NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0599

JEANNE STUART

VERSUS

FARON JOSEPH BENOIT

Judgment Rendered: October 29, 2010

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Appealed from
The Family Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 139,944

Honorable Lisa Woodruff-White, Judge

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Jeanne Stuart

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

Gaidry, J. concurs with reasons

WELCH, J.

Jeanne Stuart appeals a judgment sustaining a peremptory exception raising the objections of *res judicata* and no cause of action and dismissing her motion to increase child support. For reasons that follow, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL HISTORY

Jeanne Stuart and Faron Joseph Benoit are the parents of Jonathon Joseph Benoit, who was born on July 26, 1999.[1] Pursuant to a stipulated judgment signed on April 30, 2002, the parties were awarded joint custody of the child, with Jeanne Stuart designated as the domiciliary parent, subject to specific physical custodial periods in favor of Faron Benoit. Faron Benoit was ordered to continue paying child support to Jeanne Stuart in the amount of $150.00 per month, plus 50% of the child's extraordinary medical, dental, eye care, and orthodontia expenses not covered by health insurance.

On December 16, 2003, Jeanne Stuart filed a motion requesting, among other things, an increase in child support. This motion resulted in another stipulated judgment, rendered on March 2, 2004 and signed on June 22, 2004, providing that Faron Benoit would pay child support to Jeanne Stuart in the amount of $200.00 per month, retroactive to December 16, 2003.

On June 26, 2009, Jeanne Stuart filed another motion alleging "that there has been a change in circumstances since child support was set on March 2, 2004, such that an increase in child support is warranted. Mover alleges and avers that respondent is earning more and the child's expenses have increased." After a hearing on July 7, 2009, the trial court rendered judgment denying the motion to increase child support. A judgment in accordance with the trial court's ruling was

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[1] The parties were never married and Faron Benoit executed an authentic act acknowledging paternity of the child. See generally La. R.S. 9:392.

signed on July 27, 2009. Jeanne Stuart filed a motion for new trial, which the trial court denied in open court on September 22, 2009.

The same date that the motion for new trial was denied, Jeanne Stuart filed another motion to increase child support alleging "that there has been a change in circumstances since child support was set on March 2, 2004, such that an increase in child support is warranted. Mover alleges and avers that respondent is earning more and the child's expenses have increased, and other factors to be shown at a hearing on the merits."

In response to this motion, Faron Benoit filed a peremptory exception raising the objections of *res judicata* and no cause of action. After a hearing on the objections, the trial court rendered judgment sustaining the exception and dismissing the September 22, 2009 request for an increase in child support. A written judgment in conformity with the trial court's oral ruling was signed on November 10, 2009, and it is from this judgment that Jeanne Stuart appeals.[2]

LAW AND DISCUSSION

Modification of Child Support

The basic elements of a cause of action for modification of child support are set forth in La. C.C. art. 142 and La. R.S. 9:311(A). Louisiana Civil Code article 142 provides that "[a]n award of child support may be modified if the circumstances of the child or of either parent materially change." Under La. R.S. 9:311(A), the party seeking the modification must demonstrate "a material change in circumstances of one of the parties between the time of the previous award and

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2 Jeanne Stuart's sole assignment of error is that the trial court legally erred in failing to conduct an evidentiary hearing on the September 22, 2009 motion for an increase in child support by granting Faron Benoit's peremptory exception without receiving any evidence. However, since the trial court sustained the peremptory exception and dismissed the September 22, 2009 motion, see La. C.C.P. art. 934, it was clearly proper for the trial court *not* to conduct an evidentiary hearing on the child support matter. Thus, Jeanne Stuart's assignment of error has no merit. Although generally, this court will only review issues that are submitted to the trial court and contained in the specifications or assignments of error, in the interest of justice, we will consider the merits of the peremptory exception sustained by the trial court. See Uniform Rules—Courts of Appeal, Rule 1-3.

the time of the rule for modification of the award."[3] To be "material" the change in circumstances must have "real importance or great consequences for the needs of the child or the ability to pay of either party." La. R.S. 9:311, Comment (a)—2001.[4]

No Cause of Action

The function of the peremptory exception raising the objection of no cause of action is to question whether the law extends a remedy against the defendant to anyone under the factual allegations of the pleading. **Industrial Companies, Inc. v. Durbin**, 2002-0665, p. 6 (La. 1/28/03), 837 So.2d 1207, 1213. The peremptory exception of no cause of action is designed to test the legal sufficiency of the pleading by determining whether the particular plaintiff is afforded a remedy in law based on the facts alleged in the pleading. *Id.* The exception is triable on the face of the pleading and, for the purpose of determining the issues raised by the exception, the well-pleaded facts in the pleading must be accepted as true. *Id.* In reviewing a trial court's ruling sustaining an exception of no cause of action, the court of appeal should subject the case to *de novo* review, because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the pleading. *Id.*, 2002-0665 at p. 7, 837 So.2d at 1213. Simply stated, a pleading 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. Every reasonable interpretation

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3 The term "previous award" means the last time the child support award was set—not the last time a motion for modification was considered and denied. **Deshotels v. Deshotels**, 93-2026, pp 3-4 (La. App. 1st Cir. 6/24/94), 638 So.2d 1199, 1201.

4 2001 La. Acts, No. 1082, § 2 added the adverb "materially" modifying the verb "change" in La. C.C. art. 142, and § 1 of the same act added the adjective "material" modifying change "circumstances" in La. R.S. 9:311(A). These amendments legislatively overruled the holding in **Stogner v. Stogner**, 98-3044, pp. 10-13 (La. 7/7/99), 739 So.2d 762, 769-770, that any change in circumstances was sufficient to justify a modification of child support. La. C.C. art. 142, Comment—2001; La. R.S. 9:311, Comment (a)—2001. Therefore, the amendments implicitly restored the validity of the prior appellate jurisprudence requiring that a change in circumstances justifying modification of child support be "substantial." See **Richardson v. Richardson**, 2002-2415, p. 1 n.1 (La. App. 1st Cir. 7/9/03), 859 So.2d 81, 87 n.1 (Gaidry, J., concurring).

must be accorded the language of the pleading in favor of maintaining its sufficiency and affording the plaintiff the opportunity of presenting evidence at trial. *Id.*

As previously noted, Jeanne Stuart's June 26, 2009 motion to increase child support was denied by the trial court in July 2009. The present motion to increase child support was filed three months later on September 22, 2009—the same day the trial court denied the motion for new trial on the June 26, 2009 motion. The September 22, 2009 motion did not raise any new grounds for an increase in child support that were not raised by the June 26, 2009 motion that had been denied. In fact, the September 22, 2009 motion made the exact same factual allegations—that Faron Benoit was "earning more" and that "the child's expenses ha[d] increased" and the same conclusory allegation that such facts constituted "a change in circumstances" since the previous award of child support. The September 22, 2009 motion is different from the June 26, 2009 motion only in that it also alleged that there were "other factors to be shown at a hearing on the merits" constituting a change in circumstances.

Assuming as true the facts that Jeanne Stuart alleged in her motion—that Faron Benoit is "earning more" and that "the child's expenses have increased"—we find these allegations insufficient to state a cause of action for modification of child support. Notably absent from Jeanne Stuart's pleading are factual allegations that a *material* change in circumstances of the parties or of the child had occurred. Although "earning more" or an "increase" in the child's expenses may constitute changes—any change is not sufficient to justify a finding that a material change in circumstances has occurred. Rather, the alleged change in circumstances must be material or of real importance or of great consequences for the needs of the child or in the ability of the other party to pay. Therefore, after *de novo* review, we find that the trial court properly sustained Faron Benoit's peremptory exception raising

the objection of no cause of action.[5]

CONCLUSION

For all of the above and foregoing reasons, the November 10, 2009 judgment of the trial court sustaining the peremptory exception and dismissing Jeanne Stuart's motion is affirmed. All costs of this appeal are assessed to the plaintiff appellant, Jeanne Stuart.[6]

AFFIRMED.

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[5] Having found merit to the peremptory exception raising the objection of no cause of action, we pretermit discussion of the merits of the objection of *res judicata.*

[6] Accord **Lavespere v. Lavespere**, 2008-0904 (La. App. 1st Cir. 10/31/08)(*unpublished*).

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GAIDRY, J., concurring.

I concur in the result reached only, as I disagree with the legal basis of the trial court's judgment sustaining the peremptory exception and certain reasoning employed by the majority. In summary, I believe that the judgment sustaining the exception was properly based upon *res judicata* rather than the failure to state a cause of action.

A trial court's judgment sustaining the peremptory exception of no cause of action is subject to *de novo* review by an appellate court, employing the same principles applicable to the trial court's determination of the exception. *See Stroscher v. Stroscher*, 01-2769, p. 3 (La. App. 1st Cir. 2/14/03), 845 So.2d 518, 523. Any doubts are resolved in favor of the sufficiency of the petition. *Id.*

Louisiana Code of Civil Procedure article 934 provides:

> When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception *shall* order such amendment within the delay allowed by the court. If the

> grounds of the objection raised through the exception cannot be so removed, or if the plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed.

(Emphasis added.)

I conclude that the trial court committed an abuse of its discretion and legal error in failing to allow Ms. Stuart to amend her motion to remove the grounds of the objection. *See Ramey v. DeCaire*, 03-1299, pp. 9-10 (La. 3/19/04), 869 So.2d 114, 119-20. If a petition's allegations are merely conclusory and fail to specify the acts that establish a cause of action, then the trial court should permit the plaintiff the opportunity to amend the petition. *Badeaux v. Southwest Computer Bureau, Inc.*, 05-0612, p. 11 (La. 3/17/06), 929 So.2d 1211, 1219. I disagree with the majority's conclusion that Ms. Stuart's failure to use the adjective "material" or the adverb "materially" to qualify the alleged change in circumstances was fatal to her attempt to state a cause of action. Rather, I believe that the proper disposition of the new motion should have been based upon comparison of the facts alleged to constitute a change in circumstances, weighed in light of the time period within which such changes could have occurred.

The general rule of *res judicata* in our state is set forth in La. R.S. 13:4231. Louisiana Revised Statutes 13:4232 establishes limited exceptions to the general rule of *res judicata*, and subsection B expressly provides that in most domestic matters, including "an action for determination of incidental matters under Civil Code Article 105" (which include "custody, visitation, or support of a minor child"), *res judicata* applies only to causes of action "actually litigated."

From a conceptual standpoint, a parent's cause of action to modify an award of child support by definition may only occur "between the time of

the previous award and the time of the motion for modification of the award." La. R.S. 9:311(A). Thus, a cause of action for modification cannot be extinguished by the original judgment awarding child support, simply because it was not "existing" at the time of the judgment. *See* La. R.S. 13:4231(1), (2). However, where a new cause of action to modify child support is shown to be based upon the same alleged change in circumstances previously litigated and rejected by the trial court, *res judicata* would apply to bar relitigation of such circumstances occurring prior to the judgment. Here, the pertinent allegations and extremely brief interval between the judgment denying the motion for new trial and the new motion (a matter of hours at most) clearly demonstrate that Ms. Stuart was attempting to reassert the same cause of action.

Despite my differences with the majority opinion on the foregoing issues, I agree that the peremptory exception was properly sustained (albeit on the other objection raised) and that denial of the motion was appropriate. I accordingly concur in the result.