NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 2114

CHARLES CURTIS, JR.

VERSUS

FRESENIUS MEDICAL CARE d/b/a BMA/NMC DIALYSIS CENTER, DIANNE DOE AND CARMEN DOE

Judgment Rendered: September 20, 2006

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On Appeal from the Nineteenth Judicial District Court
In and For the Parish of East Baton Rouge
State of Louisiana
Docket No. 454,900

Honorable Kay Bates, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

This is an appeal from the trial court's grant of a peremptory exception raising the objection of no cause of action in favor of defendant, Bio-Medical Applications of Louisiana, Inc., d/b/a BMA West Baton Rouge, dismissing the claims of plaintiff, Charles Curtis, Jr. For the reasons that follow, we reverse the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

Charles Curtis, Jr. filed this lawsuit on October 27, 1998, against Bio-Medical Applications of Louisiana, Inc., d/b/a BMA West Baton Rouge and two of its unnamed employees (BMA). He asserted that one year earlier, on October 27, 1997, he went for his dialysis treatment at the medical facility operated by BMA.[1] In his petition for damages, plaintiff claimed that at this facility, each patient is assigned his or her own mechanical dialyzer and tubing for treatment. Plaintiff alleged that on October 27, 1997, the dialysis process was initiated and administered by two BMA employees, but that after the process had begun, it was discovered that the dialyzer and tubing being used by plaintiff had been assigned to and used by another patient.[2] As a result, plaintiff claimed he was subjected to the risk of disease, resulting in extreme fear for his life, health and safety; physical pain and nausea; fear of developing a strain of hepatitis, AIDS, or other communicable or infectious disease; physical injury; and psychological and emotional injury.

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[1] We note that the correct name of defendant is Bio-Medical Applications of Louisiana, Inc., d/b/a BMA West Baton Rouge, and that plaintiff, in his petition, incorrectly identified defendant as Fresenius Medical Care North America d/b/a BMA/NMC Dialysis Center.

[2] Hemodialysis, or artificial kidney treatment, involves the passage of the patient's blood from his or her circulatory system into a dialysis machine where it is filtered by passing it through a dialyzer, which acts to remove certain impurities and excess fluids from the blood.

BMA answered the petition admitting that each patient is assigned his or her own dialyzer; that on October 27, 1997, plaintiff was prepared for dialysis by its employees; that plaintiff was inadvertently connected to another patient's dialyzer; and that his blood went into the dialyzer and was subsequently re-infused. Nevertheless, on August 18, 1999, BMA filed a motion for summary judgment asserting that the type of claim made by plaintiff, based entirely on a fear of contracting a disease, is not a recognized cause of action and therefore should be dismissed as a matter of law.[3]

On January 13, 2000, the parties filed a Joint Motion for Entry of Consent Judgment, in which they stated that they had agreed to resolve the issues raised in BMA's motion for summary judgment and had prepared a consent judgment, which was signed by the trial court on January 25, 2000. The Consent Judgment and Order of Dismissal provided, in pertinent part:

> IT IS ORDERED, ADJUDGED AND DECREED that defendant's motion for summary judgment is granted and plaintiff's claims against defendant . . . are dismissed, with prejudice.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this judgment shall not prejudice plaintiff's

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[3] In its motion for summary judgment, BMA argued that plaintiff's cause of action, often called a "fear of AIDS" case, is not viable under Louisiana law, citing the case of **Falcon v. Our Lady of the Lake Hospital**, 98-0714 (La.App. 1 Cir. 4/1/99), 729 So.2d 1169, in which the First Circuit stated:

> [I]n order to establish a cause of action, a plaintiff must be able to demonstrate the presence of HIV (or other blood-borne and/or contagious disease) and a channel of exposure or infection. Absent such a showing, a plaintiff's fear of contracting HIV (or other serious illness) would be speculative and not sufficiently reasonable as a matter of law to impose liability.

Falcon, 98-0714 at p. 8, 729 So.2d at 1173. Because plaintiff did not allege the presence of HIV (or other blood-borne disease), BMA contented that it was entitled to summary judgment as a matter of law.

BMA also submitted evidence, in support of its motion, that, in accordance with industry standards, dialyzers are sometimes re-used, but that prior to re-use, dialyzers are disinfected and re-processed. BMA submitted further evidence that the dialyzer in question, which had been used by another patient, had been re-processed and disinfected prior to being used by plaintiff. Lastly, BMA presented evidence that the patient, whose dialyzer and tubing were used, was HIV and hepatitis free.

> right to file additional claims should he later contact a blood borne disease as a result of the alleged incident giving rise to this lawsuit.

Thereafter, on May 7, 2002, plaintiff filed a Petition to Nullify Summary Judgment in the original suit, seeking to nullify the consent judgment and order of dismissal of January 25, 2000, alleging in pertinent part:

> 1.
>
> Upon information and belief, the basis of the consent judgment and order of dismissal . . . was the belief that Charles Curtis, Jr. was not HIV positive. Hence, it was the position of the Defendant, agreed to by Plaintiff, that he had no cause of action merely based upon the fear of contracting HIV, or some other related disease.
>
> 2.
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> The consent order of dismissal, referred to above, contained the following language:
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> > "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this judgment shall not prejudice plaintiff's right to file additional claims should he later contract a blood borne disease as a result of the alleged incident giving rise to this lawsuit."
>
> 3.
>
> On or about May 24, 2001, Charles Curtis, Jr., discovered that he was in fact HIV positive.
>
> 4.
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> Upon information and belief, unknown to Plaintiff, he was HIV positive at the time the litigation at issue was ongoing.

In the alternative, plaintiff also reiterated the allegations of his original petition.

In response thereto, BMA filed a peremptory exception raising the objection of no cause of action asserting that plaintiff had not alleged any facts which, if accepted as true, would show that the consent judgment was obtained through fraud or ill practices. After a hearing, the trial court

granted the exception, finding that plaintiff had not alleged in his petition that the consent judgment was obtained through fraud or ill practices, and therefore failed to state a cause of action. The trial court, however, gave plaintiff fifteen days within which to amend his petition for nullity to state a cause of action. Plaintiff amended his petition on May 15, 2003, by initially adding to the alternative section of his petition, the factual allegations of his petition for damages filed on October 27, 1998. Plaintiff further supplemented the original petition for nullity with the following pertinent allegation:

13.

> Upon information and belief, the transmission of the HIV virus to Charles Curtis, Jr. came from the dialysis treatment described above or, in the alternative, other improper dialysis treatment rendered by Bio-Medical.

On June 9, 2003, BMA again filed a peremptory exception raising the objection of no cause of action. In the second exception, BMA raised the same objection that had been sustained by the trial court in its earlier ruling. Following a second hearing, the trial court granted BMA's exception of no cause of action, determining that plaintiff again failed to allege that the consent judgment was obtained through fraud or ill practices, and dismissed plaintiff's suit with prejudice.

Plaintiff has appealed, asserting that the trial court erred in granting the exception.

DISCUSSION

A cause of action, when used in the context of the peremptory exception, is defined as the operative facts that give rise to the plaintiff's right to judicially assert the action against the defendant. **Ramey v. DeCaire**, 03-1299, p. 7 (La. 3/19/04), 869 So.2d 114, 118. The function of

the peremptory exception raising the objection of no cause of action is to test the legal sufficiency of the petition. **Id.** In making the determination on an exception of no cause of action, all well-pleaded allegations of fact in the petition must be accepted as true, and no reference can be made to extraneous supportive or controverting evidence. See LSA-C.C.P. art. 931. The court must then determine whether the law affords any relief to the claimant if those factual allegations are proven at trial. If the allegations of the petition state a cause of action as to any part of the demand, the exception must be overruled. A petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief. **Pelts & Skins, L.L.C. v. Louisiana Dept. of Wildlife and Fisheries**, 05-0952, p. 4 (La.App. 1 Cir. 6/21/06), ___ So.2d ___, ___; **Home Distribution, Inc. v. Dollar Amusement, Inc.**, 98-1692, p. 5 (La.App. 1 Cir. 9/24/99), 754 So.2d 1057, 1060.

Louisiana has chosen a system of fact pleading. LSA-C.C.P. art. 854, Comment (a). Therefore, it is not necessary for a plaintiff to plead the theory of his case in the petition. However, the mere conclusions of the plaintiff unsupported by facts does not set forth a cause of action. **Ramey**, 03-1299 at p. 7, 869 So.2d at 118.

The burden of demonstrating that no cause of action has been stated rests on the exceptor. In reviewing a trial court's sustaining an exception of no cause of action, the reviewing court conducts a *de novo* review. **Ramey**, 03-1299 at pp. 7-8, 869 So.2d at 119; **Pelts & Skins, L.L.C.**, 05-0952 at p. 4, ___ So.2d at ___. The pertinent question is whether, in the light most favorable to plaintiff and with every doubt resolved in plaintiff's behalf, the

petition states any valid cause of action for relief. **Ramey**, 03-1299 at p. 8, 869 So.2d at 119.

In this appeal, plaintiff asserts that he has sufficiently set forth three causes of action, namely, a nullity action based on the intent of the parties; a nullity action based on a lack of consent; and a new action based on having contracted the HIV virus due to BMA's negligence.

Initially, plaintiff argues that in filing the nullity petition in this lawsuit, he is attempting to carry out the intent of the parties in that the summary judgment was based on the parties' then belief that plaintiff was HIV free. Plaintiff contends that the consent judgment clearly recognized a renewal of the action if plaintiff was not HIV free, or if he became infected with the HIV virus. As a result of his HIV status and the intent of the parties, plaintiff asserts, he opted to file the nullity action based on ill practice.

Louisiana Code of Civil Procedure article 2004 provides that any final judgment obtained by "fraud or ill practices" may be annulled. This article is not limited to cases of actual fraud or intentional wrongdoing, but is sufficiently broad to encompass all situations where a judgment is rendered through some improper practice or procedure. Courts must review petitions for nullity closely, as actions for nullity based on fraud and ill practices are not intended as substitutes for appeals or second chances to prove claims previously denied for failure of proof. The purpose of an action for nullity is to prevent injustice that cannot be corrected through new trials and appeals. **Belle Pass Terminal, Inc. v. Jolin, Inc.**, 01-0149, p. 5 (La. 10/16/01), 800 So.2d 762, 766; **Stroscher v. Stroscher**, 01-2769, p. 4 (La.App. 1 Cir. 2/14/03), 845 So.2d 518, 523-24.

The two criteria for determining whether a judgment has been rendered through fraud or ill practices and is subject to nullification are: (1) whether circumstances under which the judgment was rendered showed the deprivation of legal rights of the litigant seeking relief; and (2) whether enforcement of the judgment would be unconscionable or inequitable. **Belle Pass Terminal, Inc.**, 01-0149 at p. 6, 800 So.2d at 766.

Allegations of impropriety are essential to a cause of action under LSA-C.C.P. art. 2004. **Livingston Parish Sewer Dist. No. 2 v. Millers Mut. Fire Ins. Co. of Texas**, 99-1728, pp. 3-4 (La.App. 1 Cir. 9/22/00), 767 So.2d 949, 952, writ denied, 00-2887 (La. 12/8/00), 776 So.2d 1175. Further, a judgment will not be annulled on account of fraud or ill practice in the course of a legal proceeding if the fraud or ill practice pertained to a matter irrelevant to the basis of the decision and the judgment therefore was not obtained by fraud or ill practice. **Belle Pass Terminal, Inc.**, 01-0149 at p. 7, 800 So.2d at 767; **Stroscher**, 01-2769 at pp. 4-5, 845 So.2d at 524.

In this matter, the trial court was of the opinion that plaintiff's petition, including the amended petition, failed to allege any impropriety that would constitute fraud or ill practices under LSA-C.C.P. art. 2004. We agree.

However, plaintiff also argues that a lack of consent nullifies the consent judgment. Plaintiff asserts that consent is lacking in this case because the basis of the consent judgment was that plaintiff was HIV free. Therefore, according to plaintiff, he was operating under an error of fact.[4]

A consent judgment, which is a bilateral contract between the parties, must be based on consent. Thus, a consent judgment, as opposed to other

[4] An action of annulment of a relatively null contract based on error must be brought within five years from the time the ground for nullity was discovered. LSA-C.C. art. 2032.

final judgments rendered against a party without their consent, may be annulled for an error of fact, or of the principal cause of the agreement. **State, Dep't of Trans. & Dev. v. K. G. Farms, Inc.**, 402 So.2d 304, 307 (La.App. 1 Cir.), writ denied, 406 So.2d 625 (La. 1981). See also **Stroscher**, 01-2769 at p. 5, 845 So.2d at 524.[5]

Consent may be vitiated by error, fraud, or duress. LSA-C.C. art. 1948. Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party. LSA-C.C. art. 1949. Cause is the reason why a person obligates himself. LSA-C.C. art. 1967. Error may concern a cause when it bears on the nature of the contract or any other circumstance that the parties regarded, or should have in good faith regarded, as a cause of the obligation. LSA-C.C. art. 1950. **Durand v. Board of Trustee's of Sheriffs' Pension & Relief Fund**, 96-2409, p. 7 (La.App. 1 Cir. 11/7/97), 704 So.2d 12, 15, writ denied, 97-3005 (La. 2/6/98), 709 So.2d 745; **deGravelles v. Hampton**, 94-0819, p. 3 (La.App. 1 Cir. 3/3/95), 652 So.2d 647, 649, writ denied, 95-0826 (La. 5/5/95), 654 So.2d 332. Thus, a contract may be invalidated for unilateral error as to a fact which was a principal cause for making the contract, but only when the other party knew or should have known that it was a principal cause. **Durand**, 96-2409 at p. 7, 704 So.2d at 15; **deGravelles**, 94-0819 at p. 4, 652

[5] Accord **Succession of Simmons**, 527 So.2d 323, 325 (La.App. 4 Cir.), writ denied, 529 So.2d 12 (La. 1988); **Williams v. Williams**, 586 So.2d 658, 661 (La.App. 2 Cir. 1991); **Polk v. Polk**, 98-1788 (La.App. 3 Cir. 3/31/99), 735 So.2d 737, 739. See also Frank L. Maraist & Harry T. Lemmon, Vol. 1, Louisiana Civil Law Treatise: Civil Procedure (1999), § 12.6 at 341 ("A consent judgment is based on a bilateral contract between the parties, and the nullity of a consent judgment generally is governed by contract principles.").

So.2d at 649.[6]

In this matter, plaintiff alleged in his petition to nullify the consent judgment that the basis of the consent judgment was his belief that he was not HIV positive. Plaintiff further alleged that he and BMA agreed that he had no cause of action in his original suit for damages based merely upon the fear of contracting HIV. Plaintiff alleged that he discovered, after the date of the signing of the consent judgment, that he was HIV positive and that, unknown to plaintiff, he was HIV positive at the time the litigation at issue was ongoing. Plaintiff further alleged, in his amended petition, that the transmission of the HIV virus to plaintiff came from the dialysis treatment rendered by BMA.

We have reviewed plaintiff's petition for nullity, as amended, and conclude that it does state a cause of action for nullity of the consent judgment based on a lack of consent. Plaintiff alleged that the reason he entered into the consent judgment was because he was HIV free, and we find that this was plaintiff's primary reason for entering into the consent judgment. Further, BMA knew or should have known that plaintiff's belief that he was HIV free was plaintiff's primary cause for dismissing his claim, as the consent judgment contained language that should plaintiff become HIV positive, he reserved the right to refile.[7]

Thus, in the light most favorable to the plaintiff and with every doubt resolved in plaintiff's behalf, we find that the petition states a valid cause of

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[6] One of the source provisions of LSA-C.C. art. 1949, LSA-C.C. art. 1825 (1870), described the cause upon which rescission may be sought as the "principal cause, when there are several." According to the original French text of Civil Code art. 1825 (1870), the "principal cause," rather than the "motive," is that cause without which the contract would not have been made. This is sufficiently expressed by "cause" without resorting to "principal cause," which is redundant. LSA-C.C. art. 1949, Comment (e).

[7] Because this matter is before the Court on an exception raising the objection of no cause of action, we do not address BMA's argument regarding plaintiff's neglect or delay in discovering that he was HIV positive.

action for relief. Accordingly, the trial court incorrectly sustained the peremptory exception raising the objection of no cause of action.[8]

CONCLUSION

For the reasons set forth herein, the judgment of the trial court sustaining the peremptory exception raising the objection of no cause of action is reversed. This matter is remanded for further proceedings. Costs of this appeal are assessed to the defendant.

REVERSED AND REMANDED.

[8] Because we are reversing the judgment of the trial court, we pretermit any discussion of plaintiff's alternative request to file a new lawsuit in this proceeding.