NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 0762

D & J FILL, INC.

VERSUS

STATE OF LOUISIANA,
DEPARTMENT OF ENVIRONMENTAL QUALITY

consolidated with

NUMBER 2013 CA 0763

D & J FILL, INC.

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF
ENVIRONMENTAL QUALITY

Judgment Rendered: APR 2 4 2014

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 558,477 c/w 578,855

Honorable Wilson E. Fields, Judge
* * * * * *

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

GUIDRY, J.

A former landfill business appeals the dismissal of its petition for damages filed against the Louisiana Department of Environmental Quality (LDEQ) pursuant to the district court sustaining a peremptory exception raising the objection of no cause of action. For the following reasons, we reverse and remand this matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

In August 1994, the LDEQ issued interim orders to D & J Fill, Inc. to operate a solid waste facility (landfill) in Ascension Parish pending D & J Fill's application for a standard operating permit. Twelve years later, on or about June 1, 2007, the LDEQ simultaneously issued an Order to Close and a decision denying D & J Fill's request for a standard permit. D & J Fill filed a petition for *de novo* review of the LDEQ's actions with the Nineteenth Judicial District Court and later filed a motion for summary judgment seeking dismissal of the LDEQ's Order to Close and its decision to deny D & J Fill's standard permit application. The LDEQ filed a cross motion for summary judgment, seeking dismissal of D & J Fill's petition for *de novo* review.

Following a hearing on the cross motions, the district court denied the LDEQ's motion for summary judgment, granted D & J Fill's motion for summary judgment, and remanded the matter to the LDEQ for further consideration upon finding that the LDEQ violated D & J Fill's due process rights in issuing the Order to Close and denying its permit application without affording D & J Fill an adjudicatory hearing. The LDEQ appealed the summary judgment in favor of D & J Fill to this court. On appeal, we reversed the district court, insofar that it held that the LDEQ's regulatory decisions were made in violation of D & J Fill's due process rights. However, finding that the merits of D & J Fill's petition for *de novo* review could not be decided by summary judgment, because consideration of

whether the LDEQ acted arbitrarily and capriciously in denying D & J Fill's permit application amounted to a factual determination, we denied the LDEQ's concurrent writ application and remanded D & J Fill's petition for *de novo* review to the district court for a full determination on the merits. See D & J Fill, Inc. v. State, Department of Environmental Quality, 09-0138 (La. App. 1st Cir. 10/23/09), 24 So. 3d 1030 (unpublished opinion).

While the prior appeal was still pending, D & J Fill filed a petition for damages against the LDEQ, alleging that the LDEQ's Order to Close and denial of a standard permit was a misapplication of the law and an illegal and ultra vires act; therefore, it sought damages, including, but not limited to, economic damages, lost profits, and lost income. D & J Fill later filed a motion to consolidate its petition for damages with its action for *de novo* review. By an order signed February 14, 2012, the matters were consolidated. Following consolidation of the actions, the LDEQ filed a peremptory exception objecting to D & J Fill's petition for damages on the basis of no cause of action. Therein, the LDEQ alleged that its decisions to issue the Order to Close and deny D & J Fill's permit application were "discretionary acts based on public policy considerations," making it immune from liability pursuant to La. R.S. 9:2798.1(B). Following a hearing on the exception, the district court sustained the exception and dismissed D & J Fill's petition for damages with prejudice. D & J Fill devolutively appeals that judgment.

DISCUSSION

SUBJECT MATTER JURISDICTION

Although not raised in the district court, the LDEQ asserts in opposition to this appeal that the district court, and, in turn, this court lack subject matter jurisdiction to consider D & J Fill's petition for damages. See Louisiana Land Acquisition, LLC v. Louisiana Department of Environmental Quality, 11-2037, pp.

7-8 (La. App. 1st Cir. 7/18/12), 97 So. 3d 1144, 1148, writ granted in part, 12-1872 (La. 11/16/12), 103 So. 3d 358. There is no merit to this contention.

Our state constitution accords district courts original jurisdiction over "civil matters." La. Const. art. V, §16(A)(1). District courts historically have exercised original jurisdiction in tort actions as civil matters. Pope v. State, 99-2559, p. 10 (La. 6/29/01), 792 So. 2d 713, 719. While the success of D & J Fill's petition for damages ultimately depends on it prevailing on its petition for *de novo* review of the LDEQ's permitting decisions, which is still pending before the district court, the sole relief sought by D & J Fill in its petition for damages are tort damages, which clearly fall within the original jurisdiction of the district court. Hence, we find both the district court and this court have subject matter jurisdiction to consider the claims presented in D & J Fill's petition for damages.[1]

NO CAUSE OF ACTION

The objection that a petition fails to state a cause of action is properly raised by the peremptory exception. La. C.C.P. art. 927(A)(5). A trial court's judgment sustaining the peremptory exception raising the objection 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. Tobin v. Jindal, 11-1004, p. 5 (La. App. 1st Cir. 2/10/12), 91 So. 3d 329, 332-33. The exception of no cause of action refers to the operative facts that give rise to the plaintiff's right

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[1] In its brief on appeal, the LDEQ additionally argues that it is immune from suit based on quasi-judicial immunity. Because many administrative boards and commissions have a quasi-judicial function when they adjudicate matters such as licenses, it has become common for courts to recognize quasi-judicial immunity, equivalent to judicial immunity, for such boards and commissions, and their individual members, for actions taken and decisions made in their adjudicative role. Talbert v. Louisiana State Board of Nursing, 03-0258, p. 4 (La. App. 1st Cir. 12/31/03), 868 So. 2d 729, 731.

However, as this court recognized in Louisiana Land Acquisition, where the LDEQ refuses to hold an adjudicatory hearing, the Louisiana Legislature has delegated the district court as the adjudicative tribunal. See Louisiana Land Acquisition, 11-2037 at pp. 5-6, 97 So. 3d at 1147 (citing In the Matter of Supplemental Fuels, Inc., 94-1596 (La. App. 1st Cir. 5/9/95), 656 So. 2d 29); see also La. R.S. 30:2024(C). Thus, we find no merit in the LDEQ's assertion of judicial immunity.

to judicially assert the action against the defendants. Tobin, 11-1004 at p. 5, 91 So. 3d at 333. A court must review the petition and accept all well-pleaded facts as true, and the only issue is whether, on the face of the petition, plaintiffs are legally entitled to the relief sought. Clavier v. Our Lady of the Lake Hospital, Inc., 12-0560, pp. 3-4 (La. App. 1st Cir. 12/28/12), 112 So. 3d 881, 885, writ denied, 13-0264 (La. 3/15/13), 109 So. 3d 384.

An exception of no cause of action is likely to be granted only in the unusual case in which the plaintiff includes allegations that show on the face of the petition that there is some insurmountable bar to relief. Thus, dismissal is justified only when the allegations of the petition itself clearly show that the plaintiff does not have a cause of action, or when its allegations show the existence of an affirmative defense that appears clearly on the face of the pleadings. Blackett v. City of Monroe, 33,339, pp. 3-4 (La. App. 2d Cir. 9/7/00), 766 So. 2d 768, 770-71.

In this case, the LDEQ has asserted that it is immune from liability by virtue of La. R.S. 9:2798.1(B), which provides: "Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties." However, La. R.S. 9:2798.1(C)(2) provides that the immunity granted in Subsection B is not applicable to "acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct."

In its petition for damages, D & J Fill alleged the following as grounds for its suit:

> 3.
>
> D&J applied for a standard permit with LDEQ, which application remained pending during the entirety of its operations. In other words, a standard permit was never granted to D&J and D&J did

not operate the landfill under a standard permit, but continued to operate under the Interim Operating Plan.

4.

In 2007, LDEQ issued an Order to Close and Denial of Standard Permit to petitioner herein, ordering it to cease operations and close its business pursuant to regulations governing standard permitted operations, not those operating under an Interim Operating Plan such as D&J. ....

....

7.

On August 24, 2007, D&J instituted a suit seeking judicial review and trial de novo of the denial of the request for an administrative adjudicatory hearing against LDEQ seeking a judgment nullifying the Order to Close and declaration that the Order to Close was ill-founded, ultra vires and issued pursuant to laws and/or regulations which did not apply to D&J's operations under the Interim Operating Plan. ....

8.

The suit for judicial review alleges that LDEQ improperly issued the Order to Close pursuant to authority governing standard permitted operations, not those that operate pursuant to an Interim Operating Plan. Since the legal authority governing the Order to Close did not apply to D&J's operations, the Order to Close was thereby absolutely null, ultra vires and improperly issued.

....

16.

At all times material herein, LDEQ has acted in an intentional, illegal, arbitrary, capricious, willful, wanton, reckless and outrageous manner in issuing and effectuating the Order to Close and Denial of Standard Permit upon D&J.

17.

Despite knowledge of the appropriate regulations applicable to a landfill such as D&J, LDEQ intentionally and knowingly misapplied the law, acted illegally and in an ultra vires manner in order to force Petitioner's business to close and suffer the above outlined damages.

Reviewing the above-quoted paragraphs of D & J Fill's petition, it has alleged conduct by the LDEQ that appears to meet the criteria of La. R.S. 9:2798.1(C)(2), and as such, would make the immunity defense of La. R.S. 9:2798.1(B) inapplicable to the LDEQ. Nevertheless, the LDEQ asserts that D & J Fill's allegations are merely assertions of legal conclusions, and thus, cannot defeat the objection of no cause of action asserted in its peremptory exception. We disagree.

While the correctness of conclusions of law is not conceded for the purposes of a ruling on an exception of no cause of action, all well-pleaded allegations of fact must be accepted as true. And if the allegations set forth a cause of action as to any part of the demand, the exception must be overruled. Any doubts should be resolved in favor of the sufficiency of the petition. See Lambert v. Riverboat Gaming Enforcement Division, 96-1856, p. 4 (La. App. 1st Cir. 12/29/97), 706 So. 2d 172, 175, writ denied, 98-0297 (La. 3/20/98), 715 So. 2d 1221. D & J Fill's petition for damages specifically alleges the manner in which it asserts that the LDEQ wrongfully denied its permit application and issued the Order to Close -- by failing to abide by the regulatory standards provided in D & J Fill's Interim Operating Plan, by which D & J Fill asserts its operations were exclusively governed.[2]

It has yet to be conclusively established that the LDEQ acted beyond its authority in the manner asserted by D & J Fill in its petition, but for the purposes of deciding the objection of no cause of action, these assertions by D & J Fill must be accepted as true. As such, we find that, to the extent D & J Fill factually alleged that the LDEQ willfully and intentionally applied the wrong regulatory standards to deny its permit application and to order closure of its business, D & J Fill has stated a claim pursuant to La. R.S. 9:2798.1(C) to overcome the LDEQ's assertion of discretionary immunity and to maintain its petition for damages. See Sommer v. State, Department of Transportation and Development, 97-1929, pp. 18-19 (La. App. 4th Cir. 3/29/00), 758 So. 2d 923, 935-36, writ denied, 00-1759 (La. 10/27/00), 772 So. 2d 122 (wherein the court found that because the defendants' actions were malicious and intentional, La. R.S. 9:2798.1(C) applied to deny the

[2] We observe that LAC 33:VII.509(B)(1)(a)(i) provides that an existing facility is subject to regulations *in accordance with an interim operational plan* when it is issued a temporary permit to allow operations to continue at the existing facility while a standard permit application is being processed.

defendants immunity). Accordingly, we find that the objection of no cause of action should be overruled,[3] and D & J Fill's petition for damages should be maintained, subject to the district court's *de novo* review of the LDEQ's permitting decisions.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court that dismissed D & J Fill's petition for damages by sustaining the LDEQ's peremptory exception raising the objection of no cause of action. Finding that D & J Fill's petition states grounds for holding that the LDEQ may not be entitled to La. R.S. 9:2798.1(B) immunity, we overrule the exception and remand this matter to the district court for further proceedings. All costs of this appeal, in the amount of $3,787.50, are cast to the Louisiana Department of Environmental Quality.

REVERSED AND REMANDED.

[3] The overruling of the exception of no cause of action is not a definitive ruling that the LDEQ's affirmative defense of immunity, pursuant to La. R.S. 9:2798.1(B), is inapplicable under the facts to be established in the case. See Lambert, 96-1856 at p. 7 n.2, 706 So. 2d at 176 n.2.