

****THIS OPINION HAS BEEN DESIGNATED AS NOT FOR PUBLICATION****

SUCCESSION OF PAUL SERPAS, JR.

NO. 16-C-257

C/W 16-C-258 & 16-C-259

C/W

FIFTH CIRCUIT

SUCCESSION OF JANE INEZ MURRAY
SERPAS (THE "DECEDENT")

COURT OF APPEAL

C/W

STATE OF LOUISIANA

SUCCESSION OF JANE INEZ MURRAY
SERPAS

VERSUS

ERIC OLIVER PERSON, MICHELLE SERPAS
CAMERO, M.D., ABC INSURANCE
COMPANY, DEF INSURANCE COMPANY,
GHI INSURANCE COMPANY, AND JKL
INSURANCE COMPANY

ON SUPERVISORY REVIEW FROM THE TWENTY-FOURTH JUDICIAL
DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. C/W 729-856 C/W 749-450, DIVISION "G"
HONORABLE E. ADRIAN ADAMS, JUDGE PRESIDING

September 28, 2016

**ROBERT A. CHAISSON
JUDGE**

Panel composed of Fredericka Homberg Wicker,
Jude G. Gravois, and Robert A. Chaisson

WRIT DENIED; SANCTIONS DENIED

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FHW
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CHAISSON, J.

In this succession dispute, plaintiff Cheryl B. Montgomery, Testamentary Executrix of the Succession of Jane Inez Murray Serpas, seeks supervisory review of the trial court's November 10, 2015 judgment granting defendants', Dr. Michelle Serpas Camero's and Eric Oliver Person's, motion to strike Ms. Montgomery's amending petition.

BACKGROUND

This case arises out of two related successions, those of Paul Serpas, Jr. and Jane Inez Murray Serpas, who were married on June 20, 2008. Paul Serpas died on March 17, 2013 and Jane Serpas died on July 22, 2013. On November 10, 2011, Jane Serpas executed a Notarial Testament prepared by Eric Person, a licensed Louisiana attorney, which provided that, in the event she were to predecease her husband, her entire estate, including a home located at #3 Chateau du Jardin Drive, Kenner, would be bequeathed to her husband, Paul Serpas. The will further provided that if her husband were to predecease her, her entire estate would be bequeathed to her niece, Cheryl Montgomery. On March 15, 2012, Jane Serpas executed an Act of Donation (also prepared by Eric Person), wherein she donated the home at Chateau de Jardin Drive to her husband in full ownership with no reservation of rights in the event of her death. On October 17, 2012, Paul Serpas executed his Notarial Testament wherein he bequeathed his entire estate to his three children, one of whom is Dr. Camero, with no disposition provided for his wife. On the same day, Jane Serpas executed a healthcare power of attorney naming Dr. Camero as her agent-in-fact to make all decisions regarding healthcare matters. Paul Serpas died of cancer a few months later on March 17, 2013. Jane Serpas spent the next four months in and out of an assisted living facility and East Jefferson Hospital before her death on July 22, 2013. Dr. Camero was

subsequently appointed independent executrix of Paul Serpas's succession and Ms. Montgomery was appointed testamentary executrix of Jane Serpas's succession.

PROCEDURAL HISTORY

Ms. Montgomery filed her original petition on behalf of herself and as testamentary executrix of Jane Serpas's succession on March 13, 2014, in Civil District Court for the Parish of Orleans. In her petition she named as co-defendants Eric Person, in both his personal and professional capacity, as well as his personal and professional liability insurers, and Dr. Michelle Camero, in both her personal and professional capacities, as well as her personal and professional liability insurers. In her original petition, Ms. Montgomery alleges that Mr. Person intentionally or negligently breached his professional duty towards his clients, Paul and Jane Serpas, and that Dr. Camero breached her duties owed as both an attorney-in-fact and as a physician. She further averred that the co-defendants are joint tortfeasors who conspired to cause injury and damage to Jane Serpas.

On November 3, 2014, Ms. Montgomery filed a supplemental and amending petition which reiterated and reaverred all of the allegations in the original petition, with the exception of amending the language in article 20 of the original petition to claim that the healthcare decisions made by Dr. Camero as attorney-in-fact were not made as part of any physician-patient relationship. The language of the petition which stated the suit was to be brought against Dr. Camero in her professional capacity and including her professional liability insurer as a defendant was not removed in this supplemental and amending petition.

Both co-defendants filed exceptions to the supplemental and amending petition in December 2014; however, before the hearing on those exceptions, the case was transferred to the 24th Judicial District Court in May 2015 and consolidated with the Succession of Paul Serpas, Jr. and the Succession of Jane

Inez Murray Serpas.¹ The defendants subsequently refiled the following exceptions:

- Mr. Person filed a dilatory exception of prematurity and a declinatory exception of lack of jurisdiction in which he argued that the trial court lacked jurisdiction over the claims at that time because the co-conspiracy claims included medical malpractice claims by a co-defendant that first must be heard by a medical review panel. Mr. Person also filed peremptory exceptions of no right of action (because Ms. Montgomery was not a client of Mr. Person and could therefore not sue for legal malpractice in her personal capacity), no cause of action (for failure to state a claim upon which relief could be granted), and peremption under La. R.S. 9:5605, which requires actions for legal malpractice to be filed within one year of the date of the alleged act.
- Dr. Camero filed a dilatory exception of prematurity and a declinatory exception of lack of jurisdiction in which she argued, like Mr. Person, that the medical malpractice claims against her must first be heard by a medical review panel.

A hearing on all of these exceptions was set for August 31, 2015.

On August 11, 2015, Ms. Montgomery filed a second supplemental and amending petition in which she again reaverred all of the allegations and claims set forth in the original and first supplemental petitions. No new facts were alleged in the second supplemental and amending petition, but Ms. Montgomery sought to amend the language to state that the claims against Dr. Camero were brought against her solely in her personal capacity, not her capacity as a treating physician for Jane Serpas. However, the language of the petition was not amended to remove Dr. Camero's professional liability insurer as a defendant. The second supplemental and amending petition added new causes of action under the following theories: Louisiana Racketeering Act, Unjust Enrichment, Breach of

¹ Prior to the transfer and consolidation of these cases, Ms. Montgomery, acting as testatrix of Jane Serpas's succession, had intervened in the succession of Paul Serpas and filed a motion to nullify the act of donation. This motion was denied by judgment rendered on April 1, 2014.

Duty, Breach of Fiduciary Duty by Mr. Person, Breach of Fiduciary Duty by Dr. Camero, Fraud, Negligent/Intentional Misrepresentation, Detrimental Reliance, and Civil Conspiracy.

On August 17, 2015, Dr. Camero and Mr. Person filed an *ex parte* motion to strike the second supplemental and amending petition, in which they argued that the newest petition should be struck because Ms. Montgomery had not sought leave of court for permission to file the second supplemental and amending petition as required under La. C.C.P. art. 1155. The court denied the *ex parte* motion at that time, but set it for a contradictory hearing to be heard on August 31, 2015, at the time of the hearing on defendants' exceptions.

At the August 31, 2015 hearing, the trial court first considered the motion to strike. Dr. Camero and Mr. Person argued that, because Ms. Montgomery had not sought leave of court to supplement her petition, the "Second Supplemental and Amending Petition" should be stricken. They averred that the petition in question was supplemental in both name and content because it added new causes of action, new quantum of damages, and causes of action (in particular the breach of fiduciary duty for failure to provide accountings for the estate) which became exigible subsequent to the filing of the original petition in March 2014. Ms. Montgomery argued that the new petition was only an 'amending' and not a 'supplemental' petition because all of the new causes of action related back to the facts and circumstances which gave rise to the claims of the original petition as required under La. C.C.P. art. 1153. She further argued that because defendants had not yet filed an answer to any of the petitions, under La. C.C.P. art. 1151, she was entitled to file an amended petition without leave of court. After hearing counsels' arguments, the trial court granted the motion to strike the second supplemental and amending petition.

After hearing testimony and argument, the trial court also granted Mr. Person's exceptions of no right of action, no cause of action, and peremption and dismissed with prejudice the claims against Mr. Person. The court also considered and granted both Mr. Person's and Dr. Camero's dilatory exceptions of prematurity.²

On September 14, 2015, Ms. Montgomery filed a motion for modification, clarification or, alternatively, for partial new trial as well as an "amending petition" which reiterated and reaverred all of the allegations and claims in her original petition and her (first) supplemental and amending petition. No new factual allegations were pled. The language of this final "amending petition" is nearly identical to the second supplemental and amending petition previously filed, including the addition of the new causes of action against defendants.

On October 12, 2015, Dr. Camero and Mr. Person filed a motion to strike the latest amending petition. The trial court heard both the motion to strike and Ms. Montgomery's motion for clarification/partial motion for new trial on November 10, 2015. Ms. Montgomery argued that, pursuant to La. C.C.P. arts. 932, 933, and 934, she has a right to amend her petition to remove the grounds for the exceptions, and, furthermore, that she has a right to add the new causes of action set forth in her original petition because defendants had not yet answered the petition. Dr. Camero and Mr. Person argued that all claims were dismissed against them according to the August 31, 2015 judgments and that Ms. Montgomery had failed to provide any new evidence or reasons for granting a new trial. With regard to the claims against Dr. Camero, which were dismissed on the dilatory exception of prematurity, she argued that the language of La. C.C.P. art. 933(A) requires dismissal rather than granting Ms. Montgomery an opportunity to amend. That

² The declinatory exceptions of prematurity were withdrawn.

article states, “[i]f the dilatory exception pleading prematurity is sustained, the premature action, claim, demand, issue or theory shall be dismissed.” With regard to the claims brought against Mr. Person, he argued that the language of La. C.C.P. arts. 932, 933, and 934, which required the court to provide Ms. Montgomery with an opportunity to amend the petition to remove the grounds for the exception is conditional upon the trial court’s determination that such grounds may be removed by amendment of the petition. Mr. Person argued that the trial court determined that no amendment of the petition could cure the grounds for the exceptions filed by Mr. Person and therefore dismissed the claims with prejudice. At the conclusion of the hearing, the trial court granted the motion to strike and denied Ms. Montgomery’s motion for clarification and/or a partial new trial.

Ms. Montgomery filed a Notice of Appeal on December 7, 2015, wherein she requested a devolutive appeal from the November 10, 2015 judgment granting the defendants’ motion to strike the amending petition. Ms. Montgomery’s Notice of Appeal did not identify any other ruling of the trial court that she sought to appeal; however, in her appellate brief, Ms. Montgomery also attempted to appeal the judgments from August 31, 2015 on defendants’ exceptions. Upon motion of Dr. Camero and Mr. Person, we dismissed the appeal as to these previous judgments as untimely, and determined that we would review the judgment as to defendants’ motion to strike pursuant to our supervisory jurisdiction.

DISCUSSION

Ms. Montgomery seeks review of the trial court’s judgment granting defendants’ motion to strike an amended petition she filed subsequent to the trial court’s previous judgments sustaining various exceptions filed by defendants.

“When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the

exception shall order such amendment within the delay allowed by the court.” La. C.C.P. art. 934. Although the article mandates that a judgment sustaining such exceptions afford the plaintiff an opportunity to amend the petition, that right is qualified by the restriction that the objection be curable. *Hennig v. Alltel Communs., Inc.*, 05-96 (La. App. 5 Cir. 5/31/05), 903 So.2d 1137, 1140 (citing *Nelson v. Williams*, 97-276 (La. App. 5 Cir. 9/30/97), 707 So.2d 440). Where the amendment would be a vain and useless act, such an amendment is not required by La. C.C.P. art. 934. *Id.*

The record before us reflects that at the conclusion of the hearing on defendants’ various exceptions, at the request of Ms. Montgomery’s counsel, the trial court did in fact allow Ms. Montgomery fifteen days within which to amend her petition.³ The transcript of that hearing further reflects that written judgments on the exceptions were provided to the trial court at the conclusion of the hearing, that those judgments did not contain an order allowing Ms. Montgomery fifteen days within which to amend, and that the trial court requested that an amended judgment be provided to him which contained that provision. Inexplicably, the record does not contain any amended judgment that contains the language allowing Ms. Montgomery fifteen days within which to amend her petition. To the contrary, the judgments rendered on August 31, 2015, at the conclusion of the hearing, contain hand-written language indicating that Ms. Montgomery’s suit is dismissed with prejudice.⁴

Upon thorough review and consideration of the entire record before us, we conclude that the trial court did not err in his legal conclusion that Ms.

³ The record reflects that the trial court allowed an opportunity to amend even though counsel for Ms. Montgomery acknowledged that the grounds for the objections pleaded in some of defendants’ exceptions could not be removed by amendment.

⁴ This hand-written language was presumably added by the trial court; however, adding further confusion to this issue is the fact that the judgments in the official record contain the initials “EA” next to the hand-written language, while various copies of the judgments provided to this Court do not contain any initials next to the hand-written language.

Montgomery's latest petition was in fact a supplemental petition which sought to add additional causes of action, rather than an amending petition which sought to remove the grounds for the objections pleaded by defendants' various exceptions.⁵ Although the trial court allowed Ms. Montgomery fifteen days to amend her petition to remove the grounds for the objections, he did not grant her leave of court to file a supplemental petition adding new causes of action. We find, therefore, that the trial court did not abuse his discretion in striking Ms. Montgomery's latest petition, and accordingly deny Ms. Montgomery's writ application.

Additionally, on the record before us, given the apparent confusion regarding the issue of Ms. Montgomery's right to amend her petition, the trial court's clear statement at the conclusion of the hearing that he was granting Ms. Montgomery fifteen days within which to amend, and this Court being unable to conclude that Ms. Montgomery was in bad faith in her attempt to amend the petition or in seeking review from this Court of the ruling on defendants' motion to strike, we decline to impose sanctions against Ms. Montgomery as requested by defendants.

WRIT DENIED; SANCTIONS DENIED

⁵ We further note, as was acknowledged by Ms. Montgomery's counsel at the conclusion of the hearing, that the grounds for the objections pleaded by defendants in some of their exceptions are not able to be removed by amendment of the petition.

SUSAN M. CHEHARDY
CHIEF JUDGE

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **SEPTEMBER 28, 2016** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

16-C-257

C/W 16-C-258 & 16-C-259

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)

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