

ERIC GIRTLEY

NO. 15-CA-397

VERSUS

FIFTH CIRCUIT

ACE AMERICAN INSURANCE COMPANY,  
ENTERGY LOUISIANA, LLC, ALLSTATE  
INSURANCE COMPANY, ROBERT HENRY  
I., PASTOR AND THE CITY OF KENNER

COURT OF APPEAL

STATE OF LOUISIANA


ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON, STATE OF LOUISIANA  
NO. 741-129, DIVISION "K"  
HONORABLE ELLEN SHIRER KOVACH, JUDGE PRESIDING

December 9, 2015

COURT OF APPEAL  
FIFTH CIRCUIT

FILED 12/09/15

**MARC E. JOHNSON**  
**JUDGE**

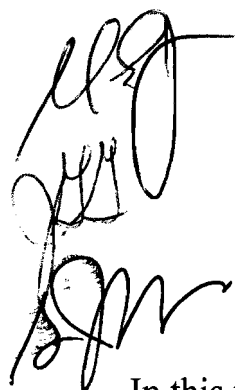
  
CLERK  
Cheryl Quinlan, Clerk

Panel composed of Judges Jude G. Gravois,  
Marc E. Johnson, and Stephen J. Windhorst

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**AFFIRMED**

A handwritten signature in black ink, appearing to be 'J. G. Girtley', written in a cursive style.

In this tort suit, Plaintiff appeals a judgment maintaining Defendant's exceptions of no cause of action and no right of action. For the following reasons, we affirm.

*FACTS & PROCEDURAL HISTORY*

In August 2014, Plaintiff, Eric Girtley, filed suit for personal injuries he allegedly sustained when he was struck by a vehicle while he was trying to cross Loyola Blvd. in Kenner at its intersection with 31<sup>st</sup> St. in his wheelchair. Plaintiff alleged that the street light near the intersection was not functioning at the time of the accident. As such, Plaintiff named Entergy Louisiana, LLC ("Entergy") as a defendant, asserting that it failed to properly inspect and maintain the street light,

which it was contractually obligated to do, and that its failure created an unreasonable risk of harm which was a proximate cause of the accident.<sup>1</sup>

In February 2015, Entergy filed peremptory exceptions of no cause of action and no right of action. Entergy asserted that Plaintiff had no cause of action because (1) it did not owe any duty to Plaintiff to continuously operate streetlights, and (2) there was no privity of contract between Plaintiff and Entergy. It further claimed that Plaintiff did not have a right of action because he was not a party to the contract and did not have any interest in any contractual agreement between Entergy and Jefferson Parish. On April 15, 2015, after a hearing, the trial court maintained Entergy's exceptions of no cause of action and no right of action and dismissed Plaintiff's claims against Entergy with prejudice. Plaintiff appeals this judgment.

#### *ISSUE*

On appeal, Plaintiff argues that the trial court erred in maintaining Entergy's exceptions of no cause of action and no right of action. He contends the trial court erred in finding that Entergy did not have a legal duty to maintain and replace defective street lights, despite Entergy's written contract with Jefferson Parish to do so. Plaintiff maintains that Jefferson Parish delegated its duty to maintain and replace the street lights to Entergy through a written contract and in exchange for consideration paid to Entergy. Plaintiff asserts that the contract between Entergy and Jefferson Parish was for the safety and welfare of the citizens of Jefferson Parish; thus, the contract contained a stipulation *pour autrui*, which gave the citizens of Jefferson Parish the right to bring an individual suit against Entergy for its negligence in failing to properly maintain the street lights.

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<sup>1</sup> Plaintiff also named the driver of the vehicle, Robert Pastor; his insurer, Allstate Ins. Co.; the City of Kenner; its insurer, ACE American Ins. Co.; and the Parish of Jefferson.

## LAW & ANALYSIS

The Louisiana Supreme Court has explained the criteria for deciding an exception of no cause of action as follows:

A cause of action, when used in the context of the peremptory exception, is defined as the operative facts that give rise to the plaintiff's right to judicially assert the action against the defendant. The function of the peremptory exception of no cause of action is to test the legal sufficiency of the petition, which is done by determining whether the law affords a remedy on the facts alleged in the pleading. No evidence may be introduced to support or controvert an exception of no cause of action. Consequently, the court reviews the petition<sup>2</sup> and accepts well-pleaded allegations of fact as true. The issue at the trial of the exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. [Internal citation omitted.]

*Wright v. La. Power & Light*, 06-1181 (La. 3/9/07); 951 So.2d 1058, 1068-69.

Mere conclusions of the plaintiff in his petition unsupported by facts do not set forth a cause of action. *Id.* at 1069.

The ruling on an exception of no cause of action is subject to a *de novo* review, because the exception raises a question of law and the trial court's decision is based only on the sufficiency of the petition. *Id.* at 1069. The reviewing court is to determine "whether, in the light most favorable to plaintiff and with every doubt resolved in plaintiff's behalf, the petition states any valid cause of action for relief." *Id.*

The sole allegations that pertain to Entergy in Plaintiff's petition are as follows:

V.

That the street light located at the or near the aforesaid accident, was not properly functioning and failed to properly illuminate the area where said collision occurred.

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<sup>2</sup> The petition includes any exhibits attached thereto. See La. C.C.P. art. 853; *Donnaud's Inc. v. Gulf Coast Bank & Trust Co.*, 03-427 (La. App. 5 Cir. 9/16/03); 858 So.2d 4, 6, *writ denied*, 03-2862 (La. 1/9/04); 862 So.2d 985.

## VIII.

That the aforesaid accident sued on herein was the fault of and proximately caused by Defendant, Entergy Louisiana, LLC, in the following, non-exclusive, respects:

- (a) By failing to properly inspect the non-working street light at the subject location that failed to illuminate the subject area of the collision that it was contractually obligated to inspect;
- (b) By failing to properly maintain the street light at the subject location that failed to illuminate the subject area of the collision that it was contractually obligated to maintain;
- (c) By having notice of the defective streetlight [sic] and failing to repair it;
- (d) Any other acts of negligence that created an unreasonable risk of harm which were the cause of the accident sued upon which are discovered between the filing of this petition and the trial of this matter.

A threshold issue in any negligence action is whether the defendant owed the plaintiff a duty. Whether a duty is owed is a question of law. The inquiry is whether the plaintiff has any law, statutory, jurisprudential, or arising from general principles of fault, to support his claim. *Laguerre v. Mendez*, 08-784 (La. App. 5 Cir. 2/25/09); 9 So.3d 896, 898. In the absence of duty, there can be no liability. *Shafouk Nor El Din Hamza v. Bourgeois*, 493 So.2d 112, 116 (La. App. 5<sup>th</sup> Cir. 1986), *writ denied*, 497 So.2d 1013 (La. 1986).

In *Shafouk, supra*, this court stated that there is no statutory, jurisprudential or general principle of fault that supports a cause of action for negligence against a power company for its failure to provide street lighting. In so stating, we noted that there is no authority that requires a power company to provide street lighting as part of its general “public utility service.” *Id.* at 117.

In *Shafouk*, this court found that the plaintiff failed to state a cause of action in negligence against the power company, LP&L, for failing to provide adequate street lighting along a roadway and in failing to maintain those lights already installed. The plaintiff, an Egyptian citizen, was struck and killed by a vehicle and a wrongful death action was filed on his behalf, alleging that LP&L was negligent for its failure to provide and maintain adequate street lighting in the area of the accident. We found that the plaintiff failed to allege any facts that would have established a legal relationship between the plaintiff and LP&L such that LP&L could be liable under a duty-risk analysis. We specifically stated that the failure of LP&L to provide adequate street lighting was at most the deprivation of a benefit, not the violation of a duty. *Shafouk, supra* at 117. Although we acknowledged that LP&L had a contract with the parish to install and maintain street lighting along the roadway at issue, we noted that the duty to supply street lighting did not extend to anyone other than the parties to the contract. *Id.* at 116-17.

Plaintiff does not appear to disagree with the holding of *Shafouk* that there is no general duty of a power company to provide street lighting. However, he argues that Entergy had a contractual obligation to provide street lighting. Plaintiff contends that unlike *Shafouk*, where the contract between LP&L and the plaintiff was not in the record, the contract between Entergy and Jefferson Parish is in the record and shows the extent of Entergy's contractual obligation.

As previously stated, an exception of no cause of action only considers the allegations contained in the petition and any exhibits attached to the petition. *Wright*, 951 So.2d at 1068; *Donnaud's*, 858 So.2d at 6. Thus, the contents of the contract at issue cannot be considered unless specifically alleged or attached to the petition. In the present case, the contract between Entergy and Jefferson Parish is not attached to Plaintiff's petition and cannot be considered in the context of an

exception of no cause of action. Further, Plaintiff's petition does not specifically allege the contents of the contract – it simply states a conclusory allegation that Entergy was contractually obligated to inspect and maintain the street lights. As previously noted, conclusory allegations unsupported by facts do not state a cause of action. *Wright*, 951 So.2d at 1069. Therefore, similar to *Shafouk*, there is no allegation in the petition that a contractual obligation existed between Plaintiff and Entergy regarding street lighting. As such, we find Plaintiff's petition fails to state a cause of action against Entergy – either in tort or in contract. When there is no cause of action, it follows that no one has a right of action. *Shafouk*, 493 So.2d at 116.

La. C.C.P. art. 934 provides that when the grounds of the objections pleaded by a peremptory exception may be removed by amendment of the petition, the judgment shall order such an amendment within a specific time delay.

Accordingly, we consider Plaintiff's argument that the contract between Entergy and Jefferson Parish provided a stipulation *pour autrui*, for his benefit, to determine whether he can amend his petition to state a cause of action.

La. C.C. art. 1978 provides that “[a] contracting party may stipulate a benefit for a third person called a third party beneficiary,” commonly referred to as a stipulation *pour autrui*. *Joseph v. Hospital Serv. Dist. No. 2*, 05-2364 (La. 10/15/06); 939 So.2d 1206, 1211. There are three criteria for determining whether contracting parties have provided a benefit for a third party, or a stipulation *pour autrui*: (1) the stipulation for a third party is manifestly clear; (2) there is certainty as to the benefit provided the third party; and (3) the benefit is not a mere incident of the contract between the promisor and the promisee. *Id.* at 1212.

Regarding the third criteria that the benefit cannot be a mere incident of the contract, the Louisiana Supreme Court explained:

[N]ot every promise, performance of which may be advantageous to a third person, will create in him an actionable right. The problem is to separate the cases where an advantage has been stipulated from those where the advantage relied upon is merely an incident of the contract between the parties. [Internal citations omitted.]

*Joseph, supra* at 1212-13. In an attempt to further explain, the supreme court cited and discussed *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.*, 113 La. 1091, 37 So. 980 (1905). In *Allen*, a water company contracted with the city to furnish water and maintain the fire hydrants. The plaintiff sued the water company for damages sustained as a result of the loss of its building due to fire because of an alleged breach of the water company's obligation to maintain the hydrants. The supreme court held that the plaintiff had no right of action because the contract was between the city and the water company, and it did not contain a stipulation *pour autrui*. The supreme court determined that the plaintiff, as an inhabitant of the city, was merely an incidental beneficiary of the contract.

We likewise find that Plaintiff was simply an incidental beneficiary to the contract between Entergy and Jefferson Parish. Jefferson Parish contracted with Entergy to maintain electric street light fixtures. The contract was for the benefit of Jefferson Parish and any benefit ultimately received by Plaintiff was merely incident of the obligation Entergy owed to Jefferson Parish. Thus, there was no stipulation *pour autrui* in the contract. See *Burdis v. Lafourche Parish Police Jury*, 542 So.2d 117 (La. App. 1<sup>st</sup> Cir. 1989).<sup>3</sup> Accordingly, we find that Plaintiff cannot

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<sup>3</sup> In *Burdis, supra*, the plaintiff was injured while riding his motorcycle on a roadway when he failed to negotiate a curve. A street light was located at the site of the accident, but it was not working at the time of the accident. The plaintiff sued the power company, LP&L, alleging it had failed to properly maintain and repair the street light. The plaintiff further alleged that LP&L had contracted with the parish to provide and maintain the street lights along the roadway at issue. LP&L filed an exception of no cause of action claiming it had no duty to light the roadway, which was maintained.

On appeal, the First Circuit affirmed the maintaining of the exception of no cause of action. The court concluded that LP&L had no duty to provide street lighting and, therefore, no liability in negligence. The court further found no cause of action in contract. It noted that the plaintiff was not a party to the contract and had not alleged facts which supported the finding of a stipulation *pour autrui* in his favor. The court considered the contract between the parish and LP&L to be for the benefit of the parish and that any benefit ultimately received by the plaintiff was a mere incident of the obligation owed to the parish.



amend his petition to remove the grounds for the exceptions of no cause of action and no right of action.

*DECREE*

Based on the foregoing, we find that Plaintiff's petition fails to state a cause of action. When there is no cause of action, there can be no right of action. Thus, the trial court properly sustained Entergy's exceptions of no cause of action and no right of action. We further find that Plaintiff cannot remove the grounds for the exceptions by amending his petition; accordingly, the trial court properly dismissed Plaintiff's claims against Entergy. The trial court's April 15, 2015 judgment is affirmed. Plaintiff is to bear the costs of this appeal.

**AFFIRMED**

SUSAN M. CHEHARDY  
CHIEF JUDGE

FREDERICKA H. WICKER  
JUDE G. GRAVOIS  
MARC E. JOHNSON  
ROBERT A. CHAISSON  
ROBERT M. MURPHY  
STEPHEN J. WINDHORST  
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CLERK OF COURT

MARY E. LEGNON  
CHIEF DEPUTY CLERK

SUSAN BUCHHOLZ  
FIRST DEPUTY CLERK

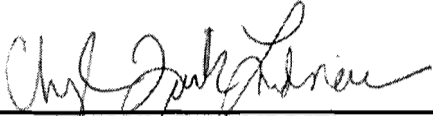
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**NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY**

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 2-20** THIS DAY **DECEMBER 9, 2015** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

  
\_\_\_\_\_  
CHERYL Q. LANDRIEU  
CLERK OF COURT

**15-CA-397**

**E-NOTIFIED**

DANIEL B. SNELLINGS  
KENNETH B. KROBERT  
L. LANE ROY  
MATTHEW L. STEDMAN

**MAILED**

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