

DONNA M. SMITH * **NO. 2018-CA-0573**
VERSUS * **COURT OF APPEAL**
MONIQUE E. BARIAL, ET AL * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2017-09989, DIVISION "E"
Honorable Melvin C. Zeno, Judge

Judge Paula A. Brown

(Court composed of Chief Judge James F. McKay, III, Judge Roland L. Belsome,
Judge Paula A. Brown)

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**MOTION TO DISMISS DENIED;
WRIT GRANTED; RELIEF DENIED;
JUDGMENT AFFIRMED**

DECEMBER 19, 2018

This matter derives from a petition to annul a Community Property Consent Judgment (“Consent Judgment”) involving Plaintiff/Appellant, Donna M. Smith (“Ms. Smith”) and her former husband, Thomas Ussin Brown (“Mr. Brown”). In connection with the petition to annul, Ms. Smith filed a Petition for Damages (the “Petition”) against Defendants/Appellees, the Law Offices of Chanel R. DeBose and Chanel R. DeBose (collectively, “Ms. DeBose’); Judge Monique Barial (“Judge Barial”); the Office of Risk Management (“ORM”); and Judiciary Commission members, Kelly McNeil Legier, Sandra A. Vujnovich, Michelle A. Beaty, and John Keeling (collectively, the “Judiciary Commission members”). Ms. DeBose filed an exception of prematurity. Judge Barial, the Judiciary Commission members, and ORM filed exceptions of no cause of action. Ms. Smith appeals the judgments sustaining the Defendants/Appellees’ respective exceptions of prematurity and no cause of action. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

This Court previously considered some of the underlying issues raised in this appeal in the matter of *Brown v. Brown*, 2015-1016 (La. App. 4 Cir. 2/24/16), 187

So.3d 538 (“*Brown*”). Accordingly, we adopt pertinent facts and the procedural history from *Brown* in our review of the case *sub judice* as follows:

Ms. Smith and Mr. Brown were divorced on December 22, 2009. In connection with the partition of community property, a consent agreement was executed on November 6, 2014. At that time, both parties were represented by counsel.^[1] Thereafter, a [“Consent Judgment”] was rendered on December 10, 2014.

Ms. Smith, acting *pro se*, filed a petition to annul the [C]onsent [J]udgment alleging fraud and ill practice on the part of Mr. Brown and duress, coercion and misrepresentation by Ms. Smith’s attorney.^[2] In response, Mr. Brown filed peremptory exceptions of no cause of action and *res judicata*, along with a dilatory exception of nonconformity of the petition.

Mr. Brown’s exceptions were heard on April 29, 2015.³ In a judgment dated June 2, 2015, the trial court [Judge Barial] granted the exception of no cause of action and rendered all remaining matters moot. Ms. Smith’s appeal followed.

On appeal, this Court determined that the allegations pled in the petition to annul did not state a cause of action; hence, Judge Barial did not err in granting the exception of no cause of action. *Brown*, 2015-1016, pp. 4-5, 187 So.3d at 541-2. However, “out of an abundance of caution,” we remanded the case to the district court to give Ms. Smith the opportunity to amend her petition to annul to state a cause of action in accord with La. C.C.P. art. 934.⁴ *Id.* at pp. 5-6.

¹ Mr. Brown was represented by Ms. DeBose and Ms. Smith was represented by Sharry I. Sandler and the Law Office of Sharry I. Sandler (“Ms. Sandler”).

² The opinion referenced the fact that, “[i]nitially, Ms. Smith collaterally filed a motion to annul the consent judgment, which was not the proper procedure under La. C.C.P. art. 2004. She subsequently filed a new petition to annul, and the matters were consolidated.”

³ The record indicates Deidre K. Peterson (“Ms. Peterson”) represented Ms. Smith at the April 29, 2015 hearing on the exceptions.

⁴ La. C.C.P. art. 934 provides:

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

On April 11, 2016, Ms. Smith filed a motion to set date to file amended petition for annulment of the Consent Judgment. Judge Barial granted the motion, ordering Ms. Smith to file her amended petition on or before May 15, 2016. Judge Barial further ordered that a hearing on the amended petition would be scheduled upon its filing. Ms. Smith failed to file her amended petition by the May 15, 2016 deadline. As a result, Ms. DeBose filed a motion to dismiss the petition to annul. Judge Barial heard argument on the motion to dismiss on March 27, 2017 and orally granted the motion.

Sometime later, Ms. DeBose filed a motion for status conference, which Judge Barial granted on June 12, 2017 and scheduled for hearing on July 19, 2017. Ms. DeBose alleged in the motion that the written judgment of dismissal had not been signed due to outstanding costs owed to the Orleans Parish Clerk of Court. In a separate filing, on June 12, 2017, Judge Barial also granted Ms. Smith's notice for a suspensive appeal, but denied her request to proceed *in forma pauperis* without posting a security bond.⁵ On July 11, 2017, pursuant to the district court's own motion, Judge Barial signed an order staying further proceedings and continued the status conference without date. The order noted that the district court had been divested of jurisdiction by granting Ms. Smith's appeal.

On October 16, 2017, Ms. Smith, *in proper person*, filed the Petition, which is the subject of the present appeal, in another division of Civil District Court for

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.

⁵ On July 3, 2017, Ms. Smith also filed, in this Court, a notice of intent to file a writ of mandamus to request permission to proceed *in forma pauperis* on appeal. This Court granted Ms. Smith's writ application for the limited purpose of remanding the matter to the district court to consider the notice of intent as a notice of appeal. See *Smith v. Brown*, 2017-0618 (La. App. 4 Cir. 7/28/17).

the Parish of Orleans (“CDC”). Ms. Smith claimed she was entitled to damages from Defendants/Appellees for their various acts of fault. Ms. Smith generally alleged that Ms. DeBose engaged in conspiracy, fraud, and collusion with Mr. Brown and Ms. Smith’s own attorney, Ms. Sandler, to concoct the Consent Judgment. As to Judge Barial, Ms. Smith claimed that Judge Barial improperly disregarded orders from this Court and willfully participated in Ms. DeBose’s alleged criminal acts. Ms. Smith contended the Judiciary Commission members were liable for damages, arguing they sanctioned illegal behavior by failing to act on the judicial complaint she had filed against Judge Barial. Ms. Smith further alleged that ORM was vicariously liable for the acts/omissions of Judge Barial and Judiciary Commission members for their refusal to adhere to the rules and laws governing their respective offices.

In response to the Petition, Ms. DeBose filed an exception of prematurity, motion to stay, and alternatively, motion for security of costs (the “Prematurity Exception”). Ms. DeBose argued Ms. Smith’s claims were premature as they emanated from Ms. DeBose’s alleged actions in a pending judicial proceeding. Specifically, Ms. DeBose urged that Ms. Smith had filed a previous lawsuit, which was pending at the time Ms. DeBose filed her motion, in federal district court setting forth substantially the same allegations.⁶

⁶ In support of the Prematurity Exception, Ms. DeBose attached a copy of a lawsuit Ms. Smith filed on July 20, 2015, in United States District Court, Eastern District of Louisiana, *Smith v. Brown, et al.*, Civil Action Case No. 2015-2784. In that action, Ms. Smith sought relief against Ms. DeBose, Mr. Brown, and other defendants for alleged misconduct in the concoction and enforcement of the Consent Judgment. Ms. DeBose also attached a copy of a notice of filing of removal Ms. Smith filed in CDC on October 27, 2017 and a copy of a November 16, 2017 notice of removal and demand for trial by jury (“Notice of Removal”) filed in the United States District Court, Eastern District of Louisiana to remove her actions from state court to the federal district court. Ms. Smith raised similar misconduct allegations against Ms. DeBose and the other defendants in the Notice of Removal as she alleged in the Petition and the July 20, 2015 federal court complaint.

Judge Barial, the Judiciary Commission members, and ORM filed exceptions of no cause of action (the “No Cause of Action Exceptions”). Judge Barial and the Judiciary Commission members contended the claims made against them were barred by various doctrines of immunity. ORM maintained it had no legal vicarious liability for the actions of Judge Barial or ORM.

The district court conducted a hearing on the exceptions on March 9, 2018. The district court sustained Ms. DeBose’s Prematurity Exception and stayed further proceedings against Ms. DeBose. The district court granted Judge Barial’s, the Judiciary Commission members’ and ORM’s No Cause of Action Exceptions and dismissed Ms. Smith’s Petition against these Defendants/Appellees with prejudice. Ms. Smith filed a notice of appeal from each judgment⁷ on March 23, 2018 and a request for written reasons for judgment. On April 26, 2018, the district court granted the notice of appeal; and on May 23, 2018, the district court rendered written reasons for each judgment. This appeal followed.

DISCUSSION

Ms. Smith’s assignments of error fall within two categories: (1) the district court erred in granting the Prematurity Exception; and (2) the district court erred in granting the No Cause of Action Exceptions. Before we address the merits of these alleged errors, we will first consider the motion to dismiss the appeal filed on behalf of Ms. DeBose.

Motion to Dismiss

Ms. DeBose argues that Ms. Smith’s appeal of the Prematurity Exception judgment should be dismissed because the appeal is from an interlocutory

⁷ The record shows the written judgment granting the Prematurity Exception was signed on March 26, 2018 and the written judgment granting the No Cause of Action Exceptions was signed on March 29, 2018.

judgment which falls outside of this Court’s appellate jurisdiction. Ms. DeBose correctly notes that a judgment that does not determine the merits, but only preliminary matters, such as the judgment granting the Prematurity Exception, is an interlocutory judgment. *See La. C.C.P. art. 1841.* “An interlocutory judgment is appealable only when expressly provided by law.” *See La. C.C.P. art. 2083(C).* The proper procedural mechanism to seek review of an interlocutory judgment that is not immediately appealable is an application for supervisory writ. *Delahoussaye v. Tulane University Hosp. and Clinic*, 2012-0906, p. 4 (La. Ap. 4 Cir. 2/20/13), 155 So.3d 560, 562. Nonetheless, when a party appeals a non-appealable judgment, such as in this case, appellate courts possess the discretionary authority to convert the appeal of an interlocutory judgment into an application for supervisory writ. *See Stelluto v. Stelluto*, 2005-0074, p. 7 (La. 6/29/05), 914 So.2d 34, 39. Appellate courts may exercise this discretion when the motion for appeal has been filed within the thirty-day time period allowed for the filing of an application for supervisory writs under Rule 4-3 of the Uniform Rules, Courts of Appeal. *See Board of Supervisors of La. State Univ. and Agric. and Mech. Coll. v. Mid City Holdings, L.L.C.*, 2014-0506, p. 4 (La. App. 4 Cir. 10/15/14), 151 So.3d 908, 911.

In the case *sub judice*, Ms. Smith timely filed her appeal within the thirty-day time delay for filing an application for a supervisory writ. Accordingly, we exercise our discretionary authority and convert Ms. Smith’s appeal of the judgment granting the Prematurity Exception to an application for supervisory writ. In conjunction therewith, Ms. DeBose’s motion to dismiss is denied. We will now proceed to examine the merits of Ms. Smith’s claims.

Prematurity Exception Judgment

First, Ms. Smith alleges the district court erred in granting Ms. DeBose's Prematurity Exception. The dilatory exception of prematurity questions whether the cause of action has matured to the point where it is ripe for judicial review. *See Williamson v Hospital Service Dist. No. 1 of Jefferson*, 2004-0451, p. 4 (La. 12/1/04), 888 So.2d 782, 785. "A suit is premature if it is brought before the right to enforce it accrues." *Jefferson Door Co., Inc. v. Cragmar Const., L.L.C.*, 2011-1122, p. 3 (La. App. 4 Cir. 1/25/12), 81 So.3d 1001, 1004. Well-settled jurisprudence establishes that an action against a party arising out of pending judicial proceedings cannot be brought until the pending proceedings have been terminated. *See Ballex v. Naccari*, 1995-0451, p. 2 (La. App. 4 Cir. 6/7/95), 657 So.2d 511, 512. Appellate courts review a judgment sustaining an exception of prematurity for manifest error. *Jefferson Door*, 2011-1122, p. 3, 81 So.3d at 1004.

In the case *sub judice*, the district court's written reasons for judgment reflect that it dismissed Ms. Smith's Petition against Ms. DeBose due to identical claims pending in federal district court. Based upon our review of the record, Ms. Smith's petition to annul—which involves similar fault allegations against Ms. DeBose as alleged in the Petition—was also pending at the time the district court signed the judgment on the Prematurity Exception. Therefore, based on pending judicial proceedings involving the same parties, the Petition against Ms. DeBose was not ripe for judicial review. Accordingly, we find no manifest error in the judgment sustaining the Prematurity Exception and staying further proceeding against Ms. DeBose in state court, pending the resolution of the complaint filed in federal district court.

Notwithstanding, Ms. Smith argues the district court erred in that it did not allow her an opportunity to amend her Petition before it granted the Prematurity

Exception. In support, Ms. Smith cites La. C.C.P. art. 933(B). That article requires the district court to permit a litigant to amend a petition when the grounds for sustaining the exception can be removed. However, the right to amend is not absolute. *Roy Anderson Corporation v. 225 Baronne Complex, L.L.C.*, 2017-1005, p. 14 (La. App. 4 Cir. 7/11/18), 251 So.3d 493, 503. When the grounds for sustaining the exception cannot be removed, amendment is not permitted when it would constitute a vain and useless act. *Id.* Here, Ms. Smith can make no allegations in an amended petition that would remove the ground—a pending judicial proceeding in federal district court—for granting the Prematurity Exception. As such, the district court did not err by not permitting Ms. Smith to amend her Petition. This assignment of error lacks merit.

Exceptions of No Cause of Action

Next, Ms. Smith contends the district court erred in granting the respective No Cause of Action Exceptions of Judge Barial, the Judiciary Commission members, and ORM. This Court explained the function of the exception of no cause of action and appellate review of this exception in *Llopis v. Louisiana State Board of Dentistry*, 2017-0934, 2018 WL 4201980, at *5 (La. App. 4 Cir. 8/29/18), ---So.3d--- (citing *Meckstroth v. Louisiana Dept. of Transp. & Dev.*, 2007-0236 (La. App. 4 Cir. 6/27/07), 962 So.2d 490)) as follows:

The peremptory exception of no cause of action tests the legal sufficiency of a petition by examining whether, based upon the facts alleged in the pleading, the law affords the plaintiff a remedy. La. Code of Civ. Proc. Art. 927(A)(4); *Montalvo v. Sondes*, [19] 93-2813 (La. 5/23/94), 637 So.2d 127, 131. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. La. Code Civ. Proc. Art. 931. The court reviews the petition and accepts all well pleaded allegations of fact as true, and the issue at the trial of the exception is whether, on the face of the petition, the plaintiff is entitled to the relief sought. *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So.2d 1234, 1235-36

(La. 1993); *Kuebler v. Martin*, 578 So.2d 113 (La. 1991); *Hero Lands Co. v. Texaco, Inc.*, 310 So.2d 93 (La. 1975). Because Louisiana is a fact-pleading jurisdiction, mere legal conclusions, unsupported by facts, are not sufficient to set forth a cause of action. *State ex rel. Ieyoub v. Racetrac Petroleum, Inc.*, [20] 01-0458 (La. App. 3 Cir. 6/20/01), 790 So.2d 673, 678. The reviewing court should conduct a *de novo* review because the exception raises a question of law and the trial court's decision is based solely on the sufficiency of the petition. *Fink v. Bryant*, [20] 01-0987, p. 4 (La. 11/28/01), 801 So.2d 346, 349; *Wright v. Louisiana Power & Light*, [20] 06-1181, p. 8 (La. 3/9/07), 951 So.2d 1058, 1059.

With these precepts in mind, we will conduct a *de novo* review of Judge Barial's, the Judiciary Commission members', and ORM's No Cause of Action Exception separately.

Judge Barial

The district court determined that the Petition did not state a cause of action against Judge Barial based on the doctrine of absolute judicial immunity. The doctrine of judicial immunity provides absolute immunity from liability for all acts performed within a judge's subject matter jurisdiction, unless the judge acted outside his or her judicial capacity and the judge's actions were based on malice and corruption. See *Viator v. Miller*, 2004-1119, p. 5 (La. App. 3 Cir. 4/27/05), 900 So.2d 1135, 1140. The four factors to determine whether the actions of a judge fall within their judicial capacity are:

1. whether the precise act complained of is a normal judicial function;
2. whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers;
3. whether the controversy centered around a case pending before the court; and
4. whether the acts arose directly out of a visit to the judge in his official capacity.

See Haley v. Leary, 2009-1626, pp. 3-4 (La. App. 4 Cir. 8/14/10), 69 So.3d 430, 433. The doctrine's purpose is to insure that all judges are free to fulfill their responsibilities without the threat of civil prosecution by disgruntled litigants. *Knapper v. Connick*, 1996-0434, p. 3 (La. 10/15/96), 681 So.2d 944, 946.

Consequently, to state a cause of action against a judge, a plaintiff must allege facts that (1) show malice and corruption; and (2) facts that show the judge acted outside the jurisdiction of his or her judicial capacity. *Viator*, 2004-119, p. 5, 681 So.2d at 946. Our courts have found that only intentional acts done without legal justification and egregious conduct that demonstrates an active desire to cause harm rise to the level of malice and corruption to mandate a forfeiture of immunity. *See Llopis*, 2017-0934 at *8.

Ms. Smith's Petition alleges that Judge Barial engaged in misconduct with Ms. DeBose and failed to follow orders from this Court, thereby depriving Ms. Smith of due process. Upon our examination of the Petition, we find the claims of malicious and corrupt misconduct against Judge Barial amount to mere conclusory allegations that are devoid of specific facts. Moreover, Ms. Smith's complaints regarding Judge Barial's rulings and alleged non-compliance with orders from this Court occurred while Judge Barial was acting in her judicial capacity within her elected jurisdiction. Based upon our *de novo* review, the Petition does not meet the two factors required to maintain a cause of action against a judge as discussed in *Viator*. Accordingly, Judge Barial was entitled to judicial immunity and the district court properly granted the exception of no cause of action in favor of Judge Barial.

Judiciary Commission members

In her Petition, Ms. Smith seeks recovery against the Judiciary Commission members based on their failure to sanction Judge Barial for misconduct as claimed by Ms. Smith. The Judiciary Commission members counter that they are entitled to immunity from suit based on absolute immunity afforded by Supreme Court Rule 23, Section 32 and the doctrine of quasi-judicial immunity.⁸ Supreme Court Rule 23, Section 32 provides that “[m]embers of the Judiciary Commission, duly appointed hearing officers for the Commission, the Chief Executive Officer of the Commission, Special Counsel, Commission Counsel, Hearing Officer Counsel, and members of their staffs shall be absolutely immune from civil suit for all conduct in the course of their office duties.” The doctrine of quasi-judicial immunity affords immunity from suit to administrative agencies, such as the Judiciary Commission, for actions taken in their adjudicatory role. *See Durousseau v. Louisiana State Racing Commission*, 1998-0442 (La. App. 4 Cir. 12/9/98), 724 So.2d 844. The doctrine of quasi-judicial immunity is equivalent to the same concept that affords absolute immunity to judges. *Id.* at 846. Therefore, in order to state a cause of action to justify a waiver of the Judiciary Commission members’ immunity defenses, the Petition must allege facts to show the Judiciary Commission members acted outside of their authority and engaged in misconduct. Upon our examination of the Petition, we find it does not allege such facts. Accordingly, the district court properly granted the Judiciary Commission members’ No Cause of Action Exception.

ORM

⁸ “Quasi-judicial” is defined by BLACK’S LAW DICTIONARY, 1440 (10th ed. 2014), as: “[o]f, relating to or involving an executive or administrative official’s adjudicative acts.”

Ms. Smith alleges in the Petition that ORM should be found vicariously liable for the actions of Judge Barial and the Judiciary Commission members. The concept of vicarious liability, which holds employers liable for the acts of its employees, is codified in La. C.C. art. 2320. That article states, in pertinent part, that “[m]asters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.” However, in the case *sub judice*, ORM is not the employer of Judge Barial or the Judiciary Commission members. Upon review, the Petition does not state any facts or articulates any legal basis to impute the alleged liability of Judge Barial or the Judiciary Commission members to ORM. Moreover, having found that the district court properly sustained the No Cause of Action Exceptions in favor Judge Barial and the Judiciary Commission members, thereby dismissing Ms. Smith’s Petition as to those parties, ORM could not be found liable for their acts, even if an employer/employee relationship existed. The district court did not err in sustaining ORM’s No Cause of Action Exception.

CONCLUSION

Based on the foregoing reasons, Ms. DeBose’s motion to dismiss is denied. We convert Ms. Smith’s appeal of the judgment sustaining the Prematurity Exception into a writ application, and upon review, deny relief. The judgment sustaining the No Cause of Action Exceptions in favor of Judge Barial, the Judiciary Commission members, and ORM is hereby affirmed.⁹

⁹ Based upon our review of the record and the nature of the fault allegations pled against Judge Barial, the Judiciary Commission members, and ORM in the Petition, we conclude Ms. Smith can plead no facts that would remove the grounds for sustaining the No Cause of Action Exceptions. Therefore, to permit amendment would be a vain and useless act. See *Roy Anderson Corp. v. 225 Baronne Complex, L.L.C., supra*.

**MOTION TO DISMISS DENIED;
WRIT GRANTED; RELIEF
DENIED; JUDGMENT
AFFIRMED**