NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 0712

CRAIG J. BRANDNER

VERSUS

GLENN MOLONGUET

Judgment Rendered: DEC 2 3 2014

Appealed from the
Twenty-second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 2013-11030

Honorable August J. Hand, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON AND HIGGINBOTHAM, JJ.

WHIPPLE, C.J.

This is an appeal by plaintiff Craig Brandner from a judgment of the district court that dismissed with prejudice his suit for injunctive relief, through which plaintiff sought an order requiring defendant to remove any comments posted about him on the internet and in other published documents and an order enjoining defendant from engaging in defamatory and harassing behavior toward him and others. For the following reasons, we affirm.

PROCEDURAL HISTORY

On March 5, 2013, Craig J. Brandner, an oral and maxillofacial surgeon practicing in St. Tammany Parish, filed a petition for injunctive relief against Glenn Molonguet, a former patient of Dr. Brandner, alleging that Molonguet had published false information regarding Dr. Brandner's medical care of Molonguet solely for the purpose of causing harm to Dr. Brandner and his medical practice and that Molonguet had harassed other patients of Dr. Brandner who had posted positive reviews about Dr. Brandner. Attached to his petition was a copy of five online postings, dated between June 2012 and November 2012, to a Yahoo website by an individual with a screen name of "Glenn," that were critical of Dr. Brandner's treatment, alleged that Dr. Brandner had cut a nerve, warned other posters to check the CPT (current procedural terminology) codes billed, and were critical of other reviewers who posted positive comments about Dr. Brandner.

Alleging that he would suffer irreparable injury and loss if Molonguet were allowed to continue to harass and libel him, his business and his patients, Dr. Brandner sought a temporary restraining order and thereafter a preliminary and permanent injunction, enjoining Molonguet: from

publishing "any further comments or information about [Dr. Brandner]"; from harassing Dr. Brandner or going onto his properties, including his home and offices; and from harassing internet reviewers who post positive reviews of Dr. Brandner. Brandner further sought judgment ordering Molonguet to remove "any publications, websites, internet blogs, or other published documents that he had published."

In response to the petition, Molonguet filed a peremptory exception raising the objection of no right of action. In support of the exception, Molonguet contended that Dr. Brandner had no right of action to enjoin Molonguet's constitutionally protected speech, that Dr. Brandner had no right of action on his own behalf because he operated his dental practice as a corporation; and that Dr. Brandner had no standing to sue on behalf of his patients or internet reviewers.

Brandner then filed a first supplemental and amended petition, naming as an additional plaintiff Barbara Donham, Dr. Brandner's business manager. In the supplemental and amended petition, plaintiffs detailed the history of Dr. Brandner's treatment of Molonguet in May 2005; Molonguet's dispute about the fees charged for that treatment; and Molonguet's subsequent alleged harassing contacts with Dr. Brandner and Donham, defamatory online posts about Dr. Brandner, vandalism of Dr. Brandner's office, and threatening activities.

According to the amended petition, after the fee dispute initiated by Molonguet was decided in Dr. Brandner's favor by a justice of the peace, Molonguet began to make harassing and threatening phone calls to Dr. Brandner's office and further, after obtaining Dr. Brandner's personal email address, sent harassing emails to Dr. Brandner's personal email account from August 2006 through June 2007. Additionally, plaintiffs contended

that in June 2007, Molonguet sent Dr. Brandner an email threatening to write online reviews about Dr. Brandner, stating that "bad things happen to innocent people" and claiming that he would post the bills from the procedure performed and would claim that Dr. Brandner had damaged his nerve.

Plaintiffs also detailed Molonguet's alleged harassment of Dr. Brandner and Donham after Donham posted a positive online review of Dr. Brandner in June 2007 under a screen name that differed from her full name. According to the amended petition, approximately three months after Donham's review, Molonguet responded to the review and "falsely alleged that Dr. Brandner damaged his nerve." Also after discovering Donham's identity as the individual who posted the positive review, Molonguet emailed Dr. Brandner in November 2007, stating that it had been three days since he was able to "finally identify your biggest fan," that he "still ha[d]n't done anything with" his discovery, and that he did not "know what to do with this information." Molonguet then sent Donham an email at her personal email address in December 2007, which as quoted in the petition, used vile language, stating that he heard that Donham had a "f-cked up kid," that "[t]his is a God" and that he could not tell her "how happy" that made him.

Plaintiffs averred in the amended petition that in addition to the allegedly false postings referenced in the original petition, in March 2008, Molonguet posted a review of Dr. Brandner, allegedly falsifying billing information from the 2005 procedure and falsely alleging that Dr. Brandner had cut his nerve. Then, in May 2008, Molonguet sent Dr. Brandner and Donham email invitations to review his private blogs, which, given the names Molonguet assigned to the blogs, were apparently related to

Molonguet's complaints about Dr. Brandner. According to the amended petition, also in May 2008, Molonguet opened one of his blogs for public viewing.

According to the amended petition, in response to these actions by Molonguet, Dr. Brandner and Donham filed a petition for injunctive relief against Molonguet on May 14, 2008, and, in response to the lawsuit, Molonguet "agreed not to contact Dr. Brandner or Donham by email, mail, phone, fax, or in person and to no longer publish any blogs, websites, or bulletin boards regarding Dr. Brandner or Donham." Thus, plaintiffs did not pursue the litigation. However, according to plaintiffs' allegations in the amended petition, "Molonguet reneged on his 2008 agreement" and again began posting false information about Dr. Brandner on online forums.

Finally, in addition to the phone calls, emails, and online postings, plaintiffs further averred that Molonguet had vandalized Dr. Brandner's office and had performed "threatening activities such as burning candles with dead animals in Dr. Brandner's office parking lot."

According to plaintiffs, Molonguet had obtained personal information about them and had threatened them, and they feared for their safety and well-being, as well as the safety and well-being of their families, "given the continuous harassment by Molonguet." Thus, they sought a TRO and thereafter a preliminary and permanent injunction: (1) enjoining Molonguet from publishing any further comments or information about them; (2) ordering Molonguet to remove "any and all publications, websites, internet blogs, or other published documents" that he had published; (3) ordering Molonguet to stay away from plaintiffs' places of business and not to interfere in any way with their employment; (4) prohibiting Molonguet from "abusing, harassing, stalking, following, or threatening [plaintiffs] or any

person on whose behalf this Petition is filed in any manner whatsoever"; (5) prohibiting Molonguet from contacting plaintiffs "personally, electronically, by phone, in writing or through a third party, without express written permission" of the court; (6) prohibiting Molonguet from going within 100 yards of plaintiffs' residences, apartment complex, or family dwellings; (7) prohibiting Molonguet from going onto properties owned by plaintiffs; and (8) prohibiting Molonguet from harassing reviewers who post positive reviews of plaintiffs.

In response to the supplemental and amended petition, Molonguet filed peremptory exceptions raising various objections, including an exception of no right of action, an exception of "no cause of action and/or no right of action," and an exception of prescription.[1]

In support of the exception of no right of action, Molonguet adopted his argument in support of the exception of no right of action he filed with regard to the original petition, specifically, that Dr. Brandner has no right of action on his own behalf to assert any claim for injury to his dental business, which is operated as a corporation, nor does he have a right of action to assert any claims on behalf of his patients.

With regard to the exception of no cause of action, Molonguet asserted that an injunction generally will not issue to restrain torts such as alleged defamation or harassment and that, because plaintiffs had not alleged past injury or imminent future harm, plaintiffs failed to allege any facts that

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[1]Molonguet also filed a dilatory exception of vagueness, contending that the allegations in the amended petition about "threatened conduct," "threatening activities," and harassing other patients were vague and ambiguous and were inadequate to place him on notice of the facts sought to be proved. He also contended that the petition alleged that he published "false information" without identifying how such information was allegedly false and that, although plaintiffs alleged "irreparable harm," they did not set forth any factual basis for such a claim. However, the exception of vagueness was denied as moot, and it has not been challenged on appeal.

would justify any type of injunction for protected speech and harassment or any limitation on his conduct and right of expression.[2]

With regard to the exception of prescription, Molonguet contended that because the instant suit was filed on March 5, 2013, any claims related to alleged actions by Molonguet that occurred prior to March 5, 2012 were prescribed.

Molonguet also filed a special motion to strike, pursuant to LSA-C.C.P. art. 971,[3] moving for an order striking the petition for injunctive relief and the first supplemental and amended petition for injunctive relief, on the basis that Molonguet's actions addressed an issue of public concern and, therefore, fell within the exception of LSA-C.C.P. art. 971. He further asserted that his statements were not only constitutionally protected, but were also truthful and, thus, that his statements were not actionable. He further sought attorney's fees and costs associated with the filing of the special motion to strike.

Following a hearing on the exceptions and the special motion to strike, the trial court issued written reasons for judgment, finding merit to the exceptions of no right of action, no cause of action, and prescription and to the special motion to strike. The trial court determined that plaintiffs had no right of action to assert any claims for damage allegedly caused to the dental corporation or any claims on behalf of patients or online reviewers. With regard to the exception of no cause of action, improperly titled as an

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[2]As noted by the trial court is its reasons for judgment and judgment, Molonguet improperly designated this exception as an exception of "no right of action" as to the original petition and an exception of "no cause or action and/or no right of action" as to the amended and supplemental petition, when in fact these arguments raise the objection of no cause of action.

[3]Louisiana Code of Civil Procedure article 971(A)(1) provides that a cause of action against a person that arises from any act by the person in furtherance of his constitutional right of free speech in connection with a public issue "shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim."

exception of no right of action, and the special motion to strike, the trial court found merit to the argument that the requested injunctive relief would be an illegal prior restraint of Molonguet's constitutional right of free speech and further found that the evidence submitted by Molonguet in support of the special motion to strike demonstrated that plaintiffs could not establish each and every element of their claim for injunctive relief. Finally, the trial court concluded that all claims asserted by plaintiffs that arose more than one year before the March 5, 2013 date of filing suit were prescribed and any other claims that had not prescribed were to be dismissed pursuant to the special motion to strike and the exception of no cause of action.

Accordingly, by judgment dated January 9, 2014, the trial court: (1) granted the exception of no right of action as to any claims asserted on behalf of "patients," "reviewers," and "other unidentified individuals," but denied the exception as to any claims asserted by Dr. Brandner individually and professionally; (2) granted the exception of no cause of action for injunctive relief, improperly referred to as an exception of no right of action in response to the original petition and as an exception of no cause of action and/or no right of action in response to the supplemental petition, as to any constitutionally protected speech; (3) granted the special motion to strike; (4) granted the exception of prescription as to any claims arising prior to March 5, 2012; (5) denied the exception of vagueness as moot; and (6) dismissed with prejudice all of plaintiffs' claims and demands. The judgment further granted Molonguet's request for attorney's fees and costs incurred in connection with the special motion to strike and ordered that the parties were to "attempt to enter into an agreement" as to reasonable attorney's fees and costs and submit a consent judgment to the court or that,

in the event the parties could not reach an agreement, the court would fix attorney's fees and costs on motion of Molonguet.[4]

From this judgment, Dr. Brandner appeals,[5] contending that the trial court erred in:

(1) Granting the exception of no right of action as to Dr. Brandner's assertion of a claim for damage caused to him operating as a professional corporation on the basis that Dr. Brandner the individual is separable from the dental corporation;

(2) granting the exception of no right of action as to Dr. Brandner's assertion of a claim on behalf of his patients;

(3) granting the exception of no cause of action for injunctive relief by finding that Molonguet's speech is constitutionally protected free speech;

(4) granting the exception of prescription by reasoning that allegations regarding Molonguet's conduct from 2005 to 2008 were attempts to reassert old claims, rather than allegations to illustrate that Dr. Brandner will suffer irreparable harm without injunctive relief; and

(5) granting the special motion to strike.

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[4]While the judgment did not set the specific amount of the award of attorney's fees, we note that in Thibaut v. Thibaut, 607 So. 2d 587, 609 (La. App. 1st Cir. 1992), writs denied, 612 So. 2d 37, 38, 101 (La. 1993), this court specifically held that where a judgment on the merits awarded attorney's fees to be fixed later by a rule to show cause, the amount of the attorney's fees to be awarded was not reviewable by this court in the appeal of that judgment on the merits. This court further noted that pursuant to LSA-C.C.P. art. 2088, the rendition of judgment on the merits and appeal of that judgment did not divest the trial court of jurisdiction to determine, after a hearing, the amount to be awarded as attorney's fees. Thibaut, 612 So. 2d at 609. See also Brandner v. Staf-Rath, L.L.C., 12-62 (La. App. 5th Cir. 5/31/12), 102 So. 3d 186, 188-189 n.3, writs denied, 2012-2196, 2012-2210 (La. 11/21/12), 102 So. 3d 62 (wherein the Fifth Circuit noted that the trial court retained jurisdiction to hear the attorney's fee matter during the pendency of the appeal of the judgment on the merits), and Quantum Resources Management, L.L.C. v. Pirate Lake Oil Corporation, 13-74 (La. App. 5th Cir. 10/30/13), 128 So. 3d 462, 466, writ denied, 2013-2759 (La. 2/14/14), 132 So. 3d 963 (wherein the court held that pursuant to LSA-C.C.P. art. 2088, the trial court retains jurisdiction to award attorney's fees, even while an appeal is pending).

[5]Because Donham did not appeal the January 9, 2014 judgment, the judgment dismissing her claims is final as to her.

DISCUSSION

Claims Asserted by Dr. Brandner on Behalf of the Professional Dental Corporation (Assignment of Error No. 1)

In his first assignment of error, Dr. Brandner contends that the trial court erred in granting the exception of no right of action as to any claims for damage to his dental practice, which is operated as a professional dental corporation.[6] He asserts that because Molonguet posted online comments accusing Dr. Brandner of insurance fraud and dental malpractice and because his reputation is directly linked to the success of the oral surgery business, Dr. Brandner the individual cannot and should not be separated from Brandner, the professional dental corporation.

A peremptory exception raising the objection of no right of action is a threshold procedural device used to terminate a suit brought by a person who has no legally recognized right to enforce the right asserted. An exception of no right of action is designed to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted. LSA-C.C.P. art. 927(A)(5); Joseph v. Hospital Service District No. 2 of Parish of St. Mary, 2005-2364 (La. 10/15/06), 939 So. 2d 1206, 1210. Evidence to support or controvert the exception of no right of action is admissible. Jackson v. Slidell Nissan, 96-1017 (La. App. 1st Cir. 5/9/97), 693 So. 2d 1257, 1261.

A corporation is a separate and distinct legal entity. LSA-C.C. art. 24; Succession of Mydland, 94-0501 (La. App. 1st Cir. 3/3/95), 653 So. 2d 8, 11. As such, only the corporation, not its members, may sue to recover any damages it has sustained. Bayou Fleet Partnership v. Clulee, 13-934 (La.

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[6]Dr. Brandner's dental practice is operated as a corporation bearing the name "Craig J. Brandner, a Professional Dental Corporation."

App. 5th Cir. 9/10/14), ___ So. 3d ___, ___, 2014 WL 4437663 at *3. A shareholder has no separate or individual right of action against third persons for wrongs committed against or damaging to the corporation. Skannal v. Bamburg, 44,820 (La. App. 2nd Cir. 1/27/10), 33 So. 3d 227, 240, writ denied, 2010-0707 (La. 5/28/10), 36 So. 3d 254. This same rule applies even where one person may be the sole shareholder. Mente & Co. v. Louisiana State Rice Milling Co., 176 La. 476, 480, 146 So. 28, 29 (1933). Once established, the separate nature of the corporate existence must be respected. Joseph, 939 So. 2d at 1215.

In support of his contention that he has a right of action to seek injunctive relief on behalf of his dental corporation, Dr. Brandner relies on Greenberg v. De Salvo, 254 La. 1019, 229 So. 2d 83 (1969), cert. denied, 397 U.S. 1075, 90 S. Ct. 1521, 25 L. Ed. 2d 809 (1970). In Greenberg, a lawyer sought injunctive relief and damages for defamatory remarks made against him by the defendant. The trial court rendered judgment enjoining the defendant from speaking or publishing those prior statements in the future. In reversing the trial court's judgment and the appellate court's affirmation of that judgment, the Louisiana Supreme Court concluded that because the plaintiff lawyer had an adequate remedy at law, he had not proved his entitlement to the equitable remedy of an injunction to restrain the defendant's speech. Greenberg, 254 La. at 1026-1032, 229 So. 2d at 86-88.

In so holding, the Louisiana Supreme Court quoted from the West Virginia Supreme Court of Appeals's opinion of Kwass v. Kersey, 139 W. Va. 497, 81 S.E.2d 237 (1954), wherein that court had stated, "The property right in the practice of a profession is *ex necessitate*, an intangible property, connected with the personality of a practitioner of such profession. ... The

personality of the plaintiff and his professional standing as a lawyer cannot be separated on a rational basis." Greenberg, 254 La. at 1032, 229 So. 2d at 88. However, a complete reading of the West Virginia court case and the court's analysis therein demonstrates that Dr. Brandner's argument takes this statement out of context. Notably, the West Virginia was analyzing whether a property right was at issue, which property right could be protected by injunctive relief. Kwass v. Kersey, 139 W. Va. at 507 & 514-515, 81 S.E.2d at 242 & 246. There was no discussion therein of whether the plaintiff lawyer operated his law practice as a corporation or the effect that such incorporation would have on his standing to bring suit.

Moreover, the entirety of the Louisiana Supreme Court's quote from the Kwass opinion demonstrates that the Louisiana Supreme Court was quoting from Kwass for the proposition that the remedy of injunctive relief will not lie where there is an adequate remedy at law. See Greenberg, 254 La. at 1032, 229 So. 2d at 88. And, more importantly, we note that there was no suggestion in the Greenberg case that the plaintiff lawyer operated his practice as a corporation and, thus, no consideration of the issue of whether he would have standing to pursue relief on behalf of such a corporation. Accordingly, we find Greenberg to be inapposite herein, and we find no error in the trial court's determination that Dr. Brandner had no individual right of action against Molonguet for wrongs allegedly committed against the dental corporation.[7] Because Dr. Brandner does business in corporate form and reaps the benefits of incorporation, he cannot individually assert a claim belonging to the corporation. Bayou Fleet

[7]Notably, as stated above, the exception of no right of action was denied as to claims asserted by Dr. Brandner individually and professionally.

Partnership, ___ So. 3d at ___, 2014 WL 4437663 at *3. This assignment of error lacks merit.

Claims Asserted by Dr. Brandner on Behalf of His Patients and Online Reviewers (Assignment of Error No. 2)

Dr. Brandner next contends that he is the proper party to bring suit against Molonguet on behalf of his patients and online reviewers and, thus, that the trial court erred in granting the exception of no right of action as to those claims. Citing Singleton v. Wulff, 428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976), Dr. Brander claims that the courts have long recognized that a person may sue on behalf of a third party where: (1) there is an intimate relationship between the two such that their rights are entwined, and (2) the third party is obstructed from pursuing the claim himself. He further claims that in the instant case, such a relationship exists between him and his patients who are online reviewers.

In Singleton, the United States Supreme Court stated that federal courts must hesitate before resolving a controversy on the basis of rights of third persons not parties to the litigation and that its general rule was that ordinarily, one may not claim standing in the United States Supreme Court to vindicate the constitutional rights of some third party. Singleton, 96 S. Ct. at 2874. However, the Court noted that there were two elements it considered to determine whether the rule should apply in a particular case: (1) the relationship of the litigant to the person whose right he seeks to assert and whether the "enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue"; and (2) where such a relationship does exist, whether there is some genuine obstacle to the third party asserting his or her own rights. Singleton, 96 S. Ct. at 2874-2875.

In the instant case, even pretermitting whether this federal principle applies herein, Dr. Brandner neither alleged in the petitions nor presented evidence to establish that his patients could not pursue their own rights with regard to negative comments posted in reply to their online posts. Accordingly, we find no error in the trial court's determination that Dr. Brandner likewise has no right of action to assert any claims on behalf of his patients and online reviewers.

Granting of Exception of No Cause of Action and Dismissal of Dr. Brandner's Request for Injunctive Relief
(Assignment of Error No. 3)

Dr. Brandner next contends that the trial court erred in granting the exception of no cause of action as to his request for injunctive relief based on a finding that Molonguet's speech is constitutionally protected free speech. In support of this assignment of error, Dr. Brandner argues that Molonguet's publications were defamatory *per se*, that Molonguet cannot rebut the presumption that the publications were false and made with malice, and that an injunction is a permissible remedy for defamation and is justified herein given Molonguet's seven-year pattern of harassment.

We note that although the trial court, in written reasons, addressed the exception of no cause of action and the special motion to strike together, its reasoning for granting the exception of no cause of action appears to be based on its conclusions that "the requested injunctive relief would be an illegal prior restraint of [Molonguet's] constitutional right of free speech" and that "[p]rotected speech may not be restrained by injunction."

In ruling on an exception of no cause of action, the court must determine whether the law affords **any relief** to the plaintiff if he proves the factual allegations in the petition and attached documents at trial. Home Distribution, Inc. v. Dollar Amusement, Inc., 98-1692 (La. App. 1st Cir.

9/24/99), 754 So. 2d 1057, 1060. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action, and all facts pleaded in the petition must be accepted as true. LSA-C.C.P. art. 931; Walton Construction Company, L.L.C. v. G.M. Horne & Company, Inc., 2007-0145 (La. App. 1st Cir. 2/20/08), 984 So. 2d 827, 832. When a petition is read to determine whether a cause of action has been stated, it must be interpreted, if possible, to maintain the cause of action instead of dismissing the petition. Brister v. GEICO Insurance, 2001-0179 (La. App. 1st Cir. 3/28/02), 813 So. 2d 614, 617. Any reasonable doubt concerning the sufficiency of the petition must be resolved in favor of finding that a cause of action has been stated. Brister, 813 So. 2d at 617. Moreover, if the grounds of the objection may be removed by amendment of the petition, the judgment granting the exception shall order such amendment within the delay allowed by the court. LSA-C.C.P. art. 934.

The reviewing court conducts a *de novo* review of a trial court's ruling granting an exception of no cause of action, because the exception raises a question of law, and the lower court's decision is based only on the sufficiency of the petition. 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.

At the outset, we note that while Molonguet, through his exceptions raising the objection of no cause of action, asserts that Dr. Brandner has failed to assert facts that would support a claim for an injunction, a request for injunctive relief is not a *cause of action*, but rather an equitable *remedy* sought to prevent irreparable injury from the wrongs alleged in the underlying cause of action. See Vartech Systems, Inc. v. Hayden, 2005-2499 (La. App. 1st Cir. 12/20/06), 951 So. 2d 247, 262 (noting that injunctive relief was not a proper remedy where plaintiff had asserted a

cause of action for defamation); see also Louisiana Crisis Assistance Center v. Marzano-Lesnevich, 878 F. Supp. 2d 662, 669 (E.D. La. 2012) ("Generally, a request for injunctive relief is not considered an independent 'cause of action,' but rather a remedy sought to redress the wrongs alleged in the underlying substantive claims."). 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. Walton Construction Company, L.L.C., 984 So. 2d at 832. A cause of action is a matter of substance concerned with the violation of a right, not a matter of remedy. Coulon v. Gaylord Broadcasting, 433 So. 2d 429, 430 (La. App. 4th Cir.), writ denied, 439 So. 2d 1073 (La. 1983).

In the instant case, the underlying cause of action asserted by Dr. Brandner to support his request for the remedy of injunctive relief is defamation.[8] 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. The elements necessary to establish a defamation cause of action are defamatory words, publication, falsity, malice (actual or implied), and resulting injury. Vartech Systems, Inc., 951 So. 2d at 261.

With regard to any cause for action for defamation that the trial court and this court have determined Dr. Brandner has a right to assert (i.e., only

[8]With regard to the allegations of harassing phone calls and emails to Dr. Brandner in 2007 and 2008, those allegations are addressed in our discussion of the exception of prescription. Moreover, while Dr. Brandner also alleged in the amended petition that Molonguet had vandalized his office and had burned candles with dead animals in his office parking lot, we note that the trial court dismissed all of plaintiffs' claims with prejudice, and Dr. Brandner has not assigned error to the dismissal of any alleged causes of action for destruction of property or trespass. Accordingly, we are constrained to find the judgment as to those causes of action is final.

those arising from conduct by Molonguet that affected Dr. Brandner personally and professionally), Dr. Brandner alleged in the original and amended petitions filed herein the following facts, which for purposes of the exception of no cause of action must be taken as true: Molonguet posted on the internet false statements about Dr. Brandner's treatment of him, specifically that Dr. Brandner had damaged Molonguet's nerve, and about Dr. Brandner's business practices in regard to the billing procedure for the 2005 procedure; Molonguet posted the false statements with the sole intent of harming Dr. Brandner; and as a result of Molonguet's actions, Dr. Brandner's reputation has been harmed.

Accepting these allegations as true, we cannot conclude that Dr. Brandner failed to allege facts to support a cause of action for defamation. Moreover, while it is true that the remedy sought by Dr. Brandner was injunction and that courts are generally reluctant to issue an injunction to restrain torts such as defamation or harassment, we likewise cannot conclude that under the facts alleged, if taken as true, the law does not afford **any relief** to Dr. Brandner, given the availability of monetary damages in defamation actions. In such a situation, a plaintiff should be allowed to amend his petition to assert a proper remedy. See generally Badeaux v. Southwest Computer Bureau, Inc., 2005-0612 (La. 3/17/06), 929 So. 2d 1211, 1217-1218 (where the plaintiffs failed to state a cause of action for damages under a particular statute that only authorized the remedy of injunctive relief, the Supreme Court remanded the matter to allow the plaintiffs to amend the petition to state a cause of action for the general tort of defamation).

Nonetheless, because, as discussed below, we conclude that the trial court correctly determined, in its consideration of Molonguet's special

motion to strike, that Dr. Brandner could not establish the elements of his claim for defamation and affirm the trial court's dismissal of the suit on that basis, we decline to vacate or amend the granting of the exception of no cause of action or remand for the opportunity to amend the petitions, as such actions would be futile.

Prescription as to Claims Arising Prior to March 5, 2012 (Assignment of Error No. 4)

In this assignment of error, Dr. Brandner contends that the trial court erred in granting the exception of prescription as to any conduct by Molonguet prior to March 5, 2012, one year prior to Dr. Brandner's filing of suit, where he filed suit within ten months of Molonguet's first online posting in this "new round of harassment" and he "necessarily" had to recount Molonguet's "seven-year campaign" of harassment and defamation to justify injunctive relief.

Liberative prescription runs against all persons unless an exception is established by legislation. LSA-C.C. art. 3467. If the facts alleged in a petition do not show that a claim has prescribed, the burden is on the party raising the objection of prescription to prove it. However, if a claim is prescribed on the face of the pleadings, the burden is on the plaintiff to show that prescription has not tolled because of an interruption or a suspension of prescription. Brister, 813 So. 2d at 616.

Causes of action arising from conduct that is delictual in nature, such as defamation and harassment, are subject to LSA-C.C. art. 3492's one-year prescriptive period, which commences to run from the date the injury or damage is sustained. See Clark v. Wilcox, 2004-2254 (La. App. 1st Cir. 12/22/05), 928 So. 2d 104, 112, writ denied, 2006-0185 (La 6/2/06), 929 So. 2d 1252 (claims for defamation are subject to one-year prescriptive period),

and see generally Weathersby v. Jacquet, 2001-1567 (La. App. 3rd Cir. 4/3/02), 813 So. 2d 1135, 1139 (claim for sexual harassment is subject to one-year prescriptive period).

With regard to the claims of defamation, in the original and amended petitions, Dr. Brandner alleged that Molonguet communicated a false statement to a third party in March of 2006 about Dr. Brandner's treatment of him and posted false comments about him online from September 2007 through May 2008 and then later from June 2012 through November 2012. Given that Dr. Brandner did not file the instant suit until March 5, 2013, we agree with the trial court that all causes of action in tort related to alleged delictual conduct occurring prior to March 5, 2012, are prescribed.

With regard to Dr. Brandner's argument that he had to recount Molonguet's "seven-year campaign" of harassment and defamation to the justify the injunctive relief sought, we note that, as stated above, injunction is a remedy, not a separate cause of action. Thus, the right to seek injunctive relief remains viable only for any underlying causes of action that are not prescribed. Nolan v. Jefferson Parish Hospital Service District No. 2, 01-175 (La. App. 5th Cir. 6/27/01), 790 So. 2d 725, 733. To the extent that Dr. Brandner is seemingly asserting a "continuing tort" theory in contending that he had to recount Molonguet's "seven-year campaign" against him to the justify injunctive relief, we note that where continuing tortious conduct causes continuing damages, the "continuing tort" doctrine provides that prescription does not commence to run until the conduct causing damage is abated. Bustamento v. Tucker, 607 So. 2d 532, 538-539 (La. 1992). However, defamation is not a continuing tort. Rather, each and every publication, or communication, of a defamatory statement to a third person constitutes a *separate* cause of action. Reed v. Baton Rouge Crime

Stoppers, 2011-0618 (La. App. 1st Cir. 11/9/11), 2011 WL 5419678, *1 (unpublished); Wiggins v. Creary, 475 So. 2d 780, 781 (La. App. 1st Cir.), writ denied, 478 So. 2d 910 (La. 1985). Thus, we find no error in the trial court's finding that all causes of action for defamation (and, consequently, the right to pursue any remedies relating to those causes of action, including injunctive relief) arising prior to March 5, 2012 have prescribed.[9]

Moreover, with regard to any alleged actions of harassment related to telephone calls and personal emails sent to Dr. Brandner, Dr. Brandner has not alleged any such harassing conduct by Molonguet since the year 2008, thus belying any contention of a continuing tort as to such allegedly harassing actions by Molonguet. Accordingly, while we do not condone the conduct at issue, as described by Dr. Brandner, we are constrained to find no error in the trial court's factual determination that any causes of action for harassment that may have been asserted by Dr. Brandner with regard to alleged conduct by Molonguet that occurred prior to March 5, 2012, are prescribed.

Accordingly, considering the foregoing and the record as a whole, we must affirm the portion of the trial court's judgment granting the exception of prescription as to any causes of action for defamation arising prior to March 5, 2012.[10]

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[9]We note that in brief, Dr. Brandner contends that he is not asserting claims regarding Molonguet's actions from 2005 through 2008. Thus, to the extent that Dr. Brandner is not attempting to assert any causes of action for alleged delictual actions occurring prior to March 5, 2012, any challenge to the portion of the trial court's judgment granting the exception of prescription as to such claims is seemingly moot.

[10]Because any causes of action for conduct by Molonguet occurring prior to March 5, 2012, are clearly prescribed, we find it unnecessary to address the effect of Dr. Brandner's abandonment of the earlier filed suit against Molonguet for some of this alleged conduct.

This assignment of error also lacks merit. [11]

Granting of Special Motion to Strike
(Assignment of Error No. 5)

In his final assignment of error, Dr. Brandner contends that the trial court erred in granting Molonguet's special motion to strike where he demonstrated that Molonguet's speech is unprotected defamation and that he will suffer irreparable harm if Mologuet's conduct is not enjoined.

Louisiana Code of Civil Procedure article 971 was enacted by the legislature as a procedural device to be used in the early stages of litigation to screen out meritless claims brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. Thinkstream, Inc. v. Rubin, 2006-1595 (La. App. 1st Cir. 9/26/07), 971 So. 2d 1092, 1100, writ denied, 2007-2113 (La. 1/7/08), 973 So. 2d 730. The intent of Article 971 is to encourage continued participation in matters of public significance and to prevent this participation from being chilled through an abuse of judicial process. Lamz v. Wells, 2005-1497 (La. App. 1st Cir. 6/9/06), 938 So. 2d 792, 796. To this end, it is the intention of the legislature that LSA-C.C.P. art. 971 shall be construed broadly. Davis v Benton, 2003-0851 (La. App. 1st Cir. 2/23/04), 874 So. 2d 185, 190.

Pursuant to article 971, a cause of action against a person arising from any act in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitutions in connection with a public

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[11] In so holding, we are cognizant of the concerns of Dr. Brandner that Molonguet's past behavior, which, at least as to Donham, included inexcusably vile comments and curse words, is indicative of possible future behavior, which appears to have begun anew with this "new round" of online comments by Molonguet.

We note that the law protects against cyberstalking, which includes repeated electronic communications for the purpose of harassing any person. LSA-R.S. 14:40.3(B)(2). While we cannot conclude that the conduct that is properly before us in this suit is actionable tortious defamation, we express no opinion as to any other relief that may be available.

issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim. LSA-C.C.P. art. 971(A)(1). Accordingly, LSA-C.C.P. art. 971 provides a burden-shifting mechanism, whereby once the mover first establishes that the cause of action against him arises from an act by him in the exercise of his right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue,[12] the burden then shifts to the plaintiff to demonstrate a probability of success on the claim. Thinkstream, Inc., 971 So. 2d at 1100.

The granting of a special motion to strike presents a question of law, and appellate review of questions of law is simply a review of whether the trial court is legally correct or legally incorrect. Starr v. Boudreaux, 2007-0652 (La. App. 1st Cir. 12/21/07), 978 So. 2d 384, 388.

With regard to whether Molonguet's online comments directed at Dr. Brandner and his treatment of Molonguet which were posted in the year prior to the filing of suit herein constituted the exercise of his right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue, we note that the online posts about Dr. Brandner's treatment of Molonguet included: statements that Dr. Brandner had cut or nipped a nerve in his mouth; statements indicating his belief that Dr. Brandner had billed Molonguet for services he never received; and suggestions to others that they check the CPT codes under which Dr. Brandner billed for services. Construing LSA-C.C.P. art. 971 broadly, as we must do, we conclude that these statements concern a matter of public

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[12]Louisiana Code of Civil Procedure article 971(F)(1) defines "[a]ct in furtherance of a person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue" to include "[a]ny written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."

concern and, thus, that Molonguet carried his initial burden of establishing that the subject matter of the viable causes of action against him stems from actions relating to free speech in connection with a public issue. See Davis, 874 So. 2d at 190. Accordingly, the burden shifted to Dr. Brandner to establish the probability of success on his defamation claim against Molonguet.

As set forth above, in order to prevail on a cause of action for defamation, the plaintiff has the burden of proving: defamatory words, publication, falsity, malice (actual or implied), and resulting injury. Vartech Systems, Inc., 951 So. 2d at 261.

With regard to the element of falsity of the statements regarding Dr. Brandner having cut or damaged a nerve in Molonguet's mouth, we note that while in his affidavit, Dr. Brandner denied that he told Molonguet or his wife that he had "nicked a nerve" or that he told the oral surgeon from whom Molonguet later sought treatment that he had "disrupted" Molonguet's nerve, Dr. Brandner's own handwritten medical records attached to his affidavit contain a notation that "even carefully removing lesion ***disrupted*** INF alveolar nerve."[13] (Emphasis added). Moreover, Molonguet's wife attested that immediately after her husband's dental procedure, Dr. Brandner came into the waiting room and told her that he had "nicked" a nerve during the procedure. And the record further includes an approval from the plan administrator of Molonguet's insurer, verifying coverage for a subsequent procedure to be performed to "repair[] a damaged nerve."

[13]Notably, Dr. Brandner explained in his affidavit that the cyst on Molonguet's left mandible that was to be removed was "wrapped around his inferior alveolar nerve."

In light of the foregoing, we conclude that the record demonstrates that Dr. Brandner will be unable to carry his burden of demonstrating the falsity of any statements by Molonguet that a nerve in his mouth was cut.

Furthermore, with regard to the statements by Molonguet indicating his belief that, and suggesting that, Dr. Brandner had billed Molonguet for services he never received, Dr. Brandner contends that, because they accuse him of criminal activity, i.e., insurance fraud, these statements are defamatory *per se*, thus giving rise to a presumption of falsity, malice, and injury. While it is true that allegations of criminal conduct, express or implied, are defamatory *per se*, and that when a plaintiff proves publication of those words, the elements of falsity and malice are presumed, we note that these presumptions may be rebutted. Costello, 864 So. 2d at 140.

Malice, for purposes of the tort of defamation, is a lack of reasonable belief in the truth of the allegedly defamatory statement. Thinkstream, Inc., 971 So. 2d at 1101. Thus, only when a court finds that a statement has been made without reasonable grounds for believing it to be true can the person making the statement be found to be motivates by malice or ill will. Thinkstream, Inc., 971 So. 2d at 1102.

To demonstrate his belief in the truth of his statements regarding claims of overbilling and his lack of malice or disregard for the truth thereof, Molonguet submitted his own affidavit; the affidavit of Christine Kraft, the owner of a company that engaged in review of medical bills; and a report by Dr. Matthew D. Bojrab, a maxillofacial surgeon engaged by Kraft to review the medical and billing records at issue herein. In his affidavit, Molonguet outlined: the provisions of the consent form he signed in connection with the dental procedure at issue; Dr. Brandner's record of the services rendered; the discrepancies he believed existed between Dr. Brandner's medical records

and billing; information he found on the internet that explained billing code options; and documentation he had reviewed that summarized guidelines for CPT coding.

Additionally, in her affidavit, Kraft attested that based on her review of the medical records at issue and the insurance billing documentation, as well as the medical report of Dr. Bojrab, in which he opined that the use of certain CPT codes in Dr. Brandner's billing for the procedure at issue was inappropriate, her professional opinion was that the documentation provided by Dr. Brandner and his staff was inadequate to support the use of certain CPT codes that were billed.

Accordingly, considering the foregoing and the record as a whole, we must conclude that any presumption of malice with regard to Molonguet's statements regarding improper billing was rebutted herein. The evidence neither suggests that Molonguet knew the statements were false, nor that he acted with reckless disregard for the truth. Thus, Dr. Brandner failed to meet his burden of proof establishing a probability of success on this claim.[14] See generally Starr, 978 So. 2d at 392. Having found lack of support for one of the elements of Dr. Brandner's claim of defamation as to these statements, we need not consider the remaining elements of that claim. See Vartech Systems, Inc., 951 So. 2d at 261 (if even one of the elements of a claim for defamation is absent, the cause of action fails).

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[14]We note that we find no merit to Dr. Brandner's contention that resolution in his favor of the justice-of-the-peace litigation regarding the fee dispute operated as *res judicata* as to Molonguet's allegations of the use of improper CPT codes. While Molonguet alleged overpayment of the oral surgery bill in the justice-of-the-peace complaint, a review of his complaint reveals that this allegation was based on his contention that prior to the procedure Dr. Brandner had agreed to discount his fee and to accept a payment of $3,300.00 from Molonguet as payment in full, which amount Molonguet's wife paid prior to the procedure. Nothing about the CPT codes billed to his insurer was addressed therein.

Considering the foregoing, we find no error in the trial court's judgment granting the special motion to strike as to Dr. Brandner's cause of action for defamation or in its dismissal of Dr. Brandner's suit.

CONCLUSION

For the above and foregoing reasons, we affirm the January 9, 2014 judgment dismising with prejudice of Dr. Brandner's suit for injunctive relief on the bases that: he has no right of action to pursue claims on behalf of his dental corporation or his patients and online reviewers; any causes of action for defamation asserted by Dr. Brandner which arose prior to March 5, 2012, have prescribed; and the trial court properly granted the special motion to strike as to any causes of action for defamation that had not prescribed. Costs of this appeal are assessed against Dr. Craig Brandner.

AFFIRMED.