

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 0861

KELDA PRICE, KELVIN WELLS AND
ON BEHALF OF MINOR CHILDREN

VERSUS

GEICO GENERAL INSURANCE COMPANY

Judgment Rendered: APR 18 2013

*WFK
JKW*

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 595,821

The Honorable Todd Hernandez, Judge Presiding

* * * * *

Kelda Price
Kelvin Wells
Baton Rouge, Louisiana

Plaintiff/Appellant, Pro Se
Plaintiff/Appellant, Pro Se

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GEICO General Insurance Company

* * * * *

BEFORE: PARRO, WELCH, AND KLINE,¹ JJ.

¹ Hon. William F. Kline, Jr., retired, is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.

*Parro, J. concurs in the result
by WFK*

KLINE, J.

This is an appeal by plaintiffs, Kelda Price and Kelvin Wells, following the trial court's granting of an exception of no cause of action in favor of defendant, GEICO General Insurance Company (GEICO), without allowing the plaintiffs an opportunity to amend their petition to state a cause of action. For the reasons that follow, we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Plaintiffs filed suit against GEICO claiming that their two vehicles, a 1997 Plymouth Breeze and a 1993 Nissan Maxima, were purposely totaled while parked in their yard. Plaintiffs allege that they had uninsured/underinsured (UM) motorist coverage pursuant to an insurance policy issued by GEICO. Plaintiffs allege that GEICO acted in bad faith by not paying for the damage to the vehicles. Plaintiffs seek damages for property damage, mental anguish, loss of usage, and loss of consortium.

Plaintiffs filed a petition in this matter on October 19, 2010. GEICO filed an Exception for Insufficiency of Service of Process on November 8, 2010. On January 20, 2011, the plaintiffs filed a Motion for Judgment of Default claiming that GEICO had failed to answer the petition. On January 24, 2011, Judge Janice Clark recused herself from the case. The case was re-allotted to Judge Todd Hernandez.

Plaintiffs subsequently cured the defect in service on GEICO, and GEICO filed an exception of no cause of action on February 15, 2011, which was set for hearing on April 25, 2011. The hearing was held on April 25, 2011, with no appearance by any plaintiff or representative. One day after the hearing, plaintiffs filed a motion to continue based upon a motion to compel against the East Baton Rouge Sheriff's Office being set for hearing on June 13, 2011. On May 3, 2011,

the trial judge signed a judgment in conformity with its April 25, 2011 ruling granting no cause of action.²

ASSIGNMENTS OF ERROR

Pursuant to Uniform Rules—Court of Appeal, Rule 2-12.4, an appellant’s brief must comply with certain requirements. The brief must include, among other things, “a concise statement of the case, the ruling ... of the trial court ..., a specification or assignment of alleged errors ..., an argument confined strictly to the issues of the case, ... citations of the pages of the record ..., and a short conclusion stating the precise relief sought.” Uniform Rules—Court of Appeal, Rule 2-12.4.

Plaintiff’s *pro se* brief fails to comply with the requirements of Rule 2-12.4 as there are no specifications or assignments of error. Plaintiff’s brief contains argument but no specific errors. Although we could summarily dismiss this entire appeal, in acknowledgment of plaintiffs *pro se* status, we will review the record to determine if the judgment appealed from is supported by the record.

STANDARD OF REVIEW

The function of the peremptory exception raising the objection of no cause of action is to test the legal sufficiency of a pleading by determining whether the law affords a remedy on the facts alleged in the pleading. *Ourso v. Wal-Mart Stores, Inc.*, 08-0780 (La. App. 1 Cir. 11/14/08), 998 So. 2d 295, 298, *writ denied*, 08-2885 (La. 2/6/09), 999 So. 2d 785. The exception is triable on the face of the pleadings, and, for the purposes of determining the issues raised by the exception,

² On May 9, 2011, Judge Janice Clark signed a preliminary default after she had already recused herself from the case. However, a preliminary default is inappropriate and remains so until disposition of the pending exception and motions, and the lapse of time provided for by La.C.C.P. art. 1914. *Livingston Parish Police Jury v. Patterson*, 589 So. 2d 9 (La. App. 1 Cir. 1991). A preliminary default could not be entered *after* the granting of the exception of no cause of action as it became moot.

the well-pleaded facts in the petition must be accepted as true. *Ourso*, 998 So. 2d at 298. In reviewing a trial court's sustaining an exception of no cause of action, appellate courts conduct a *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 petition. *Torbert Land Co., L.L.C. v. Montgomery*, 09-1955 (La. App. 1 Cir. 7/9/10), 42 So. 3d 1132, 1135, *writ denied*, 10-2009 (La. 12/17/10), 51 So. 3d 16.

LAW AND ANALYSIS

Claims of Plaintiffs

Plaintiffs appear to claim that the trial court erred in granting the exception of no cause of action since plaintiffs had UM coverage with GEICO. 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. The function of the peremptory exception of no cause of action is to test the legal sufficiency of the petition, which is done by determining whether the law affords a remedy on the facts alleged in the pleading. No evidence may be introduced to support or controvert an exception of no cause of action. Consequently, the court reviews the petition and accepts well-pleaded allegations of fact as true. The issue at the trial of the exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. *Ramey v. DeClaire*, 2003-1299 (La. 3/19/04), 869 So. 2d 114, 118.

Where 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 where the plaintiff fails to comply with the court's order to amend, the action shall be dismissed. La. C.C.P. art. 934.

Plaintiffs' petition alleges that two vehicles were damaged. Although GEICO argues that all of the allegations are for property damage, plaintiffs do seek damages for "Mental Pain, and suffering, anguish, past, present, and future" in their petition. Plaintiffs allege they had UM coverage which would include coverage for bodily injury damages. La. R.S. 22:1295(1)(a)(i) requires insurers to provide UM coverage in certain circumstances as follows:

No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle designed for use on public highways and required to be registered in this state or as provided in this Section unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury liability provided by the policy, under provisions filed with and approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover nonpunitive damages from owners or operators of uninsured or underinsured motor vehicles **because of bodily injury, sickness, or disease, including death** resulting therefrom; ...

A review of La. R.S. 22:1295(1)(a)(i) requires an insurer to offer UM coverage "because of bodily injury, sickness, or disease, including death."

An award for mental anguish as a result of damage to property is normally permitted in four instances: (1) property damaged by an intentional or illegal act; (2) property damaged by acts for which the tortfeasor will be strictly or absolutely liable; (3) property damaged by acts constituting a continuous nuisance; (4) property damaged at a time when the owner thereof is present or situated nearby and the owner experiences trauma as a result. *Nikolaus v. City of Baton Rouge/Parish of East Baton Rouge*, 09-2090 (La. App. 1 Cir. 6/11/10), 40 So. 3d 1244, 1248, *writ not considered*, 10-1638 (La. 10/8/10), 46 So. 3d 1256.

GEICO claims that the instant matter is a *property damage* claim and plaintiffs cannot allege bodily injury claims since the policy does not cover property damage. However, this matter is before us on an exception of no cause of

action. “No evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action.” La. C.C.P. art. 931 (in pertinent part). The issue before this court on an exception of no cause of action is whether the plaintiff is legally entitled to the relief sought. *Ramey*, 869 So. 2d at 118. It appears that the ground for GEICO’s objection may be removed by amendment of the petition because plaintiffs, under certain circumstances, may legally make a claim for mental anguish resulting from property damage. Therefore, the trial court should have allowed plaintiffs an opportunity to amend their petition to set forth a cause of action, if any they can. Accordingly, we reverse the judgment of the trial court dismissing plaintiffs’ petition and remand this matter so that plaintiffs may amend their petition within the delay allowed by the trial court.

Trial Court Action Proper

Plaintiffs also object to the action of the trial court for proceeding with the hearing on the exception of no cause of action on April 25, 2011. Plaintiffs claim they sought a continuance in order to obtain discovery from the East Baton Rouge Sheriff’s Office. As is clear from the record, the motion to continue was filed the day *after* the hearing on the exception on April 26, 2011. Therefore, the trial court was unaware of the motion to continue at the time it rendered its judgment on the exception of no cause of action. Furthermore, the record shows that neither the plaintiffs, nor anyone on their behalf, appeared at the hearing on the exception of no cause of action. Plaintiffs could have appeared and requested a continuance but failed to do so.

Additionally, the ground upon which plaintiffs sought a continuance was to obtain the discovery information from the East Baton Rouge Sheriff’s Office pursuant to a subpoena. Even if the plaintiffs were able to obtain the information

sought by the subpoena, no such evidence would have been admissible at the hearing on the exception of no cause of action. No evidence may be introduced to support or controvert the exception raising the objection of no cause of action. La. C.C.P. art. 931; *Ramey*, 869 So. 2d at 118. Therefore, any evidence plaintiffs may have obtained from the East Baton Rouge Sheriff's Office is not relevant to the exception of no cause of action.

Plaintiffs also assert that Judge Todd Hernandez, the trial judge, should have recused himself. A review of the record reveals that the claim that the trial judge should have recused himself is being made for the first time on this appeal. "A party desiring to recuse a judge of a district court shall file a written motion therefor assigning the ground for recusation. This motion shall be filed prior to trial or hearing unless the party discovers the facts constituting the ground for recusation thereafter, in which event it shall be filed immediately after these facts are discovered, but prior to judgment." La. C.C.P. art. 154. No motion to recuse was filed at all in the present matter. As a general rule, appellate courts will not consider issues that were not raised in the pleadings, were not addressed by the trial court, or are raised for the first time on appeal. *Dan-Cin Const. Co., Inc. v. Thrasher*, 08-1552 (La. App. 1 Cir. 2/13/09), 9 So. 3d 205, 208. *See also*, Uniform Rules-Courts of Appeal, Rule 1-3. ("The Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise."). The record indicates that the plaintiffs never raised the issue of grounds for the trial judge recusing himself, the argument has been waived. Thus, we need not address plaintiffs' argument on the trial judge's failure to recuse himself.

DECREE

The judgment of the trial court is affirmed insofar as it sustains the peremptory exception raising the objection of no cause of action regarding coverage for property damage and is reversed to the extent it dismisses plaintiffs' petition without allowing them an opportunity to amend to state a cause of action, if they can. This matter is remanded with instructions for the trial court to set a delay for amendment of the petition. If plaintiffs fail to amend their petition as instructed, their petition shall be dismissed by the trial court. Costs of this appeal are to be borne equally by appellants, Kelda Price and Kevin Wells, and Appellee, GEICO General Insurance Company.

**AFFIRMED IN PART; REVERSED IN PART; AND REMANDED
WITH INSTRUCTIONS.**