NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1025

MARTIN MACKLIN, ROSA MACKLIN, ELIZABETH MACKLIN AND MARY MACKLIN, INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, PATRICK MACKLIN

VERSUS

PETER BUSINELLE AND ABC INSURANCE COMPANY

Judgment Rendered: JUN - 8 2012

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Appealed from the
Sixteenth Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
Suit Number 120808

Honorable John E. Conery, Presiding

KUHN, J CONCURS & ASSIGNS REASONS

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

GUIDRY, J.

Martin Macklin, Rosa Macklin, Elizabeth Macklin, and Mary Macklin, individually and on behalf of her minor son, Patrick Macklin, appeal from a judgment of the trial court sustaining an exception of no cause of action and dismissing their claims against defendants, Peter Businelle and Western World Insurance Company, with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

In October of 2008, Martin Macklin was living in a mobile home in Lonely Oak Trailer Park in Bayou Vista, Louisiana. Macklin leased the premises for the mobile home from Businelle, who owned the trailer park. Businelle was also Macklin's personal friend. On October 18, 2008, Businelle entered the mobile home occupied by Macklin and found him non-responsive on the bathroom floor with a knot on his head and slumped over the bathtub. Businelle then left the mobile home, leaving Mackin in the same position in which he found him, and went to work. Businelle attempted to call Mackin on his cell phone at 12:00 p.m. to check on him and, later that afternoon, he returned to the mobile home. Macklin was still non-responsive on the bathroom floor, but he was in a different position. Businelle dragged Macklin into the living room and dripped cold water on his face and then called a mutual friend to advise the friend of Macklin's condition. The mutual friend, upon arriving at the mobile home, called 911.

Thereafter, Macklin, his wife, and his children filed a petition for damages, naming Businelle and his insurer, Western World Insurance Company, as defendants. In their petition, the plaintiffs asserted that Macklin had suffered a stroke and is now permanently disabled, and that but for Businelle's negligence, he would be in better health today. The defendants, thereafter, filed a dilatory exception raising the objection of lack of procedural capacity and a peremptory exception raising the objections of no right of action and no cause of action. The

plaintiffs, after obtaining leave of court, filed a first supplemental and amending petition. However, following a hearing on the exceptions, the trial court sustained the peremptory exception of no cause of action and gave the plaintiffs thirty days from the date of the hearing to amend their petition to state a cause of action. Thereafter, the plaintiffs filed a second supplemental and amending petition. The defendants responded by filing another exception raising the objection of no cause of action.

Following a hearing on January 7, 2011, the trial court signed a judgment sustaining the defendants' exception of no cause of action as to the allegations contained in the plaintiffs' petition for damages, first supplemental and amending petition for damages, and second supplemental and amending petition for damages, and dismissing their claims against the defendants with prejudice. The plaintiffs now appeal from this judgment.

DISCUSSION

The peremptory exception raising the objection of no cause of action is designed to test the legal sufficiency of the petition by determining whether the plaintiff is afforded a remedy in law based on the facts alleged in the pleading. Fink v. Bryant, 01-0987, p. 3 (La. 11/28/01), 801 So. 2d 346, 348-349. The function of the objection of no cause of action is to question whether the law extends a remedy to anyone under the factual allegations of the petition. Fink, 01-0987 at pp. 3-4, 801 So. 2d at 348. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. Fink, 01-0987 at p. 3, 801 So. 2d at 349. The exception is triable on the face of the petition, and for purposes of determining the issues raised in the exception, the well-pleaded facts in the petition must be accepted as true. Fink, 01-0987 at p. 4, 801 So. 2d at 349. A petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any

claim. Fink, 01-0987 at p. 4, 801 So. 2d at 349. Any doubts are resolved in favor of the sufficiency of the petition. Van Hoose v. Gravois, 11-0976, p. 6 (La. App. 1st Cir. 7/7/11), 70 So. 3d 1017, 1021.

Appellate review of a trial court's ruling on an exception of no cause of action is *de novo*, because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition. City of Denham Springs v. Perkins, 08-1937, p. 12 (La. App. 1st Cir. 3/27/09), 10 So. 3d 311, 321-322, writ denied, 09-0871 (La. 5/13/09) 8 So. 3d 568.

A review of the plaintiffs' petitions shows that their claims against Businelle and Western World Insurance Company sound in negligence. In resolving negligence cases, Louisiana employs a duty-risk analysis, whereby a plaintiff must establish: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant failed to conform his conduct to the appropriate standard (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the injuries (the scope of liability or scope of protection element); and (5) proof of actual damages (the damages element). McIntyre v. St. Tammany Parish Sheriff, 02-0700, p. 7 (La. App. 1st Cir. 3/28/03), 844 So. 2d 304, 309. The existence of a duty owed by Businelle to Macklin is essential for plaintiffs to have a claim for a remedy under the law, and thus, to have a cause of action. See Lanza Enterprises, Inc. v. Continental Insurance Company, 129 So. 2d 91, 94 (La. App. 3rd Cir. 1961).

Whether a legal duty is owed by one party to another depends upon the facts and circumstances of the case and the relationship of the parties. Terrell v. Wallace, 98-2595, p. 4 (La. App. 1st Cir. 12/28/99), 747 So. 2d 748, 750, writ denied, 00-0297 (La. 3/24/00), 758 So. 2d 158. Duty constitutes a question of law. Terrell, 98-2595 at p. 4, 747 So. 2d at 750.

The plaintiffs assert in the instant case that Businelle, as Macklin's landlord, had a duty to provide aid or assistance to Macklin, his tenant, after letting himself into the mobile home and finding Macklin in obvious physical distress on the floor.

This court has stated that "[i]t is widely recognized in the field of tort law that the courts do not impose a general duty to come to the aid of one who is in peril, that is, one will not be held legally liable for his inaction even though his assistance could have saved the injured party." Strickland v. Ambassador Insurance Company, 422 So. 2d 1207, 1209 (La. App. 1st Cir. 1982). However, there is a legally recognized duty to render assistance in situations where the plaintiff's peril or injury is due to negligence on the part of the defendant or in situations where one begins rescue and thereby discourages others from aiding the injured party. Strickland, 422 So. 2d at 1209. The courts will also find a duty to aid where there is a special relationship between the parties. For example, the courts have found the following relationships to give rise to a duty: carrier and passenger; innkeeper and guest; shopkeeper and business visitor; jailer and prisoner; and school and pupil. Strickland, 422 So. 2d at 1209.

Further, other special relationships have been found when examining the duty to control or warn against criminal actions of a third person. See La. C.C. art. 2702. These relationships include, in addition to those already stated: parent and child; employer and employee; restaurateur and patron; and teacher and pupil. Terrell, 98-2595 at p. 5, 747 So. 2d at 750. However, this court has specifically found that landowners do not have a special relationship with those who live on their premises. Terrell, 98-2595 at p. 5, 747 So. 2d at 750. Accordingly, applying the law of this Circuit as detailed above to the facts as alleged in the plaintiffs' petitions, we find that Businelle, as the owner of the mobile home park from which Macklin rented the space upon which his trailer was located, did not have a special relationship with Macklin.

The plaintiffs assert that the special relationships recognized by the jurisprudence are not exclusive, and that the Restatement (Second) of Torts and jurisprudence from other jurisdictions indicates that the landlord/tenant relationship is a special relationship for purposes of imposing a duty on the landlord to render assistance. However, such authority is not binding on this court in rendering its decision. See Unlimited Horizons, L.L.C. v. Parish of East Baton Rouge, 99-0889, p. 7 (La. App. 1st Cir. 5/12/00), 761 So. 2d 753, 758. Rather, we are bound by the law as adopted by this Circuit.[1]

Further, we disagree with plaintiffs' assertion that this Circuit has recognized a duty to provide aid or rescue where a person can do so without danger to himself or others. In Wicker v. Harmony Corporation, 00-0231, p. 6 (La. App. 1st Cir. 3/28/01), 784 So. 2d 660, 665-666, writ denied, 01-1726 (La. 9/28/01), 798 So. 2d 115, this court stated that "Louisiana should not follow the common law 'American Rule', but should follow other civil law countries in establishing a 'duty to rescue'. A person who observes a person in obvious peril should be required to render assistance when he can do so without personal risk." However, this language was clearly dicta, as this court subsequently held that "because we have found that Harmony contractually assumed a duty in this case, it is not necessary for the Court to adopt a 'Duty to Rescue' doctrine at this time." Wicker, 00-0231 at p. 7, 784 So. 2d at 666.

Likewise, though this court again recognized in Beach v. Pointe Coupee Electric Membership Corporation, 04-2255, p. 4 (La. App. 1st Cir. 11/16/05), 917 So. 2d 556, 558, writ denied, 06-0165 (La. 5/26/06), 930 So. 2d 21, that "under most civil law traditions, when a person without danger to himself or others can

[1] Plaintiffs also cite this court to Miller v. McDonald's Corp., 439 So. 2d 561 (La. App. 1st Cir.), writ not considered, 442 So. 2d 462 (La. 1983) and Smith v. Orkin Exterminating Company, Inc., 540 So. 2d 363 (La. App. 1st Cir. 1989). However, both of these cases involved the duty owed by a business owner to its visitor, which is a recognized special relationship giving rise to a duty to render aid and a duty to protect against the acts of third parties.

provide aid or rescue to another in distress, he has a duty to do so," this language was also dicta, as the issue before the court was whether a principal had a duty to warn. This court, in reversing summary judgment in favor of the principal, stated that "a person who observes that another is in obvious peril, has the slight duty to warn of known imminent dangers when he can do so without personal risk." Beach, 04-2255 at pp. 4-5, 917 So. 2d at 558. Accordingly, neither of these cases adopted a "Duty to Rescue" and we reject the plaintiffs' argument to the contrary. See Cook v. Kendrick, 41,061, p. 11 n.1 (La. App. 2nd Cir. 5/19/06), 931 So. 2d 420, 428 n.1, writ denied, 06-1853 (La. 10/27/06), 939 So. 2d 1284 (noting that the Louisiana First Circuit Court of Appeal has tiptoed close to imposing a duty to rescue).

Further, we disagree with the plaintiffs' characterization of the Louisiana Supreme Court's decision in Potter v. First Federal Savings and Loan Association of Scotlandville, 615 So. 2d 318, 324-325 (La. 1993). In Potter, the court stated that La. C.C. art. 2702[2] does not preclude a lessee's tort action against a lessor for injuries he sustained from intervening acts of a third person when the lessor's negligence or breach of other tort duties was a cause in fact and legal cause of the lessee's injuries. 615 So. 2d at 324-325. However, in that case the court reversed summary judgment, finding that genuine issues of material fact existed as to whether a dangerous condition was created from inadequate lighting, i.e., from the defendant's negligent conduct. See Potter, 615 So. 2d at 326. Accordingly, the court's decision in that case reinforces existing law regarding a lessor's duty, rather than expands it as argued by the plaintiffs.

Finally, plaintiffs argue in the alternative that Businelle assumed a duty of providing aid by entering the mobile home to check on Macklin. However, as

[2] Prior to 2004, the substance of La. C.C. art. 2702 was found in La. C.C. art. 2703. However, we refer to the current Civil Code article in this report for ease of reference.

noted in Strickland, such a duty exists only when a person begins rescue and thereby discourages others from aiding the injured party. 422 So. 2d at 1209. In this case, plaintiffs assert that Businelle entered the mobile home in the morning to check on Macklin, and upon his return to the mobile home later in the day, he attempted to render aid and called for assistance. Plaintiffs have not asserted that Busnielle, after the second entrance when he began to render aid to Macklin, discouraged others from aiding Businelle. Rather, the facts as alleged in the petitions are exactly to the contrary. Further, the facts as alleged do not support that Businelle otherwise voluntarily assumed a duty to rescue or render assistance when he entered the mobile home on the morning of October 18, 2008. See Moore v. Safeway, Inc., 95-1552 (La. App. 1st Cir. 11/22/96), 700 So. 2d 831, 846, writs denied, 97-2921, 97-3000 (La. 2/6/98), 709 So. 2d 735, 744 (finding that if a person undertakes a task which he has no duty to perform, he must perform the task in a reasonable and prudent manner and that a negligent breach of a duty that has been voluntarily assumed may create civil liability).

Accordingly, from our review of the record, we find that plaintiffs have failed to allege facts sufficient to establish that the defendants owed a duty to aid Macklin, and likewise, we find no error in the trial court's judgment sustaining the exception raising the objection of no cause of action and dismissing the plaintiffs' claim with prejudice.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to the plaintiffs, Martin Macklin, Rosa Macklin, Elizabeth Macklin, and Mary Macklin, individually and on behalf of her minor son, Patrick Macklin.

AFFIRMED.

MARTIN MACKLIN, ET AL.

VERSUS

PETER BUSINELLE AND ABC INSURANCE COMPANY

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KUHN, J., concurring.

In asserting that this Circuit has recognized a duty to provide aid or rescue where a person can do so without danger to himself or others, plaintiffs rely on language from the plurality opinion in ***Wicker v. Harmony Corporation***, 00-0231 (La. App. 1st Cir. 3/28/01), 784 So. 2d 660, 665, ***writ denied***, 01-1726 (La. 9/28/01), 798 So. 2d 115. However, this language was nothing more than dicta, as this court subsequently held that "because we have found that Harmony contractually assumed a duty in this case, it is not necessary for the Court to adopt a "Duty to Rescue" doctrine at this time." ***Wicker***, 784 So. 2d at 666. The language relied upon by plaintiffs is also of little precedential weight for the additional reason that it was taken from a plurality opinion with only one judge signing unconditionally and two judges concurring.