NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 0983

L. WALKER ALLEN, II

VERSUS

ROBERT C. LOWE; JEFFREY M. HOFFMAN; LOWE, STEIN, HOFFMAN, ALLWEISS & HAUVER, LLP; SUSAN TAYLOR MARTIN AKA SUSAN TAYLOR ALLEN; ELIZABETH MARTIN ARMSTRONG; JOHN DOE; AND THE JOHN DOE COMPANY, INC.

Judgment Rendered: DEC 23 2015

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2013-15920

Honorable Robert J. Burns, Ad Hoc, Judge

* * * * * * *

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Hoffman, Allweiss & Hauver, LLP,
and Susan Taylor Martin

* * * * * *

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

VGW – concurs in written reasons,
by ED

WELCH, J.

The plaintiff/appellant, Lange Walker Allen, II, appeals a March 25, 2015 judgment sustaining exceptions of no cause of action filed by the defendants/appellants, Robert C. Lowe, Jeffrey M. Hoffman, Lowe, Stein, Hoffman, Allweiss & Hauver, LLP ("Lowe Stein"), and Susan Taylor Martin.[1] For the following reasons, we find dismissal of the plaintiff's claims against these defendants proper.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal challenges the dismissal of Lange Allen Walker, II's claims against his ex-wife and her legal counsel seeking recovery for damages sustained following the issuance of a contempt order against Mr. Allen during divorce proceedings.

Over the course of Mr. Allen's and Ms. Martin's divorce proceedings, a dispute arose over the distribution of a 2008 Toyota Land Cruiser in the possession of Ms. Martin. On October 4, 2012, the trial court allocated the vehicle to Ms. Martin and ordered Mr. Allen to execute the title to the vehicle and provide the title to Ms. Martin's attorney by October 9, 2012. Mr. Allen did not timely comply with the order. On October 18, 2012, after Mr. Allen failed to comply with the trial court's order, Ms. Martin filed a rule for contempt seeking to enforce the trial court's October 4, 2012 order. See **Allen v. Allen**, 2013-0996 (La. App. 1st Cir. 12/29/14), 2014 WL 7368574, 1-2, writ denied, 2015-214 (La. 05/22/15), 171 So.3d 922.

The rule for contempt was heard on December 19, 2012. With counsel for the parties present, the trial court ruled: finding Mr. Allen in contempt for willfully and deliberately violating the trial court's order of October 4, 2012 to deliver the

[1] We note that the other named defendants in this action, Elizabeth Martin Armstrong, John Doe, and The John Doe Company, Inc., have not made an appearance in this action at the district court nor do they seek relief in the instant appeal.

signed and executed certificate of title for the vehicle to Ms. Martin; ordering Mr. Allen to deliver the signed and executed title and all keys for the vehicle to the office of Ms. Martin's attorney by 5:00 p.m. on December 19, 2012; ordering Mr. Allen to pay Ms. Martin $5,553.00 in attorney fees and $340.00 in court costs by December 28, 2012 at 4:00 p.m.; and ordering Mr. Allen to pay $1,000.00 to the Twenty-Second Judicial District Court Judicial Expense Fund by December 28, 2012 at 4:00 p.m. Mr. Allen was sentenced to serve thirty days in the parish jail if he failed to timely comply with the judgment.[2]

Mr. Allen filed an appeal with this court asserting numerous assignments of error; essentially, Mr. Allen averred that the October 4, 2012 order was invalid, he should not be found in contempt, and the hearing on the rule for contempt was invalid. *Id.* at 3. This court affirmed the trial court's judgment. On May 22, 2015, the Louisiana Supreme Court denied Mr. Allen's writ application on the matter. All appellate remedies available to Mr. Allen in connection with the December 19, 2012 contempt order have been exhausted.

On December 19, 2013, during the pendency of Mr. Allen's appeal challenging the merits of the contempt order, Mr. Allen filed the instant suit in the Twenty-Second Judicial District Court naming as defendants: Mr. Lowe, Mr. Hoffman, Lowe Stein, Susan Martin, Elizabeth Martin Armstrong (Ms. Martin's daughter), and two unidentified defendants. Mr. Lowe, Mr. Hoffman, and their firm represented Ms. Martin in the divorce proceedings. On January 10, 2014, Mr. Allen filed an amended petition.

Mr. Allen's suit generally alleges that the defendants entered "into an informal *ad hoc* partnership, joint venture, or civil conspiracy..." to deprive him of money and property. Mr. Allen alleged that the defendants were liable under three

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[2] The $1,000.00 fine paid by Mr. Allen to the Twenty-Second Judicial District Court Judicial Expense Fund was ultimately refunded to him. **Allen v. Allen**, 2014 WL 7368574, 2, n.4.

distinct theories of recovery: (1) violations of 42 U.S.C. § 1983, and related claims for attorney's fees and damages under 42 U.S.C. § 1988; (2) violations of the Louisiana Unfair Trade Practices Act, La. R.S. 51:1401, *et seq.* ("LUTPA"); and (3) intentional tort claims alleging that the attorney defendants' actions violated the Louisiana Rules of Professional Conduct. The factual allegations in the amended petition focus on the events surrounding the December 19, 2012 contempt hearing. Mr. Allen maintains that Lowe and Hoffman, on behalf of the other defendants, "inveigled" the trial court into issuing the contempt order and to improperly grant the attorney's fees and costs associated with the contempt order.

Removal to Federal Court

On January 30, 2014, Mr. Lowe, Mr. Hoffman, and Lowe Stein removed the claims against them to the United States District Court for the Eastern District of Louisiana and soon thereafter filed a motion to dismiss with the federal district court. The defendants sought reasonable attorney's fees associated with their defense of the 42 U.S.C. § 1983 and LUTPA claims pursuant to 42 U.S.C. § 1988 and under La. R.S. 51:1409(A), respectively, which were eventually granted.[3] Mr. Allen did not file an opposition to the motion to dismiss. (R. 32). In an order dated September 9, 2014, the federal district court dismissed Mr. Allen's 42 U.S.C. § 1983 and LUTPA claims for "failure to state a claim that is plausible on its face." See F.R.C.P. Rule 12(b)(6); **Allen v. Lowe**, 2014-204 (E.D. La. 09/09/14), 2014 WL 4450359, 2. However, the federal district court declined to exercise its supplemental jurisdiction to consider Mr. Allen's intentional tort claims against Mr. Lowe, Mr. Hoffman, and Lowe Stein, and these claims were remanded to the state court.

[3] On March 9, 2015, the federal court granted the request for attorney's fees filed by Mr. Lowe, Mr. Hoffman, and the law firm. In its order and reasons, the federal court held that Mr. Allen's 42 U.S.C. § 1983 claim was frivolous and that the LUTPA claim was brought in bad faith for the purpose of harassment.

State Court Proceeding

On February 13, 2014, all of the judges of the Twenty-Second Judicial District Court recused themselves from hearing all matters involving Mr. Allen as a party due to a separate suit being filed against the judges by Mr. Allen. As a result, Judge Robert J. Burns was assigned to the matter as judge *ad hoc* to replace Judge William J. Knight, who had been initially allotted the case.

On October 31, 2014, Mr. Lowe, Mr. Hoffman, and Lowe Stein filed an exception of no cause of action seeking dismissal of the remaining intentional tort claims against them. On December 19, 2014, Ms. Martin also filed a peremptory exception of no cause of action seeking dismissal of the 42 U.S.C. § 1983 action, the LUTPA claims, and the intentional tort claims asserted by Mr. Allen against her. Both exceptions were initially set for hearing on January 14, 2015, by order of Judge Knight. Mr. Allen's attorney was served by the St. Tammany Sheriff's Office with the separate rule to show cause orders on November 24, 2014 and December 31, 2014.

On January 6, 2015, Judge Knight vacated his order on both of the rule to show cause orders, which had set the hearing on January 14, 2015, with identical notations on each order: "Order. Vacated. Signed in error after recusal. Present to Judge Burns." As per the notations on the rule to show cause orders, on January 15, 2015, Judge Burns ordered the resetting of the hearing on both exceptions for February 25, 2015 at 1:30 pm. On January 21, 2015, the clerk of court sent notice via letter to counsel for parties providing notice that the hearing on exceptions of no cause of action originally set for January 14, 2015 before Judge Knight was reset for February 25, 2015 at 1:30 p.m before Judge Burns. The clerk of court's letter notes that certified copies of the modified rule to show cause orders were attached.

No opposition to the exceptions of no cause of action was ever filed by or on behalf of Mr. Allen, prior to either the January or February hearing dates. Neither Mr. Allen nor his counsel appeared at the February 25, 2015 hearing. During the hearing, the trial court inquired into the provision of notice to Mr. Allen and his attorney, and the clerk advised the trial court of the clerk of court's mailing of the January 21, 2015 letter to counsel of record for both parties. The trial court then heard and sustained defendants' exceptions. In a judgment signed March 25, 2015, the trial court dismissed all claims against Mr. Lowe, Mr. Hoffman, Lowe Stein, and Ms. Martin with prejudice. The trial court held that Mr. Allen's claims against the defendants were frivolous, unreasonable, groundless, brought in bad faith, and/or for purposes of harassment; therefore, meeting the criteria for allowing the defendants recovery of attorney's fees and litigation expenses pursuant to 42 U.S.C. § 1988, La. R.S. 51:1409, and the Louisiana procedural rules. The defendants filed a rule to tax costs on May 13, 2015, which was set for hearing on July 1, 2015.[4]

Mr. Allen filed the instant devolutive appeal raising one assignment of error: the trial court erred in holding the February 25, 2015 hearing because the order setting the February 25, 2015 hearing was never served on either Mr. Allen or his counsel of record as required by La. C.C.P. art. 1313(C). The defendants answered the appeal requesting affirmance of the judgment, and additionally asked that this court modify or amend the judgment to award them damages for frivolous appeal and costs as permitted under La. C.C.P. arts. 863 and 2164. The defendants also filed an exception of no cause of action in this court urging us to dismiss the action.

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[4] We note that the trial court's ruling on the motion to tax costs is not currently before this court. (See **Hoyt v. State Farm Mutual Automobile Insurance Company**, 623 So.2d 651, 664 (La. App. 1st Cir.), writ denied, 629 So.2d 1179 (La. 1993): When the motion and judgment for costs is rendered after the final judgment on the merits, the costs judgment is a separate final appealable judgment.)

LAW AND DISCUSSION

Notice of February 25, 2015 Hearing

Mr. Allen contends that the January 21, 2015 letter from the clerk of court providing notice of the reassignment of the hearings on the exceptions is deficient because the clerk of court failed to serve notice by either the sheriff, certified, or registered mail; thus, service of notice of the order violates the requirements of La. C.C.P. art. 1313(C). Louisiana Code of Civil Procedure article 1313 provides, in pertinent part, as follows:

> A. Except as otherwise provided by law, every pleading subsequent to the original petition, and every pleading which under an express provision of law may be served as provided in this Article, may be served either by the sheriff or by:
>
> (1) Mailing a copy thereof to the counsel of record, or if there is no counsel of record, to the adverse party at his last known address, this service being complete upon mailing.
> (2) Delivering a copy thereof to the counsel of record, or if there is no counsel of record, to the adverse party.
> (3) Delivering a copy thereof to the clerk of court, if there is no counsel of record and the address of the adverse party is not known.
> (4) Transmitting a copy by electronic means to counsel of record, or if there is no counsel of record, to the adverse party, at the number or addresses expressly designated in a pleading or other writing for receipt of electronic service. Service by electronic means is complete upon transmission but is not effective and shall not be certified if the serving party learns the transmission did not reach the party to be served.
>
> B. When service is made by mail, delivery, or electronic means, the party or counsel making the service shall file in the record a certificate of the manner in which service was made.
>
> C. **Notwithstanding Paragraph A of this Article, if a pleading or order sets a court date, then service shall be made either by registered or certified mail or as provided in Article 1314, or by actual delivery by a commercial courier**. [Emphasis added.]

However, Mr. Allen's reliance upon La. C.C.P. art. 1313(C) is misplaced for two reasons. First, we note La. C.C.P. arts. 1313 and 1314 pertain to service by the moving party to the adverse party of pleadings and incidental orders setting hearings. **Little v. Pou**, 42,872 (La. App. 2nd Cir. 01/30/08), 975 So.2d 666, 673,

writ denied, 2008-0806 (La. 06/06/08), 983 So.2d 920; see also **Miles on Behalf of Miles v. STU Ins. Co.**, 633 So. 2d 586, 587 (La. App. 1st Cir. 1993), writ denied, 94-0445 (La. 03/11/94), 634 So.2d 398.[5]

Second, the defendants herein did comply with La. C.C.P art. 1313(C) with respect to notice of the hearing on January 14, 2015, when they requested that the sheriff serve both rule to show cause orders on Mr. Allen's counsel of record. The issue herein is whether the clerk of court's January 21, 2015 letter provided sufficient notice to the parties regarding the resetting of the hearing on the exceptions, where notice had been initially properly served upon the plaintiff.

Due process, at a minimum, requires deprivation of life, liberty or property be preceded by notice and an opportunity to be heard at a meaningful time. **Armstrong v. Manzo**, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965); **Zachary Taylor Post No. 3784 v. Riley**, 481 So.2d 699, 701 (La. App. 1st Cir. 1985). The notice given must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. **Zachary Taylor Post No. 3784**, 481 So.2d at 701.

The Louisiana Code of Civil Procedure contains no provision directly addressing notice requirements for a trial court re-setting a hearing on an exception initially properly noticed under La. R.S. 1313(C). Some courts have looked to La. C.C.P. art. 1571, when setting exceptions for hearing in certain instances. See **Prejean v. Ortego**, 262 So.2d 402, 403 (La. App. 3rd Cir. 1972). Louisiana Code of Civil Procedure Article 1571 requires district courts to prescribe the procedure for assigning cases such that all parties receive adequate notice of trial. Unless a party has requested notice of the trial on the merits under La. C.C.P. art. 1572,

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[5] Our finding that La. C.C.P. art. 1313(C) applies to pleadings and incidental orders is also supported by review of La. C.C.P. 1313 in *pari materia* with La. C.C.P. arts. 1311, 1312 and 1314, as all of these articles address the manner in which counsel or the party filing a pleading must serve an opposing counsel or party.

which did not occur in the instant case, no particular type or kind of notice is required under La. C.C.P. art. 1571. Further, the method for setting dates for trial is to be regulated by the local rules of court.[6] See La. C.C.P. art. 1571, comment (a). Uniform Rules of District Court Rule 9.14 provides:

> (a) The date on which a motion to fix for trial on the merits may be made, and the method of setting a date for trial or hearing of a matter, including deadlines for scheduling orders, pre-trial briefs, contact with jurors, or any other matter, shall be determined by each district court as set forth in Appendix 9.14.

Appendix 9.14 of the Twenty-Second Judicial District Court Rules addressing the fixing of trials, exceptions, and motions provides:

> 1. Assignment of civil cases on the merits shall be made only on written motion in the section in which the case has been allotted or transferred. Any objection to the motion to set for trial must be filed within the (10) days. The motion shall certify that all exceptions, motions, discovery and other preliminary matters have been disposed of and shall be served on all opposing counsel. Assignments may also be made at pre-trial and status conferences.
>
> 2. Exceptions and motions may be fixed for hearing by the Clerk of Court at the written request of any party, or by motion in open court. **The Court may fix a hearing on any exception or motion on its own motion** or refer such matters to trial on the merits. [Emphasis added.]
>
> 3. Unless it is otherwise specifically provided by statute at least ten (10) days notice will be required for trial on the merits and five (5) days notice on motions, rules and exceptions.

Appendix 9.14(3) is silent on the method for providing notice to the parties of a hearing on an exception; however it does provide that the trial court can fix a hearing on an exception on its own motion.[7] Based on the facts presented herein,

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[6] Louisiana Code of Civil Procedure article 1572 provides:

> The clerk shall give written notice of the date of the trial whenever a written request therefor is filed in the record or is made by registered mail by a party or counsel of record. This notice shall be mailed by the clerk, by certified mail, properly stamped and addressed, at least ten days before the date fixed for the trial. The provisions of this article may be waived by all counsel of record at a pre-trial conference.

[7] Mr. Allen asserts that it is the custom and practice of the Twenty-Second Judicial District Court to have the sheriff serve rule to show cause orders. In support of his position, Mr. Allen attaches

we are of the opinion that the mailing of the January 21, 2015 letter to all counsel of record by the clerk of court constituted adequate notice to the plaintiff that the trial of the exceptions of no cause of action had been reset for February 25, 2015. If Mr. Allen's counsel failed to receive that notice, then Mr. Allen and his attorney nevertheless should have discovered that the hearing had been reset for another date when the exception failed to come up for hearing on January 14, 2015. Further, as noted above, Mr. Allen was not prejudiced by the lack of notice because evidence may not be introduced to support or controvert the exception of no cause of action. La. C.C.P. art. 931. However, we need not directly rule on this issue, as we notice on our own motion that Mr. Allen's petition fails to state a cause of action.

No Cause of Action

The failure to disclose a cause of action may be noticed by an appellate court on its own motion and no hearing is required. La. C.C.P. art. 927; **Capital City Towing & Recovery, Inc. v. City of Baton Rouge**, 97-0098 (La. App. 1st Cir. 02/20/98), 709 So.2d 248, 251. The function of an exception raising the objection 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 pleading. **Everything on Wheels Subaru, Inc. v. Subaru South, Inc.**, 616 So.2d 1234, 1235 (La. 1993). The question, therefore, is whether, in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the petition states any valid cause of action for relief. **Home Distribution, Inc. v. Dollar Amusement, Inc.**, 98-1692, (La. App. 1st Cir. 09/24/99), 754 So.2d 1057, 1060. However, because Louisiana retains fact pleading, mere conclusory statements in the petition, without supporting facts, are insufficient to set forth a cause of action. **Montalvo v.**

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only the sheriff returns of the orders setting the January 14, 2015 hearing; however, Mr. Allen's position is undermined by the fact that it was the defendants who requested service by the sheriff of the orders herein. Mr. Allen provides no other evidence to support his assertion.

Sondes, 93-2813 (La. 5/23/94), 637 So.2d 127, 131 (La. 1994). Below we consider the pending claims asserted in Mr. Allen's amended petition.

42 U.S.C. § 1983 Claims Against Ms. Martin

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege (1) the violation of a right secured by the Constitution and laws of the United States, and (2) must show that the alleged deprivation was committed by a person acting under color of state law. **West v. Atkins**, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254-2255, 101 L.Ed.2d 40 (1988). Private individuals generally are not considered state actors, and "private misuse of a state statute does not describe conduct that can be attributed to the State." **Lugar v. Edmondson Oil Co.**, 457 U.S. 922, 941, 102 S.Ct. 2744, 2756, 73 L.Ed.2d 482 (1982). However, a private individual may act under color of law in certain circumstances, such as when a private person is involved in a conspiracy or participates in joint activity with state actors. **Ballard v. Wall**, 413 F.3d 510, 518 (5th Cir. 2005).

First, the contempt order against Mr. Allen has been upheld by both this court and the Louisiana Supreme Court; therefore, we find no merit in Mr. Allen's assertions that the valid order violated his constitutional rights. Second, Mr. Allen's amended petition fails to allege any facts to support a finding of conspiracy or joint activity between Ms. Martin and a state actor. We agree with the federal district court's previous holding that Mr. Allen's amended petition only alleges that the trial court was deceived or "inveigled" by counsel for Ms. Martin into violating the law, and fails to allege facts that the trial court was acting in concert with counsel for Ms. Martin.[8] Given our finding that the amended petition fails to state a cause of action against Ms. Martin under 42 U.S.C. § 1983, we also find that the amended petition fails to state a cause of action under 42 U.S.C. § 1988.

[8] Black's Law Dictionary defines "inveigled" to mean "[t]o lure or entice through deceit or insincerity." Black's Law Dictionary 380 (3rd ed. 1996).

Accordingly, we find Mr. Allen's amended petition fails to state a claim under 42 U.S.C. § 1983 and § 1988 and these claims are dismissed.

Louisiana Unfair Trade Practices Act Claim Against Ms. Martin

Louisiana Revised Statutes 51:1405(A) prohibits any "unfair or deceptive acts or practices in the conduct of any trade or commerce." Louisiana Revised Statutes 51:1409(A) grants a right of action to "[a]ny person who suffers any ascertainable loss" from a violation of this prohibition. It has been left to the courts to decide, on a case-by-case basis, what conduct falls within the statute's prohibition. **Quality Environmental Processes, Inc. v. I.P. Petroleum Co., Inc.**, 2013-1582 (La. 05/07/14), 144 So.3d 1011, 1025. In **Quality Environmental Processes, Co., Inc.**, the supreme court considered whether certain actions by the defendant attorneys violated LUTPA including, discovery violations and the failure to provoke a concursus as required by an agreement regarding the tender of royalties. *Id.* at 1024. The court found that the goal of LUTPA is to protect consumers and to foster competition and did not include ensuring the ethical and fair cooperation between attorneys litigating a case, even though such actions may violate rules pertaining to discovery or ethical conduct. *Id.* at 1026. Similarly, we find Mr. Allen's claims against Ms. Martin related to the divorce proceedings fail to state a cause of action under LUTPA because Mr. Allen's allegations "do not fall under the protection of LUTPA's narrow goal of protecting against egregious actions of fraudulent, deceitful, and unfair business practices to promote and foster healthy and fair business competition." *Id.* Accordingly, we conclude Mr. Allen's amended petition fails to state a claim against Ms. Martin for LUTPA violations under the facts of this case, and these claims are dismissed.

Intentional Tort Claims Against Defendants

In **Montalvo**, the supreme court addressed the issue of whether a party may maintain a cause of action against his adversary's attorney. Citing its prior holding

in **Penalber v. Blount**, 550 So.2d 577 (La. 1989), the court reaffirmed the following general principle:

> Louisiana subscribes to the traditional, majority view that an attorney does not owe a legal duty to his client's adversary when acting in his client's behalf. A non-client, therefore, cannot hold his adversary's attorney personally liable for either malpractice or negligent breach of a professional obligation. The intent of this rule is not to reduce an attorney's responsibility for his or her work, but rather to prevent a chilling effect on the adversarial practice of law and to prevent a division of loyalty owed to a client. (Citation omitted.)

Montalvo, 637 So.2d at 130.

An attorney may nevertheless be held personally liable to his client's adversary for intentional tortious conduct. To state such a cause of action, "it is essential for the petition to allege facts showing specific malice or an intent to harm on the part of the attorney...." *Id.* at 130. The other necessary element of the cause of action in an action where a non-client files an intentional tort claim against his adversary's attorney is the "bona fide termination" of the underlying judicial proceeding in favor of the party asserting the intentional tort claim. *Id.* at 131.

We find that Mr. Allen's amended petition fails to state a cause of action as it lacks factual allegations of specific actions evidencing the defendants' intent to inflict direct harm. We find the amended petition only contains allegations of negligence regarding the assertion of claims by defense counsel. Mr. Allen's amended petition further fails to allege that he secured a bone fide termination of the underlying contempt proceeding at the center of his claim. We note that since the filing of the amended petition, there has been a bone fide termination of the underlying contempt proceeding upholding the trial court's ruling in favor of Ms. Martin, not Mr. Allen. Based on the above, we find that there is no cause of action

against Mr. Lowe, Mr. Hoffman, Lowe Stein, or Ms. Martin for intentionally tortious acts; thus, the dismissal of these claims is proper.[9]

For the above reasons, we dismiss all of Mr. Allen's claims against these defendants pursuant to our properly raised exception of no cause of action. See La. C.C.P. art. 2164 (providing that the appellate court shall render any judgment which is just, legal, and proper upon the record on appeal).

Peremptory Exception

While this appeal was pending, the defendants filed an exception of no cause of action pursuant to La. C.C.P. art. 2163, which provides that "[t]he appellate court may consider the peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record." In light of the fact that the defendants' exception of no cause of action was previously raised in the trial court, we decline to consider the defendants' exception. Further, we note that the defendants' exception is rendered moot based on this court's decision.

Answer to Appeal

Finally, we consider the defendants' answer to the appeal in accordance with La. C.C.P. art. 2133, requesting that this court only award them damages for frivolous appeal under La. C.C.P. arts. 863 and 2164. Damages for a frivolous appeal are awarded pursuant to La. C.C.P. art. 2164. This statute is penal in nature and must be strictly construed. **Nungesser v. Nungesser**, 558 So.2d 695, 701 (La. App. 1st Cir.), writ denied, 560 So.2d 30 (La. 1990). Appeals are favored in our law; penalties for the filing of a frivolous appeal will not be imposed unless they are clearly due. **Cavin v. Harris Chevrolet, Inc.**, 95-1878 (La. App. 1st Cir. 5/10/96), 673 So.2d 654, 658. Damages for frivolous appeal will not be awarded

[9] Based on our findings herein, we find that remand of this action to allow further amendment of the plaintiff's petition would be futile as the plaintiff cannot state a cause of action under these facts. See La. C.C.P. art. 934.

unless it appears that the appeal was taken solely for the purpose of delay or that appealing counsel does not seriously believe in the position he advocates. **Guarantee Systems Construction & Restoration, Inc. v. Anthony**, 97-1877 (La. App. 1st Cir. 9/25/98), 728 So.2d 398, 405, writ denied, 98-2701 (La. 12/18/98), 734 So.2d 636. After careful review of the record in this matter, although we do not find merit to all of the plaintiff's/appellant's claims, we cannot say that this appeal was taken only for the purpose of delay and we are unable to find that appealing counsel did not seriously believe in the position he has advocated on appeal. Therefore, the relief sought in the defendants' answer to appeal is denied.

CONCLUSION

For the foregoing reasons, we find Lange Walker Allen, II, has no cause of action against the defendants, Robert C. Lowe, Jeffrey M. Hoffman, Lowe, Stein, Hoffman, Allweiss & Hauver, LLP, and Susan Taylor Martin. Lange Allen Walker, II's, claims against Robert C. Lowe, Jeffrey M. Hoffman, Lowe, Stein, Hoffman, Allweiss & Hauver, LLP, and Susan Taylor Martin are dismissed with prejudice. The relief sought in the answer to appeal is hereby denied. Costs of this appeal are assessed against the plaintiff/appellant, Lange Walker Allen, II.

JUDGMENT RENDERED SUSTAINING NO CAUSE OF ACTION; ANSWER TO APPEAL DENIED; PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION NOT CONSIDERED.

L. WALKER ALLEN, II

VERSUS

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ROBERT C. LOWE; JEFFREY M. HOFFMAN; LOWE, STEIN, HOFFMAN, ALLWEISS & HAUVER, LLP; SUSAN TAYLOR MARTIN A/K/A SUSAN TAYLOR ALLEN; ELIZABETH MARTIN ARMSTRONG; JOHN DOE; AND THE JOHN DOE COMPANY, INC.

STATE OF LOUISIANA

COURT OF APPEAL

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WHIPPLE, C.J. concurring.

The majority concludes and resolves this appeal on the basis that plaintiff's petition discloses no cause of action, a conclusion with which I agree. However, to the extent that the majority also concludes, seemingly in dicta, that notice of the re-set hearing was proper, I respectfully disagree herein.

As the majority notes, the exceptions filed by Lowe, Hoffman, Lowe Stein, and Martin seeking dismissal of plaintiff's claims against them were initially set for hearing on January 14, 2015, by the assigned judge. Further, by sheriff's service, plaintiff's attorney was served with the orders setting the hearing date of January 14, 2015, for the exceptions. Thus, plaintiff undisputedly had proper notice (by sheriff's service) of the initial orders, which "set a court date." However, on January 6, 2015, the initial judge, who was recused, vacated the orders, and on January 15, 2015, the ad hoc judge appointed to hear the matter ordered the resetting of the hearing for February 25, 2015. Thus, the matter was re-fixed for hearing on a later date, i.e., after the initial hearing date was vacated and was re-set by the ad hoc judge.

Plaintiff's counsel contends that he never received the later correspondence from the clerk, and he had no actual knowledge of the hearing. The majority concludes that a letter from the clerk of court, albeit containing certified copies of

the modified orders and new hearing date, **sent by ordinary mail** was sufficient to comply with procedural notice requirements, despite the clear language in LSA-C.C.P. art. 1313(C), which provides, in pertinent part, that, if an order sets a court date (which is precisely what happened here), then service shall be by registered or certified mail, or as set forth in Article 1314, or by actual delivery by a commercial courier, none of which occurred.

As this court has previously recognized, an order of the trial court setting the date of a hearing on an exception is analogous to assignment of a case for trial. See Miles on Behalf of Miles v. STU Insurance Company, 633 So. 2d 586, 587, writ denied, 634 So. 2d 398 (La. 1994). Further, unlike the determinative facts in Little v. Pou, 42,872 (La. App. 2nd Cir. 1/30/08), 975 So. 2d 666, 673, writ denied, 2008-0806 (La. 6/6/08), 983 So. 2d 920, the second setting did not occur as a result of the plaintiff's own pleading requesting a continuance, of which plaintiff therein was presumed to have notice, since plaintiff had requested it. Thus, in accordance with Little v. Pou, in my view, Articles 1313 and 1314 would apply herein and govern the notice required under these facts. Accordingly, I conclude that service of the re-set hearing date by ordinary mail was insufficient, given that a hearing was re-set by the ad hoc judge (who was absolutely entitled to do so), and that the record contains no evidence of the parties receiving notice in open court, see LSA-C.C.P. art. 1314(B), or in a phone conference with an accompanying Memorandum Order, as discussed in Little.

Thus, I respectfully disagree with the majority's conclusion that notice by ordinary mail of the new hearing date was proper under the circumstances. However, because I agree that plaintiff has no cause of action and cannot state a cause of action herein, and dismisses on this basis, I concur in the ultimate result reached.