NOT DESIGNATED FOR PUBLICATION

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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1498

FLOYD P. DONLEY, SR.

VERSUS

HUDSON'S SALVAGE LLC & EMPLOYEES
(LOIS PELTIER, JERRY HOLLIFIELD, JOHN DOE, LINDA COX,
VELMA ELAINE HINGLE AND ALAN SPALLINGER)

Judgment Rendered: MAR 2 1 2014

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket Number 2009-4174

The Honorable Bruce C. Bennett, Judge Presiding

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Floyd P. Donley Amite, LA	In Proper Person/Appellant
Sean A. Blondell Metairie, LA	Counsel for Defendant/Appellee, Hudson's Salvage, LLC
Thomas J. Miller Mandeville, LA	
Jeffery Paul Robert Baton Rouge, LA	Counsel for Defendants/Appellees, Lois Peltier, Jerry Hollifield, Linda Cox, Velma Elaine Hingle & Alan Spallinger

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

Crain, J concurs

WHIPPLE, C.J.

This matter is before us on appeal by plaintiff, Floyd P. Donley, Sr., from a judgment of the trial court maintaining a peremptory exception raising the objection of no cause of action and dismissing his claims with prejudice. For the reasons that follow, we affirm in part, reverse in part, and remand.

PROCEDURAL HISTORY

On December 1, 2009, plaintiff filed a pro se petition against Hudson Salvage, LLC ("Hudson"), Hudson's district manager, Linda Cox, Hudson's store manager Elaine Hingle,[1] and Hudson's store security officer, Alan Spallinger, as well as Lois Peltier and Jerry Hollifield, two of Hudson's managerial employees in its Hattiesburg, Mississippi headquarters office, and an unidentified employee whom he claimed was the Hudson's camera operator, who allegedly videotaped the incident (collectively referred to as the "defendants" herein). According to plaintiff's petition, on September 24, 2008, plaintiff entered the Dirt Cheap Store owned and operated by Hudson, in Amite, Louisiana, for "the purpose of taking pictures of the previously reported uncorrected safety violations" of the store. According to plaintiff's petition, after he contacted the headquarters office in Hattiesburg by telephone and e-mail regarding the store's purported "violations and unsafe practices," the Hattiesburg managerial employees "dispatched" Spallinger to "instigate a situation" with him, knowing that he would visit the store on that day. Plaintiff further alleged that "all employees of Hudson's [sic] falsely imprisoned plaintiff [...] in an area at the Store checkout counter that prevented [him] from freedom of movement and/or unimpeded exit forward or to the rear." Plaintiff alleged that as the result of his "illegal confinement," detention, and false

[1]Ms. Hingle is also referred to in the record as Velma Elaine Hingle.

imprisonment on that date by the Amite store employees, acting under the direction of the Hattiesburg managerial employees, his civil rights were violated and he suffered "physical and mental injuries," including a "panic attack," "heart trauma" (also described as "a possible heart attack"), "aggravations of previous afflictions," stress, and consequential reduction of his life expectancy by six years.[2]

Plaintiff also alleged in his petition, *inter alia*, that Cox refused to intervene to "stop the police brutality" of Amite City Police Department Officers Allen Ordeneaux, III and Joseph Phillips, who were dispatched to the scene to investigate the disturbance; that "severe police Misconduct and Abuse was allowed to continue long after the Store had decided not to sign a complaint and after the false charges could have been timely aborted;" that Hingle falsely accused him of battery, leading to his prosecution; that Cox, Hingle, and Spallinger lied under oath at the trial of December 3, 2008, that resulted in his conviction in Amite City Court; and that Cox, Hingle, and Spallinger "wrote false narrative reports" on December 8, 2008, five days after the trial, "with the intent to defame [p]laintiff."

In response, the defendants filed a peremptory exception of prescription, contending that, on the face of plaintiff's petition, his various causes of action had prescribed prior to the date of his filing the petition. Following argument and plaintiff's proffer of multiple documents to which the defendants objected, the trial court sustained the exception, dismissing plaintiff's claims with prejudice. Plaintiff appealed, and on review, this court affirmed the judgment in part, reversed in part, and remanded, determining that the trial court had properly sustained the exception of prescription and dismissed all on

[2]According to his petition, plaintiff was eighty years of age at the time of the incident at issue herein.

prescription all of plaintiff's causes of action, except for his claims of malicious prosecution and defamation. See Donley v. Hudson's Salvage, LLC, 2010-1315 (La. App. 1st Cir. 12/22/10)(unpublished opinion).

Thereafter, with regard to plaintiff's remaining claims, the defendants[3] filed a peremptory exception of no cause of action on March 11, 2013, contending that plaintiff's claims for malicious prosecution and defamation "cannot survive," in that the petition fails to state any cause of action for which the law affords a remedy. Specifically, the defendants contended: (1) that plaintiff did not allege and cannot show a lack of probable cause or legal causation, essential elements of his malicious prosecution claim, and (2) that the defendants are afforded immunity from retaliatory actions for alleged defamatory statements arising from a witness's testimony during the course of trial testimony and/or in a police report.[4] The matter was heard and argued before the trial court on June 17, 2013. On July 12, 2013, the trial court signed a judgment maintaining the defendants' exception and dismissing, with prejudice, all of plaintiff's claims in their entirety against defendants, Hudson's Salvage, LLC, Hudson's Insurance Company, Linda Cox, Elaine Hingle, Alan Spallinger, Lois Peltier, Angie Carter, and Jerry Hollifield. Plaintiff then filed the instant appeal.[5]

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[3]Although we are unable to find an amended petition by plaintiff in the record, additional defendants, Hudson's Insurance Carrier and Angie Carter, joined the previously named defendants in urging the exception of no cause of action.

[4]In support of the exception, the defendants attached as exhibits to their exception of no cause of action the affidavits of Officers Ordeneaux and Phillips, as well as this court's previous opinion, a judgment of the federal district court, and an opinion of the federal court of appeal.

[5]Although plaintiff's brief does not set forth specific assignments of error or otherwise comply with the requirements of Uniform Rules – Courts of Appeal, Rule 2-12.4, in light of his pro se status, this court will consider the merits of his appeal, despite the improper form of his appellate brief. See LSA-C.C.P. art. 2164; Putman v. Quality Distribution, Inc., 2011-0306 (La. App. 1st Cir. 9/30/11), 77 So. 3d 318, 320; Jones v. International Maintenance Corporation, 2010-2181 (La. App. 1st Cir. 5/6/11), 64 So. 3d 893, 895.

DISCUSSION
Exception of No Cause of Action

On appeal, plaintiff contends that the trial court erred in sustaining the defendants' exception of no cause of action and dismissing his remaining claims of malicious prosecution and defamation. The defendants counter that the petition is fatally deficient overall because plaintiff did not allege and cannot "show" the absence of probable cause and failed to allege or show legal causation. In support of their claim that plaintiff cannot establish a lack of probable cause, defendants cite affidavits filed in support of their exception, which they argue demonstrate that there was probable cause for plaintiff's arrest and prosecution. At the outset, we note that this case is before us solely on review of its dismissal on an exception and not on the merits or whether any party is entitled to summary judgment on a particular claim or defense. As this court has previously recognized, the exception of no cause of action cannot be used as a substitute for trial on the merits. Farria v. LaBonne Terrebonne of Houma, Inc., 476 So. 2d 474 (La. App. 1st Cir. 1985).

A cause of action, for purposes 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. Ramey v. DeCaire, 2003-1299 (La. 3/19/04), 869 So. 2d 114, 118. The function of the exception of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the petition. Southeastern Louisiana University v. Cook, 2012-0021 (La. App. 1st Cir. 9/21/12), 104 So. 3d 124, 128. An appellate court exceeds the limited scope of an exception of no cause of action by reaching the merits. Farmco, Inc. v. West Baton Rouge Parish Governing Council, 2001-1086 (La. 6/15/01), 789 So. 2d 568, 569 (per curiam).

Generally, no evidence may be introduced to support or controvert the exception raising the objection of no cause of action. LSA-C.C.P. art. 931; Ramey v. DeCaire, 869 So. 2d at 118. However, as set forth in City National Bank of Baton Rouge v. Brown, 599 So. 2d 787, 789 (La. App. 1st Cir.), writ denied, 604 So. 2d 999 (La. 1992), the jurisprudence recognizes an exception to this rule, which allows the court to consider evidence which is admitted without objection to enlarge the pleadings. Woodland Ridge Association v. Cangelosi, 94-2604 (La. App. 1st Cir. 10/6/95), 671 So. 2d 508, 510. Otherwise, the court must accept all factual allegations of the petition as true and maintain the exception only if no remedy is afforded under the allegations asserted. McElwee v. State, Department of Transportation and Development, 98-0223 (La. App. 1st Cir. 2/19/99), 729 So. 2d 695, 697.

In considering whether the exception of no cause of action has merit, all facts pled in the petition must be accepted as true, and any doubts are resolved in favor of the sufficiency of the petition to state a cause of action. Ramey v. DeCaire, 869 So. 2d at 118. If the petition alleges sufficient facts to establish a case cognizable in law, the exception raising the objection of no cause of action must fail. Rebardi v. Crewboats, Inc., 2004-0641 (La. App. 1st Cir. 2/11/05), 906 So. 2d 455, 457. However, in order to state a cause of action, the plaintiff must allege specific facts supporting the elements of his claim to show that he has a cause of action upon which relief and judgment may be granted against the defendant. Wells v. Flitter, 2005-2525 (La. App. 1st Cir. 9/27/06), 950 So. 2d 679, 681, writ denied, 2007-0312 (La. 11/2/07), 966 So. 2d 598. Moreover, the mere conclusions of the plaintiff unsupported by facts do not set forth a cause of action. Montalvo v. Sondes, 93-2813 (La. 5/23/94), 637 So. 2d 127, 131.

In ruling on an exception of no cause of action, the court must determine whether the law affords any relief to the claimant assuming he proves the factual allegations in the petition and annexed documents at trial. City of Denham Springs v. Perkins, 2008-1937 (La. App. 1st Cir. 3/27/09), 10 So. 3d 311, 321, writ denied, 2009-0871 (La. 5/13/09), 8 So. 3d 568. Furthermore, the facts shown in any annexed documents must also be accepted as true. B & C Electric, Inc. v. East Baton Rouge Parish School Board, 2002-1578 (La. App. 1st Cir. 5/9/03), 849 So. 2d 616, 619.

Appellate courts review a judgment sustaining a peremptory exception raising the objection of no cause of action *de novo.* Ramey v. DeCaire, 869 So. 2d at 119. This standard of review applies because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition. Ramey v. DeCaire, 869 So. 2d at 119.

Plaintiff's Motion to Lodge Supplemental Materials

We first address plaintiff's "motion to lodge materials" with this court. In the motion, plaintiff seeks leave to file purported store surveillance video footage of the underlying incident of September 24, 2008, which was allegedly recorded by store personnel. Plaintiff argues that this video is "vitally important" to receiving a "fair and impartial hearing" from this court. Except as previously noted, pursuant to LSA-C.C.P. art. 931, no evidence may be introduced at any time to support or controvert the objection that a petition fails to state a cause of action. Instead, the exception of no cause of action is a means to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the petition. Southeastern Louisiana University v. Cook, 104 So. 3d at 128. Moreover, as a reviewing court, our determination is based on the record presented on appeal, inasmuch as we are not empowered to receive new or additional evidence. See City of Hammond v. Parish of Tangipahoa, 2007-0574

(La. App. 1st Cir. 3/26/08), 985 So. 2d 171, 176-177. For all of these reasons, plaintiff's "Motion to Lodge Materials" in this court is hereby denied.

Malicious Prosecution

Malicious prosecution actions have never been favored in our law, and the plaintiff in such an action must clearly establish that the forms of justice have been perverted to the gratification of private malice and the willful oppression of the innocent. Johnson v. Pearce, 313 So. 2d 812, 816 (La. 1975). An action for malicious prosecution of a criminal proceeding, such as that asserted by plaintiff herein, requires the following elements: (1) the commencement or continuance of an original criminal proceeding; (2) its legal causation by the present defendant against the plaintiff, who was the defendant in the criminal proceeding; (3) the *bona fide* termination of the criminal proceeding in favor of the present plaintiff; (4) the absence of probable cause for the criminal proceeding; (5) malice; and (6) damage to the plaintiff, conforming to legal standards. Miller v. East Baton Rouge Parish Sheriff's Department, 511 So. 2d 446, 452 (La. 1987).

For purposes of the exception of no cause of action, chief among these elements is the requirement that the plaintiff must allege that the criminal proceeding was **initiated** or **continued** without "probable cause." Probable cause for arrest exists when facts and circumstances within the knowledge of the arresting officer and of which he has reasonable and trustworthy information are sufficient to justify a man of average caution in the belief that the person to be arrested has committed or is committing an offense. Miller v. East Baton Rouge Parish Sheriff's Department, 511 So. 2d at 452. Thus, in the context of an exception of no cause of action, plaintiff's petition must allege sufficient facts, which, if taken as true, disclose that because of the defendants'

actions, the arrest and ensuing prosecution was instituted or continued without probable cause.

Contending that the dismissal of plaintiff's claims should be affirmed, the defendants argue that plaintiff has failed to state a cause of action because the petition contains no allegation (nor can plaintiff show, based on the affidavits of record,) that the arrest and prosecution occurred without probable cause for the criminal proceeding, a necessary element to state a cause of action for (and prevail on) a claim of malicious prosecution.[6]

The probable cause element in a malicious prosecution suit requires the absence of both an honest and a reasonable belief in the guilt of the prosecuted party. Coleman v. Kroger Company, 371 So. 2d 1186, 1188 (La. App. 1st Cir.

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[6]We note that in support of their exception, the defendants attached the affidavits of Officers Ordeneaux and Phillips to their exception of no cause of action. Officer Ordeneaux attested therein that on September 24, 2008, he was dispatched to the Dirt Cheap store to investigate a call that a subject was refusing to leave. Upon arrival, store personnel informed Officer Ordeneaux that the subject, who was identified as plaintiff, refused to leave the store, and that plaintiff had punched Hingle in the sternum. Officer Ordeneaux then interviewed District Manager Cox, who told him that after she observed plaintiff photographing the interior of the store, she asked him to stop photographing because it was against company policy. Cox reported that plaintiff then became verbally combative towards her, so she asked him to leave the store. Cox then reported that as plaintiff was walking toward the store exit, he struck Hingle in the sternum area with a closed fist for no reason and without provocation. Security Officer Spallinger then attempted to control plaintiff and was also struck by plaintiff in the process. Officer Ordeneaux attested that after requesting to see plaintiff's driver's license, plaintiff lunged at him with a closed fist as if to strike him. Officer Ordeneaux attested that, with the assistance of Officer Phillips, he placed plaintiff in handcuffs for his safety and the safety of other civilians on the scene. Officer Ordeneaux stated that plaintiff was subsequently charged with two counts of simple battery for striking Hingle and Spallinger. Officer Ordeneaux specifically testified that plaintiff's arrest was "based on probable cause that he committed a battery on Ms. Hingle and then committed a second battery on Officer Spallinger." He further attested that he believed there was sufficient probable cause for the arrest of plaintiff "after interviewing the eyewitnesses to the batteries and the victims of the batteries."

Officer Phillips attested that he was also dispatched to the Dirt Cheap store regarding the incident at issue in plaintiff's petition, that he was present when Officer Ordeneaux interviewed plaintiff, and that he too interviewed complaining witnesses. Officer Phillips witnessed plaintiff using "loud and abusive language" in response to Officer Ordeneaux's questioning and assisted Officer Ordeneaux in plaintiff's subsequent arrest on charges of simple battery. Officer Phillips likewise attested that plaintiff's arrest was based upon probable cause and that he believed there was sufficient probable cause for the arrest of plaintiff after interviewing the eyewitnesses to the batteries and the victims of the batteries.

Pretermitting whether these affidavits were or could be properly considered on an exception of no cause of action, we reiterate that our determination as to whether plaintiff's petition states a cause of action for malicious prosecution turns solely on the sufficiency of the facts alleged by plaintiff in his petition. Moreover, on review of the ruling on the exception, the issue is not whether plaintiff can "show" these elements at trial, but whether plaintiff has alleged sufficient facts to disclose a cause of action.

1979), writ denied, 372 So. 2d 1041 (La. 1979). The determination of probable cause depends upon the particular facts of each case because the court must decide whether the circumstances were such as to create the belief in a reasonable mind that the plaintiff was guilty of the crime charged. Coleman v. Kroger Company, 371 So. 2d at 1189. The crucial determination in regard to the absence of probable cause is whether the defendant had an honest and reasonable belief in the guilt of the plaintiff at the time charges were pressed. Reese v. City of Baton Rouge, 93-1957 (La. App. 1st Cir. 10/7/94), 644 So. 2d 674, 676-677.

We have thoroughly reviewed plaintiff's lengthy and detailed petition herein. While plaintiff sets forth various complaints against each defendant, we agree that the petition does not contain any allegations that Officers Ordeneaux and Phillips[7] acted without a reasonable belief that there were grounds to arrest plaintiff. Further, plaintiff's petition also fails to allege that any of the named defendants herein, other than Elaine Hingle (and her employer, Hudson) caused or continued his prosecution without "an honest and reasonable belief in the guilt of the plaintiff at the time charges were pressed." See Reese v. City of Baton Rouge, 644 So. 2d at 676-677.

As to Hudson, plaintiff alleges "severe police Misconduct and Abuse was allowed to continue long after the Store had decided not to sign a complaint and after the false charges could have been timely aborted by calling the Police Dispatcher or informing the Officers immediately upon their arrival." As to Elaine Hingle, plaintiff alleges that she "falsely accused" him of battery and "according to the Police Narrative Report, asked Officer Ordeneaux to charge Donley, on her behalf, with Battery while she was in Acadian Ambulance on her

[7]Specifically, the petition does not set forth any factual allegations that would support that these officers acted without an honest and reasonable belief in the guilt of the plaintiff at the time of his arrest and when charges were pressed. However, the arresting officers are **not** named as defendants herein. Thus, our inquiry in this appeal is solely whether the petition discloses a cause of action against those who are named defendants herein, i.e., Hudson and its various employees.

way to Hood Memorial Hospital" while "knowing it to be false and damaging to Donley and causing irreparable harm."

Thus, as to all of the defendants except Hingle and her employer, the defendants are correct in their assertion that plaintiff's petition contains no specific facts supporting this necessary element for a malicious prosecution claim against them. As to these two defendants, however, considering the above-quoted allegations, although plaintiff fails to use the precise terminology "lack of probable cause," we are constrained to find that he has set forth at least "bare bones" allegations which, if accepted as true, could meet this necessary element of a malicious prosecution claim. Thus, after accepting all of the alleged "facts" as true, we find that plaintiff's petition fails to state a cause of action for malicious prosecution as to any of the named defendants, except with regard to Hingle and Hudson. However, to the extent that defendants argue that the dismissal on the exception was proper as to all defendants because plaintiff cannot "show" legal causation,[8] we again note that this case is only before us for review of an exception of no cause of action.[9]

For these reasons, except as to plaintiff's malicious prosecution claims against Hingle and Hudson, as her employer, we find no error in the portion of the judgment of the trial court maintaining the defendants' exception of no cause of

[8]As defendants note in brief, legal causation of the criminal proceedings by the present defendant against the plaintiff, who was the defendant in the criminal proceeding, is another requisite element of a claim for malicious prosecution. See Miller v. East Baton Rouge Parish Sheriff's Department, 511 So. 2d at 452.

[9]Such arguments related to whether plaintiff can or cannot make the requisite "showing" of legal causation are more appropriately addressed on a motion for summary judgment or at a trial on the merits. See Kennedy v. Sheriff of East Baton Rouge Parish, 2005-1418 (La. 7/10/06), 935 So. 2d 669, 690 n.20.

action and dismissing these claims with prejudice.[10]

Defamation

Defamation is a tort which involves the invasion of a person's interest in his or her reputation and good name. Costello v. Hardy, 2003-1146 (La. 1/21/04), 864 So. 2d 129, 139. Four elements are necessary to establish a defamation cause of action: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury. Costello v. Hardy, 864 So. 2d at 139. The fault requirement is often set forth in the jurisprudence as malice, actual or implied. Costello v. Hardy, 864 So. 2d at 139. Thus, in order to survive an exception of no cause of action on a defamation claim, a plaintiff must allege that the defendant, with actual malice or other fault, published a false statement with defamatory words which caused plaintiff damages. See Costello v. Hardy, 864 So. 2d at 139-140. If even one of the required elements of the tort is lacking, the cause of action fails. Costello v. Hardy, 864 So. 2d at 140. By definition, a statement is defamatory if it tends to harm the reputation of another so as to lower the person in the estimation of the community, deter others from associating or dealing with the person, or otherwise expose the person to contempt or ridicule. Costello v. Hardy, 864 So. 2d at 140.

In Louisiana, defamatory words have traditionally been divided into two categories: those that are defamatory per se and those that are susceptible of a defamatory meaning. Costello v. Hardy, 864 So. 2d at 140. Words which

[10]The July 12, 2013 judgment of the trial court dismissed **all** of plaintiff's claims with prejudice. Generally, when the grounds of the objection may be removed by amendment of the petition, the court shall order such amendment within a delay to be set by the court. If the plaintiff fails to amend within the time allowed, the action shall be dismissed. LSA-C.C.P. art. 934; Wells v. St. Tammany Parish School Board, 340 So. 2d 1022, 1024 (La. App. 1st Cir. 1976); Dunaway Realty Company, Inc. v. Pulliam, 364 So. 2d 198, 201 (La. App. 1st Cir. 1978). According to the June 17, 2013 transcript of the hearing on the exception of no cause of action, after the trial court maintained the defendants' exception, the trial court afforded plaintiff fifteen (15) days to file any amended pleadings. On review of the record before us, it appears that plaintiff failed to do so.

expressly or implicitly accuse another of criminal conduct, or which by their very nature tend to injure one's personal or professional reputation, without considering extrinsic facts or circumstances, are considered defamatory per se. Costello v. Hardy, 864 So. 2d at 140. When a plaintiff proves publication of words that are defamatory per se, falsity and malice (or fault) are presumed, but may be rebutted by the defendant. Costello v. Hardy, 864 So. 2d at 140. Injury may also be presumed. Costello v. Hardy, 864 So. 2d at 140. When the words at issue are not defamatory per se, a plaintiff must prove, in addition to defamatory meaning and publication, the elements of falsity, malice (or fault) and injury. Costello v. Hardy, 864 So. 2d at 140.

In "Count A" of his petition, plaintiff alleges that Cox, Hingle, and Spallinger "acting under color of law assisted the Amite City Police Department in fabricating a document that they knew to be false, gave false court testimony, made meritless spurious and groundless charges against [plaintiff], wrote false narrative reports five days after [plaintiff's] trial of December 3, 2008 at City Court, on police Stationary, all this done with the intent to defame Plaintiff" and to thereby "dilute any oral testimony [plaintiff] may present" at the city court trial.

In "Count 4" as to Cox, plaintiff alleges that Cox "falsely states that she viewed Ms[.] Hingle being pushed over the counter and onto the credit card machine," which is not supported by "City Court testimony" of December 3, 2008, or the store video. In "Count 5" against Cox, plaintiff alleges that Cox "falsely stated" that she had seen plaintiff, after he fell to the floor upon his exit from the containment area, continue to take pictures, which "is belied" in the video and Cox's own narrative.

In "Count 1," plaintiff alleges that Hingle "made false statements in her signed narrative report" of December 8, 2008, namely that she was pushed over by plaintiff, a fact that he alleges she denied under oath at the city court trial on

December 3, 2008. In "Count 2" against Hingle, plaintiff alleges that she "lied under oath, thereby depriving [plaintiff] of a fair trial, namely that [plaintiff] had struck her with his fists, in the chest." In "Count 3" against Hingle, plaintiff alleges that Hingle "falsely accused" plaintiff of battery in her police narrative report "knowing it to be false and damaging to [plaintiff] and causing [plaintiff] irreparable harm."

As to defendant Spallinger, in "Counts 3, 4, and 5" plaintiff alleges that Spallinger "deprived [plaintiff] of a fair trial by lying under Oath" at the trial on December 3, 2008. In "Count 6" plaintiff alleges that Spallinger "deliberately defamed" him so that plaintiff's testimony "would be less believable at the City Court Trial, thereby enhancing Hudson's ability to prevail against [plaintiff] should any future trial for damages be filed against Hudson." Plaintiff further alleges that this "was done in the presence of the Court Audience and noted immediately by [plaintiff] and wife on return home at about 8:30 pm [sic] the night of the trial."

The defendants contend that in order to allege a cause of action in defamation, plaintiff was required to allege facts to support that the false and defamatory statements conveyed to a third party were not privileged communications. The defendants contend that plaintiff cannot state a cause of action because the trial testimony and the written narratives and statements made to law enforcement personnel by Cox, Hingle, and Spallinger are privileged communications subject to immunity from plaintiff's claims of defamation.

In Louisiana, privilege relating to a communication is a defense that will defeat a defamation action. Kennedy v. Sheriff of East Baton Rouge, 935 So. 2d at 681. The defense is founded upon the principle that as a matter of public policy, in order to encourage the free communication of views in certain

defined instances, a person is sometimes justified in communicating defamatory information to others without incurring liability. Kennedy v. Sheriff of East Baton Rouge, 935 So. 2d at 681.

Privileged communications may be either: (1) absolute (such as statements by judges in judicial proceedings or legislators in legislative proceedings); or (2) conditional or qualified. Kennedy v. Sheriff of East Baton Rouge, 935 So. 2d at 681. The basic elements of a conditional privilege are: (1) good faith; (2) an interest to be upheld; (3) a statement limited in scope to that interest; (4) a proper occasion for the communication of the statement; and (5) publication in a proper manner and to proper parties only. Kennedy v. Sheriff of East Baton Rouge, 935 So. 2d at 581-682.

With reference to plaintiff's claims that he was defamed by statements made by defendants in their **trial testimony**, we agree with the defendants that Louisiana law grants an absolute privilege to non-litigant witnesses in a judicial proceeding when their testimony is pertinent and material to the proceeding. Zuber v. Buie, 2002-1718 (La. App. 1st Cir. 5/9/03), 849 So. 2d 559, 561, writ denied, 2003-1592 (La. 10/3/03), 855 So. 2d 318. Communications made in **judicial or quasi-judicial proceedings** carry an absolute privilege so that witnesses, bound by their oaths to tell the truth, may speak freely without fear of civil suits for damages. Knapper v. Connick, 96-0434 (La. 10/15/96), 681 So. 2d 944, 946. "The administration of justice requires the testimony of witnesses to be unrestrained by liability to vexatious litigation. The words they utter are protected by the occasion...." Oakes v. Walther, 179 La. 365, 371, 154 So. 26, 28 (1934), (quoting Terry v. Fellows, 21 La. Ann. 375, 376 (1869).

Immunity is granted so that witnesses may speak freely without fear of a civil suit for defamation.[11] Zuber v. Buie, 849 So. 2d at 562.

Applying these precepts, to the extent that plaintiff's defamation claims arise from the **testimony** of the defendants as witnesses at trial, which is absolutely immune from tort liability, plaintiff's petition fails to allege (and cannot establish) a cause of action in defamation against any of these defendants, where no remedy is afforded under the asserted allegations.

With regard to plaintiff's allegations that the **written statements and narratives** provided by Cox, Hingle and Spallinger to the law enforcement personnel set forth a cause of action for defamation, our jurisprudence holds that a good faith report to law enforcement officers of suspected criminal activity may appropriately be characterized as speech on a matter of public concern. Cook v. American Gateway Bank, 2010-0295 (La. App. 1st Cir. 9/10/10), 49 So. 3d 23, 33. Moreover, Louisiana courts have recognized that the public has an interest in possible criminal activity being brought to the attention of the proper authorities, and have extended a conditional privilege to reports made in good faith. Kennedy v. Sheriff of East Baton Rouge, 935 So. 2d at 683. However, as the jurisprudence recognizes, the conditional privilege is abused if the publisher: (a) knows the matter to be false; or (b) acts in reckless disregard as to its truth or falsity. Jalou, II, Inc. v. Liner, 2010-1023 (La. App. 1st Cir. 6/16/10), 43 So. 3d 1023, 1037.

Thus, to state a cause of action in defamation arising from **written statements and narratives provided to law enforcement personnel**, plaintiff must allege that the conditional privilege afforded these types of statements was

[11]Otherwise, fear of a civil suit for damages could lead to two forms of self-censorship. First, the witness might be reluctant to come forward to testify, and once on the stand, his testimony might be distorted by the fear of subsequent liability. Marrogi v. Howard, 2001-1106 (La. 1/15/02), 805 So. 2d 1118, 1124, n. 9.

abused in that the defendants: (a) knew the matter to be false; or (b) acted in reckless disregard as to its truth or falsity.

In "Count A' of his petition, plaintiff alleges that Cox, Hingle, and Spallinger "wrote false narrative reports five days after [plaintiff's] trial . . . on police Stationary, . . . with the intent to defame Plaintiff." Further, in "Count 4" as to Cox, plaintiff states that Cox "falsely states" in her narrative, events she saw that are not supported by City Court testimony," all of which plaintiff disputes. In "Count 1" as to Hingle, plaintiff alleges that she "made false statements in her signed narrative report" after she and another witness had denied in defendant's City Court trial that she was "pushed over by [plaintiff]."

We recognize that statements and written narratives, such as the ones provided herein to law enforcement officers, are afforded a conditional privilege. In this case, plaintiff has alleged specific facts to support that the conditional privilege was abused, in that these defendants gave post-trial information in their "written narratives" that they knew was false and contrary to earlier testimony. Thus, taking these allegations as true, as we must for the purpose of discerning whether the exception of no cause of action was properly maintained, because the law provides a remedy against Cox, Hingle, and Spallinger, should plaintiff's stated allegations be borne out at trial, we are likewise constrained to find the trial court erred in maintaining the defendants' exception of no cause of action as to these specific claims. See Industrial Companies, Inc. v. Durbin, 2002-0665 (La. 1/28/03), 837 So. 2d 1207, 1215-1216.

Accordingly, because we find plaintiff's petition asserts a cause of action for defamation (1) against defendants Cox, Hingle, and Spallinger, and (2) solely with regard to their alleged acts of providing purportedly false written statements and narratives to law enforcement personnel, we must reverse this

portion of the judgment and remand for further proceedings with reference to these allegations only. However, in so finding, we express no opinion as to whether plaintiff's defamation claim arising from the allegedly false written narratives of Cox, Hingle, and Spallinger has any merit or whether plaintiff can or should ultimately prevail on the merits of his allegations.

CONCLUSION

For the above and foregoing reasons, the portion of the July 12, 2013 judgment of the trial court, maintaining defendants' peremptory exception of no cause of action as to plaintiff's defamation claims, purportedly arising from the defendants' prior trial testimony, and dismissing those claims with prejudice, is hereby affirmed. The portion of the judgment, maintaining defendants' exception for failure to state a cause of action for defamation is further affirmed, except with regard to those claims based on the alleged giving of purportedly false written narratives to law enforcement personnel by defendants, Linda Cox, Velma Elaine Hingle, and Alan Spallinger.

The portion of the July 12, 2013 judgment of the trial court, maintaining the defendants' peremptory exception of no cause of action for malicious prosecution and dismissing those claims with prejudice, is also affirmed as to all defendants, except as to defendants, Velma Elaine Hingle and Hudson's Salvage, LLC. The portion of the July 12, 2013 judgment of the trial court, maintaining the defendants' peremptory exception of no cause of action for malicious prosecution as to Hingle and Hudson's Salvage, LLC is hereby reversed. In all other respects, the judgment is affirmed, and the case is remanded for further proceedings consistent with the views expressed herein.

Costs of this appeal are assessed one-half to plaintiff/appellant, Floyd P. Donley, Sr. and one-half to the defendants/appellees, Hudson's Salvage, LLC,

Hudson's Insurance Company, Linda Cox, Velma Elaine Hingle, Alan Spallinger, Lois Peltier, Angie Carter, and Jerry Hollifield.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED; MOTION TO LODGE SUPPLEMENTAL MATERIALS DENIED.