

**NOT DESIGNATED FOR PUBLICATION**

**ANTHONY HILL AND DANA HILL, AS THE SURVIVING HEIRS OF THEIR DECEASED MOTHER, ANA GLORIA MURILLO** \* **NO. 2006-CA-0330**  
\* **COURT OF APPEAL**  
\* **FOURTH CIRCUIT**  
**VERSUS** \* **STATE OF LOUISIANA**

**BRYAN COOK, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, TAELEAHA SAULET-VASQUEZ AND AMICA MUTUAL INSURANCE COMPANY** \* \* \* \* \*

APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2003-12317, DIVISION "G-11"  
Honorable Robin M. Giarrusso, Judge

\* \* \* \* \*

**Judge Terri F. Love**

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(Court composed of Judge James F. McKay, III, Judge Terri F. Love, Judge Max N. Tobias, Jr.)

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**AFFIRMED**



Anthony and Dana Hill appeal the grant of exceptions of no right of action and no cause of action, dismissing claims against Amica Mutual Insurance Company. We find that the district court properly sustained the exceptions raised by Amica Mutual Insurance Company, dismissing claims against it.

### **RELEVANT FACTS AND PROCEDURAL HISTORY**

This appeal arises out of a two-car head-on collision that occurred on U.S. Highway 11 in Slidell, Louisiana. At the time of the accident, Ms. Ana Gloria Murillo (hereinafter “Ms. Murillo”) was a passenger in a vehicle driven by one of her daughters, Ms. Taleaha Saulet-Vasquez (hereinafter “Ms. Saulet-Vasquez), when it was struck head-on by a vehicle being driven by Mr. Michael Cook<sup>1</sup> (hereinafter “Mr. Cook”). Ms. Murillo sustained fatal injuries in the accident. At the time of the accident, Ms. Murillo was insured by Amica Mutual Insurance Company (hereinafter “Amica”) by a policy of liability and uninsured/underinsured motorist benefits, medical benefits, and survivor’s loss benefits. State Farm Mutual Automobile Insurance Company (hereinafter “State Farm”) provided liability coverage for the vehicle operated by Mr. Cook.

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<sup>1</sup> Plaintiffs filed an amending petition, substituting the name “Michael Cook” for the incorrect name for defendant/appellee, “Bryan Cook.”

After the subject fatal collision, two of the five surviving heirs and children of Ms. Murillo, Anthony Hill and Dana Hill (plaintiffs/appellants), initially instituted litigation for wrongful death and survival damages against Michael Cook, Ms. Saulet-Vasquez, State Farm, and Amica.<sup>2</sup> After the suit was filed, the plaintiffs/appellants dismissed the claim against Ms. Saulet-Vasquez and settled with Mr. Cook and State Farm for policy limits. Thereafter, Byron Turner, one of Ms. Murillo's sons, intervened.

The appellants and intervenor asserted a claim for bad faith penalties, which alleged that Amica failed to satisfy a claim for wrongful death and survival benefits within either thirty (30) or sixty (60) days of being provided satisfactory proof of loss. Amica filed peremptory exceptions of no right of action and no cause of action, asserting that the appellants have no right to claim penalties given that only "insureds" may recover penalties by law.

The trial court sustained the exceptions and dismissed plaintiffs' and intervenor's claims against defendant, Amica, with prejudice. The trial court designated the judgment dismissing the claims against Amica as final. Plaintiffs have taken an appeal and assigned error to the district court's sustaining of the peremptory exceptions.

### **STANDARD OF REVIEW**

The determination of whether a plaintiff has a right of action is a question of law, and is to be considered *de novo*. *Horrell v. Horrell*, 99-1093 (La. App. 1 Cir. 10/6/00), 808 So.2d 363, 367-68. "Appellate review of questions of law is simply

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<sup>2</sup> In an amending petition, the plaintiffs/appellants named the State of Louisiana, Department of Transportation and Development ("DOTD") as defendants, alleging defective design of the U.S. Highway 11 Bridge, where the accident occurred. Claims against the DOTD were not yet adjudicated at the time the trial court designated the judgment dismissing claims against Amica as final.

a review of whether the trial court was legally correct or legally incorrect.” *State of Louisiana through the Dept. of Social Services v. Baha Towers Ltd. P’ship*, 04-0578, (La. App. 4 Cir. 12/01/04), 891 So.2d 18, citing *O’Niell v. Louisiana Power & Light Co.*, 558 So. 2d 1235, 1238 (La. App. 1<sup>st</sup> Cir. 1990). “As customary in Louisiana courts, on consideration of an exception of no right of action, the averments of fact in the pleading will be taken as true in the absence of evidence to the contrary.” *Horrell v. Horrell*, 99-1093 (La. App. 1 Cir. 10/6/00), 808 So. 2d 363, 367-68, citing *Bd. of Directors of Louisiana Recovery Dist. v. All Taxpayers*, 529 So.2d 384 (La. 1988).

In *Southern Tool Supply, Inc. v. Beerman Precision, Inc.*, 03-0960 (La. App. 4 Cir. 11/26/03), 862 So.2d 271, 277, this Court recited the standard of review for a trial court's decision of an exception of no cause of action as follows:

We review a trial court's decision on an exception of no cause of action *de novo* "because the exception raises a question of law and the lower court's decision is based only on the sufficiency of the petition." *City of New Orleans v. Bd. of Comm'rs of Orleans Levee Dist.*, 93-0690, p. 28 (La. 7/5/94), 640 So.2d 237, 253. In so doing, we are confined to the allegations of the petition. No evidence can be introduced to support or to controvert an exception of no cause of action. La. C.C.P. art. 931. Rather, we must accept as true the well pleaded factual allegations set forth in the petition. Based thereon, our job is to determine "whether, on the face of the petition, the plaintiff is legally entitled to the relief sought." *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So. 2d 1234, 1235 (La. 1993).

## DISCUSSION

Appellants aver that Amica failed to satisfy claims for wrongful death and survival benefits within either thirty (30) or sixty (60) days of being provided satisfactory proof of loss. Because of this, appellants, in their capacity as surviving

heirs of Ms. Murillo, maintain that they have a right to bring an action for bad faith penalties, and assert that Amica's failure to tender the claim to them was arbitrary and capricious. In response to this claim, Amica filed exceptions of no right of action and no cause of action, arguing that the right to claim penalties beyond the policy limits is a specific right of "insureds" that the heirs of Ms. Murillo could not rightfully exercise. The trial court granted the exceptions. We find that the trial court properly granted Amica's exceptions of no right of action and no cause of action.

The Supreme Court of Louisiana shed light on these two exceptions in *Badeaux v. Southwest Computer Bureau, Inc.*, 05-0612 (La. 3/17/06), 929 So.2d 1211, 1216-17:

Although these two exceptions are often confused or improperly combined with the same exception, the peremptory exceptions of no right of action and no cause of action are separate and distinct. La. C.C.P. art. 927(A)(4) and (5); *Industrial Cos., Inc. v. Durbin*, 02-0665, p. 6 (La.1/28/03); 837 So.2d 1207, 1212. This court has recognized that one of the primary differences between the exception of no right of action and no cause of action lies in the fact that the focus in an exception of no right of action is on whether the particular plaintiff has a right to bring the suit, while the focus in an exception of no cause of action is on whether the law provides a remedy against the particular defendant. *Id.*

The function of an exception of no right of action is a determination of whether plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the petition. La. Code Civ. Proc art. 927; *Turner v. Busby*, 03-3444, p. 4 (La. 9/9/04), 883 So.2d 412, 415. The exception of no right of action serves to question whether the plaintiff in the particular case is a member of the class of persons that has a legal interest in the subject matter of the litigation. *Id.*

In contrast, an exception of no cause of action questions whether the law extends a remedy against the defendant to anyone under the factual allegations of the petition. *Industrial Cos.*, 02-0665 at p. 6, 837 So.2d at 1213. The

exception is triable on the face of the petition and, to determine the issues raised by the exception, each well-pleaded fact in the petition must be accepted as true. *Id.*

### **EXCEPTION AS TO RIGHT OF ACTION**

An action can only be brought by a person having a real and actual interest which he asserts. La. Code Civ. Proc. art. 681. The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. Code Civ. Proc. art. 927A(5). “The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit.” *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com’n*, 94-2015, p. 5 (La. 11/30/94), 646 So.2d 885, 888. “The exception of no right of action assumes that the petition states a valid cause of action for some person and takes into question whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation.” *Id.*

We find no merit in the appellants’ contention that the trial court erred in granting Amica’s exception of no right of action, as the appellants have failed to prove that, as a matter of law, they fall within the class in whose favor the law grants an action, here the insured. LSA-R.S. 22:1220, Section (B)(5), provides a penalty for “[f]ailing to pay the amount of any claim due *any person insured* by the contract within sixty days after receipt of satisfactory proof of loss from the claimant.”

In *Paul v. Allstate Ins. Co.*, the plaintiff alleged entitlement to penalties under LSA-R.S. 22:1220 on the grounds that Allstate had failed to act in good faith to settle his claim. 98-499 (La. App. 5 Cir. 10/28/98), 720 So.2d 1251, 1254.

Allstate excepted to the plaintiff’s petition on the ground that plaintiff did not have

a right of action/cause of action under that statute.<sup>3</sup> *Id.* The plaintiff responded that he had a right of action under LSA-R.S. 22:1220(B)(5) because Allstate had arbitrarily and capriciously failed to settle his claim. *Id.* The Court held that a third-party claimant, that is, a person other than the one named as an insured in the insurance contract, does not have a right of action against the insurer for the latter's failure to pay timely the amount of a claim. *Paul*, 720 So.2d 1251, 1255.

In the instant case, the appellants are not named “insureds” under the subject policy. In their appeal brief, appellants maintain that since Amica acted in bad faith in addressing the claims of its insured, Ms. Murillo, her children should inherit the right to sue for bad faith penalties and the enforcement of the insurance contract. However, Article 1765 of the Louisiana Civil Code provides that “[e]very obligation is deemed heritable as to all parties, *except when the contrary results from the terms or from the nature of the contract.*” La. Civ. Code art. 1765.

The terms of the Amica contract of insurance are delineated as follows:

if a named insured shown in the Declarations dies, coverage will be provided for:

- 1) the surviving spouse if a resident in the same household at the time of death; and
- 2) the legal representative of the deceased person as if a named insured shown in the Declarations. The appellants are not included in either of the aforementioned delineated categories. Given that, they have no right of action and the district court properly sustained Amica’s exception of no right of action.

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<sup>3</sup> The court presumed that the trial judge denied Allstate's exception, as the judgment was silent on the disposition of the exception. *Paul v. Allstate Ins. Co.*, 98-499 (La. App. 5 Cir. 10/28/98), 720 So.2d 1251, 1254.



## EXCEPTION AS TO CAUSE OF ACTION

On appeal, the appellants and intervenor argue that the district court erred in granting the exception of no cause of action; they base their claim for bad faith penalties on the contention that Amica's conduct in claims handling was arbitrary and capricious. The appellants and intervenor state that as heirs, they "step into the shoes" of the deceased and have a right to recover bad faith. We find no error in the ruling of the trial court sustaining the exception of no cause of action.

The purpose of an exception of no cause of action is to test the sufficiency of the petition, questioning whether the plaintiff's allegations, if taken as true, afford him a remedy at law. *Johnson v. T.L. James & Co.*, 93-1170, p. 3 (La. App. 1 Cir. 4/8/94), 635 So.2d 744, 745. An exception of no cause of action should be granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief. *Industrial Cos., Inc. v. Durbin*, 02-0665, p. 7 (La. 1/28/03), 837 So.2d 1207, 1213; *Barrie v. V.P. Exterminators, Inc.*, 625 So.2d 1007, 1018 (La. 1993).

The argument that Amica acted in bad faith in addressing the claims of its insured, Ms. Murillo, and that her children should inherit the right to sue for bad faith penalties and the enforcement of the insurance contract fails. There has been no showing of arbitrary, capricious conduct on the part of Amica and no showing that conduct that would give rise to bad faith penalties occurred as to Ms. Murillo. Further, there has not been any showing that Amica's delay in payment of the claim was without cause.

## **CONCLUSION**

The appellants failed to prove that they fall, as a matter of law, within the class in whose favor the law grants an action, here the insured, we find that the trial court properly granted Amica's exception of no right of action. Also, the appellants failed to prove under the factual allegations of the petition that the law extends a remedy to them against Amica. The district court rightfully sustained the exception of no cause of action. Given that, the suit against Amica was rightfully terminated.

## **DECREE**

Accordingly, we affirm the decision of the trial court.

**AFFIRMED**