

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1389

JERRY JOSEPH ROGERS

VERSUS

**DIOCESE OF HOUMA-THIBODAU, FATHER ALRFEDO
LORESCO, AND SOUTHERN DOMINICAN PROVINCE**

Judgment Rendered: May 4, 2007

**Appealed from the
Seventeenth Judicial District Court,
in and for the Parish of Lafourche,
State of Louisiana
Docket Number 101659**

Honorable F. Hugh Larose, Judge Presiding

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Father Alfredo Loresco**

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

WHIPPLE, J.

This matter is before us on appeal by plaintiff, Jerry Joseph Rogers, from a judgment of the trial court: (1) sustaining exceptions of no cause of action filed by defendants, Father Alfredo Loresco and the Diocese of Houma-Thibodaux, and (2) dismissing plaintiff's suit with prejudice.¹ Finding no error, we affirm.

DISCUSSION

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. Rebardi v. Crewboats, Inc., 2004-0642 (La. App. 1st Cir. 2/11/05), 906 So. 2d 579, 581. Thus, appellate courts review judgments sustaining an exception of no cause of action *de novo*. Stroscher v. Stroscher, 2001-2769 (La. App. 1st Cir. 2/14/03), 845 So. 2d 518, 523. Generally, no evidence may be introduced to support or controvert the exception raising the objection of no cause of action. See LSA-C.C.P. art. 931. However, the jurisprudence has recognized an exception to this rule, which allows the court to consider evidence that is admitted, without objection, to enlarge the pleadings. Rebardi v. Crewboats, Inc., 906 So. 2d at 581.

In determining whether a petition sets forth or discloses a cause of action, all facts pleaded in the petition are accepted as true for the purpose of the exception, and any doubts are resolved in favor of the sufficiency of the petition. Pelts & Skins, L.L.C. v. Louisiana Department of Wildlife and Fisheries, 2005-0952 (La. App. 1st Cir. 6/21/06), 938 So. 2d 1047, 1052-1053, writ denied, 2006-1821 (La. 10/27/06), 939 So. 2d 1281. Accordingly, the

¹By judgment signed May 10, 2006, the trial court granted plaintiff's motion to dismiss his claims against Southern Dominican Province without prejudice.

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. Rebardi v. Crewboats, Inc., 906 So. 2d at 582.

In his petition, plaintiff essentially asserted that Father Loresco owed him damages for fraudulent concealment and misrepresentation of paternity of a child allegedly fathered by Loresco with plaintiff's wife, and for mental anguish and emotional distress. Plaintiff also sought reimbursement for expenses incurred in raising the child and for medical and pharmaceutical expenses. As against the Diocese of Houma-Thibodaux, plaintiff sought damages under the doctrine of *respondeat superior* and on the additional basis that the Diocese was liable in that the Diocese had failed to properly supervise Loresco.

After carefully setting forth the jurisprudence which it had reviewed and considered, the trial court rejected plaintiff's arguments and concluded that the petition failed to disclose any cause of action for which relief could be granted under Louisiana law, reasoning as follows:

As pointed out in the plaintiff's argument, a lawyer can be sanctioned by his governing board for having affairs with clients. A doctor can be sanctioned by his governing board for conducting such activities with his patients. And certainly priests can be reprimanded and even defrocked by their order. But these are all self-imposed restrictions. These are not restrictions created in the eyes of the law.

In the reading of the plaintiff's petition, though artfully drafted as is the term used in many of the cases, it is still a claim for loss or alienation of affection. The cases are abundantly clear dating back to 1927, the Moulin versus Monteleone case which is at 165 La. 169, a 1927 Louisiana Supreme Court case that found that no cause of action lies for a claim for alienation of love or affection.

With regard to plaintiff's claims for special or economic damages, alleged to arise from a purported tort of fraudulent misrepresentation or

concealment of paternity, the trial court noted that because plaintiff's disavowal action had been deemed prescribed by another division of district court, plaintiff was the legal father. Thus, the court concluded, there was no legal basis for him to seek reimbursement for these costs from the defendants or anyone else. In rejecting these allegations as likewise unsupportable under Louisiana law, the trial court stated:

The misrepresentation of paternity is a novel issue or one that this Court cannot find great guidance on. But, again, I find it simply to be the same issue of an interference with or an alienation [of] affection of a spouse just wrapped in a different cloak. I can find no language other than the Viator [v. Miller, 2004-1199 (La. App. 3rd Cir. 4/27/05), 900 So. 2d 1135] case that even discusses it and none of them accepted it as a cause of action.

The trial court then concluded:

[B]ased on the clear jurisprudential and statutory law that is provided to this Court, I am not willing to take that step. . . . I find that the statement of the misrepresentation of paternity does not state a cause of action. There's also of course a claim for monetary damages which deal with the expenses of raising the child for which one has been [misled] to believe . . . is their child. . . . [T]he Civil Code article[s] that [set] forth the law regarding paternity and disavowal of paternity are clear. In particular, . . . Civil Code Article 189 sets forth the prescription period for the disavowal of a child. That action was actually filed among these parties in another division of this court and it was found that [the] action had prescribed. The reason for this is the societal interests [that] the child not be made to suffer as a result of the [in]discretions or transgressions of the parents. Based on the fact that the disavowal action was denied and [plaintiff] is the legal father, there is no legal basis for anyone else to absorb or pay the expenses.

On appeal, plaintiff candidly admits that there is no cause of action under Louisiana law against an alleged third-party tort-feasor for alienation of a spouse's affection. Nonetheless, plaintiff argues that the allegations in his petition set forth an actionable, separate tort. Specifically, plaintiff argues that his case presents "an extreme instance of concealment of paternity" and that

his priest, “the very man that performed his marriage ceremony, intentionally concealed for eighteen years the parentage of [J.R.]” He argues that this court should recognize a cause of action *ex proprio motu*: (1) based on the parties’ “special relationship”; (2) because Loresco “intentionally concealed the parentage of [J.R.] long enough for [plaintiff] to lose the opportunity to disavow [J.R.]; and (3) because Loresco “intentionally concealed the parentage . . . to have [plaintiff] financially provide for her while she remained a minor” and while Loresco was acting as plaintiff’s “priest, confessor, and counselor.” Thus, he argues, the judgment granting the defendants’ exceptions should be reversed inasmuch as his cause of action is not founded on the alienation of his wife’s affection, but is instead based on the violation of a “special relationship” that existed between plaintiff and his priest for which defendants should be held to owe a special duty.

Rogers contends in his assignments of error that the judgment maintaining the exceptions should be reversed because the trial court erred in: (1) failing to recognize a cause of action for misrepresentation of paternity; (2) improperly labeling and treating this case as a case of alienation of affection; and (3) ruling that this case did not rise to the level of emotional distress sufficient to support a claim for intentional infliction of emotional distress.

After thoroughly reviewing the petition and record in this matter, as well as the pertinent jurisprudence, we reject plaintiff’s arguments. First, we agree with the trial court’s observation that there is no actionable cause of action for alienation of affection available to plaintiff. With regard to plaintiff’s claims for intentional infliction of emotional distress, we likewise find on our *de novo* review that the petition fails to disclose or set forth a cause of action. As recognized by the court in Scamardo v. Dunaway, 94-545 (La. App. 5th Cir. 2/15/95), 650 So. 2d 417:

[T]he mere seduction and loss of one's spouse due to the seduction or affair cannot be the basis for the action [of intentional infliction of emotional distress]. There must be proof that defendant violated some legal duty to plaintiff, so that plaintiff is in fact the victim and not just the jilted party. (Emphasis omitted.)

Scamardo v. Dunaway, 650 So. 2d at 420-421.

Moreover, despite plaintiff's contentions, we note that the legislature of this state has not recognized misrepresentation of paternity as a cause of action. As a separate branch of government, we are neither inclined nor empowered to do so. As set forth in Viator v. Miller, 2004-1199 (La. App. 3rd Cir. 4/27/05), 900 So. 2d 1135, 1142-1143:

Although [plaintiff] . . . attempts to rest his claim on allegations of bad faith, detrimental reliance, civil fraud and other general tort law theories, an examination of the facts alleged in the petition clearly shows the basis of his claims rests on the adulterous relationship between Judge Miller and [plaintiff's] ex-wife.

Similarly, we find no legislative or jurisprudential authority under Louisiana law for the tort of fraudulent concealment or misrepresentation of paternity. Thus, even accepting the well-pleaded allegations in the petition as true, as we are bound to do in determining the merits of defendants' exception, (and, for purposes of our review, specifically pretermitted whether plaintiff is the party who would have the right of action or right to proceed, if a claim could be asserted), we find that the petition fails to state or disclose a cause of action for which relief may be granted under Louisiana law absent some

articulated legal duty owed by the defendants to plaintiff.²

CONCLUSION

For these reasons, the April 17, 2006 judgment of the trial court sustaining defendants' exceptions of no cause of action and dismissing plaintiff's claims at his costs is affirmed. Costs of this appeal are assessed to plaintiff/appellant, Jerry Joseph Rogers.

AFFIRMED.

²Moreover, as against the Diocese, even if such a cause of action were legally recognized in this state, in the instant case, even taking the allegations of the petition as true, the acts alleged by plaintiff would not meet the course-and-scope of employment requirements for the doctrine of *respondeat superior* to apply. See Timmons v. Silman, 99-3264 (La. 5/16/00), 761 So. 2d 507, 510 (where the Supreme Court reasoned that an employee can be said to be acting within the course and scope of his employment when the employee's action is of the kind that he is employed to perform, occurs substantially within the authorized limits of time and space of his employment, and is activated at least in part by a purpose to serve the employer). Even assuming, solely for purposes of this discussion that these acts actually occurred and that they occurred within the course of Loresco's employment, they can not be viewed as occurring within the scope of his employment. Further, absent some allegation of rape, or of physical or mental infirmity on the part of plaintiff's spouse, we are unaware of any legal duty that could possibly be owed by the Diocese to intervene in, supervise, or prevent consensual conduct, if such occurred, between individuals who are legal majors/adults.