NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0772

KIMBERLY HULBERT

VERSUS

NATIONAL DEMOCRATIC COMMITTEE, DEMOCRATIC STATE CENTRAL COMMITTEE OF LOUISIANA, LOUISIANA DEMOCRATIC MAYORAL CAMPAIGN COMMITTEE, ABC INSURANCE COMPANY, XYZ INSURANCE COMPANY, AND BRITTON LOFTIN

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 580,183, Section 27
Honorable Todd W. Hernandez, Judge Presiding

Larry E. Demmons
Taggart Morton, L.L.C.
New Orleans, LA

Attorney for
Plaintiff-Appellant
Kimberly Hulbert

Randolph A. Piedrahita
Due', Price, Guidry,
Piedrahita & Andrews (APA-NAP)
Baton Rouge, LA

and

Remy V. Starns
New Orleans, LA

Attorneys for
Defendant-Appellee
Democratic State Central
Committee of Louisiana

BEFORE: PARRO, WELCH, AND KLINE,[1] JJ.

Judgment rendered MAY 06 2013

---

[1] **Judge William F. Kline, Jr., retired, is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.**

PARRO, J.

In this suit, the trial court granted a defendant's peremptory exception pleading the objection of no cause of action and dismissed all of the plaintiff's claims against that defendant. The plaintiff appealed from the adverse judgment. After the appeal was lodged, the defendant filed a motion to strike portions of the plaintiff's appellate brief. For reasons that follow, we grant the defendant's motion to strike, reverse the judgment, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2008, the Democratic National Committee (National Committee) hired Kimberly Hulbert to work as a field organizer in Louisiana under a "dual employment agreement" with the National Committee and the Democratic State Central Committee of Louisiana (State Committee). According to Ms. Hulbert, shortly after her employment began, the State Committee's Executive Director, Britton Loftin, "began a pattern of continued, repeated and offensive sexual harassment toward [her]." After being laid off by the National Committee in the fall of 2008, Ms. Hulbert continued to work for the State Committee, and also worked for the Louisiana Democratic Mayoral Campaign Committee (Mayoral Committee), until early April 2009, when she alleges she was forced to resign from her employment "as a result of Mr. Loftin's comments, repeated sexual harassment and refusal to pay her wages[.]"

In July 2009, Ms. Hulbert filed this suit for damages against the National Committee, the State Committee, the Mayoral Committee, and Mr. Loftin.[2] In her petition, Ms. Hulbert alleged two "causes of action." First, she claimed Mr. Loftin's actions constituted "a sexually hostile work environment and sexual harassment, in violation of Louisiana's Employment Discrimination Law [LEDL], La. R.S. 23:301, *et seq.*," and that the National Committee, the State Committee, and the Mayoral Committee were liable for Mr. Loftin's actions as his "employers" within the meaning of the LEDL. Second, Ms. Hulbert alleged Mr. Loftin's actions constituted the intentional

[2] In her petition, Ms. Hulbert also named ABC Insurance Company, as the National Committee's insurer, and XYZ Insurance Company, as the State Committee's insurer, as defendants.

infliction of emotional distress. Pursuant to the LEDL and LSA-C.C. art. 2315, she sought compensatory damages; back pay; benefits; front pay; damages for emotional distress, humiliation, and embarrassment; and attorney fees, plus court costs.

The State Committee filed an answer and affirmative defenses to Ms. Hulbert's suit. Later, the State Committee filed a peremptory exception pleading the objection of no cause of action, contending Ms. Hulbert's action against it should be dismissed, because the State Committee was a nonprofit corporation to which the LEDL did not apply, and that Ms. Hulbert had "judicially confessed" to its status as such in her petition. Ms. Hulbert opposed the State Committee's exception, arguing that merely because she alleged in her petition that the State Committee was a nonprofit corporation did not confer such status upon it. In her opposition, she sought the opportunity to conduct discovery on this issue prior to any hearing on the State Committee's exception. She also argued that the LEDL's exclusion of nonprofit organizations from its coverage applied only to religious and educational nonprofit entities, and not to entities such as the State Committee. Lastly, she argued that, if her suit was indeed dismissed, the trial court's dismissal should be without prejudice, or should specifically reserve her right to "amend and/or refile her suit against [the State Committee] pursuant to Title VII of the Civil Rights Act." Notably, in their arguments in support of, and in opposition to, the State Committee's exception of no cause of action, neither Ms. Hulbert nor the State Committee addressed whether her petition stated a cause of action against the State Committee for intentional infliction of emotional distress.

In November 2009, the trial court held a hearing on the State Committee's exception of no cause of action. At the hearing, the trial court indicated that it would not delay its ruling to allow Ms. Hulbert to conduct further discovery on the State Committee's nonprofit status; that the LEDL "clearly" indicated that nonprofit entities were exempt from its coverage; and that it would grant the State Committee's exception "without any indication whatsoever as to reservations of [Ms. Hulbert's]

rights." On November 10, 2009, the trial court signed a judgment stating, in pertinent part:

> **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Defendant's Exception of No Cause of Action is granted and Plaintiff's claims against the [State Committee] be and are hereby dismissed, with prejudice, at Plaintiff's cost.

Ms. Hulbert filed a motion for new trial, repeating the arguments previously raised in opposition to the State Committee's exception of no cause of action. The State Committee opposed Ms. Hulbert's motion. Neither party addressed the effect of the trial court's judgment on Ms. Hulbert's claim for intentional infliction of emotional distress. Thereafter, on December 7, 2009, the trial court signed a judgment stating that, after considering the motion and memoranda, Ms. Hulbert's motion for new trial was "summarily denied," and the court had found "no basis in law or fact" reasonably leading it to believe that its judgment should be reversed or modified. Ms. Hulbert then filed a motion for appeal from the November 10, 2009 judgment, and the trial court granted the appeal by order dated February 11, 2010.[3]

MOTION TO STRIKE

After the appeal was lodged, the State Committee filed a motion to strike certain portions of Ms. Hulbert's appellate brief, which we will address before moving to the merits of the appeal. In support of its motion to strike, the State Committee claims Ms. Hulbert's appellate brief impermissibly references "irrelevant" events that occurred after the trial court signed the November 10, 2009 judgment and after the order of appeal.

The appellate record shows that, following the trial court's dismissal of Ms. Hulbert's suit against the State Committee, her suit against the remaining defendants continued. The National Committee filed a motion for summary judgment, seeking dismissal of Ms. Hulbert's claims against it, and Mr. Loftin filed multiple exceptions challenging her suit. Ms. Hulbert opposed the motions and amended her petition: (1)

[3] After the appeal was lodged, this court issued a rule to show cause questioning the timeliness of the appeal. Following a remand to the trial court for an evidentiary hearing, the trial court issued a ruling finding the appeal was indeed timely filed. After supplementation of the appellate record, this court issued an order maintaining the appeal. Kimberly Hulbert v. National Democratic Committee, et al., 10-0772 (La. App. 1st Cir. 8/7/12) (unpublished action).

to include facts specifically describing acts of Mr. Loftin's alleged sexual harassment; and (2) to add causes of action against all of the defendants for violation of Title VII of the Civil Rights Act and for battery under LSA-C.C. art. 2315. Further, in her brief, Ms. Hulbert alleges that, at a hearing on her motion to extend the time to pay appeal costs, she made an oral motion, again requesting that the trial court amend its November 10, 2009 judgment to clarify that that judgment only dismissed her sexual harassment claim under the LEDL against the State Committee, and not her claims for intentional infliction of emotional distress and battery. The appellate record contains no transcript of this hearing, but there is a minute entry, dated March 29, 2010, stating that a hearing was held and that plaintiff's "motion to amend the judgment" was denied. The State Committee argues that Ms. Hulbert's reference to any of the above proceedings, all which occurred after the trial court signed the November 10, 2009 judgment and the appeal was taken, should be stricken from her appellate brief.[4]

Generally, this court's appellate review is limited to the evidence that was in the record at the time the trial court rendered its judgment. See LSA-C.C.P. art. 2164; Gatlin v. Kleinheitz, 09-0828 (La. App. 1st Cir. 12/23/09), 34 So.3d 872, 874 n.2, writ denied, 10-0084 (La. 2/26/10), 28 So.3d 280. Further, arguments of counsel contained in appellate briefs, and references to facts and issues not currently before the court, are not considered record evidence. Harrelson v. Arcadia, 10-1647 (La. App. 1st Cir. 6/10/11), 68 So.3d 663, 665 n.4, writ denied, 11-1531 (La. 10/7/11), 71 So.3d 316. Accordingly, we will address only those arguments urged by Ms. Hulbert that pertain to matters submitted to the trial court prior to its rendition of the November 10, 2009 judgment. To the extent that Ms. Hulbert's brief references facts and issues that are not part of the appellate record before us, the State Committee's motion to strike is

[4] The State Committee also claims Ms. Hulbert's brief contains "foul" language that is likewise not relevant in this case. We note that the "foul" language originates from alleged conversations and text messages between Mr. Loftin and Ms. Hulbert, and Ms. Hulbert reproduced this language in her amended petition as factual support for the claims brought in this suit. Because Ms. Hulbert filed her amended petition after she perfected the instant appeal, the allegations of her amended petition are not before us.

granted.[5] Id.

ASSIGNMENTS OF ERROR

On appeal, Ms. Hulbert seeks reversal of the trial court's November 10, 2009 judgment based on the following assignments of error:

1. The trial court erred in refusing to briefly postpone the hearing on the State Committee's exception, to allow the State Committee to respond to Ms. Hulbert's requests for production of documents that sought evidence of the State Committee's alleged nonprofit status.

2. The trial court erred in determining that Louisiana's Anti-Discrimination Law, LSA-R.S. 23:302(2)(b), exempts "all" nonprofit corporations from the definition of employer, rather than all "religious and educational" institutions and nonprofit corporations.

3. The trial court erred in failing to allow Ms. Hulbert to amend her petition to remove the grounds for the State Committee's exception, pursuant to LSA-C.C.P. art. 934.

4. The trial court erred in signing a judgment (and later failing to amend that judgment pursuant to LSA-C.C.P. art. 1951) dismissing "all" of Ms. Hulbert's claims, when the State Committee's exception only sought dismissal of Ms. Hulbert's claim for sexual harassment.

DENIAL OF CONTINUANCE

Ms. Hulbert contends the trial court erred by refusing to postpone the hearing on the State Committee's exception of no cause of action, so that she could pursue discovery regarding the State Committee's nonprofit status. In opposition, the State Committee argues the trial court did not abuse its discretion in refusing to postpone the hearing, because Ms. Hulbert had already "judicially confessed" to its nonprofit status in her petition, and because an exception of no cause of action is decided solely on the allegations contained in the petition.

Absent peremptory grounds, a continuance rests within the sound discretion of the trial court.[6] Louisiana Code of Civil Procedure article 1601 provides for a

[5] Likewise, we do not consider facts and issues referenced in the State Committee's brief that are not part of the appellate record before us.

[6] The trial court may grant a continuance on peremptory or discretionary grounds. LSA-C.C.P. arts. 1601 and 1602. There are only two peremptory grounds: 1) the party seeking the continuance, despite due diligence, has been unable to obtain material evidence; or 2) a material witness is absent without the contrivance of the party applying for the continuance. LSA-C.C.P. art. 1602; St. Tammany Parish Hospital v. Burris, 00-2639 (La. App. 1st Cir. 12/28/01), 804 So.2d 960, 963. Ms. Hulbert does not contend, nor does the record reveal, that there were any peremptory grounds for a continuance in this case.

continuance "if there is good ground therefor." While the trial court's discretion to grant or deny a continuance is not absolute, and may not be exercised arbitrarily, appellate courts are reluctant to interfere in such matters. See St. Tammany Parish Hospital v. Burris, 00-2639 (La. App. 1st Cir. 12/28/01), 804 So.2d 960, 963. Absent a clear abuse of discretion in granting or denying a continuance, the ruling of the trial court should not be disturbed on appeal. Denton v. Vidrine, 06-0141, 06-0142 (La. App. 1st Cir. 12/28/06), 951 So.2d 274, 284, writ denied, 07-0172 (La. 5/18/07), 957 So.2d 152.

Moreover, well-settled jurisprudence establishes that an admission by a party in a pleading constitutes a judicial confession, within the meaning of LSA-C.C. art. 1853,[7] and is full proof against the party making it. See J4H, L.L.C. v. Derouen, 10-0319 (La. App. 1st Cir. 9/10/10), 49 So.3d 10, 15. Article 1853 explicitly provides that a judicial confession may be revoked only on the ground of error of fact. We agree that Ms. Hulbert's characterization of the State Committee as a "Louisiana non-profit corporation" in her petition, a status admitted by the State Committee in its answer, constitutes a judicial confession within the meaning of LSA-C.C. art. 1853. Accord Wilson-Robinson v. Our Lady of the Lake Regional Medical Center, Inc., No. 10-584 (M.D. La. 2011) (unpublished opinion), 2011 WL 6046984, p.2. Further, Ms. Hulbert, at no time, asserted to the trial court that her judicial confession regarding the State Committee's nonprofit status was made in error. It was not until she realized that her admission worked to her detriment, with respect to the LEDL's apparent exclusion of "nonprofit" corporations from its coverage, that she retreated from her former position.[8]

---

[7] Louisiana Civil Code article 1853 provides:

> A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it.
>
> A judicial confession is indivisible and it may be revoked only on the ground of error of fact.

[8] In a reply brief to this court, which was filed months after the appeal was lodged, Ms. Hulbert contends, "Here, Plaintiff submits that the status of [the State Committee] as a non-profit corporation is an error of fact ... ." Ms. Hulbert did not present this assertion to the trial court, and this court does not consider assertions made in a brief or for the first time on appeal. See Harrelson, 68 So.3d at 665 n.4.

See J4H, L.L.C., 49 So.3d at 16. Also, we note that, under LSA-C.C.P. art. 931,[9] evidence is not admissible to support or controvert an objection that a petition fails to state a cause of action. Thus, the trial court did not abuse its discretion by refusing to postpone the hearing at issue to allow Ms. Hulbert to pursue discovery on the State Committee's nonprofit status, as any evidence discovered would not have been admissible in ruling on the exception. This assignment of error has no merit.

NO CAUSE OF ACTION

In her remaining assignments of error, Ms. Hulbert essentially contends the trial court erred in sustaining the State Committee's exception of no cause of action, because: (1) the LEDL only exempts religious and educational nonprofit entities from its coverage, not all nonprofit entities; and (2) even if she has no claim under the LEDL against the State Committee, her petition states causes of action for intentional infliction of emotional distress and battery, as well. She also argues the trial court erred in failing to allow her to amend her petition to remove the grounds of the State Committee's exception of no cause of action.

In ruling on an exception of no cause of action, the court must determine whether the law affords any relief to the plaintiff if he proves the factual allegations in the petition and attached documents at trial. Home Distribution, Inc. v. Dollar Amusement, Inc., 98-1692 (La. App. 1st Cir. 9/24/99), 754 So.2d 1057, 1060. As earlier stated, no evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. LSA-C.C.P. art. 931. When a petition is read to determine whether a cause of action has been stated, it must be interpreted, if

[9] Louisiana Code of Civil Procedure article 931 provides:

> On the trial of the peremptory exception pleaded at or prior to the trial of the case, evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition.
>
> When the peremptory exception is pleaded in the trial court after the trial of the case, but prior to a submission for a decision, the plaintiff may introduce evidence in opposition thereto, but the defendant may introduce no evidence except to rebut that offered by plaintiff.
>
> No evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action.

possible, to maintain the cause of action instead of dismissing the petition. Brister v. GEICO Insurance, 01-0179 (La. App. 1st Cir. 3/28/02), 813 So.2d 614, 617. Any reasonable doubt concerning the sufficiency of the petition must be resolved in favor of finding that a cause of action has been stated. Id. 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. If the grounds of the objection raised by the exception cannot be so removed, or if the plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed. LSA-C.C.P. art. 934. The reviewing court conducts a de novo review of a trial court's ruling sustaining an exception of no cause of action, because the exception raises a question of law, and the lower court's decision is based only on the sufficiency of the petition. B & C Electric, Inc. v. East Baton Rouge Parish School Board, 02-1578 (La. App. 1st Cir. 5/9/03), 849 So.2d 616, 619.

In her petition, Ms. Hulbert alleged that the National Committee, the State Committee, and the Mayoral Committee were liable "for the sexual harassment occasioned and hostile work environment created by Mr. Loftin," because these defendants were Mr. Loftin's employer "within the meaning of [the LEDL], La. R.S. 23:301 *et seq.*" Under LSA-R.S. 23:302(2), the LEDL defines an "employer" as follows, in pertinent part:

> For purposes of this Chapter[10] and unless the context clearly indicates otherwise, the following terms shall have the following meanings ascribed to them:
>
> * * *
>
> (2) "Employer" means a person, association, legal or commercial entity, the state, or any state agency, board, commission, or political subdivision of the state receiving services from an employee and, in return, giving compensation of any kind to an employee. The provisions of this Chapter shall apply only to an employer who employs twenty or more employees within this state for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. "Employer" shall also include an insurer, as defined in R.S. 22:46, with respect to appointment of agents, regardless of the character of the agent's employment. This Chapter shall not apply to the following:

[10] The referenced "Chapter" is Chapter 3-A, "Prohibited Discrimination in Employment," under Title 23, "Labor and Workers' Compensation," of the Louisiana Revised Statutes.

* * *

> (b) Employment of an individual by a private educational or religious institution or any nonprofit corporation, or the employment by a school, college, university, or other educational institution or institution of learning of persons having a particular religion if the school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of the school, college, university, other educational institution, or institution of learning is directed toward the propagation of a particular religion.

(Emphasis added).

Ms. Hulbert argues that the LEDL only excludes educational or religious nonprofit corporations from its coverage, because, when read in context, the above underscored phrase, "or any nonprofit corporation," in LSA-R.S. 23:302(2)(b) only modifies the immediately preceding phrase, "a private educational or religious institution." According to Ms. Hulbert, LSA-R.S. 23:302(2)(b)'s definition of "employer" is ambiguous, susceptible of different meanings, and should be interpreted by examining the context in which its words appear and the text of the law as a whole. She argues that "it is clear from the statute that the legislature meant to exempt from coverage any educational or religious 'institutions or non-profit corporations' – not all non-profit corporations."

In opposition, the State Committee contends that the LEDL excludes any nonprofit corporation from its coverage, because LSA-R.S. 23:302(2)(b) uses the disjunctive term "or" to separate the phrase, "any nonprofit corporation," from the immediately preceding phrase, "a private educational or religious institution." According to the State Committee, the use of the disjunctive "or" denotes separate entities (i.e., "private educational or religious institutions" or "any nonprofit corporation") to which the LEDL does not apply.

The fundamental question in all cases involving statutory interpretation is legislative intent. Arabie v. CITGO Petroleum Corp., 10-2605 (La. 3/13/12), 89 So.3d 307, 312. Further, according to the general rules of statutory interpretation, our interpretation of any statutory provision begins with the language of the statute itself.

In re Succession of Faget, 10-0188 (La. 11/30/10), 53 So.3d 414, 420. When a statute is clear and unambiguous and its application does not lead to absurd consequences, the statute is applied as written, and no further interpretation may be made in search of legislative intent. Dejoie v. Medley, 08-2223 (La. 5/5/09), 9 So.3d 826, 829; see LSA-C.C. art. 9; LSA-R.S. 1:4. Unequivocal provisions are not subject to judicial construction and should be applied by giving words their generally understood meaning. See Snowton v. Sewerage and Water Bd., 08-399 (La. 3/17/09), 6 So.3d 164, 168; see also LSA-C.C. art. 11; LSA-R.S. 1:3

Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the language. LSA-R.S. 1:3. Further, every word, sentence, or provision in a law is presumed to be intended to serve some useful purpose, that some effect is given to each such provision, and that no unnecessary words or provisions were employed. Colvin v. Louisiana Patient's Compensation Fund Oversight Bd., 06-1104 (La. 1/17/07), 947 So.2d 15, 19; Moss v. State, 05-1963 (La. 4/4/06), 925 So.2d 1185, 1196. Consequently, courts are bound to give effect to all parts of a statute, if possible, and to construe no sentence, clause, or word as meaningless and surplusage, if a construction giving force to and preserving all words can legitimately be found. Colvin, 947 So.2d at 19-20; Moss, 925 So.2d at 1196; Louisiana Environmental Action Network v. Louisiana Dept. of Environmental Quality, 11-1935 (La. App. 1st Cir. 7/25/12), 97 So.3d 1148, 1152.

Under these rules of statutory construction, our interpretation of LSA-R.S 23:302(2) begins with the language of the statute itself. Section 302(2) sets forth the general definition of "employer," which broadly includes "a person, association, legal or commercial entity, the state, or any state agency, board, commission, or political subdivision of the state receiving services from an employee and, in return, giving compensation of any kind to an employee." However, Subparagraph (b) of Section 302(2) provides exceptions to Section 302(2)'s definition of "employer" by stating that the LEDL shall not apply to certain entities. Although the majority of the language in

Subparagraph (b) relates to "educational" and/or "religious" entities, it also clearly excludes "any nonprofit corporation" from the LEDL's definition of "employer." To read "any nonprofit corporation" as meaning only "educational or religious nonprofit corporations" requires that we ignore the words "or any" that separate "educational or religious institution" from "nonprofit corporation." Under the above stated rules of construction, we cannot construe the language of Subparagraph (b) in such a manner as to render any of its words meaningless or as surplusage. See Colvin, 947 So.2d at 19-20. Rather, we are bound to give effect to all parts of a statute, if possible, and to construe Subparagraph (b) in such a manner as to give force to, and to preserve, all of its words. Id. We must presume that, when enacting Subparagraph (b), the legislature intentionally included the words "or any" between the phrases "educational or religious institution" and "nonprofit corporation" to serve a useful purpose. Id. Thus, we must interpret Subparagraph (b) to give effect to these two words; in doing so, we agree with the State Committee that the use of the disjunctive term "or" between the phrases "educational or religious institution" and "any nonprofit corporation" denotes distinct and separate entities to which the LEDL does not apply. We conclude that Subparagraph (b) excludes "any nonprofit corporation" from the LEDL's definition of "employer," and is not limited to educational or religious nonprofit corporations. The following outline illustrates that, giving effect to all words used in Subparagraph (b), the LEDL's definition of "employer" does not include:

(1) a private educational or religious institution, or

(2) any nonprofit corporation, or

(3) a school, college, university, or other educational institution or institution of learning of persons having a particular religion if:

(a) the school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or

(b) the curriculum of the school, college, university, other educational institution, or institution of learning is directed toward the propagation of a particular religion.

Based on our interpretation of LSA-R.S. 23:302(2)(b), and considering Ms. Hulbert's judicial confession that the State Committee is a nonprofit corporation, we conclude the trial court correctly determined that the LEDL does not provide a cause of action to Ms. Hulbert against the State Committee. We also conclude the trial court correctly refused to allow Ms. Hulbert to amend her petition, because the grounds of the State Committee's exception of no cause of action (i.e., that it is a nonprofit corporation) could not be removed by any such amendment. See LSA-C.C.P. art. 934.

Although we conclude the LEDL does not apply to nonprofit corporations, this court, on appeal, must determine if the facts alleged in the petition state any cause of action. See Martin v. Bigner, 27,694 (La. App. 2nd Cir. 12/6/95), 665 So.2d 709, 711-12. If the allegations of the petition state a cause of action as to any part of the demand, the exception of no cause of action must be overruled. Pitre v. Opelousas General Hospital, 530 So.2d 1151, 1162 (La. 1988). If there are two or more items of damages or theories of recovery that arise from the operative facts of a single transaction or occurrence, a partial judgment on an exception of no cause of action should not be rendered to dismiss one item of damages or theory of recovery.[11] See Everything on Wheels Subaru, Inc. v. Subaru South, Inc., 616 So.2d 1234, 1239 (La. 1993).

Ms. Hulbert argues the trial court erred by dismissing all of her claims against the State Committee, when the State Committee's exception of no cause of action only pertained to her LEDL claim. According to Ms. Hulbert, her petition also set forth claims against the State Committee for intentional infliction of emotional distress and battery. In response, the State Committee contends Ms. Hulbert waived any right to complain about the terms of the judgment, because she did not raise this issue to the trial court before the judgment was rendered.

---

[11] If two or more causes of action are based on separate and distinct operative facts, a partial grant of the exception of no cause of action may be rendered, while preserving other causes of action. See Walton Construction Company, L.L.C. v. G.M. Horne & Co., Inc., 07-0145 (La. App. 1st Cir. 2/20/08), 984 So.2d 827, 832. Such is not the case here.

As earlier stated, Ms. Hulbert's petition specifically set forth claims for violation of the LEDL and for intentional infliction of emotional distress.[12] The State Committee's exception of no cause of action did not address the intentional infliction of emotional distress claim; and, Ms. Hulbert's arguments in opposition to the exception likewise did not address the intentional infliction of emotional distress claim. Therefore, we conclude that the trial court's judgment could not have disposed of this claim, because it was never considered by the trial court. Further, in addition to recognizing the viability of Ms. Hulbert's intentional infliction of emotional distress claim, we agree with her that her petition also sets forth facts constituting a claim for battery under LSA-C.C. art. 2315,[13] which the trial court likewise did not address when ruling on the State Committee's exception of no cause of action. Under the Louisiana Code of Civil Procedure's system of fact pleading, as long as the facts constituting a claim are alleged, the party may be granted relief under any legal theory justified by those facts. See LSA-C.C.P. art. 862; Lieux v. Mitchell, 06-0382 (La. App. 1st Cir. 12/28/06), 951 So.2d 307, 317, writ denied, 07-0905 (La. 6/15/07), 958 So.2d 1199. Because, under certain circumstances, an employer can be held vicariously liable for the torts of its employee, Ms. Hulbert may be entitled to relief against the State Committee for the alleged torts committed by Mr. Loftin. See Martin, 665 So.2d at 711-12 (despite no cause of action against employer under state statutes prohibiting discrimination in

---

[12] Specifically, Ms. Hulbert's petition alleges, inter alia, and in addition to the allegations set forth in footnote 13, that Mr. Loftin repeatedly sent text messages to her "requesting sexual encounters"; implying that "he wanted [her] to perform sexual favors for other persons at [his] request"; telling her "that she knew that she was going to eventually have sex with him"; and explaining to her "that had she agreed to have sex with him, she wouldn't be having problems getting paid." In order to recover for intentional infliction of emotional distress, a plaintiff must establish: (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. See White v. Monsanto Co., 585 So.2d 1205, 1209 (La. 1991). Whether Ms. Hulbert's petition contains sufficient allegations to establish a cause of action for intentional infliction of emotional distress is not before us in this appeal. See Baker v. LSU Health Sciences Center Institute of Professional Educ., 39,200 (La. App. 2nd Cir. 12/15/04), 889 So.2d 1178, 1183-1184.

[13] Specifically, Ms. Hulbert's petition alleges, inter alia, that, on one occasion, Mr. Loftin "grabbed her butt and attempted to kiss her" without her consent; and, on another occasion, "during a car ride back from a meeting, Mr. Loftin reached across the car and put his hands between Plaintiff's legs." Battery is the intentional harmful or offensive contact with another person. See Caudle v. Betts, 512 So.2d 389, 391 (La. 1987). Although Ms. Hulbert does not use the specific term "battery" in her petition, Louisiana's system of fact pleading values substance over form and does not require the use of magic titles or terminology as a threshold requirement for validly pleading an action. See Wheat v. Nievar, 07-0680 (La. App. 1st Cir. 2/8/08), 984 So.2d 773, 776; see also LSA-C.C.P. art. 854.

employment and public accommodations, plaintiff's petition alleged facts that suggested causes of action for assault, battery, and intentional infliction of emotional harm).

Therefore, because Ms. Hulbert's petition sets forth facts sufficient to support claims for intentional infliction of emotional distress and battery against the State Committee, we conclude that the trial court erred in granting the State Committee's exception of no cause of action. Accordingly we reverse the judgment, which dismissed all of Ms. Hulbert's claims against the State Committee. We remand the case to the trial court for consideration of all of Ms. Hulbert's claims against the State Committee, other than her claim under the LEDL.

CONCLUSION

For the foregoing reasons, we grant the motion to strike filed by the Democratic State Central Committee of Louisiana to the extent Kimberly Hulbert's appellate brief references facts and issues not part of the appellate record before us. Further, we reverse the November 10, 2009 judgment insofar as it dismissed "all" of Kimberly Hulbert's claims against the Democratic State Central Committee of Louisiana. This matter is remanded to the trial court for further proceedings consistent with this opinion. Costs of this appeal are assessed equally between Kimberly Hulbert and the Democratic State Central Committee of Louisiana.

MOTION TO STRIKE GRANTED; JUDGMENT REVERSED AND REMANDED.