

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CA 0698

THOMAS GARZA, SR., SANDRA GARZA, AND THOMAS GARZA, JR.,
AND ON BEHALF OF THE ESTATE OF COURTNEY A. GARZA

VERSUS

DELTA TAU DELTA FRATERNITY NATIONAL,
DELTA TAU DELTA FRATERNITY LOCAL,
SOUTHEASTERN LOUISIANA UNIVERSITY, HAMMOND CITY POLICE
DEPARTMENT, OFFICER EDWIN BERGERON, PAUL UPSHAW,
AND ABC INSURANCE COMPANY



Judgment rendered March 28, 2007

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 491,474
The Honorable Donald R. Johnson

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PLAINTIFFS/APPELLANTS
THOMAS GARZA, SR., SANDRA GARZA,
AND THOMAS GARZA, JR.

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DEFENDANTS/APPELLEES
HAMMOND CITY POLICE DEPARTMENT AND
OFFICER EDWIN BERGERON

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Downing, J. concurs

PETTIGREW, J.

Plaintiffs appeal the trial court's judgment sustaining the peremptory exception raising the objection of no cause of action filed by two of the defendants and dismissing, with prejudice, the plaintiffs' claims against those defendants. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On April 8, 2001, Courtney Garza committed suicide by hanging herself in her parents' home in Baton Rouge. At the time of her death, Courtney was twenty-one years old and a student at Southeastern Louisiana University in Hammond. On January 15, 2002, Thomas Garza, Sr., Sandra Garza, and Thomas Garza, Jr., Courtney's parents and brother respectively, filed suit against various defendants, alleging that Courtney's death was proximately caused by the concomitant negligence of the defendants. Named as defendants in the petition were Delta Tau Delta National Fraternity (DTD National), Delta Tau Delta International Fraternity, Epsilon Phi Chapter (DTD Local), the State of Louisiana, through the Board of Supervisors for the University of Louisiana System and Southeastern Louisiana University (SLU), Paul Upshaw, the Hammond City Police Department (police department), Officer Edwin Bergeron, and an unnamed insurance company.

The petition alleges that on February 6, 2001, Courtney was raped at an off-campus residence by Paul Upshaw, a member of DTD Local at SLU. Plaintiffs further alleged that various defendants subjected Courtney to continuous and ongoing threats and harassment subsequent to the alleged rape. Specifically, with regard to Officer Bergeron and the police department, the Garzas allege the following in paragraph six of the petition:

As part of the continuous and ongoing threats and harassment following the rape incident that occurred on the 6th day of February 2001, the decedent was approached by defendant, OFFICER EDWIN BERGERON, a Hammond City Police Department employee and alumni member of "DTD Local" who attempted to further quail the decedent's attempts to pursue criminal charges against defendant, PAUL UPSHAW, by informing the decedent that her efforts to report the rape incident to the authorities would be in vain and that no official action would be taken against the defendant, PAUL UPSHAW, further, defendant, OFFICER EDWIN BERGERON, informed decedent that if she continued to communicate her allegations concerning the rape incident, that she would

be sued for slander and/or defamation. This communication was made to the decedent by defendant, OFFICER EDWIN BERGERON, in his official capacity as a Hammond Police Officer and while he was in the course and scope of his employment with the Hammond City Police Department and that under the doctrine of *Respondeat Superior* the Hammond City Police Department is vicariously liable for this tortuous [sic] conduct.

Officer Bergeron and the police department filed a peremptory exception pleading the objection of no cause of action, alleging that there was no proof that Officer Bergeron was in any way involved in misconduct that would lead to a finding of negligence in accordance with La. R.S. 9:2798.1. They further argued that Officer Bergeron's alleged attempt to dissuade Courtney from reporting the rape was not the legal cause of her injury. The trial court sustained the objection and dismissed the Garzas' claims against Officer Bergeron and the police department, with prejudice. The Garzas have appealed.

NO CAUSE OF ACTION

The function of the peremptory exception raising the objection 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 petition. **Everything on Wheels Subaru, Inc. v. Subaru South, Inc.**, 616 So.2d 1234, 1235 (La. 1993); **Copeland v. Treasure Chest Casino, L.L.C.**, 2001-1122, p. 3 (La. App. 1 Cir. 6/21/02), 822 So.2d 68, 70. 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. The exception is triable on the face of the pleading, and for the purpose of determining the issues raised by the exception, the well-pleaded facts in the pleading must be accepted as true. **Richardson v. Richardson**, 2002-2415, p. 6 (La. App. 1 Cir. 7/9/03), 859 So.2d 81, 86. Thus, the only issue at the trial of the exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. **Perere v. Louisiana Television Broadcasting Corporation**, 97-2873, p. 3 (La. App. 1 Cir. 11/6/98), 721 So.2d 1075, 1077.

In reviewing a trial court's ruling sustaining an exception raising the objection of no cause of action, the appellate court should subject the case to a *de novo* review. The exception raises a question of law, and the trial court's decision is based only on

the sufficiency of the petition. **Fink v. Bryant**, 2001-0987, p. 4 (La. 11/28/01), 801 So.2d 346, 349. **B & C Elec., Inc. v. East Baton Rouge Parish School Bd.**, 2002-1578, pp. 4-5 (La. App. 1 Cir. 5/9/03), 849 So.2d 616, 619. Simply stated, a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim that would entitle him to relief. **Richardson**, 2002-2415 at p. 7, 859 So.2d at 86. Every reasonable interpretation must be accorded the language of the petition in favor of maintaining its sufficiency and affording the plaintiff the opportunity of presenting evidence at trial. **Id.** The question, therefore, is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the petition states any valid cause of action for relief. **Copeland**, 2001-1122 at p. 4, 822 So.2d at 70.

DISCUSSION

In support of their exception, Officer Bergeron and the police department rely on La. R.S. 9:2798.1, which establishes a limitation on the liability of public entities and their officers.¹ Pursuant to this statute, liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties. La. R.S. 9:2798.1(B). However, this limitation of liability does not apply to: (1) acts or omissions that are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or (2) acts or omissions that constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct. La. R.S. 9:2798.1(C).

In their petition, plaintiffs allege that Officer Bergeron and the police department, along with DTD National and DTD Local, participated in a pattern of continuous and ongoing harassment directed at Courtney as a result of her attempts to report the alleged rape. Plaintiffs further allege that this ongoing harassment resulted

¹ We note that in support of their exception, Officer Bergeron and the police department further contend that the plaintiffs' petition fails to state a cause of action because there is no proof to support the allegations of the petition. As noted above, however, this is not the appropriate analysis to apply to an exception raising the objection of no cause of action as no evidence may be introduced to support or controvert the claim that the petition fails to state a cause of action.

in Courtney's death. Accepting the well-pleaded allegations of fact in the plaintiffs' petition as true, we conclude that the petition has stated a cause of action against Officer Bergeron and the police department. If, as alleged, Officer Bergeron attempted to dissuade Courtney from filing a complaint about the alleged rape because of his affiliation with the fraternity, such action could constitute malicious, intentional, or willful misconduct pursuant to La. R.S. 9:2798.1(C)(2) and would not be subject to the limitation of liability provided for by La. R.S. 9:2798.1(B). Accordingly, we conclude that the plaintiffs' petition is sufficient to state a cause of action, and the judgment of the trial court must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is reversed, and the matter is remanded to the trial court for further proceedings. All costs of this appeal in the amount of \$822.17 are assessed to Officer Edwin Bergeron and the Hammond City Police Department.

REVERSED AND REMANDED.