NOT DESIGNATED FOR PUBLICATION

D. DOUGLAS HOWARD, JR.	*	**NO. 2003-CA-1490**
VERSUS	*	**COURT OF APPEAL**
R. BRADLEY LEWIS, CHERYL I. MAGEE, ABC INSURANCE COMPANY AND DEF INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-5498, DIVISION "C-6"
Honorable Roland L. Belsome, Judge
* * * * * *
Judge Max N. Tobias, Jr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Terri F. Love, and Judge Max N. Tobias, Jr.)

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AFFIRMED.

This is an appeal from the granting of a summary judgment in favor of the defendants in a defamation lawsuit. Based upon our de novo review, we affirm.

This case arises out of a civil rights action in the United States District Court for the Eastern District of Louisiana, *Jones v. St. Tammany Parish Jail*, 237 F. 3d 631, unpub. (5th Cir. 2000), in which the appellant, D. Douglas Howard, Jr. ("Howard"), was the attorney for the plaintiff therein. The appellees, R. Bradley Lewis ("Lewis") and Cheryl I. Magee ("Magee"), represented the defendants in the civil rights action. The plaintiff prevailed in the lawsuit and was awarded damages.

Lewis and Magee filed a motion for new trial in the federal district court and, thereafter, an appeal to the United States Court of Appeals, Fifth Circuit. In their pleadings and briefs, Lewis and Magee asserted that Howard deliberately made statements during the trial with the intent of making an appeal to bias, prejudice, and passion on the part of the jury. Specifically, Lewis and Magee claimed that Howard made statements based on race and geographic location that were intended to suggest prejudice and that he interjected his personal opinion on the merits of his client's case.

Additionally, Lewis and Magee claimed that Howard repeatedly referred to a witness as the fictional character "Rambo."

The United States Court of Appeals upheld the verdict, finding no reversible error, but admonished Howard by stating, "we also strongly disapprove of the rhetorical excess employed by plaintiff's counsel while in trial. There is no place in the federal courts for appeals based on racial stereotypes or prejudices, nor is there a place for suggesting inferences about witnesses' conduct that are not rooted in the record."

On 11 April 2001, Howard filed the present suit against Lewis and Magee, alleging defamation and intentional infliction of emotional distress. The cause of action was based on the statements made by Lewis and Magee in the federal court proceedings. On 4 February 2003, Lewis and Magee filed a motion for summary judgment. The motion was granted on 2 June 2003. The trial court's reasons for judgment stated in pertinent part:

> The Court has thoroughly reviewed all of the allegations of defamation made by plaintiff herein and finds as a matter of law that the statements made by defendants in pleadings were made without malice and were material to the cause asserted and are therefore protected by the qualified privilege afforded attorneys by La. R.S. 14:49. Defendants were acting as zealous advocates for their client in the appellate court, just as plaintiff had done in the trial court.
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> Further, the Court finds as a matter of law that the statements made by the defendants were not so extreme or outrageous so as to go beyond the bounds of decency, as is required to maintain an action for the intentional infliction of

emotional distress.

Howard appeals the judgment of the trial court, which granted the motion for summary judgment and dismissed his suit.

In his first assignment of error, Howard argues that the trial court erred in granting the summary judgment when a question of material fact existed as to whether the statements made by Lewis and Magee were made with malice. Specifically, Howard maintains that the issue of malice is not a question of law at all, but is a question of fact to be proven at trial.

Howard's second assignment of error asserts that the trial court erroneously applied the law of qualified privilege set forth in La. R.S. 14:49. Howard contends that the privilege does not apply to the statements made by Lewis and Magee, since they were not pertinent to the case at hand, were made with malice, and were without reasonable basis. Specifically, Howard submits that because the statements made by Lewis and Magee were attacks on his professional reputation, they can only be construed as malicious and, as such, are not protected by the privilege.

La. R.S. 14:49 states in pertinent part:

> A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations:
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> * * *
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> (4) Where the publication or expression is made by an attorney or party in a judicial proceeding.

In defense, Lewis and Magee argue that it was appropriate to decide the defamation action on summary judgment because the facts are uncontested and because Howard could not prove the essential elements of his defamation claim. Specifically, Lewis and Magee assert that in order to establish a *prima facie* case for defamation, Howard must prove all of the following: defamatory words, publication, falsity, malice, and resulting injury. *Cangelosi v. Schwegmann Bros. Giant Super Markets*, 390 So.2d 196, 198 (La. 1980)*; Somers v. State ex rel. Dept. of Transportation and Development*, 97-1929, p. 26 (La. App. 4 Cir. 3/29/00), 758 So.2d 923, 939.

Lewis and Magee maintain that the facts are uncontested and are supported by the trial transcript from the civil rights action. In particular, they argue that the transcript demonstrates the following: (1) Howard did, in fact, improperly suggest that defense witness, Richard Jerrell, was a poster boy for the Aryan Nation;

(2) Howard made disparaging remarks about people from the "North Shore" (a geographic location) and that those remarks were intended to play on local prejudices; (3) Howard referred to the St. Tammany Sheriff's Office as a paramilitary organization which "burn[ed] down the village;" and (4) Howard repeatedly mispronounced Captain Greg Longino's name as "Longo" and such repeated mispronunciations could reasonably be

construed as an attempt to create an improper metaphor, i.e., calling the witness “Rambo.”

Lewis and Magee further submit that their statements are protected by the qualified privilege of La R.S. 14:49 and that the protection afforded by defense of the qualified privilege may be raised on a motion for summary judgment. *Kelly v. West Cash and Carry Bldg Materials Store*, 99-0102 (La. App. 4 Cir. 10/20/99), 745 So.2d 743. Finally, Lewis and Magee maintain that the qualified privilege does apply because (1) the statements were grounded in fact, as can be ascertained from the trial transcript; (2) the statements were material to their case in defending their client; and (3) the statements did not defame Howard, because Lewis and Magee were merely objecting to Howard’s prejudicial rhetoric during the trial.

A cause of action for defamation arises out of a violation of La. C.C. art. 2315. As stated above, the elements of a claim of defamation are : (1) defamatory words; (2) publication; (3) falsity; (4) malice, actual or implied; and (5) resulting injury. *Cangelosi, supra*. This court has recognized the established principle of Louisiana law that in making a determination as to whether words are defamatory, one must look not only to the words themselves but also to the context and circumstances in which they were used. *Becnel v. Boudreaux*, 340 So.2d 687, 688 (La. App. 4 Cir.1976).

Our jurisprudence also demonstrates that defamation cases may be disposed of on summary judgment if the court determines that the words at issue are not objectively capable of having a defamatory meaning. *Ruffin v. Wal-Mart Stores, Inc*, 01-0613 (La. App. 1 Cir. 5/10/02), 818 So.2d 965; *Bell v. Rogers*, 29,757 (La. App. 2 Cir. 8/20/97), 698 So.2d 749.

Additionally, a plaintiff in a defamation suit bears a heavy burden to withstand a motion for summary judgment because, absent sufficient evidence that the plaintiff will be able to prove his or her factual assertions at trial, no genuine issue of material fact exists. *Bell, supra; Wisner v. Harvey,* 96-0195 (La. App. 1 Cir. 11/8/96), 694 So.2d 348. Our Supreme Court has held that if the documents filed in support of the defendant's motion for summary judgment are facially adequate to refute the essential elements of a particular defamation claim, the claim will not survive summary judgment unless the plaintiff affirmatively produces evidence of sufficient quality and quantity to demonstrate that it is likely that he or she will be able to meet his or her burden of proof at trial. *Sassone v. Elder*, 626 So.2d 345 (La. 1993).

As to the issue of the qualified privilege contained in La. R.S. 14:49, this court, in *Miskell v. Ciervo*, 557 So.2d 274 (La. App. 4th Cir. 1990), stated,

> [A] defamation action is barred by the principle of

> qualified privilege in favor of attorneys regarding the pleadings and briefs which they file. The reasoning for such a holding has not altered: to allow any defamation action based upon potentially offensive, albeit justifiable, statements would serve to invite a flood of litigation. Any such statement, whether proven or not, would become actionable.
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> Comment I to Rule 1.3 of the American Bar Association Model Rules of Professional Conduct states that "[A] lawyer should act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf." (emphasis added). If an attorney is afraid of the consequences which may flow from using possibly offensive statements, he can no longer represent his client with the "zeal" called for in the Model Rules.

See also, Jacobs v. O'Bannon, 472 So.2d 180 (La. App. 4th Cir. 1985); *Jacobs v. O'Bannon*, 531 So.2d 562 (La. App. 4th Cir. 1988).

Our courts have been reluctant to find that statements made in pleadings or legal proceedings are sufficient to constitute a basis for a defamation action with respect to alleged defamatory words arising in the course of a litigated controversy. *Bradford v. Murray*, 467 So.2d 1297 (La. App. 4th Cir. 1985); *State Through Dept. of Transportation and Development v. Caubarreaux Used Cars*, 520 So.2d 1180 (La. App. 3rd Cir. 1988).

In *Mitchell v. Truck Service, Inc.*, 286 So.2d 112 (La. App. 4th Cir. 1973), we expressed why a court must be hesitant in finding such words to constitute a basis for a defamation action. In *Mitchell*, plaintiffs brought a liable action based on statements made in a letter from one attorney to

another attorney and in trial memoranda. In affirming the trial court's dismissal on an exception of no cause of action, we stated:

> Our adversary system frequently requires that strong positions be taken by litigants and their attorneys in the advancement of their causes. There is no end to cases in which one side claims that the other's witnesses are not telling the truth, that they weren't even present at times and under circumstances when they have sworn to have been so, that vehicles which are sworn to have been present are nothing more than phantom vehicles, that straw men are raised by opponents in argument, that facts sworn to never have occurred and that claims are frivolous or groundless or even figments of the other party's imagination. In contested cases, it is not at all unusual for the attorney for a litigant to argue in strong language to courts that such weaknesses exist in the opponent's case and such language is not defamation. *Id.* at 115.

The Louisiana Supreme Court has recognized the qualified privilege afforded attorneys but stated further that "an attorney in Louisiana cannot make disparaging statements, either in pleadings, briefs or arguments, if the defamatory statements are not pertinent to the case or are made maliciously or without reasonable basis." *Freeman v. Cooper*, 414 So.2d 355, 359 (La. 1982). We agree with the United States Court of Appeals that the comments made by Howard in the trial demonstrated "rhetorical excess" and ergo are inappropriate. Our review of the record convinces us that the statements made by Lewis and Magee, in response to Howard's trial tactics,

were pertinent to the defense of the civil rights case, reasonably grounded in fact, and, therefore, not malicious as a matter of law.

The trial court determined that, as a matter of law, the statements made by Lewis and Magee were material to the cause asserted, were made without malice, and were therefore protected by the qualified privilege. We find no error in that ruling. The motion for summary judgment was properly granted.

AFFIRMED.