

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0619

JOHN RICHARD ROMBACH

VERSUS

STATE OF LOUISIANA THROUGH THE DIVISION OF  
ADMINISTRATION, OFFICE OF RISK MANAGEMENT,<sup>[1]</sup> STATE  
OF LOUISIANA THROUGH THE LEGISLATIVE AUDIT  
ADVISORY COUNCIL OF THE LOUISIANA LEGISLATURE,  
STATE OF LOUISIANA THROUGH THE LEGISLATIVE FISCAL  
OFFICE, STATE OF LOUISIANA THROUGH THE OFFICE OF THE  
LEGISLATIVE AUDITOR, STEVEN J. THERIOT, CPA, DARYL G.  
PURPERA, CPA, CFE, GLENN A. KOEPP, ESQ., SHERRY L.  
PHILLIPS-HYMEL, JAMES WAYNE TUCKER, JOEL THOMAS  
CHAISSON, II, ESQ., CHARLEY ROME, AND ALFRED W.  
"BUTCH" SPEER, ESQ.

**DATE OF JUDGMENT: DEC 23 2015**

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT  
NUMBER C604487, SECTION 26, PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

HONORABLE ROBERT DOWNING, JUDGE PRO TEMPORE

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John Christopher Alexander, Sr.  
Baton Rouge, Louisiana  
E. Wade Shows

Counsel for Plaintiff-Appellant  
John R. Rombach  
Counsel for Defendants-Appellees

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<sup>1</sup> Defendant, State of Louisiana through the Division of Administration, Office of Risk Management was dismissed from the lawsuit in 2013.

Grant J. Guillot  
Baton Rouge, Louisiana

State of Louisiana through the  
Legislative Audit Advisory Council of  
the Louisiana Legislature; the State of  
Louisiana through the Legislative  
Fiscal Office; Steven J. Theriot; Daryl  
G. Purpera; Glenn A. Koepp; Sherry  
L. Phillips-Hymel; James W. Tucker;  
Joel Thomas Chaisson, II; Charley  
Rome; Alfred W. "Butch" Speer; and  
the Office of the Legislative Auditor

T. Allen Usry  
New Orleans, Louisiana

Counsel for Defendants-Appellees  
the Legislative Audit Advisory  
Council of the Louisiana Legislature;  
The State of Louisiana through the  
Legislative Fiscal Office; Steven J.  
Theriot; Glenn A. Koepp; Sherry L.  
Phillips-Hymel; James W. Tucker;  
Joel Thomas Chaisson, II; Charley  
Rome; and Alfred W. "Butch" Speer

\* \* \* \* \*

BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

**Disposition: AFFIRMED.**

CHUTZ, J.

Plaintiff-appellant, John Richard Rombach, appeals the trial court's judgment dismissing his claims against defendants-appellees, the Legislative Audit Advisory Council of the Louisiana Legislature, the State of Louisiana through the Legislative Fiscal Office, Steven J. Theriot, Daryl G. Purpera, Glenn A. Koepp, Sherry L. Phillips-Hymel, James Wayne Tucker, Joel Thomas Chaisson, II, Charley Rome, Alfred W. "Butch" Speer, and the Office of the Legislative Auditor,<sup>2</sup> alleging that due to tortious conduct committed by defendants, he voluntarily resigned from public employment. On our own motion, we find that despite multiple amendments to his petition, Rombach has failed to state a cause of action.<sup>3</sup> Therefore, we raise and sustain a peremptory exception objecting on the basis of no cause of action and affirm the trial court's dismissal of his claims.

#### I. THE ALLEGATIONS OF THE PETITION

The following recitation is according to the allegations of Rombach's twice amended petition. Rombach was employed as a fiscal officer for the State of Louisiana from August 1998 until March 17, 2005. He was "an outspoken proponent of fiscal responsibility," tasked with the job of analyzing the potential cost to the State of newly-introduced legislation and specifically "to determine the probability that particular bills would either raise or lower taxes." Rombach did his job honestly and accurately; a "favorable report from [his] office was essential to

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<sup>2</sup> Although the trial court's judgment dismissed Alfred W. "Butch" Speer and the Office of the Legislative Auditor, both of these defendants were named in the original petition but not in the amendments to the petition.

<sup>3</sup> Because the Louisiana Supreme Court has recently held that an appellate court's rendition of a judgment based on an issue raised *sua sponte*, without providing the parties an opportunity to brief that issue, constituted legal error, see *Thompson v. Winn-Dixie Montgomery, Inc.*, 2015-0477 (La. 10/14/15), \_\_\_ So.3d \_\_\_, \_\_\_; *Merrill v. Greyhound Lines, Inc.*, 2010-2827 (La. 4/29/11), 60 So.3d 600, 602; *Wooley v. Lucksinger*, 2009-0571 (La. 4/1/11), 61 So.3d 507, 564-65, on November 18, 2015, this court directed the parties to show cause why the issue of whether plaintiff has stated a cause of action should not be addressed *sua sponte*. Rombach and all defendants have briefed the issue.

getting legislation passed ... and many 'pork barrel' spending projects were rejected based solely upon [his] unfavorable fiscal analysis."

According to his petition, Rombach consequently "created many political enemies—individuals who felt their respective pieces of legislation were unfairly targeted by [him] as placing an unreasonable burden on the public fisc." Because he was "generally well-liked" and "enjoyed bipartisan support during his extended tenure," Rombach's political opponents were unable to legally remove him from office.<sup>4</sup> Therefore, "a number of legislators and legislative staff members initiated a plan to 'force' [Rombach] out of his position."

Rombach averred that the plan was based on a "longstanding (but non-codified) custom or practice of paying state employees any increase in ... salary retroactive to [the employee's] anniversary date." While approval from the Joint Legislative Committee on the Budget (JLCB) was required for salary increases, Rombach, in accordance with the regular practice of the Legislative Fiscal Office (LFO), directed an LFO accountant to issue a one-time payment to Rombach as a salary adjustment retroactive to his August anniversary date. His "detractors" also identified Rombach's per diem (or overtime during the period preceding and during a legislative session) and car allowance as "salary" and challenged the issuance of payments to him for these items without JCLB approval.

Rombach alleged that a Fiscal Analyst in the LFO, whom Rombach had advised was to be terminated from employment, defendant Charley Rome, complained about the payments to Rombach to non-defendants, Louisiana legislature members. State Senator Donald Hines and State Representative Joe Salter in turn ordered the Louisiana Legislative Auditor, defendant Steven Theriot, to investigate Rome's complaints. On October 21, 2004, at the completion of his

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<sup>4</sup> See La. R.S. 24:602, requiring the involuntary removal of a financial officer only upon a majority vote of both houses.

investigation, Theriot issued a report setting forth the gist of Rome's complaints and made several recommendations.<sup>5</sup> Based on information and belief, Theriot turned over actual authorship of the report to defendant Daryl G. Purpera, whom Rombach identified as a leader in the Office of the Legislative Auditor.

Rombach also claimed that Chief Budget Analyst and Director of Senate Fiscal Services, defendant Sherry L. Phillips-Hymel, and Secretary of the Senate, former Assistant Secretary of the Senate, and Director of the Legislative Bureau, defendant Glenn A. Koepp, participated in producing a malevolent report to a JLCB subcommittee based on Theriot's October 21, 2004 report. He alleges Phillips-Hymel and Koepp also participated in a meeting on March 16, 2005, in which Koepp threatened Rombach on behalf of "the legislative leadership" that Rombach either retire quietly or face financial ruin and possible criminal and ethical violations charges. At that March 16, 2005 meeting, Koepp stated he was not saying that Rombach broke any laws, but nevertheless, Koepp would still charge and bankrupt him. The following day, Rombach voluntarily tendered his resignation.

Rombach's petition states his detractors "were compelled to move forward" on the basis of the false charges "ultimately bringing [Rombach] before the Louisiana Board of Ethics on July 23, 2010." On August 20, 2010, all charges against Rombach were dismissed by the Board of Ethics.

Additionally, Rombach asserted allegations against defendant James W. Tucker, a present and former member and speaker of the Louisiana House of Representatives, and defendant Joel Thomas Chaisson, II, a present and former member of the Louisiana House of Representatives and President of the Louisiana Senate. Rombach averred that subsequent to the dismissal of the ethics charges,

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<sup>5</sup> These recommendations included that the LFO: should adopt written policies and procedures for all salary increases; cease paying the fiscal officer a car allowance pending approval by the JLCB; and cease paying the fiscal officer and other LFO employees per diem pending approval by the JLCB. In his second amending petition, Rombach noted that the JLCB subsequently enacted rules specifically placing LFO emoluments under the purview of the JLCB.

Tucker and Chaisson repeatedly blocked Rombach's efforts for employment between 2009 and 2013 "via threats to interested employers regarding Rombach's alleged dishonest past."

With these factual allegations, Rombach contends he is entitled to damages against all defendants for defamation, malicious prosecution, abuse of process, and civil rights violations under 42 U.S.C.A. §1983.

## II. PROCEDURAL BACKGROUND

Rombach filed an original, 18-page petition for damages on August 22, 2011. On September 24, 2012, he filed a 27-page amended petition. In response, all defendants filed a dilatory exception of vagueness and peremptory exceptions raising objections of no cause of action and prescription.

After a hearing, the trial court issued a judgment (1) maintaining defendants' objection of prescription and dismissing Rombach's defamation claim with prejudice; and (2) maintaining defendants' objection of vagueness and ordering Rombach to "state a cause of action." Rombach did not appeal that judgment.

In written reasons for judgment, the trial court stated that Rombach could not defeat prescription on any cause of action related to the October 21, 2004 Theriot report. The trial court also found that as to any remaining allegations, Rombach's petition did not contain "sufficient facts regarding [defendants'] role[s], if any, in [the Board of] Ethics [p]roceedings or the institution thereof."

On July 26, 2013, Rombach filed a 12-page, second, amended petition wherein he expressly re-stated and re-alleged "[a]ll of the remaining claims raised" in his original and amended petitions. All defendants filed, among other things, dilatory exceptions objecting on the basis of vagueness as well as nonconformity of the petition to the requirements of La. C.C.P. art. 891 (requiring a short, clear, and concise statement of all causes of action arising out of, and of the material facts of, the transaction or occurrence of the subject matter of the litigation). Given the

multiple amendments, including the second one that the trial court ordered, all defendants filed a peremptory exception of no cause of action, urging that Rombach had, accordingly, failed to aver material facts necessary to state a cause of action against any defendant. Therefore, defendants sought dismissal of Rombach's petition. The trial court apparently denied the exceptions.<sup>6</sup>

All defendants filed another peremptory exception of no cause of action as well as a special motion to strike. After a hearing, the trial court granted the special motion to strike, concluding that Rombach's petition stated allegations against defendants arising from their acts in furtherance of their respective rights of petition or free speech under the United States or Louisiana Constitution in connection with a public issue.<sup>7</sup> From a judgment dismissing all his claims, Rombach appeals.

### III. NO CAUSE OF ACTION SUA SPONTE

The peremptory exception raising the objection of no cause of action questions whether the law extends a remedy to anyone under the factual allegations of the petition. *Capital City Towing & Recovery, Inc. v. City of Baton Rouge*, 97-0098 (La. App. 1st Cir. 2/20/98), 709 So.2d 248, 250-51; see also La. C.C.P. art. 927A. Failure to disclose a cause of action may be noticed by the Court of Appeal on its own motion. La. C.C.P. art. 927B. For the following reasons, we find it proper to raise and sustain the objection of no cause of action on our own motion.

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<sup>6</sup> Although the record does not contain a written judgment or minute entry reflecting the denial of the defendants' exceptions, in written reasons for judgment dated April 16, 2014, the trial court found that with his second amended petition, Rombach had cured the vagueness of his petition and its non-conformity with La. C.C.P. art. 891. The trial court's written reasons also overruled the exception of no cause of action, finding that the petition stated a cause of action in malicious prosecution. No application for a writ was filed by the defendants. See La. C.C.P. arts. 1841 (a judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment); 2083 (an interlocutory judgment is appealable only when expressly provided by law); and 2201 (supervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction).

<sup>7</sup> See La. C.C.P. art. 971.

The purpose of an exception of no cause of action is to determine the sufficiency in law of the petition. *Capital City Towing & Recovery, Inc.*, 709 So.2d at 250-51. All facts pled in the petition must be accepted as true, but conclusions of law asserted as facts are not considered well-pled allegations of fact. *Walton Constr. Co., L.L.C. v. G.M. Horne & Co., Inc.*, 2007-0145 (La. App. 1st Cir. 2/20/08), 984 So.2d 827, 832. Therefore, 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.

#### **A. DEFAMATION**

The essential elements of a defamation claim are: (1) defamatory words; (2) publication; (3) falsity; (4) malice, actual or implied; and (5) resulting injury. *Brown v. Times-Picayune, L.L.C.*, 2014-0160 (La. App. 1st Cir. 11/3/14), 167 So.3d 665, 668.

Mindful that the trial court dismissed as prescribed Rombach's defamation claim insofar as it related to Theriot's October 21, 2004 report and found only those statements made during the pendency of and subsequent to the Ethics Board proceeding remained timely, our review of Rombach's petition shows he only alleges the utterance of defamatory words by defendants "Theriot, Purpera, *et al.*" as well as by Tucker and Chaisson.

##### **1. Allegations against Theriot, Purpera et al.**

In the first amended petition, Rombach alleged that numerous newspaper reports repeated defamatory words contained in the Theriot report. In light of the trial court's ruling as untimely all statements made before July 23, 2010, the date Rombach averred the charges were brought before the Louisiana Board of Ethics,



only a July 28, 2010 newspaper report potentially alleges a claim of defamation against “Theriot, Purpera, *et al.*”

The amended petition alleges the following:

**148.** On July 28, 2012, a newspaper reported the ongoing status of [Rombach’s] ethics prosecution, again reiterating and restating the false allegations and claims of Defendants Theriot, Purpera, *et al.*:

*2010-07-28 Ethics hearing.*

Rombach is facing three ethics allegations issued against him in early 2006 by the Louisiana Board of Ethics related to his giving himself a retroactive pay raise, a car allowance and overtime pay for legislative session work. The questionable activity came in 2002, 2003 and 2004.

Rombach is facing a potential \$10,000 civil fine per charge.

The charges followed a report by then Legislative Auditor Steve Theriot which questioned Rombach’s actions.<sup>8</sup>

Initially, we note that the petition does not aver that “Theriot, Purpera, *et al.*” gave the October 21, 2004 report to the Board of Ethics by way of a formal complaint against Rombach. Additionally, while Rombach’s allegations impute the source of the “false allegations of claims” stated in the newspaper to “Theriot, Purpera, *et al.*,”

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<sup>8</sup> The remaining allegations of paragraph 148 state the following:

The state’s chief ethics attorney Kathleen Allen argued that Rombach received things of economic value to which he was not “duly entitled” as he gave himself retroactive and overtime pay as well as a \$600 a month car allowance.

The extra salary and car benefits needed legislative budget panel approval which he did not get, Allen said.

“Our position is there had to be authorization for these payments. There was not in these particular instances,” said Allen.

Rombach also said that the chairman of the budget committee signed off on Fiscal Office spending every month, including his compensation.

Rombach said he was forced to resign by legislative leaders under the threat of having a lawsuit filed against him.

Within hours of his resignation, Rombach said the budget committee adopted policies and procedures, addressing all the issues he had been accused of violating.

“Why would they do that if those were already the rules?” asked Alexander.

the statements quoted in his petition from the unidentified newspaper are clearly attributed to the Board of Ethics as the entity that issued the three charges against Rombach.

While the general rule is the original author of a libelous publication is not to be held liable for the voluntary republication of it by others, it is true that an exception exists in the jurisprudence when the republication is the natural and probable consequence of the defendant's act. See *Wiggins v. Creary*, 475 So.2d 780, 782 (La. 1st Cir.), writ denied, 478 So.2d 910 (La. 1985). But upon receiving a sworn complaint or voting to consider a matter, the Board of Ethics is required to conduct a private investigation to elicit evidence. See La. R.S. 42:1141C(1). After the investigation has been completed, the Board of Ethics is required to determine whether a public hearing should be conducted to determine if any violation of law within its jurisdiction has occurred. See La. R.S. 42:1141C(2). Thus, under Louisiana law, the Board of Ethics may not file charges against a public employee until it has all the necessary elements of its claim, meaning evidentiary support for its allegations prior to filing formal charges against an accused. See La. R.S. 42:1141C; *Ellis v. Louisiana Bd. of Ethics*, 2014-0112 (La. App. 1st Cir. 12/30/14), 168 So.3d 714, 724, writ denied, 2015-0208 (La. 4/17/15), 168 So.3d 400.

Even if we were to assume for purposes of the objection of no cause of action that the Theriot report had been a libelous publication, because the charges were filed by the Board of Ethics after it completed its mandatory investigation and made its independent determination to file charges, see La. R.S. 42:1141C(1) & (2), the replication of any of the content contained in the October 21, 2004 report was not the natural and probable consequence of "Theriot, Purpera, *et al.*" having generated the report. Therefore, because the Board of Ethics was the source of "the three ethics allegations issued against [Rombach] in early 2006 ... related to his giving himself a retroactive pay raise, a car allowance[,] and overtime pay for legislative session

work,” as stated in the newspaper report, Rombach has not and cannot set forth material facts sufficient to state a defamation claim against “Theriot, Purpera, *et al.*” for statements that coincided with statements in the October 21, 2004 report.

## **2. Allegations against Tucker and Chaisson**

Rombach averred that subsequent to the dismissal of the Board of Ethics charges, both Tucker and Chaisson repeatedly blocked his efforts to secure employment. But despite two amendments to his original petition, Rombach has yet to state the names of the interested employers, set forth a factual basis explaining either how he learned that Tucker and Chaisson had dissuaded potential employers, or state the defamatory words, the facts of their publication, or that such defamatory words were false. Absent this showing, Rombach has failed to allege material facts necessary to support a cause of action in defamation against Tucker or Chaisson.

### **B. 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). As presently formulated, the elements of the tort of malicious prosecution are: (1) the commencement or continuance of an original criminal or civil judicial proceeding; (2) its legal causation by the present defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage conforming to legal standards resulting to plaintiff. *Lemoine v. Wolfe*, 2014-1546 (La. 3/17/15), 168 So.3d 362, 367.

Reading Rombach’s allegations in a light most favorable to him, clearly, Rombach has alleged the termination of the Board of Ethics proceeding in his favor. Rombach also suggests an absence of probable cause and the presence of malice by

his allegations that on March 16, 2004, with Phillips-Hymel present, Koepp told him to resign quietly or face financial ruin and possible criminal and ethics violation charges; as well as Koepp's statement that Koepp was not saying Rombach broke any laws, but he would nevertheless charge him. And the petition is replete with allegations that Rombach was damaged as a result of his decision to voluntarily resign as a result of the statements made by Phillips-Hymel and Koepp at the March 16, 2004 meeting. But nowhere in his petition has Rombach averred that any defendant provided the Theriot report or otherwise reported suspected ethical violations to the Board of Ethics. More importantly, the Board of Ethics' independent investigation and determination to pursue charges, see La. R.S. 42:1141C(1) & (2), broke the chain of causation between any complaint a defendant may have lodged with the Board of Ethics and the ultimate commencement of the ethics proceeding. See *Kennedy v. Sheriff of East Baton Rouge*, 2005-1418 (La. 7/10/06), 935 So.2d 669, 690 n.20.<sup>9</sup> Thus, Rombach cannot allege material facts to support a cause of action in malicious prosecution.

### C. ABUSE OF PROCESS

To state a cause of action for the tort of abuse of process, a plaintiff must allege two essential elements: (1) the existence of an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular prosecution of the proceeding. *Waguespack, Seago and Carmichael (A PLC) v. Lincoln*, 1999-2016 (La. App. 1st Cir. 9/22/00), 768 So.2d 287, 290-291 (citing *Succession of Cutrer v.*

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<sup>9</sup> In its interlocutory decision overruling the exception of no cause of action based on its finding the petition stated a cause of action in malicious prosecution, the trial court relied on *LeBlanc v. Pyles*, 46,393 (La. App. 2d Cir. 7/13/11), 69 So.3d 1273, writ denied, 2011-1792 (La. 10/14/11), 74 So.3d 213. In *LeBlanc*, plaintiffs had been accused of theft by their former employer. Based on the arresting officer's testimony, the arrest and charges against the plaintiffs were levied solely as a result of the information the employer's witness had provided him. Thus, the court concluded that a separate, independent investigation had not been undertaken to such a degree that the chain of causation was broken. *LeBlanc*, 69 So.3d at 1281. Unlike the law enforcement's lack of an investigation in *LeBlanc*, in this case the Board of Ethics is statutorily mandated to conduct an independent investigation and has the autonomy of deciding whether or not to pursue alleged violations independent of a complaint. See La. R.S. 42:1141C. *LeBlanc* is inapposite and, therefore, the trial court's reliance was misplaced.

*Curtis*, 341 So.2d 1209, 1213-14 (La. App. 1st Cir. 1976), writ denied, 343 So.2d 201 (La. 1977)). Abuse of process involves the misuse of a process already legally issued whereby a party attempts to obtain a result not proper under the law. *Goldstein v. Serio*, 496 So.2d 412, 415 (La. App. 4th Cir. 1986), writs denied, 501 So.2d 208, 209 (La. 1987). Thus, the regular use of process does not constitute an abuse of process; there must be a showing of an abuse through an illegal, improper, or irregular use of process. See *Waguespack, Seago and Carmichael (A PLC)*, 768 So.2d at 292.

As with the malicious prosecution claim, Rombach has averred facts suggesting that by their conduct, Phillips-Hymel and Koepp clearly had an ulterior motive. And giving every fair inference to the facts alleged, Rombach may have suggested an ulterior motive by other defendants. But Rombach has not expressly alleged that Phillips-Hymel, Koepp, or any other specifically identified defendant reported suspected ethical violations to the Board of Ethics. Moreover, the lack of allegations that any defendant interfered with the Board of Ethics' independent investigation and determination to prosecute him, see La. R.S. 42:1141C(1), leaves his petition devoid of facts necessary to support the second element of an abuse of process claim. Accordingly, Rombach has failed to set forth material facts to state an abuse of process claim.

#### **D. FEDERAL CIVIL RIGHTS CLAIM**

The pertinent provisions of 42 U.S.C.A. §1983 state, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

According to the allegations of his petition, Rombach maintains defendants violated his Fourth Amendment right to be free from malicious prosecution. The elements of a federal claim of malicious prosecution under § 1983 and the due process clause are generally the same as those under state tort law. *Accredited Sur. & Cas. Co., Inc. v. McElveen*, 1993-678 (La. App. 3d Cir. 2/2/94), 631 So.2d 563, 567, cert. denied, 513 U.S. 963, 115 S.Ct. 424, 130 L.Ed.2d 338 (1994). Because Rombach has not alleged material facts to support a cause of action in malicious prosecution, he does not state a federal claim of malicious prosecution under § 1983.

### E. AGENCY DEFENDANTS

Rombach's amended and second amended petitions expressly named as defendants the Louisiana Audit Advisory Council of the Louisiana Legislature (the Audit Advisory Council) and the LFO. Our review of the twice-amended, 50-page petition reveals no allegations of wrongful conduct by these entities separate and apart from the actions of individually named defendant public employees and elected officials. Moreover, Rombach's petition is devoid of an allegation of vicarious liability against either the Audit Advisory Council or the LFO for the allegedly tortious conduct of any clearly specified and identified employee/agency representative defendant.

Under La. C.C. art. 2320, masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed. For an employer to be held liable for the actions of an employee under Article 2320, the plaintiff must show (1) a master-servant relationship existed between the tortfeasor and the employer, and (2) the tortious act of the tortfeasor was committed within the scope and during the course of his employment with the employer. *Hughes v. Goodreau*, 2001-2107 (La. App. 1st Cir. 12/31/02), 836 So.2d 649, 656, writ denied, 2003-0232 (La. 4/21/03), 841 So.2d 793.

Because his petition lacks allegations averring that either the Audit Advisory Council or the LFO is vicariously liable for the tortious acts of any employee/agency-representative defendant, he has failed to state a cause of action against these agency defendants. Moreover, even if we were to infer the vicarious liability of the Audit Advisory Council or the LFO for the tortious actions of any of their respective employees/agency representatives, because Rombach has failed to state a cause of action against any employee/agency-representative defendant, he cannot state a cause of action against these agency defendants.<sup>10</sup>

#### **E. AMENDMENT OF PETITION**

When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection raised through the exception cannot be so removed, or if the plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed. La. C.C.P. art. 934.

Here, we have raised and sustained a peremptory exception of no cause of action. See Frank L. Maraist, *Civil Procedure* § 6:6 at 163 in 1 **Louisiana Civil Law Treatise** (2008) (a peremptory exception urging no cause of action is an appropriate action when a petition does not contain the material facts upon which the cause of action is based). Although Article 934 generally requires that the plaintiff be

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<sup>10</sup> Because Rombach expressly re-stated and re-alleged “all of the remaining claims raised in his original and amended petition” in his second amending petition, it is unclear whether he re-asserted that the Office of the Legislative Auditor was a named defendant. But for the same reasons that the petition fails to state a cause of action against either the Audit Advisory Council or the LFO, Rombach has not stated a cause of action against the Office of the Legislative Auditor. We note in reaching this conclusion that while our review of the petition reveals no allegations that any particular employee or representative of the Office of the Legislative Auditor delivered or otherwise transmitted Theriot’s October 21, 2004 report to the Board of Ethics, in brief, citing La. R.S. 42:1161A, counsel for this agency appears to concede that the Office of the Legislative Auditor referred the report to the Board of Ethics. Regardless of whether a duty to refer the report to the Board of Ethics existed, the statutory mandate that the Board of Ethics conduct an independent investigation and its autonomy in deciding whether to pursue alleged violations independent of a complaint, see La. R.S. 42:1141C, preclude a factual basis to support the imposition of liability against the Office of the Legislative Auditor.

allowed to amend his petition if the general grounds for the exception may be cured by amendment, it does not require that the plaintiff be allowed an opportunity to speculate on unwarranted facts merely for the purpose of defeating the exception. *Wilkins v. Hogan Drilling Co., Inc.*, 424 So.2d 420, 423 (La. App. 2d Cir. 1982).

In response to the dilatory exceptions of vagueness, Rombach twice amended his petition, the second time of which was a result of court order. Nevertheless, he has yet to set forth material facts upon which a cause of action may be based. We believe the initial and second amendments of the petition fulfilled the purpose of Article 934. Accordingly, we decline to allow Rombach a third opportunity to speculate on unwarranted facts in an attempt to support his conclusion of entitlement to damages. See *Roadhouse Bar-B-Que, Inc. v. Certain Underwriters at Lloyds*, 2004-1697 (La. App. 3d Cir. 5/4/05), 909 So. 2d 619, 627; *Scamardo v. Dunaway*, 96-1036 (La. App. 5th Cir. 4/29/97), 694 So.2d 1041, 1043, writ denied, 1997-1395 (La. 9/5/97), 700 So.2d 517; *Dubroc v. Allstate Ins. Co.*, 1993-780 (La. App. 3d Cir. 3/2/94), 633 So.2d 861, 865-66 (on rehearing). Because we sustain a peremptory exception of no cause of action on our own motion, we affirm the trial court's dismissal of Rombach's petition for damages.<sup>11</sup>

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<sup>11</sup> Since we have concluded that Rombach failed to state any viable causes of action against the defendants, we pretermitt a discussion of Rombach's assignments of error challenging the efficacy of the trial court's action of granting the special motion to strike.



#### IV. DECREE

Because the petition fails to state a cause of action, that portion of the trial court's judgment, which dismisses all of Rombach's claims against the Legislative Audit Advisory Council of the Louisiana Legislature, the State of Louisiana through the Legislative Fiscal Office, Steven J. Theriot, Daryl G. Purpera, Glenn A. Koepp, Sherry L. Phillips-Hymel, James Wayne Tucker, Joel Thomas Chaisson, II, Charley Rome, Alfred W. "Butch" Speer, and the Office of the Legislative Auditor, is affirmed. Appeal costs are assessed against plaintiff-appellant, John Richard Rombach.

**AFFIRMED.**