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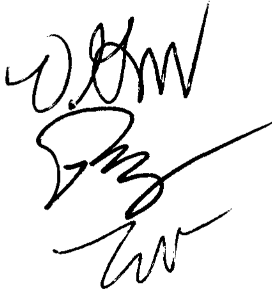
STATE OF LOUISIANA



COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2022 CA 0126

DEDRIC HARRELL AND MELISSA VARNADO INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD BREONA HARRELL

VERSUS

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

Judgment Rendered: SEP 1 6 2022

Appealed from the
Twenty-First Judicial District Court
in and for the Parish of St. Helena
State of Louisiana
Docket Number 23244

Honorable Brian K. Abels, Judge Presiding

****

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BEFORE: WHIPPLE, C.J., GUIDRY, AND WOLFE, JJ.

WHIPPLE, C.J.

In this wrongful death and survival action, plaintiffs appeal the trial court's judgment sustaining one defendant's peremptory exception raising the objection of prescription and dismissing with prejudice plaintiffs' claims against that defendant. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On November 7, 2016, Dedric Harrell and Melissa Varnado, individually and on behalf of their child, Breona Harrell, who was a minor at the time of the accident, filed suit against the State of Louisiana, Department of Transportation and Development ("DOTD"), averring that Mr. Harrell had been involved in a motor vehicle accident at approximately midnight on August 13, 2016, when he struck a tree that had fallen across Louisiana Highway 43 in St. Helena Parish. Mr. Harrell and Ms. Varnado further averred that DOTD was negligent in failing to maintain the highway in a reasonably safe condition and in failing to erect signs or markings to warn the traveling public of this inherently dangerous condition and that as a result of that negligence, Mr. Harrell suffered permanently disabling and catastrophic injuries.

Following Mr. Harrell's death on January 24, 2017, his two adult children, Breona Harrell and Brittney Harrell (hereinafter "plaintiffs"), were substituted as plaintiffs by order dated April 17, 2017. Plaintiffs then filed an Amended Petition for Damages on May 11, 2017, averring that Mr. Harrell had died as a result of the injuries he suffered in the August 13, 2016 accident, "re-alleg[ing] and aver[ring]" "[a]ll facts, allegations and causes of action set forth in the original Petition for Damages," and asserting wrongful death and survival actions against DOTD based on its alleged negligence in failing to maintain Louisiana Highway 43 in a reasonably safe condition and in failing to erect signs and markings to warn against dangerous conditions of the highway.

Almost three years after the accident and over two and one-half years after Mr. Harrell's death, on October 10, 2019, plaintiffs filed a Second Amended and Supplemental Petition for Damages, naming as additional defendants Dixie Electric Membership Corporation ("DEMCO") and Chain Electric Company. In addition to reasserting their allegations of negligence against DOTD, plaintiffs further alleged that the fallen tree had pulled down and damaged DEMCO's power lines and poles, requiring repair to those lines. Plaintiffs alleged that DEMCO was negligent in failing to utilize any signage at or near the fallen tree at any time during or after the repairs to the power lines and poles, failing to follow its own policies and procedures, failing to remove the fallen tree from the roadway, and failing to properly report the fallen tree, and the negligent acts of DEMCO were also a cause-in-fact and legal cause of Mr. Harrell's accident. Plaintiffs also alleged various negligent acts by Chain Electric, the company that performed the power line repairs on behalf of DEMCO.[1] Thus, plaintiffs contended that DOTD, DEMCO, and Chain Electric were "individually, jointly, severally and in solido liable" for plaintiffs' damages.

In response to the Second Amended and Supplemental Petition for Damages, DEMCO filed a peremptory exception on September 17, 2020, raising the objection of prescription. However, DEMCO requested that the exception not be set for hearing at that time.

Plaintiffs then settled their claims with DOTD. By a Consent Judgment dated April 13, 2021, the trial court memorialized the terms of the settlement "in

[1]Plaintiffs later filed a Third Amended and Supplemental Petition for Damages, naming Zurich American Insurance Company, Chain Electric's insurer, as an additional defendant. Plaintiffs' claims against Chain Electric and Zurich were later dismissed by summary judgment. While that judgment was reversed on appeal by DEMCO as to Chain Electric and Zurich, plaintiffs did not appeal the dismissal of their claims against Chain Electric and Zurich. Thus, that judgment is final as to plaintiffs. See Harrell v. State of Louisiana through the Department of Transportation and Development, 2021-0293 (La. App. 1st Cir. 3/10/22).

full and final settlement of all claims the plaintiffs have against the defendant, State of Louisiana, through the Department of Transportation and Development, its agents and employees," awarding plaintiffs the agreed-upon sum against DOTD and ordering plaintiffs to indemnify DOTD from any claims arising out of the accident and death of Mr. Harrell and to satisfy certain liens from the settlement proceeds.

Subsequently, on August 3, 2021, DEMCO filed a motion to set its exception of prescription for hearing. In support of its exception, DEMCO noted that plaintiffs' claims against it were prescribed on the face of the Second Amended and Supplemental Petition for Damages and further averred that DEMCO and DOTD were not joint tortfeasors, such that timely suit against DOTD did not interrupt prescription as to DEMCO.

Plaintiffs opposed DEMCO's exception, arguing that there was no basis to find that DOTD and DEMCO were not joint tortfeasors and further that DEMCO could not raise any defense that was personal to DOTD.

At the August 23, 2021 hearing on the exception, the parties introduced three joint exhibits, namely, the original Petition for Damages, the Second Amended and Supplemental Petition for Damages, and the Consent Judgment setting forth the terms of plaintiffs' settlement with DOTD. They further introduced a document entitled "Joint Stipulations," listing five stipulated facts. Following the hearing, the trial court rendered judgment dated September 20, 2021, sustaining DEMCO's exception of prescription and dismissing with prejudice plaintiffs' claims against it. From this judgment, plaintiffs appeal, setting forth ten assignments of error.

DISCUSSION

A claim for personal injuries is a delictual action subject to a liberative prescription of one year. LSA-C.C. art. 3492. Additionally, survival and wrongful death actions prescribe one year from the death of the deceased who dies due to the fault of another. LSA-C.C. arts. 2315.1(A) & 2315.2(B). Prescription is interrupted by the filing of suit in a court of competent jurisdiction. LSA-C.C. art. 3462. Moreover, where damages are caused by two or more persons, interruption of prescription against one joint tortfeasor is effective against all joint tortfeasors. LSA-C.C. art. 2324. However, a suit timely filed against one defendant does not interrupt prescription as against other defendants not timely sued where the timely sued defendant is ultimately found not liable to plaintiffs, since no joint or solidary obligation would exist. Renfroe v. State Dept. of Transportation and Development, 2001-1646 (La. 2/26/02), 809 So. 2d 947, 950.

The objection of prescription may be raised by a peremptory exception. LSA-C.C.P. art. 927(A)(1). Ordinarily, the party urging prescription bears the burden of proof at trial of the exception. However, if the petition is prescribed on its face, the burden shifts to the plaintiff to show the action is not prescribed. Quinn v. Louisiana Citizens Property Insurance Corporation, 2021-0152 (La. 11/2/12), 118 So. 3d 1011, 1017. Moreover, if a plaintiff's basis for claiming interruption of prescription is that the newly added defendant is a joint tortfeasor with a defendant who was timely sued, then plaintiff bears the burden of proving that joint tortfeasor status. Wheat v. Nievar, 2007-0680 (La. App. 1st Cir. 2/8/08), 984 So. 2d 773, 775.

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. LSA-C.C.P. art. 931. In the absence of evidence, an exception of prescription must be decided

upon the facts alleged in the petition with all of the allegations accepted as true. Morris v. Jones Funeral Home, Inc., 2020-1002 (La. App. 1st Cir. 6/18/21), 328 So. 3d 472, 475.

When evidence is introduced at the hearing on the exception, the trial court's findings of fact on the issue of prescription are subject to the manifest error standard of review. However, in a case involving no dispute regarding material facts and only the determination of legal issues, a reviewing court must review the issues *de novo*, according the trial court's legal conclusions no deference. Guidry v USAgencies Casualty Insurance Company, 2016-0562 (La. App. 1st Cir. 2/16/17), 213 So. 3d 406, 420-421, writ denied, 2017-0601 (La. 5/26/17), 221 So. 3d 81.

DEMCO did not offer any evidence at the trial of the exception to refute or controvert the allegations of plaintiffs' petitions. Nor did it contend that those allegations should not be accepted as true for purposes of the exception. Rather, DEMCO asserted in support of its exception that the factual allegations of the petitions failed to allege willful misconduct of DOTD employees or to set forth a claim of vicarious liability against DOTD for the willful misconduct of its employees. (R. 3235-3238). Additionally, the Consent Judgment offered as a joint exhibit and the Joint Stipulations introduced into evidence at the hearing addressed facts not alleged in the petitions. Thus, for purposes of the exception, there was no dispute as to the facts as alleged in the petitions or as to the facts established by the Joint Stipulations or the Consent Judgment offered as a joint exhibit. As such, we will review the legal issues presented herein *de novo*. See Guidry, 213 So. 3d at 421.

In the instant case, plaintiffs' supplemental and amended petition naming DEMCO as a defendant undisputedly was filed more than one year after Mr. Harrell's death. Accordingly, plaintiffs bore the burden of proving that

prescription against DEMCO was interrupted or suspended. See Guidry, 213 So. 3d at 421.

In support of its exception of prescription, DEMCO argued that because the basis for plaintiffs' claim that prescription was interrupted as to DEMCO was that DEMCO was a joint tortfeasor with DOTD, plaintiffs bore the burden of proving such joint tortfeasor status. DEMCO further contended that pursuant to LSA-R.S. 29:735(A)(1) of the Louisiana Homeland Security and Emergency Assistance and Disaster Act (hereinafter "the Homeland Security Act" or "the Act"), LSA-R.S. 29:721 et seq., DOTD is absolutely immune from liability when engaged in emergency preparedness and recovery activities and is further immune from liability for the actions of its employees or representatives when they are engaged in such emergency preparedness and recovery activities, except in the case of willful misconduct.

DEMCO noted that plaintiffs had not named as defendants any DOTD employees and also contended that plaintiffs had not alleged that DOTD was vicariously liable for the actions of its employees. DEMCO further asserted that DOTD could have no liability as to plaintiffs' claims against it where it was engaged in emergency preparedness and recovery activities arising out of "the historic flooding that occurred in August 2016." According to DEMCO, because plaintiffs sued DEMCO well over one year after Mr. Harrell's accident and because DOTD is immune from liability under the Homeland Security Act, plaintiffs could not rely on their claims against DOTD to interrupt prescription as to their late-filed claims against DEMCO.

The Louisiana Legislature enacted the Homeland Security Act due to the existing possibility of the occurrence of emergencies and disasters resulting from natural or manmade causes. LSA-R.S. 29:722(A); Lyons v. Terrebonne Parish

Consolidated Government, 2010-2258 (La. App. 1st Cir. 6/10/11), 68 So. 3d 1180, 1183. Pursuant to the Act, a "disaster" is defined in LSA-R.S. 29:723(4) as:

> [T]he result of a natural or man-made event which causes loss of life, injury, and property damage, including but not limited to natural disasters such as hurricane, tornado, storm, flood, high winds, and other weather related events, forest and marsh fires, and man-made disasters, including but not limited to nuclear power plant incidents, hazardous materials incidents, oil spills, explosion, civil disturbances, public calamity, acts of terrorism, hostile military action, and other events related thereto.

With regard to immunity of the State or its political subdivisions and agencies, and the employees or representatives thereof under the Act, LSA-R.S. 29:735(A)(1), prior to amendment by 2020 La. Acts, No. 362, § 1 (effective June 12, 2020 and retroactively effective March 11, 2020) and 2018 La. Acts No. 713, § 1 (effective August 1, 2018), provided, in pertinent part:

> Neither the state nor any political subdivision thereof, nor other agencies, nor, except in case of willful misconduct, the agents' employees or representatives of any of them engaged in any homeland security and emergency preparedness and activities, while complying with or attempting to comply with [the Homeland Security Act] or any rule or regulation promulgated pursuant to the provisions of this Chapter shall be liable for the death of or any injury to persons or damage to property as a result of such activity.

The Act defines "emergency preparedness" as "the mitigation of, preparation for, response to, and the recovery from emergencies or disasters" and further provides that "[t]he term 'emergency preparedness' shall be synonymous with 'civil defense', 'emergency management', and other related programs of similar name." LSA-R.S. 29:723(4). Thus, the State, its agencies, and political subdivisions are afforded complete immunity for injury or death resulting from emergency preparedness activities. Noyel v. City of St. Gabriel, 2015-1890 (La. App. 1st Cir. 9/1/16), 202 So. 3d 1139, 1145, writ denied, 2016-1745 (La. 11/29/16), 213 So. 3d 392; see also Lyons, 68 So. 3d at 1184. Additionally, agents, representatives, or employees of the State, its political subdivisions, or agencies are also completely immune except where they have engaged in willful

misconduct in the course of preparing for or responding to a disaster or emergency. Noyel, 202 So. 3d at 1145.

"The terms 'willful', 'wanton', and 'reckless' have been applied to that degree of fault which lies between intent to do wrong, and the mere reasonable risk of harm involved in ordinary negligence. These terms apply to conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if harm was intended." McQuirter v. State Through Louisiana Department of Public Safety and Corrections Elayn Hunt Correctional Center, 2020-01192 (La. 1/12/21), 308 So. 3d 285, 285 (quoting Koonce v. St. Paul Fire & Marine Ins. Co., 2015-31 (La. App. 3rd Cir. 8/5/15), 172 So. 3d 1101, 1106), writ denied, 2015-1950 (La. 11/30/15), 184 So. 3d 36. As such, only the most egregious conduct by agents, employees, or representatives of public agencies that exhibits an active desire to cause harm, or a callous indifference to the risk of potential harm from flagrantly bad conduct, will rise to the level of willful misconduct. McQuirter, 308 So. 3d at 285-286.

We first address plaintiffs' arguments set forth in assignments of error seven through nine. Plaintiffs argued in the trial court below and assert on appeal through these assignments of error that the defense of governmental immunity pursuant to the Homeland Security Act is a personal defense that could only be raised by DOTD, and not by DEMCO. While plaintiffs concede that DOTD did raise the defense of its immunity under the Act prior to its settlement with them, plaintiffs assert that because DOTD is no longer a party to the suit by virtue of that settlement, the immunity granted to DOTD pursuant to the Act no longer applies to this case. Thus, they contend that they only had to allege ordinary negligence of DOTD to establish joint tortfeasor status between DOTD and DEMCO and a resulting interruption of prescription as to DEMCO. We find no merit to these arguments.

Notably, DEMCO is not asserting immunity under the Homeland Security Act as an affirmative defense to its own potential liability to plaintiffs. Rather, it has asserted that DOTD's immunity precludes joint tortfeasor status between DEMCO and DOTD, such that timely suit against DOTD did not serve to interrupt prescription as to DEMCO. An untimely named defendant can assert a lack of joint tortfeasor status and, thus, no interruption of prescription, based on the timely named defendant's immunity, even where the timely named defendant has already been dismissed. See Rogers v. Payne and Keller of Louisiana, Inc., 392 So. 2d 109, 109-110 (La. App. 1st Cir. 1980), writ denied, 396 So. 2d 1327 (La. 1981) (untimely named defendants' exceptions of prescription sustained on basis of timely named, but later dismissed, defendant's immunity); see also Gibson v. Exxon Corporation, 360 So. 2d 230 (La. App. 1st Cir.), writ denied, 362 So. 3d 575 (La. 1978) (suit against timely named, but later dismissed, defendant did not serve to interrupt prescription as to untimely named defendant where dismissed defendant was immune). Rather, the dismissed defendant's immunity remains relevant to the issue of interruption of prescription.

In further opposition to DEMCO's exception of prescription, plaintiffs argued in the trial court below, and again on appeal through their first six assignments of error, that the immunity granted by LSA-R.S. 29:735(A)(1) is not absolute and that pursuant to the Homeland Security Act, DOTD would remain vicariously liable for the willful misconduct of its employees. Plaintiffs contend that their petition alleged facts sufficient to assert a claim against DOTD for vicarious liability for the acts of its employees. Thus, plaintiffs assert that there was no basis to find that DOTD and DEMCO could not be joint tortfeasors and that their timely suit against DOTD interrupted prescription as to DEMCO. Accordingly, to the extent that plaintiffs opposed the exception of prescription on the basis that DOTD and DEMCO are joint tortfeasors due to DOTD's vicarious

liability for the willful misconduct of its employees and, thus, that timely suit against DOTD interrupted prescription as to DEMCO, plaintiffs had the burden of establishing such joint tortfeasor status. See Wheat, 984 So. 2d at 775.

In their original Petition for Damages, plaintiffs averred that Louisiana Highway 43 was in the custody and care of DOTD and that DOTD has a duty to maintain public highways under its custody and care in a reasonably safe condition. As set forth above, they specifically alleged that DOTD was negligent in failing to maintain Louisiana Highway 43 in a reasonably safe condition and in failing to erect signs and markings to warn against the dangerous condition of the highway.[2] Plaintiffs alleged that the tree lying across Louisiana Highway 43 had fallen sometime during the evening of August 11, 2016, or the morning hours of August 12, 2016, and that DOTD had actual notice of the fallen tree well before Mr. Harrell's accident because DOTD employees were working at the site of the fallen tree during the day of August 12, 2016. Plaintiffs further alleged that DOTD had erected detour signs on the north side of the fallen tree at the intersection of Louisiana Highway 43 and Louisiana Highway 1043, but did not erect any warning or detour signs on the south side of the fallen tree, resulting in Mr. Harrell having no notice of the dangerous condition posed by the tree lying completely across his lane of travel.

In their Second Amended and Supplemental Petition, plaintiffs averred that when the tree fell across Louisiana Highway 43, it pulled down and damaged DEMCO's power lines and poles, such that DEMCO had actual knowledge of the fallen tree and damaged power lines in the early morning hours of August 12, 2016, more than eighteen hours before Mr. Harrell's accident.

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[2]Because DEMCO did not offer any evidence at the trial of the exception to refute or controvert the allegations of plaintiffs' petitions or contend that those allegations should not be accepted as true for purposes of its exception of prescription, we will accept the allegations of the petitions as true for purposes of the exception. See generally Seale & Ross, PLC v. Littleleaf Properties, LLC, 2021-0083 (La. App. 1st Cir. 10/4/21), 2021 WL 4520217, * 5 (unpublished).

According to the Second Amended and Supplemental Petition, DEMCO supervised the repair of its downed power lines and poles performed by its independent contractor Chain Electric, but contrary to DEMCO's own safety manual, DEMCO did not utilize any signage at or near the fallen tree at any time even though the tree was completely across Louisiana Highway 43. Plaintiffs further averred that when DEMCO left the job site at the completion of the electrical work, the fallen tree remained completely across Louisiana Highway 43 and that DEMCO nonetheless left the job site without erecting and leaving warning signs in place to warn the traveling public of the fallen tree across the highway, violating its own policies and breaching its duty to warn against dangerous conditions related to its work. Thus, plaintiffs contended that DOTD, DEMCO, and Chain Electric were "individually, jointly, severally and in solido liable" for their damages.

While plaintiffs' petitions did not contain any allegations of a declared state of emergency or of DOTD engaging in emergency preparedness activities during the time leading up to Mr. Harrell's accident, the Joint Stipulations filed by the parties at the hearing on the exception provided as follows:

> 1. [DOTD] was engaged in emergency preparedness activities on August 12, 2016.
>
> 2. States of emergency were declared in Louisiana and St. Helena Parish, respectively, on August 12, 2016.
>
> 3. The accident sued upon occurred during the late night to early morning of August 12-13, 2016.[3]

Plaintiffs did not offer any additional evidence at the hearing to controvert the exception. See LSA-C.C.P. art. 931.

Thus, in light of these stipulations and the factual allegations of the petitions,

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[3]The parties further stipulated therein that DOTD was sued on November 7, 2016, and that plaintiffs filed their Second Amended Petition naming DEMCO and Chain Electric as defendants on October 10, 2019.

which we accept as true for purposes of this exception, DOTD was absolutely immune from liability for its emergency preparedness operations as a matter of law. LSA-R.S. 29:735(A). Moreover, the only basis upon which DOTD could have had any liability to plaintiffs would be through a claim of vicarious liability for the willful misconduct of its employees. See Noyel, 202 So. 3d at 1145-1147. Thus, plaintiffs' opposition to the exception of prescription was dependent upon plaintiffs establishing their assertion that DOTD was a joint tortfeasor with DEMCO (such that suit against DOTD interrupted prescription as to DEMCO) based on such vicarious liability.

However, notably absent from plaintiffs' petitions are any factual allegations of any particular conduct by DOTD employees that would constitute "the most egregious conduct" exhibiting "an active desire to cause harm, or a callous indifference to the risk of potential harm from flagrantly bad conduct." Compare McQuirter, 308 So. 3d at 286 (plaintiffs alleged that sergeant wore sunglasses while driving vehicle at night, overloaded the vehicle with sandbags, struggled to maintain control of the vehicle, and looked at his phone while driving, although those allegations did not, as a matter of law, rise to willful misconduct); and Koonce, 172 So. 3d at 1107-1109 (plaintiff argued that actions of prison officials in allowing deputies without the required credentials to drive school buses to evacuate inmates in advance of approaching hurricane and of deputy who drove the bus without such credentials constituted willful misconduct, although court ultimately determined these actions were not willful misconduct). Rather, as fully detailed above, plaintiffs merely alleged that while DOTD had erected a detour sign on the north side of the fallen tree at the intersection of Louisiana Highway 43 and Louisiana Highway 1043, it did not erect any warning or detour signs on the south side of the fallen tree, and that DOTD had actual notice of the fallen tree across La. Hwy. 43 well before the accident because its employees were working

on the highway where the tree had fallen, which are general factual allegations that sound in ordinary negligence.

Accordingly, in light of the stipulations by the parties and the allegations of the petitions, which we accept as true for purposes of this exception, plaintiffs set forth, in opposition to the exception, only a claim for ordinary negligence against DOTD. Because they failed to set forth any facts showing willful misconduct by DOTD employees that would constitute or support a claim of vicarious liability against DOTD for alleged willful misconduct of its employees, which would abrogate DOTD's absolute immunity from liability pursuant to LSA-R.S. 29:735(A)(1), plaintiffs' timely suit against DOTD could not serve to interrupt prescription as to DEMCO.[4] For these reasons, we find no merit to plaintiffs' arguments in assignments of error one through six that they established an interruption of prescription as to DEMCO based on their timely suit against DOTD alleging the vicarious liability of DOTD for the willful misconduct of DOTD's employees.

Turning to plaintiffs' tenth assignment of error, plaintiffs contend that the trial court erred in failing to grant them the opportunity to amend their petition. Louisiana Code of Civil Procedure article 934 provides that the judgment

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[4]We are cognizant of the jurisprudence holding that an affirmative defense may not form the basis of a peremptory exception when the asserted defense goes to the merits of the case. See White v. New Orleans Center for Creative Arts, 2019-0213 (La. App. 4th Cir. 9/25/19), 281 So. 3d 813, 822, writ denied, 2019-01725 (La. 12/20/19), 286 So. 3d 428 (involving a peremptory exception of no cause of action); see also Davis v. Hoogacker, 2018-0921 (La. App. 1st Cir. 12/21/18), 2018 WL 6718507, * 2 (the exception of no right of action cannot be used to raise an affirmative defense). However, the statutory immunity of now-dismissed DOTD does not go to the merits of plaintiffs' case against DEMCO. Moreover, it is not being raised by DEMCO as an affirmative defense to **its** potential liability to plaintiffs. Additionally, this court is not being called upon to decide the merits of DOTD's immunity. As discussed above, based on the factual allegations of the petitions, which we have taken as true, and the stipulations of the parties, plaintiffs did not assert or establish a claim of willful misconduct by DOTD employees for which DOTD could be held vicariously liable, such that DOTD's immunity pursuant to LSA-R.S. 29:735(A)(1) is absolute. Thus, timely suit against DOTD cannot serve to interrupt prescription as to DEMCO.

sustaining the peremptory exception shall order amendment of the petition when the grounds of the objection may be removed. The decision to allow amendment of a pleading to cure the grounds of a peremptory exception is within the discretion of the trial court. Morris v. Jones Funeral Home, Inc., 2020-1002 (La. App. 1st Cir. 6/18/21), 328 So. 3d 472, 476.

At the outset, we note that plaintiffs did not request in the trial court below that they be given the opportunity to amend their petitions to attempt to remove the grounds for the exception of prescription, nor did they object at the hearing when the trial court granted the exception without granting time to amend. See Hershberger v. LKM Chinese, L.L.C., 2014-1079 (La. App. 4th Cir. 5/20/15), 172 So. 3d 140, 144 (third-party plaintiff and intervenor waived their right to raise the issue of amendment to their pleadings to remove the grounds of exceptions where they did not request such relief in the trial court and did not object to the failure to grant such time below).

Moreover, as discussed above, the only claim raised by plaintiffs in their petitions as to DOTD was a negligence claim for DOTD's alleged failure to erect warning or detour signs on the south side of the fallen tree. Nowhere in those petitions did plaintiffs allege any actions by DOTD employees that could constitute willful misconduct; as such, plaintiffs did not assert a claim of vicarious liability of DOTD for any willful misconduct of its employees.[5] An amendment to assert a vicarious liability claim against DOTD for alleged willful misconduct of its employees, requiring plaintiffs to indemnify DOTD from any claims arising out of the accident and death of Mr. Harrell, would not be an amplification or clarification of the allegations of the original petition, but a change in substance, which is not the kind of amendment contemplated by LSA-C.C.P. art. 934. See

[5]Indeed, as set forth above, plaintiffs did not allege any facts as to the declared states of emergency due to flooding at the time of the accident or that DOTD's actions were in response to that emergency.

Gates v. Hanover Insurance Company, 218 So. 2d 648, 653 (La. App. 4th Cir. 1969) (amendment of petition in an attempt to defeat an exception of no cause of action to change claim from one of vicarious liability to one of personal liability would not be an amplification or clarification of the allegations of the original petition, but a change in substance, which is not the kind of amendment contemplated by LSA-C.C.P. art. 934). Accordingly, we find no abuse of the trial court's discretion in declining to grant plaintiffs the opportunity to amend their petition.

CONCLUSION

For the above and foregoing reasons, the trial court's September 20, 2021 judgment, sustaining the exception of prescription filed by Dixie Electric Membership Corporation (DEMCO) and dismissing with prejudice the claims of Breona Harrell and Brittney Harrell against DEMCO, is hereby affirmed. Costs of this appeal are assessed against plaintiffs, Breona Harrell and Brittney Harrell.

AFFIRMED.