

**KHIRY COSEY ON
BEHALFOF HER MINOR
CHILDREN, CORBIN
HILLIARD AND ALLYSSA
HILLIARD, INDIVIDUALLY
AND ON BEHALF OF THE
ESTATE OF REGINALD
HILLIARD, JR; TIARA
LIGGINS ON BEHALF OF
HER MINOR CHILD,
TAKHIREE HILLIARD,
INDIVIDUALLY AND ON
BEHALF OF THE ESTATE OF
REGINALD HILLIARD, JR.,
TUKEYA JARVIS
INDIVIDUALLY AND ON
BEHALF OF THOMAS
HILLIARD, AND DOROTHY
JARVIS**

*** NO. 2017-CA-0364
*
* COURT OF APPEAL
*
* FOURTH CIRCUIT
*
* STATE OF LOUISIANA
* * * * ***

VERSUS

**FLIGHT ACADEMY OF NEW
ORLEANS, LLC, JAZZ
AVIATION, LLC, QBE
INSURANCE CORPORATION,
CHRISTIANSSEN AVIATION,
INC., ABC INSURANCE
COMPANY, SIGNATURE
FLIGHT SUPPORT
CORPORATION, ALLIANZ
GLOBAL CORPORATE &
SPECIALTY SE, THE ESTATE
OF JAMES BIONDO, AND DEF
INSURANCE COMPANY**

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-09317, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge**

*** * * * ***

Judge Regina Bartholomew Woods

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**(Court composed of Judge Daniel L. Dysart, Judge Regina Bartholomew Woods,
Judge Terrel J. Broussard, Pro Tempore)**

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VACATED AND REMANDED
October 25, 2017

In this negligence case, Dorothy Jarvis, Tukeya Jarvis, and Thomas Hilliard (collectively, “Appellants”) appeal the district court’s grant of the peremptory exception of no cause of action as to their claim for bystander damages under La. C.C. art. 2315.6 filed by Defendant, the Estate of James Biondo (“Defendant”). Defendant filed the exception, along with dilatory exceptions of vagueness and ambiguity, as well as lack of procedural capacity, in response to Appellants’ petition for damages, in which Appellants sought bystander damages. On appeal, Appellants assert that their petition sets forth a valid bystander claim for each of them. Because we find that Appellants’ petition fails to state a cause of action for bystander relief, but that factual deficiencies in the petition warrant its amendment, we vacate, as to allow Appellants to amend their petition for damages, and remand for further proceedings.

PROCEDURAL HISTORY

On September 15, 2016, Appellants filed suit in Orleans Parish Civil District Court against various defendants based on Mr. Biondo’s failure to properly inspect,

operate, pilot, navigate, and/or take such reasonable action to prevent the airplane crash, as well as the infliction of mental anguish and emotional distress pursuant to La. C.C. art. 2315.6, commonly referred to as bystander damages.

On November 24, 2016, Defendant filed peremptory exceptions of no cause of action and no right of action, and dilatory exceptions of vagueness and ambiguity, as well as lack of procedural capacity as to Appellants' claims pursuant to La. C.C. art. 2315.6. On January 20, 2016, the district court granted the exception of no cause of action and dismissed, with prejudice, all claims brought by Appellants. On January 30, 2017, the district court signed a Judgment on Exception and ordered all claims of Appellants dismissed with prejudice. In granting the exception of no cause of action, the district court dismissed as moot the exceptions of no right of action and vagueness. It is from this judgment that Appellants now appeal.

FACTUAL BACKGROUND¹

On August 27, 2016, Briana Davis ("Ms. Davis") made a reservation for herself and her boyfriend, Reginald Hilliard, Jr. ("Decedent"), with Flight Academy of New Orleans, LLC and/or Jazz Aviation, LLC for a "Big Easy Lights at Night" aerial tour of the City of New Orleans. Later that same evening, Ms. Davis and Decedent departed the New Orleans Lakefront Airport for the aerial tour in a Cessna 172, which was piloted by James Biondo ("Mr. Biondo"). At the

¹ Because an exception of no cause of action is based on the well-pleaded allegations of a petition, which are taken as true, for purposes of the instant appeal, the factual background as stated herein has been taken solely from the Petition for Damages and not from any appellate brief.

completion of the tour, as the plane was approaching the runway, the plane disappeared from the airport's radar and crashed into Lake Pontchartrain, sank underwater, and caused the eventual death of Decedent.

Appellants allege that they came upon the scene of the subject crash of the Cessna 172 immediately after and witnessed the retrieval of the subject aircraft and the removal of Decedent.

STANDARD OF REVIEW

Questions of law are reviewed by the appellate court under the *de novo* standard of review. *Land v. Vidrine*, 2010-1342, p. 4 (La. 3/15/11), 62 So.3d 36, 39. An exception of no cause of action raises a question of law; therefore, a district court's judgment relating to this exception is reviewed by the appellate court *de novo*. *Ramey v. DeCaire*, 2003-12999, p. 7 (La. 03/19/04), 869 So. 2d 114, 118. "The pertinent question is whether, in the light most favorable to plaintiff and with every doubt resolved in plaintiff's favor, the petition states a valid cause of action for the requested relief." *Id.* p. 7, 896 So. 2d at 117-18.

DISCUSSION

In their appellate brief, Appellants assign the following assignments of error:

1. Whether the district court erred in granting a peremptory exception of no cause of action dismissing with prejudice Appellants' claims.
2. Whether the district court erred in finding that Appellants were not in the class of relatives entitled to recover bystander damages pursuant to La. C.C. art. 2315.6.

3. Whether the district court erred in failing to analyze whether Appellants satisfied the requisite temporal and physical proximity to the scene pursuant to La. C.C. art. 2315.6.
4. Whether the district court erred in determining that Appellants, although present and aware of the potentially deadly situation Hilliard faced, are not entitled to recover pursuant to La. C.C. art. 2315.6.

Because we are remanding this matter to the district court, based solely on the first assignment of error pertaining to the exception of no cause of action, we pretermitted discussion of Appellants' other assignments of error as moot.

Peremptory Exception of No Cause of Action

The appellate court's *de novo* review of an exception of no cause of action is restricted to the plaintiff's petition and accepts the well-pleaded allegations as true. *Ramey*, 2003-1299, p. 7, 869 So.2d at 118. While it is not necessary for a plaintiff to plead the theory of his or her case, mere conclusions, unsupported by facts, do not establish a cause of action. *Id.* Based solely on the face of the petition, the appellate court must determine whether the plaintiff is legally entitled to the relief sought. *Id.*

Here, Appellants seek recovery of bystander damages under La. C.C. art. 2315.6. In order to recover under La. C.C. art. 2315.6, a plaintiff must show that: (1) he/she viewed the event causing injury to the direct victim or came upon the scene soon after; (2) the direct victim suffered such harm from which it can reasonably be expected that the plaintiff would suffer serious mental anguish from

the experience; (3) the emotional distress plaintiff sustained is both serious and reasonably foreseeable; and (4) plaintiff and the direct victim have the requisite familial relationship. La. C.C. art. 2315.6. In addition to the requirements listed above, a plaintiff must show that as he/she witnessed the injury-causing event, or the scene of the injury soon after, he/she were contemporaneously aware that the event had caused harm to the victim. *Trahan v. McManus*, 97-1224 (La. 3/2/99), 728 So.2d 1273, 1279.

In applying the aforementioned factors to the present case, Appellants' petition states affirmatively that: (1) he/she came upon the scene immediately following the crash; and (2) he/she are a relative of the Decedent, as contemplated in La. C.C. art. 2315.6, to wit: grandmother, mother and brother. Notwithstanding the above-referenced two factors, Appellants' petition is silent as to their awareness of Decedent's condition during and/or immediately following the crash, which would give rise to a reasonable expectation of serious mental anguish from the experience, and that sustained mental anguish is reasonably foreseeable. Without the latter, this Court is unable to determine whether Appellants have established a cause of action for bystander damages pursuant to La. C.C. art. 2315.6.

While Appellants' petition, as it stands, does not assert a cause of action for bystander damages, it is not beyond repair. La. C.C.P. art. 934 states that "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.” The article further provides that if the grounds of the objection cannot be removed by amendment, the claim shall be dismissed. Among the grounds of Defendant’s objections are the aforementioned deficiencies in Appellants’ petition, namely the lack of facts establishing severe and foreseeable mental distress.² Because the petition does not negate the possibility of a viable bystander claim, but rather, lacks certain relevant facts, we are not prepared to find as a matter of law that the basis for Defendant’s objection cannot be removed by amendment of the petition. Thus, we will allow Appellants to amend their petition, if they are legitimately able to remediate any factual deficiencies in accordance with La. C.C.P. art. 934.

DECREE

For the aforementioned reasons, the judgment of the district court is vacated, so as to allow Appellants time to amend their petition for damages within sixty (60) days from the date of the finality of this judgment. If they fail to amend their petition within the prescribed time, the district court shall dismiss their claims pursuant to La. C.C. art. 2315.6.

VACATED AND REMANDED

² Defendant also asserts in its brief that Appellants were in Baton Rouge at the time the accident occurred. However, that “fact” is nowhere in Appellants’ petition. The petition states that Appellants were residents of Baton Rouge, but nowhere on the face of the petition does it state that at the time of the accident that is where Appellants were located. An exception of no cause of action tests the sufficiency of a plaintiff’s claim, based on the bare allegations of the petition only, which are taken as true.