

**NOT DESIGNATED FOR PUBLICATION**

**JAMES GONZALES** \* **NO. 2007-CA-0094**  
**VERSUS** \* **COURT OF APPEAL**  
**PROGRESSIVE INSURANCE** \* **FOURTH CIRCUIT**  
**COMPANY, ERIN LUNN,**  
**MITCH BUTLER, DAVID** \* **STATE OF LOUISIANA**  
**STRAUSS, CHRISTIAN**  
**GARBETT AND THE LAW** \* \* \* \* \*  
**FIRM OF KING, LEBLANC &**  
**BLAND, PLLC**

APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2006-2820, DIVISION "G-11"  
Honorable Robin M. Giarrusso, Judge

\* \* \* \* \*

**Judge Dennis R. Bagneris, Sr.**

\* \* \* \* \*

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr.,  
and Judge Edwin A. Lombard)

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**AFFIRMED**

**JUNE 13, 2007**

Plaintiff/Appellant, James Gonzales, appeals a judgment dismissing his suit against Progressive Insurance Company, David Strauss, Christian Garbett, Sr., and the law firm of King, LeBlanc and Bland PLLC. The trial court granted defendants' exceptions of no right of action, no cause of action, and res judicata. For the following reasons, we affirm the judgment

of the trial court.

## **FACTS**

### **1. The Underlying Suit: *Huey Gonzales, Ralph Gonzales, Kathy Gonzales and Thomas Gonzales v. James Gonzales and Progressive Insurance Company.***

The underlying suit, entitled *Huey Gonzales, Ralph Gonzales, Kathy Gonzales and Thomas Gonzales v. James Gonzales and Progressive Insurance Company*, 34<sup>th</sup> Judicial District Court for the Parish of St. Bernard, State of Louisiana, forms the basis for the instant suit. This suit arose when James Gonzales allegedly struck a stationary platform while operating his boat in the waters of the Mississippi River Gulf Outlet on September 25, 2000. Following the accident, the four boat passengers, Huey Gonzales (James Gonzales's brother), Ralph G. Gonzales (James Gonzales's brother), Kathy Gonzales (James Gonzales's sister-in-law), and Thomas Gonzales (James Gonzales's brother), filed suit against James Gonzales (the boat driver) and his insurer, Progressive Insurance Company, Inc. ("Progressive").

Progressive's pre-suit adjustment of the claim gave Progressive reason to have concerns regarding the legitimacy of the claim and the accident and thus, Progressive reserved its rights and retained conflict counsel, at

Progressive's cost, to represent and defend James Gonzales. Thereafter, Progressive sought sequestration of all parties during their depositions, which the trial court granted after finding that defendants had shown probable cause for its concerns that the parties were collectively involved in a plan to commit insurance fraud. Progressive also sought, and was granted leave, to amend its answer for the purpose of asserting a reconventional demand and cross-claim alleging that the parties had conspired to defraud Progressive and pleading the affirmative defense of fraud. Shortly before the trial began, in October 2004, the plaintiffs and James Gonzales entered into a written agreement whereby the plaintiffs (the four passengers) dismissed their claims against James Gonzales and reserved their rights to proceed directly against Progressive. In consideration for this dismissal, James Gonzales assigned all of his litigation rights, existing at that time or arising anytime in the future, to the plaintiffs.

After a two-week trial, the trial court issued a judgment, finding in favor of Progressive and against the plaintiffs. The trial court found that Progressive proved by a preponderance of the evidence that plaintiffs schemed to defraud Progressive in order to recover damages not owed to them. The trial court further dismissed Progressive's cross-claim against James Gonzales, despite finding that the plaintiffs did scheme to defraud

Progressive.

**2. The Instant Appeal: *James Gonzales v. Progressive Insurance Company, David A. Strauss, Christian A. Garbett, Sr., King LeBlanc & Bland, P.L.L.C.***

On April 3, 2006, appellant, James Gonzales, filed this suit against Progressive, and its attorneys, alleging defamation, intentional infliction of emotional distress, malicious prosecution and bad faith. Specifically, Mr. Gonzales alleges that Progressive “breached its duty to fairly, objectively and properly investigate and defend him in the claim by the passengers.” Thereafter, defendants filed exceptions of no right of action, no cause of action, and res judicata, which were granted by the trial court. Because the trial court granted the exceptions of no right of action, no cause of action, and res judicata, the trial court found defendants’ exceptions of prematurity, vagueness, ambiguity, and special motion to strike moot. Mr. Gonzales now appeals this final judgment.

**DISCUSSION**

On appeal, Mr. Gonzales argues that the trial court erred when it granted defendants exceptions of no right of action, no cause of action, and res judicata. We find the trial court’s written reasons accurately set forth a valid basis for granting the exceptions and we adopt them, in pertinent part, as our own:

## No Right of Action

James Gonzales assigned his litigation rights to the fraud suit plaintiffs and therefore, has no right of action. The assignment provided:

In consideration of this partial dismissal of James Gonzales, James Gonzales assigns, transfers and subrogates unto plaintiffs Ralph Gonzales, Kathy Gonzales, Thomas Gonzales, Sr., and Huey Gonzales, Jr., any and all claims or rights against Progressive Insurance [C]ompany pursuant to any policy issued to James Gonzales for his benefit, including but not limited to any present or future claim or cause of action arising against Progressive Insurance Company for its denial of coverage and/or its bad faith, arbitrary and capricious handling of the claim and defense of this matter.

James Gonzales signed the assignment in proper person. Clearly, Gonzales assigned his rights to any and all claims or litigation rights of any kind arising out of the lawsuit in the 34<sup>th</sup> JDC. The assignment is broad enough to encompass claims against Progressive.

Strauss and Garbett were not a party to the suit in the 34<sup>th</sup> JDC, but acted in their representative capacity for Progressive. All statements made by Strauss and Garbett were made in the course of their representation of Progressive. Any claims against them and their law firm, King, Leblanc & Bland, flow from their representation and are therefore precluded due to the assignment of rights.

## No Cause of Action

### (1) Defamation

The statements made by Strauss and Garbett were done in the course and scope of defending Progressive. The trial court in the 34<sup>th</sup> JDC found probable cause to suspect insurance fraud was being committed on behalf of the plaintiffs.

Additionally, there is no evidence that suggests that the statements made by Strauss and Garbett were made with malice.

James Gonzales has no cause of action for defamation against Progressive, or the attorney's handling the matter on behalf of Progressive, because the pleadings and statements were made with probable cause. Progressive, through its counsel, alleged the plaintiffs and James Gonzales committed fraud arising out of the September 2000 boat accident. There is no proof that Progressive's statements made during litigation were false or made with malice.

## (2) Intentional Infliction of Emotional Distress

Progressive, through its employees and attorneys, investigated and defended a fraudulent insurance claim. Those actions cannot amount to a claim for IIED.

The facts, as alleged, do not arise to the level of "outrageous" as set forth in White v. Monsanto, 585 So.2d 1205 (La. 1991). There is nothing alleged that defendants went beyond "all possible bounds of decency" in defending the fraud suit.

## (3) Malicious Prosecution

If an accusation is based on probable cause, then there is no liability if there was malicious motive. JCM Construction Co. v. OPSB, 04-59 (La. 4/30/04), 871 So.2d 1122. Judge Sanborn issued a Judgment and Reasons for Judgment specifically finding, in part, that Progressive proved by a preponderance of evidence that the plaintiffs schemed to defraud Progressive in order to recover damages not owed to them. (As stated in Judge Sanborn's reasons for judgment):

The Court further finds that Plaintiffs were not credible witnesses. They repeatedly contradicted each other regarding the details leading up to the alleged accident, the alleged accident itself, and the events subsequent to the accident. They further provided trial testimony contrary to their respective deposition testimony

on these issues. Plaintiffs also provided testimony concerning the facts and circumstances of the alleged accident that was inconsistent with the physical evidence introduced at trial and related expert testimony. Finally, in comparison with the medical testimony and the medical records, the trial testimony of Huey, Ralph, and Kathy did not convince the Court that it was more probable than not that their alleged injuries were caused by the incident at issue.

Progressive and its counsel had probable cause to question the boating accident. In turn, Progressive had probable cause to file a cross-claim against *James Gonzales in Huey Gonzales, et al v. James Gonzales, et al.*

#### Res Judicata

James Gonzales is precluded from re-litigating his fraud issue in the present matter based upon Judge Sanborn's ruling in the 34<sup>th</sup> JDC matter. Judge Sanborn issued a ruling finding that Progressive had shown probable cause for their suspicions of fraud sufficient to support the extraordinary order sequestering all parties during their depositions. The issue was briefed by the parties, argued at a hearing, and discussed in chambers during an in camera review of additional evidence. The ruling is final, as neither party sought appellate review and the delays have run.

For these reasons, we hereby affirm the judgment of the trial court, which granted Progressive's exceptions of no right of action and no cause of action and dismissed plaintiff's claims against it. We further affirm the trial court judgment, which granted defendants', David Strauss, Christian Garbett, Sr., and the law firm of King, Leblanc and Bland PLLC, exceptions of no right of action, no cause of action and res judicata and dismissed



plaintiff's claims against them.

**AFFIRMED**