**NOT DESIGNATED FOR PUBLICATION**

| | | |
|---|---|---|
| **KATRINA SEAL** | * | **NO. 2001-CA-0128** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **DAVID K. PERSONS** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
| | * | |
| | * | |

*** * * * * * ***

APPEAL FROM
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 43-781, DIVISION "A"
Honorable Anthony Ragusa, Judge
* * * * * *
**Judge David S. Gorbaty**
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay III, Judge David S. Gorbaty)

Nelson J. Cantrelle, Jr.
300 Huey P. Long Avenue
Suite "G"
Gretna, LA 70053
(COUNSEL FOR PLAINTIFF/APPELLANT)

C. Gordon Johnson, Jr.
James R. Nieset, Jr.
PORTEOUS, HAINKEL, JOHNSON & SARPY

704 Carondelet Street
New Orleans, LA 701303774
(COUNSEL FOR DEFENDANT/APPELLEE)

**AFFIRMED**

Katrina Seal appeals a judgment of the trial court granting an Exception of No Cause of Action filed on behalf of David K. Persons and the law firm of Hailey, McNamara, Hall, Larmann & Papale, LPC. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY:**

During the trial of a personal injury lawsuit filed by Katrina Seal, David Persons, an attorney with the Hailey, McNamara firm, questioned Ms. Seal extensively about inconsistencies in her version of how the accident occurred. Specifically, Mr. Persons questioned Ms. Seal about how the version of the accident she gave at the emergency room and the version she gave during her deposition differed. Also, Mr. Persons suggested that Ms. Seal lied about telling her landlord about a missing handrail that she claimed contributed to her alleged fall. Further, during the course of the trial, either

through testimony or in closing argument, the jury was made aware that Ms. Seal's attorney had referred her to her treating surgeon. A verdict was rendered against Ms. Seal.

Subsequently, Ms. Seal filed suit against Mr. Persons and his law firm. The lawsuit alleged that during the trial of the personal injury case, Mr. Persons defamed her by claiming that her personal injury suit was fraudulent, and that she lied under oath.

Mr. Persons and his firm filed an Exception of No Cause of Action, arguing that the remarks in closing argument merely referenced inconsistencies in the evidence, that the remarks were not false *per se*, and that Mr. Persons was protected by a qualified privilege. The trial court granted the exception, and this appeal followed. Ms. Seal seeks a reversal of the trial court judgment, and a remand for trial on the merits.

**DISCUSSION:**

The sole issue on appeal is whether a petition states a cause of action when it alleges defamation based on the remarks of an attorney made during litigation.

This Court addressed this exact issue in *Jacobs v. O'Bannon*, 472

So.2d 180 (La.App. 4 Cir. 1985), wherein it was stated:

> One of the elements critical to the maintenance of a defamation suit is the falsity of the statement. *Cangelosi v. Schwegmann Bros., Etc.*, 390 So.2d 196 (La. 1980). While the statements made by Jacobs may be very painful to O'Bannon and contain the suggestion of unthinkable conduct on O'Bannon's part they cannot be said to be false *per se*. Anything is possible; and Jacobs was merely stating a possibility which existed in this case however remote it may be.
>
> In addition to the missing element of falsity in O'Bannon's claim, it is also barred by the principle of qualified privilege in favor of attorneys with respect to pleadings and briefs they file. As in *Mitchell v. Truck Service, Inc.* 286 So.2d 112 (La.App. 4th Cir.1973) the offensive statements constitute just a few words from a lengthy brief. The readership consists of some judges on the court of appeal and their law clerks who are regularly and constantly treated to exaggerated self serving statements in arguments of appellate counsel. Under these circumstances the statements are not actionable as defamatory.
>
> Finally, a policy consideration militates against O'Bannon's position. Jacobs mentioned a possibility which was offensive to O'Bannon. In numerous cases counsel raise possibilities which may be offensive to some. <u>For instance personal injury and compensation claimants are accused of being malingerers, the possibility of fraud on the part of the over-treating physician is raised, as well as the possibility of collusion on counsel's part for sending the claimant to a "friendly physician."</u> In domestic cases the possibility of a father shirking

> his parental responsibility and hiding his income is frequently raised. In every paternity case the possibility of someone other than the defendant being the father is raised and frequently these possibilities include infidelity and adultery. Here we have the added horrible ingredient of incest to an already repugnant list of possibilities of immoral conduct.
>
> To allow defamation suits to arise out of statements like these would foster an interminable flood of litigation. Whenever one took umbrage to such statements he or she might file suit. Even worse, after the initial defamation suit is concluded, more defamation suits would follow to obtain satisfaction for offensive statements made in the first defamation suit. The present case is a classic case of bitter litigation being conducted by aggressive, zealous counsel. Unless a qualified privilege protects them and their clients against prosecution for words uttered and statements made in the heat of litigious battle lawsuits among them might never end.

472 So. 2d at 182. (emphasis added.)

The *Jacobs* opinion affirmed the lower court's granting of an Exception of No Cause of Action and a Motion for Summary Judgment.

This Court recently reviewed two writ applications involving two similar defamation actions arising out of Ms. Seal's personal injury case. Both Ms. Seal's husband and her attorney in the personal injury case filed defamation actions against Mr. Persons and his firm. In two unpublished opinions, this Court reversed the trial court, and granted defendants'

Exception of No Cause of Action based on the *Jacobs* decision. Rehearing was denied, as were writs to the Supreme Court.

Accordingly, for the reasons outlined in *Jacobs*, the judgment of the trial court granting defendants' Exception of No Cause of Action is affirmed. All costs of this appeal are assessed to appellant.

**AFFIRMED**