MARTIN J. DAVIES	*	**NO. 2018-CA-0453**
VERSUS	*	
		COURT OF APPEAL
JANET LABATUT DAVIES	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
JANET LABATUT DAVIES	**NO. 2018-CA-0454**
VERSUS	
MARTIN J. DAVIES	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2012-04553 C\W 2009-05534, DIVISION "H-12"
Honorable Monique E. Barial, Judge
* * * * * *
Judge Daniel L. Dysart
* * * * * *
ON REHEARING

(Court composed of Judge Daniel L. Dysart, Judge Joy Cossich Lobrano, Judge Dale N. Atkins)
LOBRANO, J., CONCURS IN THE GRANTING OF REHEARING AND IN THE RESULT

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REHEARING DENIED IN PART, CLARIFIED IN PART, GRANTED IN PART, AND REMANDED

DECEMBER 19, 2018

This matter is before the Court on an application for rehearing filed by plaintiff-appellant, Martin J. Davies, and a second application for rehearing filed by defendant-appellee, Janet Labatut Davies. For the reasons that follow, we deny Mr. Davies' application for rehearing, although we clarify that decision to make clear that our review of the matter was under the standard of review for the grant of a peremptory exception of no cause of action. However, we remand this matter to the trial court pursuant to La. C.C.P. art. 934 to allow Mr. Davies the opportunity to amend his motion, if he can, to state a cause of action.

As to Ms. Davies' application for rehearing, it is granted for the limited purpose of vacating that portion of our decision which found that the trial court granted Mr. Davies' motion to terminate payment of health insurance premiums.

Mr. Davies' application for rehearing

In his application for rehearing, Mr. Davies contends that this Court erred in finding that the trial court correctly sustained Ms. Davies' exception of no cause of action with respect to Mr. Davies' motion to terminate final periodic spousal

support. He maintains that this Court erred in applying an "abuse of discretion" standard of review and in reviewing "facts outside the four corners of the pleadings" in considering whether the 2015 Consent Judgment should have been modified to terminate Ms. Davies' spousal support.[1]

A peremptory exception of no cause of action may be raised in objection to a motion to modify judgments in family law litigation, including motions to modify support obligations. *See, e.g*., *Rigaud v. DeRuise*, 13-0376 (La. App. 4 Cir. 5/21/14), 141 So.3d 917, 919; *Vincent v. Vincent*, 11-1822 (La. App. 4 Cir. 5/30/12), 95 So. 3d 1152, 1155; *Donelon v. Donelon*, 95-0088 (La. App. 4 Cir. 7/26/95), 659 So.2d 512; *Richardson v. Richardson*, 02-2415 (La. App. 1 Cir. 7/9/03), 859 So.2d 81; *Bland v. Bland*, 97-0329 (La. App. 1 Cir. 12/29/97), 705 So.2d 1158, 1160. In *Rigaud*, this Court reiterated the well-settled rule that:

> [T]he grant of an exception of no cause of action [is subject] to *de novo* review because the exception raises an issue of law and the trial court's decision is based solely on the sufficiency of the petition. *Fink v. Bryant*, 2001-0987, pp. 3-4 (La.11/28/01), 801 So.2d 346, 348-49. "The peremptory exception of no cause of action is designed to test the legal sufficiency of the petition by determining whether the particular plaintiff is afforded a remedy in law based on the facts alleged in the pleading." *Industrial Companies, Inc. v. Durbin*, 2002-0665, p. 6 (La.1/28/03), 837 So.2d 1207, 1213. "The exception is triable on the face of the petition and, for the purpose of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true." *Id*; *Badeaux v. Southwest Computer Bureau, Inc*., 2005–0612, 2005–0719, p. 7 (La.3/17/06), 929 So.2d 1211, 1217.

[1] Notably, in his original appellate brief, Mr. Davies never once addressed whether the grant of the exception of no cause of action was proper. To the contrary, Mr. Davies' entire argument focused on whether modification of the Consent Judgment was warranted based, in part, on the parties' intent when they entered into the Consent Judgment in 2015.

Rigaud, pp. 4-5, 141 So.3d at 920.

It is equally well-settled that "[n]o evidence can be introduced to support or to controvert an exception of no cause of action." *Vincent*, 11-1822, p. 7, 95 So.3d 1158. Importantly, however, there is an exception to this general rule "that allows the trial court to consider evidence in ruling on an exception of no cause of action where that evidence is admitted at trial without objection. In such instances, the pleadings are considered to have been enlarged." *Rhodus v. Lewis*, 15-1454, p. 4 (La. App. 1 Cir. 4/15/16), 193 So.3d 215, 219. Thus, for example, as noted in *Gereighty v. Domingue*, 17-339, p. 12 (La. App. 5 Cir. 5/30/18), 249 So.3d 1016, 1027, quoting *Emigh v. W. Calcasieu Cameron Hosp*., 13-2985 (La. 7/1/14), 145 So.3d 369, 372, where "the parties, without objection, admitted the contracts at issue, [they] expand[ed] what the court may examine in determining whether a legal remedy exists."

In the instant matter, Mr. Davies moved to terminate his obligation to pay final periodic spousal support and health insurance premiums based on "significant changes in the financial condition/expenses" of the parties. Mr. Davies maintained that "there have been several material changes in the financial condition of" Ms. Davies "warranting a termination of final periodic spousal support." Arguably, by suggesting that there was a change of circumstances for which his spousal support obligations were no longer required, Mr. Davis stated a cause of action. Such a determination, though, is dependent on Mr. Davies' obligations provided in the

2015 Consent Judgment, which Mr. Davies did not attach as an exhibit to his motion.[2]

At the February 28, 2018 hearing on the motion, however, both parties made specific references to the Consent Judgment, with no objections and we find that the pleadings were enlarged to include the Consent Judgment. As such, the trial court was well within its authority in considering the provisions of the Consent Judgment in ruling on the exception of no cause of action.

As we found in our original opinion, based on its specific wording, the Consent Judgment required two conditions to have been met in order for Mr. Davies' obligation to pay spousal support to be terminated. While the motion alleges that one of those conditions had been met (Ms. Davies' alleged receipt of "her share of [Mr. Davies'] UniSuper superannuation fund" and her having "full access to these funds"), there is no mention of the required second condition (the end of child support).[3] Accordingly, based on our *de novo* review, we find that the trial court correctly found that Mr. Davies' motion fails to state a cause of action for the termination of his spousal support obligation.

Under La. C.C.P. art. 934:

> 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

[2] A copy of the Consent Judgment was attached to Ms. Davies' memorandum in opposition to the motion, although we note that, an exception of no cause of action looks solely to the allegations of a petition, or as in this case, a motion.

[3] The Consent Judgment expressly states that Mr. Davies "**shall** continue to pay $4,500.00 per month to [Ms. Davis] and have the matter reset in court to determine whether that amount should be reduced" upon the occurrence of two circumstances; it states: "[o]nce child support ends **and** in the event [Ms. Davies] in unable to access her share of the UNI SUPER retirement account that is to be rolled over to her in the community property partition." (Emphasis added). The use of the term "and" clearly indicates that both circumstances were required before Mr. Davies could seek to reduce his support obligation. *See, e.g.*, *Murray v. City of Bunkie*, 96-297, p. 4 (La. App. 3 Cir. 11/6/96), 686 So.2d 45, 48, ("[t]he use of the word 'and' means that both conditions must be met.").

> 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.

As this Court found in *Rigaud*, "[n]onetheless, when a petition fails to state a cause of action, but may be amended to cure the defect, the court shall grant the plaintiff leave to amend." *Rigaud*, 13-0376, p. 6, 141 So.3d 921. In *Rigaud*, this Court found that, because "[t]he record does not indicate plaintiff was given the opportunity to amend her petition," the matter should be remanded "for that purpose." *Id*. While we express no opinion as to whether Mr. Davies is capable of amending his motion to cure the defect, we remand this matter to the trial court to allow him the opportunity to attempt such a cure.

Ms. Davies' application for rehearing

In our original opinion, we indicated that the trial court granted Mr. Davies' Motion to Terminate Payment of Health Insurance Premiums. We agree with Ms. Davies that this statement is incorrect and we vacate that portion of our original opinion which made this statement and we vacate that portion of our opinion which considered the merits of Mr. Davies' obligation to continue paying Ms. Davies' health insurance premiums. A review of the record reflects that the trial court granted a motion for new trial so as to correct an error in its original judgment and the trial court amended the original judgment so as to reflect that it "overruled" (i.e., denied) Ms. Davies' exception of no cause of action as to Mr. Davies' Motion to Terminate Payment of Health Insurance Premiums.

Thus, the only matter before this Court was the denial of Ms. Davies' exception of no cause of action as it pertained to the motion to terminate the payment of health insurance premiums. In her application for a rehearing, Ms.

Davies argues that the trial court's denial of the exception of no cause of action was incorrect and urges this Court to find that "Mr. Davies' obligation to pay health insurance is a contractual obligation, not a spousal obligation." As such, Ms. Davies argues, the trial court should have maintained her exception to Mr. Davies' motion to terminate his obligation to pay health insurance premiums.

The denial of "an exception of no cause of action is an interlocutory judgment and not a final judgment." *Llopis v. State*, 16-0041, p. 3 (La. App. 4 Cir. 12/14/16), 206 So.3d 1066, 1069, *writ denied sub nom. Llopis v. State Dep't of Health & Hosps./ Louisiana State Bd. of Dentistry*, 17-0202 (La. 3/24/17), 217 So.3d 355. "The proper procedural vehicle for seeking review of an interlocutory judgment is by application for a supervisory writ." *Id*, pp. 4-5, 206 So.3d at 1068. As we noted in *Llopis*, under certain circumstances, this Court "may exercise its discretion 'to convert an appeal of an interlocutory judgment that is not immediately appealable into a supervisory writ application.'" *Id*., p. 6, 206 So.3d at 1070, quoting *McGinn v. Crescent City Connection Bridge Auth*., 15-0165, p. 4 (La. App. 4 Cir. 7/22/15), 174 So.3d 145, 148. In deciding whether to exercise supervisory jurisdiction, two conditions must be met:

> (i) The motion for appeal has been filed within the thirty-day time period allowed for the filing of an application for supervisory writs under Rule 4-3 of the Uniform Rules, Courts of Appeal. (ii) ... [T]he circumstances indicate that an immediate decision of the issue sought to be appealed is necessary to ensure fundamental fairness and judicial efficiency, such as where reversal of the trial court's decision would terminate the litigation.

Id.

Under the circumstances of this case, it is clear that the first of these conditions for the exercise of our supervisory jurisdiction was not met. The final

judgment in this matter was rendered (as amended) on March 26, 2018. Ms. Davies did not appeal this judgment directly; rather, she answered the appeal by filing an Answer on May 30, 2018. Thus, because she did not file a motion for appeal "within the thirty-day time period" for a supervisory writ application, we decline to convert this matter to an application for a supervisory writ. We note, too, that the second condition is also not met in that we do not find that the principles of fundamental fairness and judicial efficiency would be served by our review of the denial of the exception in this complex litigation.

Based on the foregoing, we deny Mr. Davies' application for rehearing, although we remand this matter to the trial court to allow Mr. Davies to amend his motion, to the extent that it may be amended, so as to state a cause of action for the termination of his spousal support obligation. We grant Ms. Davies' application for rehearing strictly to vacate our prior finding that the trial court granted Mr. Davies' motion to terminate the obligation to pay health insurance premiums. We further decline to exercise our supervisory jurisdiction to review the trial court's denial of Ms. Davies' exception of no cause of action as to the motion to terminate payment of health insurance premiums.

This matter is remanded for further proceedings.

REHEARING DENIED IN PART, CLARIFIED IN PART, GRANTED IN PART, AND REMANDED