KEN BAILEY

VERSUS

PINNACLE POLYMERS, LLC

NO. 24-CA-490

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE FORTIETH JUDICIAL DISTRICT COURT
PARISH OF ST. JOHN THE BAPTIST, STATE OF LOUISIANA
NO. 79,299, DIVISION "C"
HONORABLE J. STERLING SNOWDY, JUDGE PRESIDING

April 02, 2025

SUSAN M. CHEHARDY
CHIEF JUDGE

Panel composed of Judges Susan M. Chehardy,
Marc E. Johnson, and John J. Molaison, Jr.

AFFIRMED IN PART; REVERSED IN PART; REMANDED WITH INSTRUCTIONS

SMC
MEJ
JJM

FIFTH CIRCUIT COURT OF APPEAL
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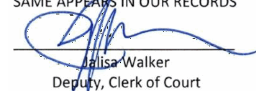

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CHEHARDY, C.J.

Plaintiff, Ken Bailey, appeals the trial court's August 28, 2023 judgment, as amended on November 28, 2024, which (1) sustained the peremptory exception of no cause of action filed by defendant, Pinnacle Polymers, LLC, thereby dismissing Baily's petition for damages, and (2) sustained Pinnacle's peremptory exception of prescription, thereby dismissing all claims asserted by Baily occurring prior to February 28, 2022. For the reasons that follow, we affirm the trial court's judgment, as amended, in part; reverse in part; and remand with instructions.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff, Ken Bailey, was employed by defendant, Pinnacle Polymers, LLC ("Pinnacle"), located in Garyville, Louisiana, as a process operator, for twenty-three years. Frederick Williams was hired by Pinnacle in May 2020 as a processing technician. In September 2020, Williams allegedly began to physically and mentally harass Bailey by doing things such as unplugging Bailey's phone, challenging him to fight, putting trash in his work bag, pulling items out of his locker and throwing them onto the floor, filling his shoes with water, turning off the gas on a forklift he was using, and writing Bailey's name on the on-call list when he had not been placed on the on-call list. In accordance with Pinnacle's corporate and human resource policies—which he contends require that if an employee is violent towards another employee, the offending employee should be immediately terminated—Bailey allegedly reported these instances of harassment by Williams to his immediate supervisor and/or to human resources. Upon receipt of Bailey's complaints, Pinnacle conducted an investigation regarding Williams' alleged conduct, yet purportedly did not take any disciplinary action against Williams.

Over a year later, in November 2021, Williams allegedly assaulted Bailey by taking an unprovoked swing with his fist at Bailey's face in a hallway of Pinnacle,

which Bailey was able to "dodge." Bailey reported the incident to his immediate supervisor, who advised that he, in turn, would report the incident to the plant superintendent and human resources. According to Bailey, Pinnacle was aware of Williams' "violent propensities" as early as November 2021, yet did nothing to separate Williams from Bailey, nor took any action against Williams. According to Bailey, during his career with Pinnacle, other employees were terminated for conduct similar to the conduct exhibited by Williams' conduct towards him.

Five months after the assault, Bailey was at work in his process unit on April 22, 2022, when Williams abruptly approached him and "got in his face" for no reason. According to Bailey, Williams then violently struck him in the head, causing Bailey to stumble and fall against a line or pipe. Williams allegedly repeatedly struck Bailey about the head in an unprovoked attack, causing Bailey to suffer physical, mental, and emotional damages as a result.[1]

On February 23, 2023, Bailey filed a petition for damages against his employer, Pinnacle, seeking to recover damages for: (1) Pinnacle's vicarious liability arising out of the intentional tort committed upon him by his co-worker, Frederick Williams, and (2) Pinnacle's general negligence following the alleged unprovoked assault and battery of Bailey that was committed by Williams during work hours, on Pinnacle's premises, was allegedly employment rooted, and incidental to Williams' performance of his duties as an employee of Pinnacle. Specifically, Bailey alleges that he and Williams had no relationship outside of their employment with Pinnacle, and that at all times when Williams was harassing and assaulting him, Williams was serving as an employee of Pinnacle and performing acts in furtherance of his employment with Pinnacle. Further, Bailey alleged that Pinnacle's negligence caused his injuries because Pinnacle knew, or in

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[1] After the incident, Williams was charged with simple battery and, in September 2022, Williams entered a plea of *nolo contender* to the charge that he assaulted and battered Bailey.

the exercise of reasonable care, should have known, that Williams had exhibited "violent propensities" towards Bailey, yet failed to take reasonable actions to prevent Williams from assaulting and battering him. Bailey did not name Williams as a defendant in the suit.

In response to Bailey's petition for damages, Pinnacle filed peremptory exceptions of no cause of action and prescription. Specifically, Pinnacle asserted that Williams' actions were not "employment related," and that certain allegations of fact were prescribed.

Pinnacle's exceptions came for hearing on August 24, 2023. After taking the matter under advisement, the trial court issued judgment on August 28, 2023, sustaining Pinnacle's exception of no cause of action on the basis that Bailey's factual allegations are insufficient to avoid the exclusive remedy of the worker's compensation statute under the facts and circumstances of this case. The trial court also sustained Pinnacle's exception of prescription on the basis that, on the face of Bailey's petition, any tortious conduct that occurred prior to February 28, 2022, had prescribed, which included all acts complained of, except for the April 22, 2022, alleged assault and battery.[2]

This timely appeal followed.

ASSIGNMENTS OF ERROR

On appeal, Bailey asserts the trial court erred (1) when it concluded that Bailey's petition for damages failed to adequately allege a cause of action against Pinnacle for its vicarious liability; (2) when it failed to address the allegations that Pinnacle was aware of the violent propensities of Bailey's co-worker, Williams, who assaulted and battered him, and finding Pinnacle could not be liable for the

[2] On November 20, 2024, upon finding that the August 28, 2023 judgment was deficient, in that it lacked the requisite decretal language, this Court remanded the matter to the trial court for amendment to its August 28, 2023 judgment to include the appropriate and necessary decretal language. After remand, the trial court issued its amended judgment on November 25, 2024.

battery; and (3) when it determined that the continuous tort doctrine did not apply and, thus, some of the negligent acts alleged in Bailey's petition had prescribed.

DISCUSSION

A. *Peremptory Exception of No Cause of Action*

The peremptory exception of no cause of action tests the legal sufficiency of a pleading by determining whether the law affords a remedy on the facts alleged. *Grubbs v. Haven Custom Furnishings, LLC*, 18-710 (La. App. 5 Cir. 5/29/19), 274 So.3d 844, 847. In the context of the peremptory exception, a "cause of action" is defined as the operative facts that give rise to the plaintiff's right to judicially assert the action against the defendant. *Id*.

The exception is triable on the face of the petition, any amendments to the petition, and any documents attached thereto. For purposes of resolving issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. *Gordon v. State, Division of Administration, Office of Community Development – Disaster Recovery*, 23-366 (La. App. 5 Cir. 3/27/24), 384 So.3d 1138, 1141. A court cannot consider assertions of fact referred to by the various counsel in their briefs that are not pled in the petition. *Welch v. United Healthwest-New Orleans, L.L.C.*, 21-684 (La. App. 5 Cir. 8/24/22), 384 So.2d 216, 221, citing *White v. New Orleans Ctr. for Creative Arts*, 19-213 (La. App. 4 Cir. 9/25/19), 281 So.3d 813, 819, *writ denied*, 19-1725 (La. 12/20/19), 286 So.3d 428. The burden of demonstrating that a petition fails to state a cause of action is upon the mover. *Ramey v. DeCaire*, 03-1299 (La. 3/19/04), 869 So.2d 114, 119. Because the exception of no cause of action raises a question of law and the trial court's decision is based solely on the sufficiency of the petition, review of the trial court's ruling on the exception is *de novo*. *Gordon*, 384 So.3d at 1140.

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. Because Louisiana

utilizes a system of fact pleading, it is not necessary for a plaintiff to plead a theory of the case in the petition; however, mere conclusions of the plaintiff, unsupported by the facts, do not set forth a cause of action. *Palowsky v. Campbell*, 21-358 (La. App. 5 Cir. 5/30/22), 337 So.3d 567, 572. The pertinent inquiry is whether, in a light most favorable to the plaintiff, and with every doubt resolved in the plaintiff's favor, the petition states any valid cause of action for relief. *I E C I, LLC v. South Central Planning & Dev. Comm'n, Inc.*, 21-382 (La. App. 5 Cir. 2/23/22), 336 So.3d 601, 611. A petition should not be dismissed for failure to state a cause of action, unless it appears beyond a doubt the plaintiff can prove no set of facts in support of any claim that would entitle him to relief. *Grubbs*, 274 So.3d at 847. Whether the plaintiff can prove the allegations set forth in the petition is not determinative of the exception of no cause of action, and the court may not go beyond the petition to the merits of the case. *Scanlan v. MBF of Metairie, LLC*, 21-323 (La. App. 5 Cir. 3/23/22), 337 So.3d 562, 565.

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. *See* La. C.C.P. art. 934. However, 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. *Id.*

1. Vicarious Liability

Bailey alleges the trial court erred in failing to find that he adequately alleged an intentional tort and Pinnacle's vicarious liability for the damages he suffered as a result. According to Bailey, the allegations of his petition sufficiently allege that Pinnacle is vicariously liable for the assault and battery committed upon him by his co-employee, Williams, which occurred during the course and scope of their employment. We disagree.

Generally, an employee's exclusive remedy against his employer for on-the-job injury is workers' compensation. An exception is made for intentional acts. La. R.S. 23:1032. An employer can be vicariously liable for the intentional acts of its employees.[3] *Payne v. Tonti Realty Corp*. 04-752 (La. App. 5 Cir. 11/30/04), 888 So.2d 1090, 1094, *writ denied*, 05-192 (La. 4/1/05), 897 So.2d 606.

The principle of vicarious liability is codified in La. C.C. art. 2320, which provides that an employer is liable for the tortious acts of its employees "in the exercise of the functions in which they are employed." La. C.C. art. 2320. The threshold question is whether the employee's conduct was in the course and scope of his employment. The "course of" employment refers to the time and place, while the "scope of" employment refers to being engaged in the functions for which employed. *See Russell v. Noullet*, 98-816 (La. 12/1/98), 721 So.2d 868, 871. An employer is not vicariously liable, however, merely because his employee commits an intentional tort on the business premises during working hours. *Baumeister v. Plunkett*, 95-2270 (La. 5/21/96), 673 So.2d 994, 996. "The inquiry requires the trier of fact to determine whether the employee's [intentional] tortious conduct was 'so closely connected in time, place and causation to his employment-duties as to be regarded a risk of harm fairly attributable to the employer's business, as compared with conduct motivated by purely personal considerations entirely extraneous to the employer's interests.'" *Russell*, 721 So.2d at 871 (quoting *LeBrane v. Lewis*, 292 So.2d 216, 218 (La. 1974)).

The question of whether an employee's tortious conduct was sufficiently employment-related that a court should impose vicarious liability upon the employer is a mixed question of fact and law. *Id*., 721 So.2d at 871. In *LeBrane*, the Louisiana Supreme Court identified four factors to be considered in

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[3] Vicarious liability is not a cause of action, but rather a method of holding one party liable for the conduct of another. *Martin v. Thomas*, 21-1490 (La. 6/29/22), 346 So.3d 238, 243.

determining vicarious liability, including whether the tortuous act was: (1) primarily employment rooted; (2) reasonably incidental to the performance of the employee's duties; (3) occurred on the employer's premises; and (4) occurred during the hours of employment. 292 So.2d at 218. It is not necessary that all four factors be satisfied in order to find liability; each case must be decided on its specific facts. *Bates v. Caruso*, 03-2150 (La. App. 4 Cir. 7/28/04), 881 So.2d 758, 762.

Generally, an employee's conduct is within the course and scope of his employment if "the conduct is of the kind that he is employed to perform, occurs substantially within the authorized limits of time and space, and is activated at least in part by a purpose to serve the employer. *Orgeron v. McDonald*, 93-1353 (La. 7/5/94), 639 So.2d 224, 226-27. To determine whether an accident may be associated with the employer's business enterprise, it must be determined whether "considering the authority given to the employee, the employee's tortious conduct was reasonably foreseeable." *Ermert v. Hartford Ins. Co.*, 559 So.2d 467, 476 (La. 1990). One must consider whether the accident was part of the inevitable toll of a lawful enterprise. *Id*. The fact that the predominate motive of the employee is to benefit himself does not prevent the employee's conduct from falling within the scope of his employment. *Id*., 559 So.2d at 477. If the purpose of serving the employer's business actuates the employee to any appreciable extent, the employer is subject to liability. *Id*.

In intentional tort cases, the court must determine "whether the tortious act itself was within the scope of the servant's employment." *Id*., 559 So.2d at 478. Importantly, however, "the fact that an act is forbidden or is done in a forbidden manner does not remove that act from scope of employment. *Id*. at 479. "The scope of risks attributable to an employer increases with the amount of authority

and freedom of action granted to the servant in performing his assigned tasks." *Id.* at 477.

Here, the allegations of Bailey's petition satisfy the time and place factors because the intentional act is alleged to have occurred on the premises of Pinnacle and during Williams' work hours. However, the petition does not allege any facts explaining why Williams intentionally struck Bailey in the face and head, although the petition does state that the altercation was abrupt and unprovoked. The petition does not allege the nature and scope of Williams' employment duties and how his intentional tortious conduct was incidental to those duties. Consequently, there are no facts alleged that would support a finding that the intentional act that occurred on April 22, 2022, was primarily employment rooted or reasonably incidental to the performance of Williams' duties. Absent these allegations, the petition fails to state sufficient facts to support the imposition of vicarious liability on Pinnacle for Williams' intentional act. *See Payne*, 888 So.2d at 1096-97 (employer not vicariously liable for intentional actions of employee who hit a co-employee with a golf cart); *Dickerson v. Picadilly Restaurants, Inc.*, 99-2633 (La. App. 1 Cir. 12/22/00), 785 So.2d 842, 845-46 (employer not vicariously liable for intentional acts of employee who stabbed a co-employee over a dispute involving a personal toolbox); *Wearrien v. Viverette*, 35,446 (La. App. 2 Cir. 12/5/01), 803 So.2d 297, 303 (employer not vicariously liable for intentional actions of employee who struck co-employee for insulting his wife).

Based on our *de novo* review of the allegations of Bailey's petition, we find the trial court did not err in finding that Bailey's petition failed to state a cause of action against Pinnacle for vicarious liability. This assignment of error is without merit.

2. Negligence

Our inquiry does not end with our analysis of the vicarious liability theory argued by Bailey. The petition should not be dismissed merely because Bailey's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the petition to determine if the allegations provide for relief on *any* possible theory. *City of New Orleans v. Board of Commissioners of Orleans Levee District*, 93-690 (La. 7/5/94), 640 So.2d 237, 253. In this regard, Bailey assigns as error the trial court's failure to address the fact that, because Pinnacle had actual, or at least, constructive knowledge of Williams' "propensity of violence towards him"—given Williams' harassment of him in September 2020, and Williams' prior assault upon him in November 2021, when Williams took a swing at his face, but missed—the assault and battery committed by Williams in April 2022 was foreseeable to Pinnacle.

Bailey's petition for damages includes allegations against Pinnacle that purport to be based in negligence. Although negligence claims by an employee against his employer for injuries sustained on the job are typically barred by the exclusivity provision of the worker's compensation act, the act does not cover injuries arising out of a "dispute with another person or employee over matters unrelated to the injured employee's employment." *See* La. R.S. 23:1031(E). Subsection 23:1031(E) was added to relieve the employer of paying compensation for injuries arising out of disputes unrelated to employment. *See Guillory v. Interstate Gas Station*, 94-1767 (La. 3/30/95), 653 So.2d 1152, 1155.[4] When an injury or illness is specifically excluded from the scope of the workers' compensation act, the exclusivity provision of the act does not apply, and the

[4] At the time that *Guillory* was decided, the pertinent subsection was designated La. R.S. 23:23:1031(D). Without changing the wording of the subsection, in 1997, by La. Acts 315, the legislature re-designated subsection (D) as subsection (E).

employer is not immune from a tort suit based on that injury. *See O'Regan v. Preferred Enterprises, Inc.*, 98-1602 (La. 3/17/00), 758 So.2d 124, 127.

In the instant matter, although counsel for Bailey admitted at the hearing on Pinnacle's exceptions that Bailey is receiving workers' compensation benefits, Bailey avers that his injury is excluded from the workers' compensation act, and thus, Pinnacle is not immune from a negligence suit based on that injury.

In his petition, Bailey alleges that Williams repeatedly harassed him over a period of time beginning in September 2020, randomly assaulted him in November 2021, and then intentionally assaulted and battered him on April 22, 2022. Bailey asserts that the assault and battery was abrupt, unprovoked, and for no reason. Bailey alleges that he reported to his supervisor and to human resources numerous incidents of harassment by Williams that occurred during the six to eight months prior to the April 22, 2022 incident, yet Pinnacle took no action to discharge Williams or otherwise protect Bailey, in contravention of Pinnacle's own corporate policies. Bailey avers that Pinnacle's negligence caused his injuries because it knew, or in the exercise of reasonable care, should have known, that Williams had "violent propensities" towards Bailey, yet failed to take reasonable steps to prevent Williams from injuring him. From these allegations we must determine whether Bailey's petition states a cause of action in negligence against Pinnacle for his injuries. The question is whether a cause of action in negligence can be stated against an employer by an employee who was the subject of an intentional act committed by an employee, after the employee notified the employer of numerous acts of harassment in the workplace by the co-employee. *Carr v. Sanderson Farm, Inc.*, 15-953 (La. App. 1 Cir. 2/17/16), 189 So.3d 450, 456.

A threshold issue in any negligence action is whether the defendant owed the plaintiff a duty. *Evans v. Abubacker, Inc.*, 23-955 (La. 5/10/24), 384 So.3d 853, 858. Although duty is generally a question of law, whether a legal duty

exists, and the extent of protection owed a particular plaintiff, depends on the facts and circumstances of the case and the relationship of the parties, and is determined on a case-by-case basis to avoid making a defendant the insurer of all persons against all harms. *See Doe v. McKesson*, 21-929 (La. 3/25/22), 339 So.3d 524, 544. Thus, whether a particular defendant owes a particular duty to a plaintiff in a particular factual context is a mixed question of law and fact. *See Parents of Minor Child v. Charlet*, 13-2879 (La. 4/4/14), 135 So.3d 1177, 1181, *cert. denied*, 574 U.S. 1127, 135 S.Ct. 1154, 190 L.Ed.2d 923 (2015). The scope of a duty may not encompass the risk encountered where the circumstances of the injury cannot reasonably be foreseen or anticipated, because in that instance, there is no ease of association between the risk of injury and the duty. *Malta v. Herbert S. Hiller Corp.*, 21-209 (La. 12/10/21), 333 So.3d 384, 399.[5]

An employer has a duty to exercise reasonable care for the safety of his employees and to not expose them to unreasonable risks of injury or harm. La. R.S. 23:13; *Mundy v. Department of Health and Human Resources*, 620 So.2d 811, 813 (La. 1993); *Martin v. Bigner*, 27,694 (La. App. 2 Cir. 12/6/95), 665 So.2d 709, 712. If an employer knows or should know of a dangerous condition or person on his premises, the employer is obligated to take reasonable steps to protect its employees. *Martin*, 665 So.2d at 712.

Here, the question is whether, accepting the allegations set forth in Bailey's petition as true—*i.e.*, that he previously reported Williams' harassment in September 2020, and again in November 2021, to both his supervisor and to human resources, neither of which included a report of actual physical contact—Pinnacle could have reasonably foreseen or anticipated that Williams would

[5] Foreseeability, as the determining test, is neither always reliable nor the only criterion for comparing the relationship between a duty and a risk. Some risks that arise because of a defendant's conduct are not within the scope of the duty owed to a particular plaintiff simply because they are unforeseeable. Ease of association is the proper inquiry. Such an inquiry questions how easily one associates the plaintiff's complained of harm with the defendant's conduct. Although ease of association encompasses the idea of foreseeability, it is not based on foreseeability alone. *Malta*, 333 So.3d at 399.

eventually batter and cause injury to Bailey, and failed to take any action to protect Bailey from injury. Bailey alleges that because of the prior reporting, Pinnacle had actual, or at least constructive knowledge, of Williams' "propensity for violence." However, we find that the incidents of harassment reported by Bailey—*i.e.*, of Williams unplugging his phone, challenging him to fight, putting trash in his work bag, pulling items out of his locker and throwing them onto the floor, filling his shoes with water, turning off the gas on a forklift he was using, and writing his name on the on-call list when he had not been placed on the on-call list—do not exhibit a "propensity of violence" about which Pinnacle knew or should have known. Even the alleged missed "swing" or "open-fisted punch" that Bailey claims Williams took against him in November 2021 did not result in an actual physical altercation sufficient to alert Pinnacle of the risk that Williams would hit Bailey in the head causing injury five months later on April 22, 2022. Additionally, even accepting as true, that Bailey reported these alleged acts of harassment to his supervisors and human resources, Bailey does not allege that Williams threatened him with violence or unequivocally conveyed his intent to harm Bailey, nor does Bailey allege that he reported or expressed his fear of being around Williams. There are no allegations that Williams had a history of criminal or violent behavior, or that he had ever previously physically attacked anyone, in or out of the workplace, such that Pinnacle knew or should have known of Williams' alleged propensity towards violence.

Even accepting the allegations of Bailey's petition as true, we find the allegations are insufficient to establish the foreseeability of Williams' intentional conduct and, therefore fail to establish a duty on the part of Pinnacle to prevent that conduct. While the petition does allege that Williams harassed Bailey on occasion, from approximately September 2020 to November 2021, and that Bailey reported those incidents of harassment to his supervisors and human resources who took no

action, there is nothing to suggest that Williams had a known history of violent behavior in the workplace, or that he had threatened to harm Bailey prior to the unprovoked physical altercation that occurred on April 22, 2022. Consequently, we find there is insufficient information to establish that Pinnacle knew or should have known of a dangerous condition or person on its premises, such that Pinnacle was obligated to take reasonable steps to protect its employees, including Bailey. Put simply, we find that Bailey's petition fails to state a valid cause of action against Pinnacle for negligence. Accordingly, we find no error in the trial court's judgment sustaining the exception of no cause of action and dismissing Bailey's negligence claim against Pinnacle.

When the grounds of an 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." *See* La. C.C.P. art. 934. We are unable to say, as a matter of law, that the objection cannot be removed by an amendment relative to either Bailey's vicarious liability or negligence claims, as analyzed above. Therefore, out of an abundance of caution, we remand this matter to the trial court to allow Bailey the opportunity to amend his petition in accordance with La. C.C.P. art. 934. The trial court shall fix the time period allowed for any such amendment.

B. *Prescription*

In his final assignment of error, Bailey avers the trial court erred when it failed to apply the continuing tort doctrine to the alleged cumulative and continuous pattern of Williams' harassment, of which Pinnacle was aware, that culminated when Williams struck and injured him. In sustaining Pinnacle's exception of prescription, the trial court determined that each alleged act of harassment and assault and battery constituted separate and independent tortious

acts, and consequently, only the alleged April 22, 2022 battery was not prescribed on the face of Bailey's petition. We agree.

The standard of review of a trial court's ruling on a peremptory exception of prescription turns on whether evidence is introduced. *Ruffins v. HAZA Food of Louisiana, LLC*, 21-619 (La. App. 5 Cir. 5/25/22), 341 So.3d 1259, 1262. When no evidence is introduced, appellate courts review judgments sustaining an exception of prescription *de novo*, accepting the facts alleged in the petition as true. *DeFelice v. Federated Nat'l Ins. Co.*, 18-347 (La. App. 5 Cir. 7/9/19), 279 So.3d 422, 426. However, when evidence is introduced at a hearing on an exception of prescription, the trial court's findings of fact are reviewed under the manifest error standard. *Id.*

Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception, including prescription. However, if prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show that the action has not prescribed. When a cause of action is prescribed on its face, the burden is on the plaintiff to show that the running of prescription was suspended or interrupted in some manner. *In re Singleton*, 19-578 (La. App. 5 Cir. 9/2/20), 303 So.3d 362, 266-67. At the trial of the peremptory exception of prescription, evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition. *See* La. C.C.P. art. 931; *Ruffins*, 341 So.3d at 1262. If no evidence is submitted at the hearing, the exception of prescription must be decided on the facts alleged in the petition, which are accepted as true. *Id.* But the latter principle applies only to properly-plead material allegations of fact, as opposed to allegations deficient in material detail, conclusory factual allegations, or allegations of law. *Id.*

In the case *sub judice*, at the time the harassment and tortious assault and battery occurred, as alleged by Bailey in his petition, delictual actions were subject

to a liberative prescriptive period of one year, which commenced to run from the date the injury was sustained. *See* former La. C.C. art. 3462. One of the exceptions to this rule is the jurisprudentially recognized doctrine of continuing tort. The continuing tort exception only applies when continuous conduct causes continuing damages. *Bustamento v. Tucker*, 607 So.2d 532, 542 (La. 1992). Where the cause of action is a continuous one giving rise to successive damages, prescription does not begin to run until the conduct causing the damage is abated. *South Central Bell Telephone Co. v. Texaco, Inc.*, 418 So.2d 531, 533 (La. 1982). The scope of application of continuing tort is limited. *Both* the conduct and damage complained of must be of a continuous nature.

In the instant case, Bailey argues that his petition alleges a pattern of Williams' harassment, and a pattern of Pinnacle failing to take any action to prevent Williams' tortious conduct, "all of which are linked, thus making the application of the continuing tort doctrine appropriate." Consequently, according to Bailey, prescription did not commence to run until the date of Williams' last harmful act, which in this case occurred on April 22, 2024, and thus, his petition is not prescribed on its face. Bailey further argues that, "at the very least, evidence of the pattern of harassment should be admissible at trial even if [he] has no cause of action for damages resulting from those prior acts."

In response, Pinnacle argues, and the trial court found, that each incident of assault and/or battery alleged by Bailey gives rise to a separate cause of action.[6] It contends that prescription runs from the date the injury is inflicted if the injury is immediately apparent to the victim, even though the extent of the damages may not be known. According to Pinnacle, even if Bailey's allegations of conduct that

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[6] The intentional tort of "battery" is a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff to suffer such contact. *Pelitire v. Rinker*, 18-501 (La. App. 5 Cir. 4/17/19), 270 So.3d 817, 833, *writ denied*, 19-793 (La. 9/17/19), 279 So.3d 378. An "assault" is, generally speaking, the threat of such harmful or offensive contact. *Id.* The defendant's intention need not be malicious nor need it be an intention to inflict actual damage. If is sufficient if the defendant intends to inflict either a harmful or offensive contact without the other's consent. *Id.*

occurred in September 2020 or November 2021 constituted an actionable intentional tort of assault and/or battery by Williams, the two sets of conduct are alleged to have occurred more than a year prior to Bailey's filing of the instant suit, and therefore, are prescribed on the face of his petition. According to Pinnacle, the conduct as alleged by Bailey was not continuous and did not constitute a continuing tort, such that prescription would have begun to run from the alleged culminating battery that occurred on April 22, 2022.

Pursuant to the continuing tort doctrine, where the wrongful, damaging conduct is of a continuing nature and gives rise to successive damages, prescription does not begin to run until the wrongful conduct ceases. *See Scott v. Zaheri*, 14-726 (La. App. 4 Cir. 12/3/14), 157 So.3d 779, 786; *Crump v. Sabine River Authority*, 98-2326 (La. 6/29/99), 737 So.2d 720, 728. The concept of the continuing tort has its roots in property damage cases and requires that both the operating cause of the injury and the resulting damages be continuous. *Crump*, 737 So.2d at 726. In *Crump*, the Supreme Court clarified this requirement as it relates to prescription as follows:

> [A] distinction is made between continuous and discontinuous causes of injury and resulting damage. When the *operating cause of the injury* is "not a continuous one of daily occurrence," there is a multiplicity of causes of action and of corresponding prescriptive periods. Prescription is completed as to each injury, and the action is barred upon the lapse of one year from the date in which the plaintiff acquired, or should have acquired, knowledge of the damage … [This is to be distinguished from the situation where] the "*operating cause of the injury* is a continuous one, giving rise to successive damages from day to day …"
> *Crump*, 737 So.2d at 726, citing A.N. Yiannopoulas, *Predial Servitudes*, § 63 (1983). [Emphasis in original.]

Id.

In Bailey's petition, he sets forth allegations that Williams began to "physically and mentally" harass him in September 2020, although the incidents

Bailey described did not involve actual, physical contact nor did he allege any resulting damage. There are no factual allegations of harassment occurring after September 2020, until over a year later, where Bailey alleges that Williams randomly assaulted him in November 2021, by raising an open fist towards his face that Bailey was able to dodge. Again, Bailey does not allege that actual physical contact between himself and Williams occurred or that he suffered any damage. Bailey alleged that he reported these incidents to Pinnacle, and Williams' conduct was investigated, but took no action against Williams was taken. The next allegation of tortious conduct asserted by Bailey took place five months later on April 22, 2022, where Williams struck Bailey in the head, causing him to stumble into a pipe, at which point Williams continued to repeatedly strike and batter Bailey in the head, inflicting both physical injuries and damages. Although Bailey characterizes these individual tortious acts as a "pattern of harassment" culminating in the April 22, 2022 attack, the facts alleged are insufficient to give rise to a continuing tort claim.

Based on our review of Bailey's petition, and accepting all allegations set forth therein as true, we find that, although Bailey pleads the applicability of the continuing tort doctrine, his petition does not claim that there have been continual or ongoing unlawful acts or successive damages; instead, we find his petition asserts several distinct tortious acts, that were separated by months and years, where no damage, much less continuous damage, was alleged to have been sustained, until the final tortious act occurring on April 22, 2022, which resulted in both physical injuries and damages.

For these reasons, we find the trial court properly sustained Pinnacle's exception of prescription finding that, on the face of Bailey's petition, the alleged tortious acts that occurred in September 2020 and in November 2021, are prescribed because they occurred more than one year prior to Bailey having filed

suit on February 28, 2023. Consequently, the only action that survives Pinnacle's exception of prescription is the April 22, 2022 battery.[7]

CONCLUSION

The trial court's August 28, 2023 judgment, as amended by the November 25, 2024 judgment, is affirmed insofar as it sustained Pinnacle Polymers' peremptory exception of no cause of action as to the vicarious liability of Pinnacle, and its peremptory exception of prescription dismissing all of Bailey's claims occurring prior to February 28, 2022. However, we reverse in part the judgment, as amended, that dismissed Bailey's petition against Pinnacle Polymers on the exception of no cause of action as it relates to issues of negligence of Pinnacle, and remand the matter to the trial court with instructions to issue an order granting Bailey the opportunity to amend his petition to state a cause of action in negligence, if he can, within a delay deemed reasonable by the trial court.

AFFIRMED IN PART; REVERSED IN PART; REMANDED WITH INSTRUCTIONS

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[7] This Court expresses no opinion as to the admissibility of evidence related to Williams' alleged pattern of harassment at any future proceeding or trial, as the admissibility of such evidence was not before the trial court at the hearing on Pinnacle's exceptions and, thus, is not a proper issue for review in this appeal.

SUSAN M. CHEHARDY
CHIEF JUDGE

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **APRIL 2, 2025** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

24-CA-490

E-NOTIFIED
40TH DISTRICT COURT (CLERK)
HONORABLE J. STERLING SNOWDY (DISTRICT JUDGE)
PETER N. FREIBERG (APPELLANT)
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