), which cited common law authorities.

[2] The issue of whether a state actor can implement a similar mandate is not before this court.

[3] At that time, the state had been operating in a declared state of emergency due to COVID-19, a highly contagious virus that spread throughout the world, resulting in economic turmoil, a public health crisis, a substantial burden on the healthcare system, and a significant number of infections and deaths.

LLC (Employer) notified all employees[4] that they were required to be fully vaccinated by October 29, 2021. Employees not vaccinated within the specified time were subject to disciplinary action, including mandatory use of leave time and, ultimately, termination. Employer's policy permitted exemptions to the vaccine requirement for valid religious and medical reasons.

Thereafter, 39 plaintiffs[5] (Employees) filed suit against Employer, challenging the employee vaccine mandate and requesting injunctive and declaratory relief, including a temporary restraining order (TRO).[6] After a hearing, the trial court denied Employees' request for a TRO, and Employer was ordered to show cause on October 19, 2021, why preliminary injunctive relief should not be granted.

In response, Employer filed an exception urging that Employees failed to state a cause of action on the following grounds:[7] (1) the vaccine mandate does not

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[4] The notice was directed to all "physicians, APPs [advanced practice providers,] and all employees, vendors, contracted staff, medical and allied health students, residents, fellows, and agency staff."

[5] Employees alleged in their petition that "33 of the 39 Plaintiffs submitted a request for exemption." They further alleged that "22 exemptions have been granted, two have been denied, and the status of 8 is unknown."

[6] Notably, cases are pending in the federal courts involving vaccine mandates, which present issues of federal law, and do not directly affect the instant case, which is based solely on state law.

[7] Employer also filed exceptions raising the objections of no right of action and prematurity.

violate a constitutional right to privacy as Employer is a private actor; (2) even assuming a cause of action exists against private actors, Employer's vaccine mandate does not violate any constitutional rights to privacy as this is not a forcible injection case; (3) the vaccine mandate does not violate statutory law; and (4) pursuant to the at-will employment doctrine, Employer can terminate Employees for failing to receive the vaccine. These exceptions were set for hearing on October 19, 2021, with the request for a preliminary injunction.

During the hearing, the trial court observed "the employees and employers employment at-will is just that. [The Employer] can fire them [e]xcept if it's based on a protected class such as sex or race." Because Employees "have a right to refuse healthcare," Employees argued that "on the face of the petition, [Employees have] clearly pled facts that, if true, would make this an unreasonable policy," urging that "[t]his case involves the threat of a firing in violation of the law." Employer urged this case involves the relationship between an employer and employee, and the threat of being discharged from at-will employment does not constitute duress. At the close of arguments, the trial court noted that this issue presents itself in an "employer/employee context" and found:

> [In] an at-will state, [employees] do have a choice. They can choose to get [vaccinated] or not . . . . Yes, I understand there are repercussions if you don't get [vaccinated]. Like in the *Tate* case.[8] . . . Employers have

8 *Tate v. Woman's Hosp. Found.*, 10-0425 (La. 1/19/11), 56 So.3d 194.

> this right, just like employers have the right if somebody wants to wear this particular T-shirt or they don't want to wear the uniform, which is a freedom of speech, an employer can say . . . you're wearing our uniform or you're not working here.

Accordingly, the trial court sustained Employer's exception raising the objection of no cause of action, dismissed Employees' claims with prejudice, and denied Employees' request for a preliminary injunction as moot.

Subsequently, Employees filed a writ application with the court of appeal and this court,[9] as well as an appeal. Employees' writ application was granted by the court of appeal, and the trial court's ruling was reversed based on the following reasons:

> After a *de novo* review of this well-pled petition, we conclude that [Employees] stated a cause of action for preliminary injunction and declaratory relief on the claim that disciplinary action including termination of employment by defendants, notwithstanding the employment at-will doctrine, would unlawfully abridge certain alleged constitutional rights and that [Employees] are entitled to a hearing thereon. Moreover, we find that the exception of no cause of action is not the appropriate procedure to dispose of this important constitutional issue. Thus, the denial of the request for temporary restraining order which would have allowed for a hearing under the appropriate legal process

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[9] *Hayes v. University Health Shreveport, LLC*, 21-1542, currently pending before this court.

> was in error, as was the sustaining of the exception of no cause of action and dismissal of the petition with prejudice.
>
> Accordingly, this writ is granted and the October 12, 2021, and October 20, 2021, rulings are reversed. The matter is remanded to the trial court with instructions to enter a temporary restraining order enjoining any disciplinary action including termination of employment for unvaccinated employees on October 29, 2021,[10] as requested and to conduct a hearing on the request for preliminary injunction and declaratory relief within the timeframe provided by law.

Hayes v. University Health Shreveport, LLC, 54,445 (La.App. 2 Cir. 10/28/21) (unpublished writ action).[11]

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10 The court of appeal erred factually. The employment of Employees was not scheduled to be terminated on October 29, 2021. Instead, "[i]ndividuals not fully vaccinated by the deadline [Friday, October 29, 2021] will be placed on leave and removed from the schedule beginning Monday November 1, for 30 days or until fully vaccinated." "Any employee not fully vaccinated following the 30-day leave period ending Monday, November 29, will be terminated for policy violation." Exemptions were provided for legitimate medical reasons and religious beliefs.

11 Notably, the judgment upon which the trial court ruled was a final, appealable judgment (*see Everything on Wheels Subaru, Inc. v. Subaru South*, Inc., 616 So.2d 1234, 1239 (La. 1993)); the court of appeal, instead, handled the case on an application for supervisory review, on an expedited basis, without giving Employer an opportunity to be heard. However, because Employer is granted relief herein, this court declines to address the procedural irregularities with the court of appeal opinion.

In light of a hearing scheduled for November 9, 2021, on Employees' petition for preliminary injunction, Employer filed a writ application with this court, requesting that the court of appeal's decision be stayed, which was granted "pending further orders of this court." *Hayes v. University Health Shreveport, LLC*, 21 1601 (La. 11/6/21). Subsequently, Employer's writ application was granted for the purpose of determining whether Employees of a private healthcare provider stated a cause of action for a constitutional violation caused by the Employer's vaccination mandate with medical and religious exceptions, entitling Employees to injunctive and declaratory relief.[12] *Hayes v. University Health Shreveport, LLC*, 21-1601 (La. 11/17/21), ___ So.3d ___.

DISCUSSION

In deciding an exception raising the objection of no cause of action, this court is guided by the well-settled principle that the function of an exception of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the pleading. *Darville*

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[12] In *Nelson v. Ochsner Lafayette General*, 21-1453, consolidated with the instant case and decided in a separate opinion issued on the same day, 47 employees filed suit against Lafayette General Health System, Inc., seeking to enjoin the employer-healthcare provider from enforcing a COVID-19 vaccine mandate. In *Nelson*, the trial court denied the employees' request for a temporary restraining order, sustained the employer's exception raising the objection of no cause of action, and dismissed employees' action. The appellate court denied employees' writ application, finding "no error in the trial court's ruling." *Nelson v. Ochsner Lafayette General*, 21-0648 (La.App. 3 Cir. 10/27/21) (unpublished writ action).

v. Texaco, Inc., 447 So.2d 473, 474-75 (La. 1984). No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. La. C.C.P. art. 931. Therefore, the court reviews the petition and accepts well-pleaded allegations of fact as true, and the issue at the trial of the exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So.2d 1234, 1235 (La. 1993).

The salient allegations of the petition are as follows. The plaintiffs are employees, staff, and contract workers of Employer, which they allege to be a "private employer." Employer is attempting to require Employees to be vaccinated against COVID-19 by October 29, 2021, or face "disciplinary action." Employees object to the mandate based on their "fundamental right" to make autonomous, informed decisions regarding medical treatment.

"The employer-employee relationship is a contractual relationship." *Quebedeaux v. Dow Chem. Co.*, 01-2297, p. 4 (La. 6/21/02), 820 So.2d 542, 545. "As such, an employer and employee may negotiate the terms of an employment contract and agree to any terms not prohibited by law or public policy." *Id.*, 01-2297 at 4-5, 820 So.2d at 545. "When the employer and employee are silent on the terms of the employment contract, the [Louisiana Civil Code] provides the default rule of employment-at-will." *Id.*, 01-2297 at 5, 820 So.2d at 545. "This default rule is contained in LSA-C.C. art. 2747," which has been in the Civil Code since 1808 –over 213 years. This code article sets forth the fundamental framework for Louisiana's at-will employment doctrine—which means that, generally, "an

employer is at liberty to dismiss an [at-will] employee at any time for any reason." *See Quebedeaux*, 01-2297 at 5, 820 So.2d at 545. Reciprocally, at-will employees are at liberty to leave the employment to seek other opportunities for any reason or no reason at any time.

However, an employer's right to terminate an at-will employee "is tempered by numerous federal and state laws which proscribe certain reasons for dismissal of an at-will employee." *Quebedeaux*, 01-2297 at 5, 820 So.2d at 545. As long as the termination does not violate any statutory or constitutional provisions, the employer is not liable for wrongful termination. For example, laws prohibit discrimination against anyone based on "race, sex or religious beliefs," and protect employees from termination "for exercising certain statutory rights." *See id*., 01-2297 at 5, 820 So.2d at 545-46 & nn.8 & 9 (citing 42 U.S.C.A. § 2000e, *et seq*.; 42 U.S.C.A. § 1981; La. R.S. 23:301, et seq.; La. R.S. 23:1361). "Aside from [these limited] federal and state statutory exceptions, there are no broad policy considerations creating exceptions to employment at will." *Id.*, 01-2297 at 5, 820 So.2d at 545-46.

Here, whether Employees have stated a cause of action depends on whether federal or state law limits Employer's right to terminate an at-will employee for failure to comply with the vaccine mandate. This case does not involve allegations of constitutionally prohibited discrimination based on race, sex, or religious belief, nor does it involve a statute that was adopted for the purpose of protecting an employee from termination under these circumstances. Rather, Employees argue that Employer's ability to dismiss them as at-will employees is tempered by an existing statute

and the Louisiana Constitution—namely, La. R.S. 40: 1159.1, *et seq*., and La. Const. art. I, § 5. Both of these arguments are unavailing.

With respect to their statutory argument, Employees point to La. R.S. 40:1159.7 of the Louisiana Medical Consent Law (La. R.S. 40:1159.1, et seq.), which governs the right of an adult to refuse medical treatment and provides:

> Nothing contained herein shall be construed to abridge any right of a person eighteen years of age or over to refuse to consent to medical or surgical treatment as to his own person.

Employees' statutory claim against Employer fails. The medical informed consent provision on which Employees rely applies to the relationship between a healthcare provider, a patient, or a patient's lawful representative.[13] *See* La. R.S. 40:1157.1(A) and 40:1159.4. Indeed, the Subchapter of the "Healthcare Provisions: Health Care" Chapter within which the consent law is found is titled "Healthcare Consumers." Employees have not alleged that Employer is their healthcare provider or that they are patients of Employer. Instead, their cause of action is based on an employer-employee relationship. This court, there-

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[13] "The informed consent doctrine is based on the principle that every human being of adult years and sound mind has a right to determine what shall be done to his or her own body." *Snider v. Louisiana Med. Mut. Ins. Co*., 13-0579, p. 8 (La. 12/10/13), 130 So.3d 922, 930. "Surgeons and other doctors are thus required to provide their patients with sufficient information to permit the patient himself to make an informed and intelligent decision on whether to submit to a proposed course of treatment." *Id*.

fore, finds Employees have not alleged a cause of action based on the Medical Consent Law.[14]

Employees' claim under La. Const. art. I, § 5 is likewise unavailing. Employees invoke their right to privacy under La. Const. art. I, § 5, which they liken to their right to be free from discrimination based on race, sex, and religious beliefs in the workforce. La. Const. art. I, § 5 states, in pertinent part:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy.

In *Hondroulis v. Schuhmacher*, 553 So.2d 398, 415 (La. 1988) (on reh'g), in the context of informed consent, this court recognized that the right to privacy contained in La. Const. art. I, § 5 provides the right to decide whether to obtain or reject medical treatment. While Employer does not dispute that Louisiana recognizes a constitutional right to reject medical treatment, Employer asserts this remedy is limited to state actors. Stated differently, because Employer is a private entity, Employer contends La. Const. art. I, § 5 is not applicable. Here, Employer has been sued in its capacity as a "private employer." There is no allegation or even the barest insinuation that Employer is a state actor; indeed, the parties in this case stipulated that Employer is a private actor.

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[14] Employees further assert the right to refuse medical treatment is also embodied in the Louisiana Advanced Directive laws, *see* La. R.S. 40:1151.2; the Louisiana Military Advanced Directive Act, *see* La. R.S. 40:1153.2; and the nursing home residents' bill of rights, La. R.S. 40:2010.8(6). However, none of these statutes are relevant to the employment context.

Louisiana courts have consistently required governmental action to trigger the application of La. Const. art. I, § 5. *See Allen v. La. State Bd. of Dentistry*, 543 So.2d 908, 911-12 (La. 1989) (the prohibitions against illegal searches and seizures in La. Const. art. I, § 5 "are aimed at governmental conduct rather than the actions of private citizens operating independently of the government or its agents"). *See also, e.g., Guilbeaux v. Guilbeaux*, 08-17, p. 7 (La.App. 3 Cir. 4/30/08), 981 So.2d 913, 917 ("Insofar as [defendants] are not state actors, we find that [plaintiff] does not have an invasion of privacy claim under Article I, § 5."); *Johansen v. La. High Sch. Athletic Ass'n*, 04-0937, p. 12 (La.App. 1 Cir. 6/29/05), 916 So.2d 1081, 1090 ("[T]he protection extended by Article I, § 5 does not extend so far as to protect private citizens against the actions of private parties."); *Brennan v. Bd. of Trustees for Univ. of La. Syst.*, 95-2396 (La.App. 1 Cir. 3/27/97), 691 So.2d 324, 328 ("The Louisiana Constitution's protection of privacy provisions contained in Article I, § 5 does not extend so far as to protect private citizens against the actions of private parties."); *Carr v. City of New Orleans*, 622 So.2d 819, 822 n.3 (La.App. 4 Cir. 7/27/93) (the plaintiff "states that she is asserting a claim for breach of privacy under Article 1, Section 5 of the Louisiana Constitution. [The plaintiff's] constitutional claim is inapplicable here, where the defendants are private parties."); *Casse v. La. Gen. Servs., Inc.,* 531 So.2d 554, 555 (La.App. 5 Cir. 1988) (quoting Louis "Woody" Jenkins, *The Declaration of Rights*, 21 Loyola L. Rev. 9, 28) ("The Section (Art. I, Sec. 5) is intended to apply solely to government action, in accord with the

view of the committee that a bill of rights cannot reach private action.").[15] Federal courts applying Louisiana law have reached the same conclusion. *See Parks v. Terrebone Parish Consol. Gov.*, No. CV 16-15466, 2017 WL 699838 at *11 (E.D. La. 2017) (quoting *Brennan*, 95-2396 at 7, 691 So.2d at 328) ("[N]either state constitutional provision 'extend[s] so far as to protect private citizens against the actions of private parties.'"); *Ponder v. Pfizer, Inc.*, 522 F.Supp. 2d 793, 798 (M.D. La. 2007) (dismissing a privacy claim against an employer and holding: "While courts have found [La. Const. art. I, § 5] applicable to government conduct, Louisiana courts have not applied it to private action.").[16] Therefore, the validity of these cases is upheld, and this court declines the

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[15] Many cases addressing the right to privacy under La. Const. art. I, § 5 involve the legality of police action (often in the context of searches and seizures), and the court has likewise indicated in those cases that the right to privacy protects against governmental action. *See*, *e.g.*, *State v. Tucker*, 626 So.2d 707, 710 (La. 1993) (recognizing "the citizen's right to be free from governmental interference"); *State v. Belton*, 441 So.2d 1195, 1199 (La. 1983) (recognizing the "right to be free from government interference"); *State v. McHugh*, 630 So.2d 1259, 1264 (La. 1994) (an individual's "right to be left alone, to be free of unjustified governmental interference with his mind, body or autonomy, is also protected by Article I, § 5's reasonableness clause, which secures an individual from *any* unreasonable invasion of privacy.").

[16] This conclusion is consistent with the Fourth Amendment of the United States Constitution as interpreted by the Supreme Court, which has been applied only as a restraint on the government and not as a limitation on nongovernmental actors. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984); Katz v. U.S., 389 U.S. 347, 350 (1967). *See also Moresi v. State Dept. of Wildlife and Fisheries*, 567 So.2d 1081, 1092 (La. 1990) (noting the "strong resemblance between our state guaranty and that of the Fourth Amendment").

invitation to extend the scope of La. Const. art. I, § 5 to restrict private actors.[17]

Employees' primary argument in favor of their position that Section 5 applies to private actors is this court's recognition in *Hondroulis*[18] that La. Const. art. I, § 5 establishes an "affirmative right to privacy impacting non-criminal areas of law and establishing the principles of the Supreme Court decisions in explicit statement instead of depending on analogical development." *Id.*, 553 So.2d at 415 (on reh'g) (emphasis added; citations omitted). According to Employees, the use of the phrase "affirmative right" means the protection afforded by Section 5 goes beyond state action to create a cause of action against private parties. Contrary to Employees' arguments, and considering the context in which this statement was made in *Hondroulis*, this court interprets that language as a simple statement of the obvious, that is,

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[17] There is dicta in *Parish National Bank v. Lane*, 397 So.2d 1282, 1286 n.8 (La. 1981), and *Jaubert v. Crowley Post-Signal, Inc.*, 375 So.2d 1386, 1387 n.2 (La. 1979), regarding the contention that the right to privacy in La. Const. art. I, § 5 extends to private entities. In *Moresi v. State, Dep't of Wildlife & Fisheries*, 567 So.2d 1081, 1092 (La. 1990), which involved the actions of a state actor, this court noted that the protection afforded by La. Const. art. I, § 5 "goes beyond limiting state action." With this holding, that dicta is rejected by this court.

[18] The sole issue in *Hondroulis* was a narrow one, which is not at issue here: "Does a medical consent form, which tracks the language of [former] LSA-R.S. 40:1299.40 A., have to specify all known risks of a particular surgical procedure?" *Id.*, 553 So.2d at 400. The court's holding did not involve constitutional rights or the employment-at-will doctrine, but instead involved interpretation of former La. R.S. 40:1299.40, which was Louisiana's informed consent statute at that time.

what was previously an unwritten right was made express in the 1974 Louisiana Constitution and is no longer derived by implication. *See* Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 1 & 21 (1975) (stating that La. Const. art. I, § 5 "establishes" the protection of privacy "in an explicit statement instead of depending on reasoning from other [constitutional] provisions for its establishment").

CONCLUSION

For the foregoing reasons, no exception to this state's at-will employment doctrine applies in this matter.[19] In the absence of the existence of any statutory or constitutional rights that temper the application of that doctrine, as explained in *Quebedeaux*, this court finds Employer is entitled to terminate Employees for failure to comply with the vaccine mandate. Employees have not stated a cause of action under La. Const. art. I, § 5 or Louisiana statutory law for injunctive or declaratory relief.

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[19] A corollary of the employment-at-will doctrine is that courts are not quasi-human resources departments that re-evaluate personnel decisions or the wisdom of those determinations, so long as there is no violation of "federal and state laws which proscribe certain reasons for dismissal of an at-will employee." *See Quebedeaux*, 01-2297 at 5, 820 So.2d at 545. "The role of the courts is not to judge whether an employer's personnel decisions are fair or good business decisions." *Hook v. Georgia-Gulf Corp.*, 99-2791, p. 14 (La.App. 1 Cir. 1/12/01), 788 So.2d 47, 56. "Broad policy considerations creating exceptions to employment at will and affecting relations between employer and employee should not be considered by this court." *Quebedeaux*, 01-2297 at 5, 820 So.2d at 546 (citing *Gil v. Metal Serv. Corp.*, 412 So.2d 706, 708 (La.App. 4 Cir. 1982)).

DECREE

The decision of the court of appeal is reversed, and the trial court's judgment sustaining an exception of no cause of action filed by University Health Shreveport, LLC d/b/a Ochsner LSU Health Shreveport and LSU Health-St. Mary Medical Center, LLC, denying injunctive relief,[20] and dismissing the plaintiffs' action is reinstated.

REVERSED;
TRIAL COURT JUDGMENT REINSTATED.

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[20] Although the right to amend is ordinarily afforded, this court cannot perceive of an amendment that could establish a cause of action under the circumstances of this case. *See* La. C.C.P. art. 934. Indeed, counsel for Employees conceded as such at the hearing in this matter.