NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0932

FLOYD J. WILLIAMS

VERSUS

CITY OF BATON ROUGE, BATON ROUGE CITY POLICE DEPARTMENT, AND MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD

DATE OF JUDGMENT: APR 12 2017

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER C442500, SECTION 26, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE DONALD R. JOHNSON, JUDGE

* * * * * *

Kenneth R. Barnes, Jr. Joseph Arthur Smith, III Justin M. Delaune Baton Rouge, Louisiana	Counsel for Plaintiff-Appellant Floyd J. Williams
Jonathan Holloway Baton Rouge, Louisiana	Counsel for Defendants-Appellees The City of Baton Rouge/Parish of East Baton Rouge and the Baton Rouge Police Department
V. Charles Cusimano Baton Rouge, Louisiana	Counsel for Defendant-Appellee The Baton Rouge Municipal Fire and Police Civil Service Board

* * * * * *

BEFORE: HIGGINBOTHAM, THERIOT AND CHUTZ, JJ.

Disposition: REVERSED AND RENDERED; REMANDED.

Theriot, J. concurs

CHUTZ, J.

Plaintiff-appellant, Floyd J. Williams ("plaintiff"), appeals a judgment dismissing his claims, with prejudice, on a peremptory exception raising the objection of prescription. We reverse and remand this matter for further proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

On September 9, 1996, plaintiff was terminated from his position as a police officer with the Baton Rouge City Police Department ("the BRPD"). Plaintiff appealed his termination to the Municipal Fire and Police Service Board (the Board), but later voluntarily dismissed the appeal. On September 9, 1997, plaintiff filed a suit alleging he was wrongfully terminated from the BRPD. Plaintiff alleged Greg Phares ("Chief Phares"), who was the chief of police at the time of his termination, "engaged in a continuous pattern of racial discrimination against plaintiff and other African-American Police Officers in an effort to eliminate African-American Police Officers from the Baton [Rouge] Police Force and thereby reduce the strength of African-Americans Police Officers within the City of Baton Rouge." The City of Baton Rouge ("the City") and the BRPD (collectively, "defendants") were named as defendants.[1]

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[1] The Board was also named as a defendant. In its brief, the Board indicated it was dismissed from this suit on a motion for summary judgment, although the summary judgment is not contained in the appellate record. The Board alleges the summary judgment was rendered on April 14, 2016, the same date the trial court rendered the judgment dismissing plaintiff's claims against the City and the BRPD on an exception of prescription. Plaintiff's motion for appeal did not specify which of these two judgments he was appealing, merely stating he desired to appeal from "the final judgment signed herein on April 14, 2016." For that reason, the Board now requests plaintiff's appeal be dismissed with respect to the summary judgment rendered in its favor, since plaintiff has raised no assignment of error or issue concerning the summary judgment. It is unnecessary to do so, however, because it is clear from plaintiff's appellate brief he only intended to appeal the judgment of dismissal rendered in favor of the City and the BRPD. All of the issues raised, errors assigned, and arguments made by plaintiff on appeal relate directed solely to the judgment sustaining the exception of prescription filed by the City and the BRPD.

After various proceedings, defendants filed a declinatory exception raising the objection of lack of subject matter jurisdiction and a peremptory exception raising the objections of no cause of action, no right of action, and prescription. Following a hearing, the trial court rendered a judgment on September 16, 2015, sustaining in part and overruling in part each of the exceptions. The exceptions were specifically overruled with respect to plaintiff's claims for racial discrimination. The trial court dismissed all of plaintiff's other claims on the exception of prescription. Neither plaintiff nor defendants sought review of any portion of the September 2015 judgment.[2]

Subsequently, defendants filed a second exception of prescription. Defendants argued plaintiff's racial discrimination claim was prescribed because (1) plaintiff's petition did not allege the City had a policy that it enforced that deprived him of his rights, and (2) plaintiff did not exhaust his administrative remedies prior to filing suit. Following a hearing, the trial court sustained defendants' exception of prescription and dismissed all of plaintiff's remaining claims against defendants, with prejudice. Plaintiff has now appealed, arguing in his sole assignment of error that the trial court erred in sustaining defendants' exception of prescription.

DISCUSSION

Exception of Prescription:

Plaintiff contends the trial court legally erred in sustaining defendants' exception of prescription since his suit was filed on September 9, 1997, which was

[2] Because plaintiff has assigned no error concerning the September 2015 judgment, we express no opinion on the propriety of the trial court sustaining a partial no cause of action in this matter. See ***Everything on Wheels Subaru, Inc. v. Subaru South, Inc.***, 616 So.2d 1234, 1239 (La. 1993) (generally, "if there are two or more ... theories of recovery which arise out of 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 ... theory of recovery.")

within one year of his termination on September 9, 1996. This contention has merit.

When determining the applicable prescriptive period, courts first look to the character of the action disclosed in the pleadings. ***SS v. State ex rel. Department of Social Services***, 02-0831 (La. 12/4/02), 831 So.2d 926, 931. In the present case, plaintiff alleged the BRPD police chief engaged in a continuous pattern of racial discrimination against African-American police officers, including plaintiff, for the purpose of reducing their numbers in the police force. According to plaintiff, he is seeking recovery under 42 U.S.C. § 1983[3], even though that statue is not mentioned in his petition.[4] In Louisiana, such claims are subject to a prescriptive period of one year, unless the plaintiff can show an exception established by legislation. ***SS v. State***, 831 So.2d at 931; ***Jones v. Orleans Parish School Board***, 688 F.2d 342, 344 (5th Cir. 1982).

Prescription statutes are strictly construed against prescription and in favor of the claim sought to be extinguished. ***Bailey v. Khoury***, 04-0620 (La. 1/20/05), 891 So.2d 1268, 1275; ***Alcorn v. City of Baton Rouge***, 02-0952 (La. App. 1st Cir. 12/30/04), 898 So.2d 385, 388, writ denied, 05-0255 (La. 4/8/05), 899 So.2d 12. The burden of proof on an exception of prescription lies with the party asserting it unless the plaintiff's claim is barred on its face, in which case the burden shifts to

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[3] 42 U.S.C. § 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

For purposes of § 1983, a local municipality is considered to be a "person." See ***Monell v. Department of Social Services***, 436 U.S. 658, 690, 98 S. Ct. 2018, 2035-36, 56 L.Ed. 2d 611 (1978).

[4] Since Louisiana is a fact-pleading state, plaintiffs are not required to allege the theory of the case in their petition. See La. C.C.P. art 854; ***Ramey v. DeCaire***, 03-1299 (La. 3/19/04), 869 So.2d 114, 118.

the plaintiff. ***Bailey***, 891 So.2d at 1275. If evidence is introduced at the hearing held on the exception, the trial court's findings of fact are reviewed under the manifest error standard of review. ***Cawley v. Nat'l Fire & Marine Ins. Co.***, 10-2095 (La. App. 1st Cir. 5/6/11), 65 So.3d 235, 237.

The one-year prescriptive period for delictual actions begins to run from the date the plaintiff's injury is sustained. La. C.C. 3492: ***SS***, 831 So.2d at 931. A review of plaintiff's petition reveals it was filed on September 9, 1997, which was within one year of plaintiff's termination on September 9, 1996. Since the petition was not prescribed on its face, defendants bore the burden of proving plaintiff's claim was prescribed. See ***Bailey***, 891 So.2d at 1275. Further, because no evidence was introduced at the exception hearing and no material issues of fact were in dispute, the *de novo* standard of review is applicable, and the trial court's legal conclusions are entitled to no deference. See ***Cawley***, 65 So.3d at 237.

At the exception hearing, defendants' counsel explained "my argument is not that [plaintiff's] case wasn't filed within one year." Instead, he argued this matter was prescribed because: (1) plaintiff's petition contained insufficient allegations to state a § 1983 claim for municipal liability under ***Monell***; and (2) plaintiff failed to exhaust his administrative remedies since he voluntarily dismissed his civil service appeal prior to filing the instant suit.[5]

Neither of these grounds constituted a basis for the trial court to sustain an exception of prescription, which is a procedural device used to bar valid substantive claims that have not been timely filed. See ***Taranto v. Louisiana Citizens Property Insurance Corporation***, 10-0105 (La. 3/15/11), 62 So.3d 721,

[5] On appeal, defendants also argue there is nothing for this court to consider because plaintiff was not allowed to orally argue at the exception hearing, and the trial court excluded his opposition memorandum and exhibits since they were untimely filed. This argument is meritless. First, defendants bore the burden of proof at the hearing, not plaintiff. Second, in order to determine who bears the burden of proof on an exception of prescription, the court always examines the plaintiff's petition. Moreover, while it is true the trial court did not permit oral argument by plaintiff's counsel at the hearing, the trial court specifically overruled defendants' objection to the court considering plaintiff's opposition memorandum.

726. Defendants' contention that the petition was insufficient to meet the requirements of ***Monell*** for establishing a § 1983 municipal liability claim is not directed to the timeliness of plaintiff's petition. This contention challenges the legal sufficiency of the petition and should have been asserted in an exception of no cause of action. The peremptory exceptions of no cause of action and prescription are distinct pleas. ***Succession of Thompson***, 191 La. 480, 487, 186 So. 1, 3 (1938).

The exception of no cause of action tests the legal sufficiency of the petition by determining whether the law affords a remedy based on the facts alleged. ***Everything on Wheels Subaru, Inc.***, 616 So.2d at 1235. The exception of prescription tests whether a plaintiff has lost "certain rights as the result of the passage of time." See ***Taranto***, 62 So.3d at 726. Therefore, the peremptory "exception of no cause of action cannot be made to fill the place of an exception or plea of prescription," ***Succession of Thompson***, 186 So. at 3 (1938); see also ***Charles v. Landry***, 09-1161 (La. App. 3d Cir. 3/10/10), 32 So.3d 1164, 1168. Contentions challenging the legal sufficiency of a petition should be raised by an exception of no cause of action and cannot form the basis for sustaining an exception of prescription since the two exceptions involve separate lines of inquiry.

Similarly, defendants' argument relating to plaintiff's failure to exhaust administrative remedies cannot serve as the basis for an exception of prescription. The objection of prematurity for failure to exhaust administrative remedies *must* be raised in a dilatory exception. ***State Farm Fire & Casualty Company v. Louisiana Insurance Rating Commission***, 97-0368 (La. App. 1st Cir. 4/8/98), 710 So.2d 819, 822. Because defendants did not file an exception of prematurity in this case prior to or together with their answers, any objection based on prematurity for failure to exhaust administrative remedies was waived. See La. C.C.P. art.

926(A)(1) & (B); La. C.C.P. art. 928(A); ***State Farm Fire & Casualty Company***, 710 So.2d at 822. In any event, a plaintiff is not required to exhaust civil service administrative remedies before filing a claim for relief under § 1983, since the cause of action established by that statute is fully supplementary to any remedy that might exist under state law. ***Smith v. Lorch***, 98-0319 (La. App. 1st Cir. 4/1/99), 730 So.2d 530, 533; ***Eberhardt v. Levasseur***, 630 So.2d 844, 847 (La. App. 4th Cir. 1993), writ denied, 94-0408 (La. 4/4/94), 635 So.2d 1107.

For these reasons, we conclude defendants failed to carry their burden of proving the petition filed on September 9, 1997, was filed after the tolling of the one-year prescriptive period that commenced upon plaintiff's September 9, 1996 termination. The trial court committed legal error in sustaining the defendants' exception of prescription when the record contains no support for concluding the petition was filed untimely.

No Cause of Action:

Our conclusion that the judgment sustaining the exception of prescription must be reversed does not end our inquiry. It is well-established that a pleading is construed for what it really is and not for what it is labeled. ***Rochon v. Young***, 08-1349 (La. App. 1st Cir. 2/13/09), 6 So.3d 890, 892, writ denied, 09-0745 (La. 1/29/10), 25 So.3d 824. Thus, because the substance of defendants' exception should properly be construed as constituting an objection of no cause of action, we will examine the legal sufficiency of plaintiff's allegations to state a cause of action.

An exception of no cause of action is triable on the face of the petition, and all well-pleaded fact in the petition must be accepted as true. ***Louisiana Public Service Commission v. Louisiana State Legislature***, 12-0353 (La. App. 1st Cir. 4/26/13), 117 So.3d 532, 537. The exception should be granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of any

claim that would entitle him to relief. If the petition states a cause of action on any ground or portion of the demand, the exception should generally be overruled. Further, every reasonable interpretation must be accorded to the language used in the petition in favor of sustaining its sufficiency and affording the plaintiff the opportunity of presenting evidence at trial. ***Badeaux v. Southwest Computer Bureau, Inc.***, 05-0612 (La. 3/17/06), 929 So.2d 1211, 1217. Any doubts are resolved in favor of the sufficiency of the petition. ***Winkler v. Coastal Towing, L.L.C.***, 01-0399 (La. App. 1st Cir. 4/11/02), 823 So.2d 351, 355.

In the instant case, defendants contend plaintiff's petition fails to state a cause of action for municipality liability under § 1983 under the holding of ***Monell***. The ***Monell*** Court held a municipality cannot be held liable under § 1983 on a theory of *respondeat superior*. ***Monell***, 436 U.S. at 691, 98 S.Ct. at 2036. Rather, the plaintiff must show the injury resulted from "the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy." ***Monell***, 436 U.S. at 694, 98 S.Ct. at 2037-38. Municipal liability also may attach where the constitutional deprivation is pursuant to a governmental custom, even if such custom has not received formal approval by the municipality. ***Monell***, 436 U.S. at 690-91, 98 S.Ct. 2036.

Defendants contend plaintiff's petition is legally insufficient under ***Monell*** because it does not include "one allegation that even comes close to alleging that the City of Baton Rouge had nefarious policies, practices or customs in place that violated his constitutional rights." They maintain plaintiff's claims are based on theories of vicarious liability or respondent superior, which are insufficient to support a claim of § 1983 municipal liability under ***Monell***.[6]

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[6] Defendants further contend plaintiff's petition is deficient because it failed to name Chief Phares as a defendant. However, defendants have cited no authority in support of this

To determine whether plaintiff has stated a cause of action, the allegations of his petition must be examined to determine whether those allegations, when accepted as true, are sufficient to support the elements of a municipal liability claim under § 1983. Plaintiff's petition includes the following pertinent allegations:

> 3.
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> On September 9, 1996, plaintiff was wrongfully terminated, by the Police Department.
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> 4.
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> Plaintiff asserts and will show during the trial of this action, that the defendant, Baton [Rouge], City Police Department and its police Chief, Greg Phares, engaged in a continuous pattern of racial discrimination against plaintiff and other African American Police Officers in an effort to eliminate African American Police Officers from the Baton Police Force and thereby reduce the strength of African American Police Officers within the city of Baton Rouge.
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> 10.
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> Plaintiff asserts and will show that during the pendency of a due process hearing to determine plaintiff's eligibility as a police officer, Greg Phares, in his position as Chief of Police of the Baton Rouge City Police Department, has continuously engaged in conduct intended to defame the plaintiff's reputation, and that Greg Phares has in fact published communications, which injured plaintiff['] reputation and character in the Baton Rouge Community.
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> 11.
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> Plaintiff asserts that during his employment as a police officer with the Baton Rouge City Police Department, that the Baton Rouge City Police Department engaged in extortion, coercion and intimidation, in an effort to force plaintiff to confess to engaging in criminal conduct which never occurred.
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> 12.
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> Plaintiff asserts that Greg Phares in his position as police chief for the Baton Rouge Police Department has systematically engaged in conduct described in the aforementioned paragraph against plaintiff and other African-American Police Officers for the purpose of eliminating African-Americans from the Police Department.

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contention, nor are we aware of any. In ***Monell***, 436 U.S. at 690, 98 S.Ct. at 2035-36, the Supreme Court held local governing bodies could be sued directly under § 1983.

13.

Plaintiff asserts that after the Baton Rouge Police Department terminated plaintiff and other African-American Police Officers' employment, statistics and causes of the terminations were used to justify not hiring other African Americans as Police Officers for the City of Baton Rouge.

14.

As a result of the plaintiff's wrongful termination from his employment in violation of Louisiana Law, and the U.S. Constitution, plaintiff has been deprived of private property by The City of Baton Rouge and the Baton Rouge City Police Department without due process of law.

The requisite elements of a municipal liability claim under § 1983 are: (1) a policymaker; (2) an official policy; and (3) a violation of constitutional rights whose "moving force" is the policy or custom. See ***Zarnow v. City of Wichita Falls, Texas***, 614 F.3d 161, 166 (5th Cir. 2010); cert. denied, 564 U.S. 1038, 131 S.Ct. 3059, 180 L.Ed.2d 887 (2011).

With respect to the first element, a policymaker is someone who takes the place of the governing body in a designated area of city administration. ***Zarnow***, 614 F.3d at 167; ***Webster v. City of Houston***, 735 F.2d 838, 841 (5th Cir. 1984) (*en banc*). That person must "decide the goals for a particular city function and devise the means of achieving those goals." ***Bennett v. City of Slidell***, 728 F.2d 762, 769 (5th Cir. 1984) (*en banc*). In ***Familias Unidas v. Briscoe***, 619 F.2d 391, 404 (5th Cir. 1980), the court explained that in those areas where a local official "is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held responsible under section 1983."

Applying these legal principles to the instant case, we conclude plaintiff pled sufficient facts to state a § 1983 claim for municipality liability under ***Monell***.

Under § 6.01[7] of the Baton Rouge Plan of Government ("the Plan"), the chief of police is designated as the head of the BRPD. Further, according to § 6.02 of the Plan, the chief of police "shall be in direct command" of the BRPD and is given the power to "remove all other officers and employees of the [BRPD]."[8] These provisions vest the chief of police with the power to make policies and decisions regarding the removal of police officers from the BRPD. Therefore, Chief Phares was the final policymaker for the defendants in this area at the time of plaintiff's termination.

Moreover, we disagree with defendants' contention that the allegations of plaintiff's petition were insufficient to allege the City had any policies, practices, or customs that violated his constitutional rights. It is true plaintiff did not use the words "custom" or "policy" in his petition. However, the word "policy" has been construed as including "the *pattern of conduct* in actual practice that may be called 'custom.'" (Emphasis added.) ***Bennett v. City of Slidell***, 728 F.2d 762, 767 (5th Cir. 1984). In his petition, plaintiff named the City and the BRPD as defendants and alleged Chief Phares, in his official capacity as chief of police for the BRPD, engaged in continuous *conduct constituting a systematic pattern* of racial discrimination against him and other African-American police officers for the purpose of removing African-Americans from the BRPD. Plaintiff further alleged Chief Phares, in order to further that purpose, systemically defamed plaintiff's character and reputation in the community and engaged in extortion, coercion, and intimidation in order to force plaintiff to confess to engaging in criminal conduct

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[7] Pursuant to La. R.S. 13:3712(B), this court may take judicial notice of the provisions of the Plan, even though a copy of it has not been filed in the record. ***City of Baton Rouge v. Bethley***, 09-1840 (La. App. 1st Cir. 10/29/10), 68 So.3d 535, 538-39 n.3, writ denied, 11-1884 (La. 11/4/11), 75 So.3d 927; ***Tull v. City of Baton Rouge***, 385 So.2d 343, 345 (La. App. 1st Cir.), writ denied, 392 So.2d 663 (La. 1980).

[8] Under § 6.02, the grant of authority to the chief of police is subject to Chapter 9 of the Plan. An examination of Chapter 9 reveals that, in pertinent part, § 9.01 provides "removals, and all other matters relating to the management of personnel in and for the ... Police Department shall be subject to the general laws of the state applicable to the City of Baton Rouge." Chapter 9 does not otherwise restrict the power of the chief of police to remove police officers.

that never occurred. These assertions sufficiently allege the existence of a custom or policy of racial discrimination by Chief Phares.

Additionally, in ***Familias Unidas***, 619 F.2d at 404, the Fifth Circuit explained that in the area of an official policymaker's authority, "his official conduct and decisions must necessarily be considered those of one" whose acts may fairly be said to represent official policy for which the local governing authority may be held responsible under § 1983. In this case, Chief Phares was the official policymaker concerning the removal of police officers from the BRPD. As such, his conduct must be said to represent official policy for the defendants in this area. See ***Familias Unidas***, 619 F.2d at 404. Accordingly, plaintiff's petition sufficiently alleged the existence of a custom or policy of racial discrimination for which defendants may be held liable under § 1983, if proven at trial. The allegations of plaintiff's petition further suggest this custom or policy of racial discrimination was the motivation or "moving force" behind Chief Phares' removal of plaintiff and other African-American police officers from the BRPD in violation of their constitutional rights.

Considering all of the petition's allegations must be accepted as true and any doubts must be resolved in favor of the sufficiency of the petition, we conclude the allegations of plaintiff's petition are sufficient to state a § 1983 claim against defendants under ***Monell***.[9]

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[9] Although he apparently never raised the issue below, plaintiff asserts on appeal that his petition also states a cause of action under 42 U.S.C. § 1981(a), which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

In order to establish a claim under § 1981, the plaintiff must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority, (2) the defendant intended to discriminate on the basis of race, and (3) the discrimination concerned one or more of the activities enumerated in the statute. ***Sanders v. State ex rel. Department of Health & Hospitals***,

CONCLUSION

For the above reasons, the April 14, 2016 judgment of the trial court sustaining the exception of prescription filed by defendants and dismissing plaintiff's racial discrimination claims is reversed and judgment is hereby rendered overruling that exception. Further, we conclude plaintiff's petition is legally sufficient to state a cause of action for municipal liability under 42 U.S.C. § 1983. This matter is remanded to the trial court for further proceedings consistent with this opinion. Appeal costs in the amount of $3,027.50 are to be paid by defendants, the City and BRPD.

REVERSED AND RENDERED; REMANDED.

11-0814 (La. App. 1st Cir. 8/2/12) (unpublished). While the allegations of plaintiff's petition may be sufficient to state a cause of action under § 1981, it is unnecessary to reach this issue since we have concluded the petition states a cause of action under § 1983. When a petition states a cause of action on any ground, an exception of no cause of action should be overruled. See ***Badeaux***, 929 So.2d at 1217.