NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1501

DEBRA BRACEY OLIVIER

VERSUS

FRAENKEL COMPANY &
HARVEY HOFFMAN

Judgment Rendered: May 4, 2007

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 538,539 Division "N(27)"

Honorable Donald R. Johnson, Judge Presiding

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Debra B. Olivier, In Proper Person Lakeland, LA	Plaintiff/Appellant Debra B. Olivier
Fredric T. Le Clercq Brandi Labruzzo New Orleans, LA	Counsel for Defendant/Appellee Fraenkel Company & Harvey Hoffman

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Downing, J. concurs and assigns reasons.

HUGHES, J.

Plaintiff, Debra Olivier, brought this suit against her former employer, the Fraenkel Company, and its Chairman and CEO, Harvey Hoffman. The trial court's judgment sustained defendants' exception raising the peremptory objection of no cause of action. Ms. Olivier has appealed. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL STANCE

This suit arises out of a response by Ms. Olivier's former employer, Mr. Hoffman of Fraenkel, to a request for information that he received from the National Conference of Bar Examiners (NCBE), completed with comments, and returned to the NCBE. The request was issued in connection with the NCBE's routine investigation of Ms. Olivier's character and fitness as part of her application for admission to the Louisiana bar in 2004. In space provided on the request for information, Mr. Hoffman noted that Ms. Olivier had been fired from Fraenkel. He also wrote in the comments area that "[m]y experience with Ms. Olivier was that she was unethical, a drinker to excess, a complainer and lacked loyalty. There may be some areas of the legal profession where she will do just fine."

Mr. Hoffman's comments apparently caused the NCBE to delay Ms. Olivier's admission to the bar even though she passed the bar examination. Ms. Olivier was later admitted to the bar and has filed this suit *pro se*, alleging libel, defamation, and intentional tortious interference with prospective economic advantage.[1] Defendants filed exceptions raising the peremptory objections of no cause of action and no right of action. The trial court gave oral reasons sustaining both exceptions although a judgment

[1] "An intentional, damaging intrusion on another's potential business relationship, such as the opportunity of obtaining customers or employment." Black's Law Dictionary 1498 (7th ed. 1999).

signed on April 19, 2006 indicates only that the exception raising the objection of no cause of action was granted. Ms. Olivier has appealed.

DISCUSSION

We note at the outset that the trial court's oral reasons for sustaining defendants' exceptions raising the objections of no cause of action and no right of action indicate that both exceptions were intended to be sustained. The minutes of court provided in the record do so as well. But the judgment reflects only that the exception raising the objection of no cause of action was granted. This court has previously stated that "[w]here there is a discrepancy between the judgment and the reasons for judgment, the judgment prevails." **Perkins v. Willie**, 2001-0821, p. 5 (La. App. 1 Cir. 2/27/02), 818 So.2d 167, 170-71. The following discussion is therefore limited to the exception raising the objection of no cause of action, but the omission from the judgment of mention of the exception raising the objection of no right of action will be addressed *infra*.

A successful exception raising the peremptory objection of no cause of action pursuant to Louisiana Code of Civil Procedure article 927(A)(4) results in dismissal of a petitioner's suit. The exception is a procedural device used to test the legal sufficiency of the petition. In making the determination, all well pleaded allegations of fact in the petition must be accepted as true. The court must then determine whether the law affords any relief to the petitioner if those factual allegations are proven at trial. If the allegations of the petition state a cause of action as to any part of the demand, the exception must be overruled. A petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the petitioner can prove no set of facts in support of any claim which would entitle him to relief. The question therefore is whether, in the light

most favorable to the petitioner, with every doubt resolved in his or her favor, the petition states any valid cause of action for relief under any evidence admissible under the pleadings. The burden of demonstrating that no cause of action has been stated rests on the exceptor. In reviewing a trial court's sustaining an exception of no cause of action, the reviewing court conducts a *de novo* review. **Pelts & Skins, L.L.C. v. Louisiana Dep't of Wildlife & Fisheries**, 2005-0952, p. 8 (La. App. 1 Cir. 6/21/05), 938 So.2d 1047, 1052-53, *writ denied*, 2006-1821 (La. 10/27/06), 939 So.2d 1281.

A court ordinarily may not consider evidence or exhibits in association with an exception raising the objection of no cause of action as the exception is to be tried on the petition alone for the question whether the law provides a remedy to anyone if the facts alleged are proved at trial. If evidence is admitted without objection, however, jurisprudence allows that the pleadings may be considered expanded for the purposes of the exception. **Williams v. Marionneaux**, 124 So.2d 919, 921 n.1 (La. 1960), *overruled on other grounds*; *see also* **Sivils v. Mitchell**, 96-2528, p. 4 (La. App. 1 Cir. 11/7/97), 704 So.2d 25, 27-28.

Here, the record reflects that defendants attached three documents to their memorandum in support of the exceptions. The memorandum refers to and attaches as "Exhibit A" an "Authorization and Release" that Ms. Olivier signed and had notarized as part of her application for admission to the bar."[2] Printouts of two e-mails from Ms. Olivier to a "Ron" follow thereafter. Although they are not discussed or identified in the memorandum, inclusion of these e-mails would serve defendants' aims by corroborating Mr. Hoffman's comment on the response form that Ms.

[2] Defendants referred to this document in their memorandum as the basis for an argument on the merits that Ms. Olivier's suit is either barred or waived.

Olivier was disloyal or unethical. There is no indication that the trial court considered the e-mails in its decision, but the court's oral reasons specifically refer to the release document and the judgment contains language to the effect that the court considered evidence before it.

As noted above, a court may consider evidence that is extraneous to an exception raising the objection of no cause of action, but only if the evidence has been admitted without objection by the petitioner. Here, though, our review of the record indicates that the release and the e-mails were never formally admitted into evidence; the minutes of court contain no reference to them and no transcript of the proceeding has been provided. In fact, the minutes indicate only that "[a]rgument was had and the matter was submitted."

Although these documents became incorporated into the record as attachments to the defendants' memorandum, they were not introduced into evidence at the trial level, thus the trial court should not have considered them in deciding this exception. Neither can this court consider such evidence to be part of the record. *See, e.g.*, **Capital Bank & Trust Co. v. Lacey**, 393 So.2d 668, 670 (La. 1980) ("Of course, we cannot consider any evidence that was not admitted in this case in the trial court or that was not added to the record on appeal by stipulation of the parties....").

The trial court clearly considered evidence that was not properly admitted when it decided the exception raising the objection of no cause of action. Therefore, we will reverse the trial court's judgment. Additionally, due to the incongruity noted above concerning the omission from the judgment of reference to the exception raising the objection of no right of action, we conclude that the interests of justice would be best served by

vacating the trial court's grant of defendants' exception raising the objection of no cause of action and remanding this matter to the trial court for further proceedings.

CONCLUSION

For the above and foregoing reasons, the judgment granting defendants' exception raising the objection of no cause of action is reversed and vacated and this matter is remanded to the trial court for further proceedings. Each party is to bear its own costs.

JUDGMENT VACATED, REVERSED, AND REMANDED FOR FURTHER PROCEEDINGS.

DEBRA BRACEY OLIVIER

VERSUS

FRAENKEL COMPANY &
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DOWNING, J., concurs and assigns reasons.

I agree with the opinion because the judgment at issue is on a ruling for an exception of no cause of action. As the majority explains, when considering an exception of no cause of action, the trial court cannot consider evidence or exhibits unless admitted without objection, and every allegation pleaded in the petition must be accepted as true.

Defendants, however, argue that there should be an absolute privilege to any opinion that they may express. And I agree that there should be. However, neither the legislature nor the La. Supreme Court has established this absolute privilege. Rather, our Supreme Court has established the policy of having the applicant sign a release. Therefore, despite compelling arguments in favor of an absolute privilege, we see no basis on which we can conclude such absolute privilege exists in Louisiana. Whether the release ultimately is valid and enforceable upon subsequent determination by a court is not being decided here.

Accordingly, I concur.