NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0358

BRENDA JOYCE WILLIAMS

VERSUS

RONNIE L. WILLIAMS

Judgment Rendered: February 9, 2007

Appealed from the
Family Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 152,733

Honorable Luke A. LaVergne, Judge Presiding

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Marcus T. Foote **G. Bruce Kuehne** **Baton Rouge, LA**	**Counsel for Plaintiff/Appellant,** **Brenda Joyce Williams**
Mark D. Plaisance **Harry W. Ezim, Jr.** **Baton Rouge, LA** **And** **Michael H. Aaron** **Baton Rouge, LA**	**Counsel for Defendant/Appellee,** **Ronnie L. Williams**

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

Carter, C.J. concurs. (by JMM)

WHIPPLE, J.

This is an appeal from a judgment of the Family Court for East Baton Rouge Parish, maintaining defendant's peremptory exception of no cause of action and dismissing plaintiff's petition to nullify judgment and for declaratory judgment. For the following reasons, we affirm the October 18, 2005 judgment maintaining the exception and vacate the October 25, 2005 judgment awarding attorney's fees.

FACTS AND PROCEDURAL HISTORY

The parties were married December 26, 1971. On October 22, 1999, during the parties' marriage and prior to the filing of a divorce petition, plaintiff, Brenda J. Williams, and defendant, Ronnie L. Williams, signed an agreement purporting to settle "any and all claims each may have against the community of acquet[s] and gains that exist or has existed" between the parties. The agreement provided that the parties were to each retain an undivided one-half interest in immovable property located at 280 Englewood in Baton Rouge, Louisiana and in the furnishings contained therein. The agreement further provided that based upon a lump sum payment of $30,000.00 and monthly payments of $1,500.00 by Mr. Williams, Mrs. Williams "waive[d] any and all further claims against Ronnie L. Williams for recovery of alimony, child support and/or community property claims." Subsequently, the parties were divorced by judgment signed February 25, 2000.

Almost four years later, on November 10, 2004, Mrs. Williams filed a petition for judicial partition of community property, contending that, while the parties had partitioned some movable property by mutual agreement, the parties had not been able to amicably agree to a partition of remaining community property, which she contended in her detailed descriptive list

was valued in excess of $10,000,000.00. Thus, Mrs. Williams sought to have the court judicially partition the community property in accordance with LSA-R.S. 9:2801.

Mr. Williams responded by filing a "Rule to Show Cause Why Peremptory Exception of No Cause of Action Should Not Be Granted or in the Alternative, Why the Plaintiff's Petition Should Not Be Involuntarily Dismissed for Lack of Merit." In his pleading, Mr. Williams contended that the parties, by mutual agreement, had compromised and divided the community property that existed between them, had reduced the agreement to writing and had recorded the agreement with the clerk of court. Mr. Williams further contended that he had paid Mrs. Williams the $30,000.00 lump sum payment and had consistently paid her $1,500.00 per month since December 1999, as agreed to by the parties in the community property settlement agreement. Thus, Mr. Williams contended, Mrs. Williams had failed to state a cause of action in that all community property previously existing between the parties had already been partitioned by mutual agreement and consent.

In the alternative, Mr. Williams requested that Mrs. Williams' petition for judicial partition "be involuntary [sic] dismissed for lack of merit and frivolity." Mr. Williams also requested attorney's fees, expenses and costs on the basis that Mrs. Williams had filed the petition for judicial partition for an improper purpose and motive in an attempt to harass, embarrass and humiliate Mr. Williams and to needlessly increase the cost of litigation.

A hearing on Mr. Williams' rule was held on December 14, 2004. According to the minute entry, a stipulation was entered into the record by counsel and agreed to by the parties, and the court rendered judgment in accordance with those stipulations. Additionally, according to the minute

entry, counsel for Mr. Williams then moved for attorney's fees and court costs, and the court rendered judgment ordering Mrs. Williams to pay attorney's fees to defense counsel in the amount of $8,000.00 and court costs.

The judgment signed by the Family Court on December 17, 2004, provided that based upon the pleadings, applicable law, evidence and "the stipulation of the parties," judgment was rendered as follows: sustaining Mr. Williams' exception of no cause of action; decreeing that the October 22, 1999 agreement to partition the community property was a valid and enforceable agreement; and dismissing Mrs. Williams' petition for judicial partition of community property with prejudice. The December 17, 2004 judgment further provided that, upon motion of defense counsel, the court awarded defense counsel attorney's fees of $8,250.00 to be paid by Mrs. Williams.[1] Notably, Mrs. Williams did not appeal this judgment.

On August 11, 2005, however, Mrs. Williams filed a Petition to Nullify Judgment on Rule and for Declaratory Judgment, seeking to nullify the December 17, 2004 judgment. She attached as Exhibit A to her petition the October 22, 1999 agreement signed by her and Mr. Williams. In her petition, Mrs. Williams alleged many bases as to why the prior judgment should be annulled, including the following allegations: that the October 22, 1999 agreement, which was signed during the marriage, could not terminate the community nor constitute a waiver of the right to partition community property and that any such effort would be an "absolute nullity"; that because the October 22, 1999 agreement had an illegal object, the December

[1]We note that the amount of attorneys fees awarded in the judgment differs from the amount shown in the minute entry of the December 14, 2004 hearing. Where there is such a discrepancy, the judgment should prevail. See generally Williams v. Cooper, 2005-2360 (La. App. 1st Cir. 10/6/06), ___ So. 2d ___, ___, and Camp v. Camp, 580 So. 2d 553, 554 n.3 (La. App. 1st Cir.), writ denied, 587 So. 2d 693 (La. 1991).

17, 2004 consent judgment could not be based on that agreement; that the judgment was procured by fraud or ill practices based on various alleged actions by defense counsel; that Mrs. Williams' consent to the December 17, 2004 judgment was void because she received "absolutely no lawful consideration" for such consent; that although Mrs. Williams was represented, she was "effectively without legal counsel" based on alleged errors by her attorney; that she did not understand the proceedings and specifically did not consent to the imposition of attorney's fees or to the dismissal of her petition for partition **with prejudice**; and that any consent she gave to the judgment resulted from duress due to fraud or ill practices because of threats of sanctions, actual imposition of sanctions and total lack of preparation and advice by plaintiff's counsel. Based on these allegations, Mrs. Williams prayed that the December 17, 2004 judgment be vacated or annulled.

In response to Mrs. Williams' petition to nullify the judgment, Mr. Williams again filed an exception of no cause of action, contending that at the December 14, 2004 hearing on the first exception of no cause of action filed in response to Mrs. Williams' petition for judicial partition, both parties acknowledged that they had previously partitioned their community property and both parties consented to a judgment granting the exception of no cause of action filed by Mr. Williams and dismissing Mrs. Williams' petition for judicial partition with prejudice. Thus, Mr. Williams contended, the December 17, 2004 consent judgment was a valid judgment and that Mrs. Williams could not collaterally attack it. Moreover, Mr. Williams asserted that while Mrs. Williams' petition to nullify the December 17, 2004 judgment intentionally distorted the facts and mischaracterized the proceedings and pleadings filed by his counsel, it nonetheless did not state

any factual allegations which rose to the level of fraud or ill practices to warrant nullification of the judgment. Mr. Williams also contended that a petition for declaratory judgment was not a valid procedure through which to seek to annul a judgment.

Following a hearing on the exception, the trial court signed a judgment dated October 18, 2005, maintaining Mr. Williams' exception of no cause of action and dismissing Mrs. Williams' petition to nullify the judgment and for declaratory judgment. Subsequently, on October 25, 2005, the trial court signed a second judgment, ordering Mrs. Williams to pay Mr. Williams attorney's fees in the amount of $1,000.00. The October 25, 2005 judgment further provided that "the Judgment herein supplements the judgment signed on the 18th day of October, 2005 and both judgments shall remain in full force and effect." From the October 18, 2005 judgment, Mrs. Williams appeals, alleging sixteen assignments of error.

EXCEPTION OF NO CAUSE OF ACTION

The objection of no cause of action is properly raised by the peremptory exception and questions whether the law extends a remedy to anyone under the factual allegations of the petition. The purpose of the exception of no cause of action is to determine the sufficiency in law of the petition. Richardson v. Home Depot USA, 2000-0393 (La. App. 1st Cir. 3/28/01), 808 So. 2d 544, 546. In reviewing a trial court's ruling maintaining an exception of no cause of action, the appellate court should subject the case to a *de novo* review. Knight v. Magee, 2001-2041 (La. App. 1st Cir. 9/27/02), 835 So. 2d 636, 638.

The exception of no cause of action is triable solely on the face of the petition and any annexed documents. Woodland Ridge Association v. Cangelosi, 94-2604 (La. App. 1st Cir. 10/6/95), 671 So. 2d 508, 510. For

purposes of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. The court must determine if the law affords plaintiff a remedy under those facts. Generally, no evidence may be introduced to support or controvert the exception. However, a jurisprudentially recognized exception to this rule allows the court to consider evidence that is admitted without objection to enlarge the pleadings. Stroscher v.Stroscher, 2001-2769 (La. App. 1st Cir. 2/14/03), 845 So. 2d 518, 523.

Any doubts are resolved in favor of sufficiency of the petition. The question, therefore, is whether, in the light most favorable to the plaintiff, and with every doubt resolved in her behalf, the petition states any valid cause of action for relief. If two or more causes of action are based upon separate and distinct operative facts, partial grants of the exception of no cause of action may be rendered, while preserving other causes of action. Stroscher, 845 So. 2d at 523.

When the grounds of the peremptory exception of no cause of action may be removed by amendment of the petition, the judgment maintaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection cannot be so removed, or if the plaintiff fails to comply with the order to amend, the action shall be dismissed. LSA-C.C.P. art. 934. The decision to allow amendment is within the sound discretion of the trial court. Richardson, 808 So. 2d at 547.

Thus, in the instant case, the question is whether, accepting the well-pleaded facts in the petition as true, the law affords Mrs. Williams a remedy in nullity under those facts.

ACTION OF NULLITY

Louisiana law provides for annulment of judgments under several theories relevant herein. First, pursuant to LSA-C.C.P. art. 2004, a final judgment may be annulled if it was obtained by fraud or ill practices. This article is not limited to cases of actual fraud or ill practices, but is sufficiently broad to encompass all situations wherein a judgment is rendered through some improper practice or procedure. Courts must review petitions for nullity closely, as actions for nullity based on fraud or ill practices are not intended as substitutes for appeals or as 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., 2001-0149 (La. 10/16/01), 800 So. 2d 762, 766.

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., 800 So. 2d at 766. "Ill practice" is any improper practice or procedure which operates, even innocently, to deprive a litigant of some legal right. The "legal right" of which a litigant must be deprived to have a judgment annulled includes the right to appear and assert a defense and the right to a fair and impartial trial. Morton Building, Inc. v. Redeeming Word of Life Church, 2001-1837 (La. App. 1st Cir. 10/16/02), 835 So. 2d 685, 689, writ denied, 2002-2733 (La. 1/24/03), 836 So. 2d 46.

Secondly, with regard to annulment of a consent judgment, a consent judgment is a bilateral contract between the parties, which must be based on

consent. Thus, a consent judgment, as opposed to other final judgments rendered against a party without his or her consent, may be annulled for an error of fact or error as to the principal cause of the agreement. LSA-C.C. arts. 1950 and 1967; Stroscher, 845 So. 2d at 524; State, Department of Transportation and Development v. K. G. Farms, Inc., 402 So. 2d 304, 307 (La. App. 1st Cir.), writ denied, 406 So. 2d 625 (La. 1981). Under the cited codal provisions, a contract may be invalidated for unilateral error as to a fact which was a principal cause for making the contract, where the other party knew or should have known it was the principal cause. K. G. Farms, Inc., 402 So. 2d at 307 (citing to related provisions of the Louisiana Civil Code prior to amendment by Acts 1984, No. 331, § 1, effective January 1, 1985).

Thirdly, this court has held that where a judgment of dismissal with prejudice is based upon a compromise agreement that is absolutely null, the judgment of dismissal is likewise an absolute nullity and, thus, subject to an action for nullity. Bass v. Laporte, 95-0867 (La. App. 1st Cir. 2/14/97), 691 So. 2d 138, 141-142, writ denied, 97-0646 (La. 4/25/97), 692 So. 2d 1088.

DISCUSSION

Mrs. Williams asserts, through various assignments of error, that her petition to nullify the December 17, 2004 judgment and for declaratory judgment stated a cause of action under all three bases listed above for annulling a judgment, i.e., fraud or ill practices; error of fact or as to principal cause as it relates to a consent judgment; and absolute nullity of a judgment of dismissal based on an absolutely null compromise agreement. She contends that the trial court thus erred in maintaining Mr. Williams' exception of no cause of action. She further asserts other alleged errors in

the trial court's judgment maintaining the exception of no cause of action and dismissal of her petition for nullity as set forth below.

Fraud or Ill Practices
(Assignments of Error Nos. 6 & 15)

Through these assignments of error,[2] Mrs. Williams contends that the trial court erred in concluding that she failed to state a cause of action to annul the December 17, 2004 judgment on the basis of fraud or ill practices. She contends that the petition alleged defense counsel made misrepresentations of fact and law to the court and opposing counsel on at least two separate occasions. Mrs. Williams further argues that the original exception of no cause of action filed by Mr. Williams (which led to rendition of the December 17, 2004 judgment) was actually a disguised motion for summary judgment and that the fixing of a hearing on that pleading only five days after it was filed did not comply with the Code of Civil Procedure articles governing summary judgments. Mrs. Williams contends that the trial court erred in failing to conclude that these allegations constituted fraud or ill practices. Mrs. Williams further contends that the petition alleged incompetence of her legal counsel, which contributed to other events, the entirety of which constitute fraud or ill practices.

In the petition for nullity, Mrs. Williams specifically alleged that defense counsel, in his first exception of no cause of action, had falsely represented that the 1999 agreement between the parties was signed **after** the petition for divorce was filed, when, in fact, it was signed during the parties' marriage. She further alleged in her petition that defense counsel misrepresented in the exception of no cause of action that the 1999 agreement of the parties provided that all claims against the community were

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[2] For ease of discussion, we address her assignments out of order.

settled, a statement which she contended was a misrepresentation of law and fact. In the petition, Mrs. Williams additionally alleged that at the hearing on the first exception of no cause of action, defense counsel misrepresented a legal issue to the court and to Mrs. Williams, i.e., that she was indebted to Mr. Williams for use of the family home.

Even accepting these allegations as true, we find no error in the trial court's obvious conclusion that these alleged misstatements or misrepresentations did not state a cause of action for nullity based on fraud or ill practices. With regard to the alleged misrepresentation of fact as to when the underlying agreement between the parties was signed, we note that Mrs. Williams acknowledged in her petition that she had discussed the underlying agreement "in detail" with her attorney several months prior to filing her petition for partition. Accordingly, the instant petition fails to disclose how such a misstatement by defense counsel could have operated to deprive Mrs. Williams of any legal right where she was aware of the circumstances and date of the agreement and could have raised this issue when the legal effect of the agreement was placed at issue in his pleading and before the court in the hearing on the first exception of no cause of action. Cf. Wood v. Wood, 440 So. 2d 906, 911 (La. App. 2nd Cir. 1983) (wherein the court determined that the husband's **material** misrepresentations to the wife that he had "dropped" his separation suit and that it would be unnecessary for her to retain an attorney deprived the wife of the legal right to appear and defend the suit and, thus, were grounds for annulment of a default judgment against the wife).

Moreover, regarding the alleged legal misrepresentations as to the effect of the underlying agreement and Mrs. Williams' indebtedness to Mr. Williams for use of the family home, we likewise find no error in the trial

court's obvious conclusion that these alleged facts did not constitute fraud or ill practices. Even ignoring the fact that the portions of the December 17, 2004 judgment declaring the 1999 agreement between the parties to be valid and dismissing Mrs. Williams' petition for partition were based on stipulation or consent of the parties, we note that a court's consideration of the law, even if done erroneously, can in no way be construed as an "ill practice." Lieber v. Caddo Levee District Board of Commissioners, 32,551 (La. App. 2nd Cir. 12/8/99), 748 So. 2d 587, 591, writ denied, 2000-0561 (La. 4/7/00), 759 So. 2d 763, cert. denied, 531 U.S. 928, 121 S. Ct. 306, 148 L. Ed. 2d 246 (2000). Thus, even accepting as true the instant petition's allegation that defense counsel misrepresented the law and further assuming that the trial court had in some way relied on those misrepresentations in rendering the December 17, 2004 judgment, we cannot conclude that this constitutes fraud or ill practices. An action for nullity cannot be substituted for a defense on the merits or a timely appeal. Meldean's, Inc. v. Rivers, 410 So. 2d 837, 840 (La. App. 3rd Cir.), writ denied, 414 So. 2d 376 (La. 1982).

Also, regarding Mrs. Williams' contentions that the original exception of no cause of action filed by Mr. Williams was actually a disguised motion for summary judgment and that the fixing of a hearing on that pleading did not comply with the delays for hearings on summary judgments, we initially note that Mrs. Williams acknowledged in the instant petition that her attorney did not object to the procedure utilized nor did he request a continuance. Moreover, to the extent that her allegation that the exception of no cause of action was in fact a disguised motion for summary judgment sets forth a conclusion of law, this court is not bound to accept the

correctness of that assertion.[3] LSA-C.C.P. art. 891; Kyle v. Civil Service Commission, 588 So. 2d 1154, 1159 (La. App. 1st Cir. 1991), writ denied, 595 So. 2d 654 (La. 1992).

Finally, regarding Mrs. Williams' contentions that her prior attorney's incompetence also combined with other events to constitute fraud or ill practices, we note that the improper representation or misconduct of the moving party's attorney is not a legally recognized basis for granting an action in nullity. Stroscher, 845 So. 2d at 524. Thus, we find no merit to this argument either.

Based upon our review of the petition, we cannot conclude that the trial court erred in finding that the petition fails to state a cause of action for nullity on the basis of fraud or ill practices.

Nullity of a Consent Judgment
(Assignments of Error Nos. 7, 8, 9 & 11)

Mrs. Williams further contended in her petition for nullity that she did not give her consent to the December 17, 2004 judgment declaring the 1999 agreement to be valid and dismissing her petition for partition. She also averred in her petition that any consent she gave was based on implicit and explicit representations made to her that she had nothing to gain by continuing the civil action and everything to lose, and that she received "absolutely no lawful consideration for any consent." Additionally, in her petition, Mrs. Williams alleged that she did not consent to dismissal of her

[3]With regard to Mrs. Williams' allegation in her petition that the trial court incorrectly considered evidence at the hearing on the original exception of no cause of action, we further note that judgments rendered contrary to law are subject to reversal on appeal, but are not thereby subject to an action for nullity. Levy v. Stelly, 254 So. 2d 665, 667 (La. App. 4th Cir. 1971), writ denied, 260 La. 403, 256 So. 2d 289 (1972).

petition for partition "with prejudice" and did not even know what that term meant.[4]

On appeal, Mrs. Williams asserts that because the December 17, 2004 judgment was a consent judgment, it depended entirely on contract law for its validity, and it is subject to nullification for error of fact or of the principal cause. Thus, she argues, her lack of consent and the lack of consideration, as alleged in her petition, constitute errors of fact or as to the principal cause, subjecting the consent judgment to an action for nullity.

As stated above, because a consent judgment is a bilateral contract between the parties, which must be based on consent, it may be annulled for an error of fact or error as to the principal cause of the agreement. LSA-C.C. arts. 1950 and 1967; Stroscher, 845 So. 2d at 524. Generally, a party's counsel of record is assumed to be authorized by his client to engage in settlement negotiations, but is without authority to settle his client's claim without his client's clear and express consent. Grimes v. CIBA-GEIGY Corporation, 96-0494 (La. App. 1st Cir. 12/20/96), 684 So. 2d 1159, 1160, writ denied, 97-0182 (La. 3/14/97), 689 So. 2d 1384. Nonetheless, because a client speaks through her attorney in court, any statement made by the attorney is held to be an admission by the client. Singleton v. Bunge Corporation, 364 So. 2d 1321, 1325 (La. App. 4th Cir. 1978); see also Landry v. Landry, 97-1839 (La. App. 4th Cir. 11/25/98), 724 So. 2d 271, 273. Accordingly, where an attorney appears in open court and agrees to a stipulation or the terms of a settlement recited in open court, the client is

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[4]On appeal, Mrs. Williams further contends that she did not give her attorney authority to dismiss her case with prejudice and, in fact, could not have given her consent due to her attorney being totally unprepared and unable to give her advice. However, as stated above, the improper representation or misconduct of the moving party's attorney is not a legally recognized basis for granting an action in nullity. Stroscher, 845 So. 2d at 524.

bound by that stipulation or judicial confession. Singleton, 364 So. 2d at 1325.

Notably, in her petition, Mrs. Williams makes no allegation that her counsel did not understand the terms of the stipulations or, specifically, the provision in the judgment that her petition for partition would be dismissed **with prejudice** at the time the stipulations were recited in court. Accordingly, Mrs. Williams is bound by the statements of her attorney and fails to state a cause of action to nullify the resulting consent judgment.[5]

These assignments lack merit.

Absolute Nullity of Underlying Agreement Rendering Consent Judgment Absolutely Null (Assignments of Error Nos. 2, 3, 4, 5, 10 & 12)

In these assignments of error, Mrs. Williams argues that the trial court erred in finding that she failed to state a cause of action in nullity where the underlying October 22, 1999 agreement between the parties, which formed the basis of the judgment of dismissal, was an absolute nullity, thus rendering the judgment of dismissal an absolute nullity as well.

As stated above, where a judgment of dismissal with prejudice is based upon a compromise agreement that is absolutely null, the judgment of dismissal is likewise an absolute nullity and, thus, subject to an action for nullity. Bass, 691 So. 2d at 141-142.

In her petition, Mrs. Williams alleged that the 1999 agreement was an absolute nullity because it stated that each party retained a one-half interest in the community home and, thus, by its express terms did not partition community property, but then purported to include a waiver of the parties'

[5]Any dispute Mrs. Williams has as to her communications with her attorney regarding the portions of the judgment rendered by consent would have to be resolved in a separate action by Mrs. Williams against her attorney. See Singleton, 364 So. 2d at 1325.

right to partition community property, in violation of LSA-C.C. art. 2369.8. Mrs. Williams also contended in her petition that to the extent that the 1999 agreement purported to terminate the community regime that existed between the parties, the agreement had an illegal object and, thus, could not form the basis of a consent judgment. See LSA-C.C. art. 2329.

On appeal, Mrs. Williams contends that the 1999 agreement, by its own terms, establishes that the home on Englewood Drive was still owned in community. She contends that the community was not terminated in October 1999 (when the agreement between the parties was signed), but instead, that there were 118 days between the date of the agreement and the termination of the community on February 18, 2000. Mrs. Williams asserts that during that 118-day period, community property was "created" and that to the extent that the 1999 agreement attempted to waive her right to partition that community property, the agreement was an absolute nullity pursuant to LSA-C.C. art. 2369.8. She further asserts that the December 17, 2004 judgment "which implicitly embodies" an absolutely null agreement must itself be an absolute nullity. Thus, Mrs. Williams contends, the trial court erred when it dismissed her petition in nullity.

During the existence of the community property regime, spouses may, without court approval, voluntarily partition the community property in whole or in part. LSA-C.C. art. 2336. However, LSA-C.C. art. 2329 provides that spouses may enter into a matrimonial agreement that modifies or terminates a matrimonial regime during marriage, only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules. Thus, the question arises as to whether the 1999 agreement constituted a voluntary partition of the

community property or an attempt to terminate the community property regime without court approval.

The language of the 1999 agreement at issue herein provides as follows:

> Appearing herein are Ronnie L. Williams and Brenda Joyce Hardy Williams who enter into this agreement **in settlement of any and all claims each may have against the community of acqest [sic] and gains that exist [sic] or has existed between them**. In contemplation of settlement of the community, the parties hereby agree:
>
> 1) that Ronnie L. Williams will maintain ½ of the rights, title and interest in immovable property located at 280 Englewood, Baton Rouge, Louisiana, as well as furnishings contained therein on this date, each party is to maintain an undivided ½ interest each in the forgoing property;
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> 2) that Ronnie L. Williams shall pay as a lump sum settlement in addition to transfer of the ownership interest in the above referenced immovable property, $30,000.00 payable in three installments as follows November 24, 1999 $10,000.00, March 30, 2000 $10,000.00, June 30, 2000 $10,000.00.
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> 3) In addition to the forgoing transfers and payments, Ronnie L. Williams agrees to pay to Brenda Joyce Hardy Williams, $1,500.00 per month beginning December 15, 1999 and each month thereafter.
>
> In exchange for the above transfers and/or payments, **Brenda Joyce Hardy Williams waives any and all further claims against Ronnie L. Williams for** recovery of alimony, child support and/or **community property claims**. Brenda Joyce Hardy Williams hereby acknowledges that she understands the agreement, believes it to be fair and has executed same without any duress or other undo encouragement. (Emphasis added).

In Biondo v. Biondo, 99-0890 (La. App. 1st Cir. 7/31/00), 769 So. 2d 94, 100-102, this court addressed in a partition proceeding a situation where the parties had orally agreed during the existence of their marriage to divide the proceeds from the sale of certain community property, after payment of community expenses. The wife contended that the oral agreement between the spouses constituted a partial partition of their community property on a monthly basis and that the portion of the income she received was her separate property.

However, this court concluded that by their oral agreement, the parties attempted to do more than simply partition existing community funds and that the parties in fact intended for their agreement to affect community funds received in the future. This court noted that such a sharing of income was clearly permissible, but **only** as a modification of the legal regime, thus requiring the execution of a matrimonial agreement subject to judicial approval, as set forth in LSA-C.C. art. 2329. Thus, given the absence of the execution of a matrimonial agreement and court approval of same, the oral agreement attempting to modify the matrimonial regime was null and void. Biondo, 769 So. 2d at 101-102 & n.6.

However, in Clay v. Clay, 358 So. 2d 649, 651 (La. App. 1st Cir. 1978), this court held that while agreements between husband and wife which alter the matrimonial regime during the marriage are nullities in that they violate LSA-C.C. art. 2329, such agreements, although null, may be ratified by the parties subsequent to divorce.

An absolutely null contract is one which violates a rule of public order, as when the object of the contract is illicit or immoral, and it may not be confirmed. LSA-C.C. art. 2030. A relatively null contract, on the other hand, violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made. A relatively null contract, as opposed to an absolutely null contract, may be confirmed. LSA-C.C. art. 2031. By its holding in Clay, this court clearly determined that agreements between husband and wife which alter the matrimonial regime during the marriage without following the proper requirements of LSA-C.C. art. 2329 are relative nullities, subject to confirmation or ratification. Clay, 358 So. 2d at 651.

According to the allegations of the petition in the instant case, the 1999 agreement was signed during the existence of the parties' marriage, without the parties petitioning for or obtaining court approval. Moreover, the language of the agreement indicates a clear intent by the parties to not only partition community property existing at the time of execution of the agreement, but to also terminate the legal regime during marriage. Under the allegations of the petition and given the language of the agreement itself, Mrs. Williams has alleged facts to demonstrate that the agreement was a nullity. Biondo, 769 So. 2d at 101-102 & n.6. Nonetheless, pursuant to this court's holding in Clay, this agreement was subject to ratification subsequent to the parties' divorce. Clay, 358 So. 2d at 651. Ratification of the 1999 agreement occurred, at the very least, when Mrs. Williams stipulated in open court through her counsel to the terms of the December 17, 1004 judgment sought to be annulled herein, declaring the agreement to be valid and enforceable and dismissing her petition for partition with prejudice. See Clay, 358 So. 2d at 651.

Accordingly, we are constrained to conclude that Mrs. Williams has failed to allege a cause of action to nullify the December 17, 2004 judgment on this stated basis, i.e., that the underlying 1999 agreement was an absolute nullity for violation of LSA-C.C. art. 2329 and, that the December 17, 2004 judgment was thus likewise absolutely null.[6]

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[6] We note that the Third Circuit has affirmed the nullification of agreements made during the marriage which attempt to terminate the legal regime when the issue was raised by a petition to nullify the agreement. Poirier v. Poirier, 626 So. 2d 868, 869-870 (La. App. 3rd Cir. 1993), writ denied, 94-0161 (La. 3/11/94), 634 So. 2d 389; Ducote v. Ducote, 442 So. 2d 1299, 1301-1302 (La. App. 3rd Cir. 1983, writ denied, 445 So. 2d 439 (La. 1984). However, the cases are distinguishable in that Mrs. Williams seeks to nullify a final **judgment** which upheld an underlying agreement.

We also note that in Bass, 691 So. 2d at 141-142, this court specifically held that where a compromise agreement which purported to release the father of a minor from all future support obligations for the payment of a lump sum was executed without the required court approval set forth in LSA-C.C. art. 3072 (requiring court authorization for compromises affecting minors), and for a purpose "contrary to good morals [and] law,"

Additionally, with regard to Mrs. Williams' contention that the 1999 agreement and resulting December 17, 2004 judgment violated LSA-C.C. art. 2369.8 and, thus, were absolute nullities, we also conclude that Mrs. Williams has failed to state a cause of action in nullity on that basis. Louisiana Civil Code article 2369.8 provides that a spouse has the right to demand partition of community property at any time and that a contrary agreement is absolutely null. Minvielle v. Minvielle, 2000-1039 (La. App. 5th Cir. 11/15/00), 776 So. 2d 1223, 1225, writ denied, 2000-3421 (La. 2/9/01), 785 So. 2d 823 (wherein the court found an agreement between the parties that former community property shall not be subject to partition for fifteen years was an absolute nullity).

As set forth above, however, the 1999 agreement did not attempt to prevent the parties from partitioning community property, but rather attempted to terminate the matrimonial regime existing between the parties. Although the agreement violated LSA-C.C. art. 2329 in that respect, and was thus a nullity, the agreement was subsequently ratified when Mrs. Williams stipulated, after her divorce and in open court, as to its validity. See Clay, 358 So. 2d at 651.

Moreover, we also reject Mrs. Williams' contention that the agreement provided that the home on Englewood Drive was still owned in community, but then attempted to prevent the parties from partitioning that community property in violation of LSA-C.C. art. 2369.8. These allegations in the petition and on appeal do not constitute allegations of fact that the

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the agreement was an absolute nullity, as was the resulting dismissal with prejudice which was based on the compromise agreement. In the instant case, the agreement at issue also purports to constitute a waiver of Mr. Williams' future obligation of child support, in that it provides, "Brenda Joyce Hardy Williams waives any and all further claims against Ronnie L. Williams for recovery of alimony, **child support** and/or community property claims." However, neither the petition for partition nor the divorce petition allege the existence of any minor children.

court is required to accept as true for purposes of ruling on an exception of no cause of action. Rather, they constitute assertions of law as to the legal effect of the agreement, and, as such, the court is not required to accept the plaintiff's conclusions of law. Elnaggar v. Fred H. Moran Construction Corporation, 468 So. 2d 803, 806 (La. App. 1st Cir. 1985).

Pursuant to LSA-C.C. art. 2336, when spouses voluntarily partition community property during the existence of the community property regime, the things that each spouse acquires are separate property. Fargerson v. Fargerson, 593 So. 2d 454, 456 (La. App. 2nd Cir.), writ denied, 595 So. 2d 659 (La. 1992); see also LSA-C.C. arts. 2341 & 2341.1. The 1999 agreement at issue herein specifically provided as follows:

> In contemplation of settlement of the community, the parties hereby agree:
>
> 1) Ronnie L. Williams will maintain ½ of the rights, title and interest in immovable property located at 280 Englewood, Baton Rouge, Louisiana, as well as furnishings contained therein on this date, each party is to maintain an undivided ½ interest each in the foregoing property.

The agreement further provided that "[i]n exchange for the above transfers and/or payments," Mrs. Williams waived any "community property claims."

Thus, this agreement clearly intended to partition the home located at 280 Englewood "in settlement of the community," and the parties, thus, each became owners of a ½ interest in the home, which, pursuant to LSA-C.C. art. 2336, became their **separate** property.[7] Thus, we conclude that LSA-C.C. art. 2369.8, providing that a spouse has the right to demand partition of

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[7]As noted above, to the extent the agreement may have been a nullity as an attempt to settle the community and thereby terminate the community regime, it was subject to ratification, which occurred when the stipulated December 17, 2004 judgment was rendered.

community property at any time, is simply not applicable herein.[8] See also LSA-C.C. art. 2369.1 (providing that the following articles (including LSA-C.C. art. 2369.8) apply to "former community property until a partition").

Accordingly, we likewise conclude that Mrs. Williams has failed to state a cause of action to nullify the December 17, 2004 judgment on the basis that the underlying 1999 agreement violated LSA-C.C. art. 2369.8.

These arguments also lack merit.

Consideration of Evidence in Ruling on Exception of No Cause of Action (Assignments of Error Nos. 1 & 13)

In these assignments of error, Mrs. Williams contends that Mr. Williams improperly supported his first exception of no cause of action (filed prior to the December 17, 2004 judgment) with evidence, which violated LSA-C.C.P. art. 931. She further asserts that the first exception of no cause of action relied on the 1999 agreement, which was not only inadmissible, but also was not even in the record.

Mrs. Williams further contends that Mr. Williams used similar tactics in the exception of no cause of action at issue herein in that this second exception was "full of factual allegations" that the trial court relied upon in rendering judgment maintaining the exception. She also contends that the

[8]In further support of the contention that the parties still own the home in community, Mrs. Williams contends in assignment of error number twelve that the 2005 judgment incorrectly decided that conveyance language was not necessary in the 1999 agreement in order to convey that immovable property. In assignment of error number two, Mrs. Williams contends that the trial court's ruling ignored several letters by defense counsel, which were attached to her petition in nullity. She asserts that in those letters, Mr. Williams, through defense counsel, demanded that she cooperate in the "partition" of the "community property," thereby making an admission against interest that community property still existed between the parties. A review of those letters, which are properly considered in that they were attached to the petition, indicates that the property sought to be partitioned was the former community home.

These arguments are also based on legal assertions as to the effect of the 1999 agreement, which the court is not required to accept as true for purposes of ruling on an exception of no cause of action. As stated above, Mrs. Williams' argument ignores the fact that parties may agree to remain co-owners in indivision of former community property, which ownership interests in the property then become part of each parties' separate estate upon partition.

trial court ignored the legal requirement that facts contained in the petition must be accepted as accurate for purposes of deciding an exception of no cause of action, asserting that it was simply impossible for the trial court to have accepted as accurate the allegations of the petition and still maintain the exception of no cause of action at issue herein.

At the outset, we note that to the extent that the December 17, 2004 judgment which Mrs. Williams seeks to nullify relied upon evidence inappropriately, we again note that judgments rendered contrary to law are subject to reversal on appeal, but are not thereby subject to an action in nullity. Levy v. Stelly, 254 So. 2d 665, 667 (La. App. 4th Cir. 1971), writ denied, 260 La. 403, 256 So. 2d 289 (1972).

Moreover, with regard to Mrs. Williams' contentions that, in rendering the judgment before us on appeal, the trial court incorrectly considered allegations in Mr. Williams' exceptions and also incorrectly failed to accept as true the allegations of her petition, we note that in the trial court's reasons, the trial court specifically stated that it found that the petition failed to state a cause of action "[a]fter review of the pleadings." Moreover, there is nothing in the reasons for judgment to suggest that the trial court did not accept the **well-pleaded facts** of the petition as true in rendering its judgment. Additionally, we note that the correctness of any conclusions of law asserted in Mrs. Williams' petition was not conceded for purposes of the ruling on the exception of no cause of action. LSA-C.C.P. art. 891; Kyle v. Civil Service Commission, 588 So. 2d 1154, 1159 (La. App. 1st Cir. 1991), writ denied, 595 So. 2d 654 (La. 1992). Moreover, inasmuch as this court has conducted a *de novo* review of the trial court's ruling on the exception of no cause of action, Knight, 835 So. 2d at 638, and

has concluded that the petition in fact failed to state a cause of action, we find no merit to these arguments.

Awards of Attorney's Fees
(Assignment of Error No. 14)

In this assignment of error, Mrs. Williams contends that there was no basis for the award of attorney's fees in the December 17, 2004 judgment, where there was no evidence, investigation or explanation for the award. She further contends that the trial court committed the same error when it again awarded attorney's fees in the October 25, 2005 judgment. Additionally, Mrs. Williams contends that the October 25, 2005 judgment is null in that it substantially changed the October 18, 2005 judgment before us on appeal.

With regard to Mrs. Williams' contention that there was no legal basis for the portion of the December 17, 2004 judgment awarding attorney's fees, we again note that a judgment which is contrary to law, while perhaps subject to reversal on appeal, is immune from the action of nullity. Hall v. Hall, 611 So. 2d 173, 174 (La. App. 5th Cir. 1992).

We next turn to Mrs. Williams' argument that the October 25, 2005 judgment is null as a substantive amendment to the October 18, 2005 judgment. Pursuant to LSA-C.C.P. art. 1951, a final judgment may be amended by the trial court at any time on its own motion or pursuant to the motion of any party to alter the phraseology, but not the substance, of a judgment, or to correct errors in calculation. Starnes v. Asplundh Tree Expert Company, 94-1647 (La. App. 1st Cir. 10/6/95), 670 So. 2d 1242, 1245. When an amendment to a judgment adds to, subtracts from, or in any way affects the substance of the judgment, such judgment may not be amended under LSA-C.C.P. art. 1951. The proper vehicle for a substantive

change in a judgment is a timely motion for new trial or a timely appeal. Starnes, 670 So. 2d at 1246. The Louisiana Supreme Court has also recognized that, on its own motion and with the consent of the parties, the trial court may amend a judgment substantively. An amended judgment rendered without recourse to the above procedures is an absolute nullity. Starnes, 670 So. 2d at 1246.

As to absolutely null judgments, their nullity may be adjudged at any time and may be raised collaterally. Nethken v. Nethken, 307 So. 2d 563, 565 (La. 1975). A person with interest may show an absolute nullity in collateral proceedings at any time and before any court, for absolutely null judgments are not subject to venue and the delay requirements of the action of nullity. Roach v. Pearl, 95-1573 (La. App. 1st Cir. 5/10/96), 673 So. 2d 691, 693; Knight v. Sears, Roebuck & Co., 566 So. 2d 135, 137 (La. App. 1st Cir.), writ denied, 571 So. 2d 628 (La. 1990). A collateral attack is defined as an attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling it. Roach, 673 So. 2d at 693; Knight, 556 So. 2d at 137.

As stated in the facts and procedural history, by judgment dated October 18, 2005, the trial court maintained Mr. Williams' exception of no cause of action and dismissed Mrs. Williams' petition to nullify judgment and for declaratory judgment. Thereafter, by judgment dated October 25, 2005, the court ordered Mrs. Williams to pay Mr. Williams $1,000.00 in attorney's fees and court costs. The October 25, 2005 judgment provided that it "supplement[ed] the judgment signed on the 18th of October, 2005 and both judgments shall remain in full force and effect."

Amendment of a judgment with regard to attorney's fees or costs affects the substantive rights of the parties. Watson v. Nile, 591 So. 2d

1343, 1344-1345 (La. App. 4th Cir. 1991)(wherein an attempt to have the court render a second judgment awarding attorney's fees was properly denied where such a judgment would have constituted a substantive amendment to the original judgment); see also Opelousas Authority v. Toledo, 2000-00706 (La. App. 3rd Cir. 12/6/00), 773 So. 2d 294, 296 (wherein the inclusion in the second judgment of the exact dollar amounts representing "reasonable attorney's fees" as provided in the original judgment was held to be a substantive amendment to the original judgment). Accordingly, to the extent that the October 25, 2005 judgment "supplemented" the October 18, 2005 judgment with a substantive provision awarding attorney's fees, we must conclude that the October 25, 2005 judgment constituted an improper amendment to the original October 18, 2005 judgment and was, as such, an absolute nullity.

Propriety of Declaratory Judgment Relief
(Assignment of Error No. 16)

In this assignment of error, Mrs. Williams contends that, in dismissing her petition for declaratory relief, the trial court erred in refusing to recognize her request for a declaratory judgment declaring the prior consent judgment null to be a proper form of relief. Specifically, Mrs. Williams contends that because a consent judgment is in fact a bilateral contract, it is subject to interpretation through a petition for declaratory judgment.

In Boyer v. Boyer, 96-0346 (La. App. 1st Cir. 1/23/97), 691 So. 2d 1234, 1243-1244, writ denied, 97-1415 (La. 9/26/97), 701 So. 2d 984, a wife instituted a petition for declaratory judgment seeking a declaration that the matrimonial agreement and partition of community property were null. However, this court stated that, although the wife's petition sought as relief a declaratory judgment, her demand should have been treated instead as a suit

to annul the contract (the matrimonial agreement) and a suit to annul the judgment (the judgment dissolving the community and granting the parties permission to execute the matrimonial agreement). In so holding, this court noted that in Thibodaux v. Thibodaux, 511 So. 2d 102, 104-105 (La. App. 3rd Cir. 1987), the Third Circuit held that a judgment signed by the trial court which terminated a matrimonial regime and divided the existing community property between the two parties was a consent judgment, and because it was not appealed, it became final. Thus, in that procedural posture, the only remedy was to seek to annul the judgment. Boyer, 91 So. 2d at 1244 n.15.

Under the rationale in Boyer and Thibodaux, the only remedy possibly available to Mrs. Williams, who did not appeal the December 17, 2004 judgment, was to file a petition to annul the judgment, not a petition for declaratory judgment. Moreover, for the extensive reasons addressing the various issues raised, we conclude that Mrs. Williams has failed to state a cause of action to have the December 17, 2004 judgment nullified or declared to be a nullity. Thus, this argument also lacks merit.

MOTION TO SUPPLEMENT

While this matter was pending on appeal, Mrs. Williams filed a motion to supplement the record before us with various documents. She contended that several clerical mistakes had been made in the trial court in that several documents were assigned an incorrect docket number. According to Mrs. Williams, those errors were corrected by the trial court, but the corrections were not made in the appellate record.

Mrs. Williams further contended in her motion to supplement the record that after the appeal was taken in this matter, Mr. Williams filed a "Petition for Judicial Partition of the Only Remaining Asset of the

Community (One House Located at 280 Englewood Drive, Baton Rouge) Which Has Not Been Partitioned." Mrs. Williams further contended that she responded by filing an exception of lack of jurisdiction, which was denied by the trial court. According to Mrs. Williams, these pleadings and ruling by the trial court constituted important evidence which bear directly upon the issues presented in the appeal. Thus, Mrs. Williams requested that she be allowed to supplement the appellate record with those documents.

Noting that the part of the motion to supplement which sought to supplement the record with corrected documents was more properly directed to the trial court, LSA-C.C.P. arts. 2132 and 2088(4), this court denied that portion of the motion to supplement. With regard to the portion of the motion to supplement that sought to supplement the appellate record with documents filed after the order of appeal, this court referred the motion to the panel to whom the appeal was assigned. Williams v. Williams, 2006 CA 0358 (La. App. 1st Cir. 9/5/06)(unpublished).

Turning to the portion of Mrs. Williams' motion to supplement the appellate record that was referred to this panel for consideration, we note that a record on appeal includes the pleadings, court minutes, transcripts, jury instructions (if applicable), judgments, and other rulings, unless designated. LSA-C.C.P. arts. 2127, 2128; Lee v. Twin Brothers Marine Corporation, 2003-2034 (La. App. 1st Cir. 9/17/04), 897 So. 2d 35, 37. An appellate court cannot receive new evidence. Moreover, pleadings are not evidence. Lee, 897 So. 2d at 38. Thus, even if supplementation were appropriate, the pleadings sought to be included in the appellate record do not constitute evidence.

Additionally, as noted above, this matter is before us on the dismissal of Mrs. Williams' petition to nullify judgment and for declaratory judgment

on an exception of no cause of action. An exception of no cause of action is triable solely on the face of the petition and any annexed documents, Woodland Ridge Association, 671 So. 2d at 510, and evidence that is admitted without objection to enlarge the pleadings. Stroscher, 845 So. 2d at 523. Accordingly, we conclude that supplementation of the appellate record with pleadings filed and rulings rendered after the judgment on appeal is inappropriate in resolving this appeal. Thus, the portion of Mrs. Williams' motion to supplement the appellate record referred to this panel is denied.

MOTION TO DISMISS

During the pendency of this appeal, Mr. Williams also filed in the trial court a motion to supplement the appellate record with a September 25, 2006 judgment rendered by the trial court that judicially partitioned the "only remaining asset of the community," by awarding sole ownership of the home to Mr. Williams and ordering him to pay Mrs. Williams for her undivided one-half interest in the home. The trial court granted Mr. Williams' motion to supplement the appellate record, and the record has been supplemented with that judgment.

Thereafter, Mr. Williams filed in this court a motion to dismiss Mrs. Williams' appeal. Mr. Williams contends that the rendition of the September 25, 2006 judgment, partitioning the only remaining community asset, renders this appeal moot and deprives this court of jurisdiction.

At the outset, we note that although the September 25, 2006 judgment has been included in the appellate record by order of the trial court, the propriety of that judgment and the issue of its finality are not before the court in this appeal. Also, considering the issues raised in this appeal, we reject Mr. Williams' assertion that the September 25, 2006 judgment

rendered this appeal moot. Accordingly, Mr. Williams' motion to dismiss the appeal is denied.

CONCLUSION

For the above and foregoing reasons, the October 18, 2005 judgment dismissing Mrs. Williams' petition to nullify judgment and for declaratory judgment is affirmed. Further, the October 25, 2005 judgment awarding attorney's fees in the amount of $1,000.00 is vacated as a nullity. The portion of Mrs. Williams' motion to supplement the appellate record referred to this panel is denied. Mr. Williams' motion to dismiss the appeal is also denied. Costs of this appeal are assessed equally against Mr. Williams and Mrs. Williams.

OCTOBER 18, 2005 JUDGMENT AFFIRMED; OCTOBER 25, 2005 JUDGMENT VACATED; MOTION TO SUPPLEMENT APPELLATE RECORD DENIED; MOTION TO DISMISS APPEAL DENIED.