DWAYNE ALEXANDER	*	**NO. 2018-CA-0776**
VERSUS	*	**COURT OF APPEAL**
BLUE WILLIAMS, L.L.P., ET AL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2017-05452, DIVISION "C"
Honorable Sidney H. Cates, Judge
* * * * * *

Judge Rosemary Ledet
* * * * * *

(Court composed of Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins, Judge Dale N. Atkins)

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**AFFIRMED IN PART,
REVERSED IN PART, AND
REMANDED**

JANUARY 23, 2019

This is a defamation suit. The plaintiff, Dwayne Alexander, filed this suit against multiple defendants. In response, the defendants filed various exceptions and motions for summary judgment. Following a hearing, the trial court rendered judgment dismissing the suit. From that judgment, Mr. Alexander appeals. For the reasons that follow, we affirm in part, reverse in part, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2017, Mr. Alexander, a former private investigator, commenced this suit against eleven defendants—five attorneys, three law firms, two individuals, and one state agency. For ease of discussion, the eleven defendants are grouped into the following five categories:

- Blue Williams, LLP; and two attorneys in that firm, Thomas Buck and David Parnell, Jr. (collectively the "Blue Williams Defendants");
- Burglass & Tankersley; and two attorneys in that firm, Dennis J. Phayer and Elizabeth Doubleday (collectively the "Burglass Defendants");
- Deutsch Kerrigan, LLP; and one attorney in that firm, Nancy Marshall[1] (collectively the "Deutsch Kerrigan Defendants");

[1] Although Mr. Alexander averred in his petition that Nancy Marshall was a member of the Burglass & Tankersley firm, Ms. Marshall answered the petition as a member of the Deutsch Kerrigan firm and averred in another pleading that she was named as "an attorney at a firm (the

- James Englade and the Louisiana State Board of Private Investigator Examiners (the "LSBPIE") (collectively the "State Defendants"); and

- Annette Kovac ("Ms. Kovac").

This suit stems from an earlier suit that Mr. Alexander filed in Civil District Court for the Parish of Orleans ("CDC"), entitled *Alexander v. Centanni*, *et al.*, CDC No. 2015-209 (the "*Centanni* Case"). In his petition in this suit, Mr. Alexander describes the *Centanni* Case as "a petition to annul a former judgment because attorneys for the parties (of which four are defendants herein, Dennis Phayer, Elizabeth Doubleday and their employers) had used a false affidavit concocted by James P. Englade without authority or board approval of the . . . LSBPIE."

In the *Centanni* Case, the Blue Williams Defendants, as attorney for Wayne Centanni; the Burglass Defendants, as attorney for Mr. Englade; and the Deutsch Kerrigan Defendants, as attorney for Mr. Parnell, jointly filed a writ application in this court, seeking review of the trial court's ruling denying their motion for summary judgment. They attached to their joint writ application a copy of the February 27, 2009 Cease and Desist Order that the LSBPIE issued to Mr. Alexander (the "C & D Order").[2] This court denied their writ application. *Alexander v. Centanni*, *et al.*, 17-0162 (La. App. 4 Cir. 3/29/17) (*unpub.*).

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wrong firm, as it happens)."

[2] The C & D Order, which was signed by Ms. Kovac as the LSBPIE's Chairman, stated as follows:

> Pursuant to the authority of La. R.S. 37:3522, the [LSBPIE] orders that Dwayne Alexander, who the Board finds to be engaged in the practice of private investigation in the State of Louisiana in violation of La. R.S. 37:3500 *et seq.*, be and is hereby ordered to cease and desist from such activity.

In this suit, the gist of Mr. Alexander's claim is that the defendants defamed him by attaching to their joint writ application a copy of the C & D Order. Mr. Alexander characterizes the C & D Order as a false, forged, and fabricated public record. Mr. Alexander alleges that the defendants had knowledge of the falsity of the C & D Order from the earlier litigation, that the C & D Order "had absolutely nothing to do with the current litigation on writ," and that attaching the document to the writ application was "nothing more than [a] malicious[] and willful act by all defendants to defame, tarnish petitioner['s] reputation putting him in a false light to the courts." Mr. Alexander further alleges that the C & D Order was "circulated" to the court, the court's employees and staffs, the clerk of court's staff, and counsel of record and that it was "placed in the public records."[3] Thus, Mr. Alexander alleges, the defendants participated in a scheme "to defame [his] reputation and ensure [he] is prevented from earning a living in his chosen occupation [as a private investigator]." Finally, Mr. Alexander alleges that the defendants' defamation caused damage to his personal reputation, humiliation, embarrassment, and mental anguish.

In response, the defendants filed various exceptions and motions for summary judgment. Mr. Alexander also filed a cross-motion for partial summary judgment. Following a hearing, the trial court denied Mr. Alexander's cross-motion and ruled on the defendants' exceptions and motions as follows:

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[3] Mr. Alexander also claims that "causing said false document to be filed into the judicial records violates LSA R.S. 14:132 and 14:133."

- Exception of No Cause of Action filed by the State Defendants and adopted by the Burglass Defendants is MAINTAINED;

- Motion for Summary Judgment and Exception of Privilege filed by the Blue Williams Defendants and adopted by the Burglass Defendants are GRANTED and MAINTAINED;

- Motion for Summary Judgment filed by the Kovac Defendant is GRANTED; and

- Motion for Summary Judgment filed by the Deutsch Kerrigan Defendants is GRANTED.[4]

In its written reasons for judgment, the trial court stated as follows:

> Louisiana R.S. 14:49 establishes a qualified privilege in defamation actions for any "publication or expression . . . made by an attorney or party in a judicial proceeding."[5] In cases involving this qualified privilege, actual malice must be proved, regardless of whether the publication is true or false. Louisiana R.S. 13:3415 further provides that, "no party to any action or proceeding is liable for any slanderous or libelous words uttered by his attorney at law."
>
> The law grants to attorneys and their clients this qualified privilege in defamation actions for (allegedly defamatory) statements made in the pleadings and briefs they file, if those statements are not made with actual malice, and are reasonable and pertinent to the litigation at hand. Further, the Louisiana Fourth Circuit has held in *Miskell v. Ciervo*, 557 So.2d 274 (La. App. 4th Cir. 1990), that, "if the attorneys of a client may not be held liable for defamation, the client which hired them also will not be liable." *See also Jacobs v. O'Bannon*, 472 So.2d 180 (La. App. 4th Cir. 1985) and 531 So.2d 562 (La. App. 4th Cir. 1988).
>
> The Court has examined the four corners of plaintiff's Petition for Damages, and finds that it fails to state any facts showing specific and/or actual malice or an intent to harm on the part of any of the defendants, and in support of plaintiff's conclusory allegations of actual malice. Likewise, as to plaintiff's alleged damages, plaintiff has failed to state any facts and has made nothing more than conclusory allegations that he suffered damage to reputation, humiliation, embarrassment, and mental anguish.

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[4] The Deutsch Kerrigan Defendants also filed a Motion to Strike pursuant to La. C.C.P. art. 971, which the trial court did not rule upon.

[5] "Although La. R.S. 14:49 is part of the Louisiana Criminal Code, the qualified privilege that it enumerates as defenses for criminal defamation . . . are also applicable to civil defamation cases." *Hornot v. Cardenas*, 06-1341, p. 21 (La. App. 4 Cir. 10/3/07), 968 So.2d 789, 803 (citing Reporter's Comments–1959 to La. R.S.14:47 and the cases cited in the comments).

> The court finds that plaintiff has failed to state a cause of action for defamation against the defendant attorneys and their clients, alleged to have occurred in the course of a judicial proceeding.[6]
>
> The Court further finds that amendment of the pleadings will not cure the defects in the Petition. Plaintiff complains that defendants, with malice, defamed him by publication of the 2009 Cease and Desist Order; yet, the record of this matter shows that the plaintiff himself was the first to publish the 2009 Cease and Desist Order by attaching it to his original "Petition to Annul Judgment for Fraud and Ill Practice Pursuant to C.C.P. Art. 2004," in the same CDC No. 2015-209, and prior to any complained of publication by defendants in this action.
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> Further, after review of the entire record, the memoranda, and the exhibits, the Court finds that there are no genuine issues of material fact and, pursuant to the law, defendants are entitled to summary judgment of dismissal.

For those reasons, the trial court dismissed Mr. Alexander's claims against all of the defendants with prejudice.

Mr. Alexander contemporaneously filed a Motion for New Trial and a Motion to Recuse the trial judge. The matter was referred to another CDC section for a ruling on the Motion to Recuse. The judge in the other section denied the Motion to Recuse and transferred the matter back to the trial judge. The trial judge denied the Motion for New Trial. This appeal followed.

DISCUSSION

Although Mr. Alexander assigns multiple errors,[7] we frame the dispositive issues on appeal as three-fold: (i) whether the heightened pleading standard,

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[6] The trial court correctly noted that neither La. R.S. 14:132 nor 14:133 confers a private, civil cause of action to the plaintiff. These are both criminal statutes.

[7] On appeal, Mr. Alexander asserts the following assignments of error:

1) Whether the trial court erred in granting summary judgment against the plaintiff without the plaintiff having been served with the motions? (i) Summary judgment without service is an absolute nullity; (ii) Alternatively, the trial court should have continued the matter.

enunciated in *Montalvo v. Sondes*, 93-2813 (La. 5/23/94), 637 So.2d 127, for a non-client to sue an attorney (and his or her clients or both) for defamation was met (the "*Montalvo* heightened-pleading standard"); (ii) whether the defendants properly served Mr. Alexander with their motions for summary judgment; and (iii) whether the qualified privilege granted to an attorney or a party in a judicial proceeding applies. For ease of discussion, we address each issue in turn.

No Cause of Action—Application of the Montalvo Heightened-Pleading Standard

A *de novo* standard of review applies to this court's review of a trial court's judgment maintaining a peremptory exception of no cause of action, which presents a legal question. *See Zeigler v. Housing Auth. of New Orleans*, 12-1168, p. 6 (La. App. 4 Cir. 4/24/13), 118 So.3d 442, 449 (citing *St. Pierre v. Northrop Grumman Shipbuilding, Inc.*, 12-545, p. 7 (La. App. 4 Cir. 10/24/12), 102 So.3d 1003, 1009). Summarizing the governing principles applicable to an exception of no cause of action, the Louisiana Supreme Court in *Fink v. Bryant*, 01-0987, pp. 3-4 (La. 11/28/01), 801 So.2d 346, 348-49, stated as follows:

> The function of the peremptory exception of no cause of action is to question whether the law extends a remedy to anyone under the factual allegations of the petition. *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission*, 94-2015 (La. 11/30/94), 646 So.2d 885. The peremptory exception of no cause of action is designed to test the legal sufficiency of the petition by determining whether plaintiff is afforded a remedy in law based on the facts alleged in the pleading. *Everything on Wheels Subaru, Inc. v. Subaru South*, 616 So.2d 1234 (La. 1993). 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. Ann. art. 931. The exception is

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2) Whether the trial court committed legal error in granting summary judgment on the merits when it required the judge to rule on a matter of intent, which is an outstanding issue of material fact not properly ruled upon in summary judgment?

3) Whether the trial court erred in granting the exception of no cause of action?

> triable on the face of the papers and for the purposes of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. *City of New Orleans v. Board of Commissioners*, 93-0690 (La. 7/5/94), 640 So.2d 237. In reviewing a trial court's ruling sustaining an exception of no cause of action, the appellate court and this Court should subject the case to *de novo* review because the exception raises a question of law and the trial court's decision is based only on the sufficiency of the petition. *City of New Orleans*, 640 So.2d at 253. Simply stated, a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief. *Haskins v. Clary*, 346 So.2d 193 (La. 1977).

Id. "Every reasonable interpretation must be accorded the language used in the petition in favor of maintaining its sufficiency and affording the plaintiff the opportunity of presenting evidence at trial." *Badeaux v. Sw. Computer Bureau, Inc.*, 05-0612, p. 7 (La. 3/17/06), 929 So.2d 1211, 1217.

The State Defendants, joined by the Burglass Defendants, based their peremptory exception of no cause of action on Mr. Alexander's alleged failure to satisfy the *Montalvo* heightened-pleading standard. "This heightened standard requires the plaintiff to allege facts in his petition that show malice or an intent to cause direct harm to the plaintiff." *Eschete v. Hildebrand*, 06-18, p. 5 (La. App. 5 Cir. 4/25/06), 930 So.2d 196, 199 (citing *Rogers v. Ash Grove Cement Co*., 34,934, p. 6 (La. App. 2 Cir. 11/2/01), 799 So.2d 841, 845). The State Defendants, relying on *Landry v. Base Camp Mgmt., LLC*, 15-1377, p. 8 (La. App. 1 Cir. 10/31/16), 206 So.3d 921, 925, emphasize that "[s]ince *Montalvo*, no Louisiana court has recognized the existence of a cause of action that was brought by a non-client against an adversary's attorney without alleging the *Montalvo* requirements of intent to cause direct harm and malice." The State Defendants contend that Mr. Alexander's petition fails to satisfy the *Montalvo* heightened-pleading standard.

Mr. Alexander counters that he sufficiently pled "malice" by averring that the "statements were made with actual malice, with knowledge that they were false." In support, he identifies the following paragraphs of his petition as sufficient to support a cause of action for defamation:

9.

> In this litigation, all defendants and individuals participated in the scheme, devised and with agreement of mind, to implement their illegal actions to defame the reputation and ensure Dwayne Alexander is prevented from earning a living in his chosen occupation, which has been the case since defendant [Mr.] Englade made up the false and fabricated Cease and Desist order.

10.

> The false Cease and Desist Order had absolutely nothing to do with the current litigation on writ and was nothing more than [a] malicious[] and willful act by all defendants to defame, tarnish petitioner['s] reputation putting him in a false light to the courts, particularly the Fourth Circuit Court of Appeal in hopes it would influence reversal of the judgment in his favor in the lower court. Additionally, influence the Fourth Circuit Court of Appeal if plaintiff filed any other appeals to rule against him.

11.

> The statements made by [Mr.] Englade in the forged fabricated cease and desist order were made with actual malice, in [that] the statements were made with knowledge that [they] were false and further, written on the state letter head, by [Mr.] Englade and Annette Kovac the statements are false and made up.

12.

> Plaintiff alleges that all defendants failed to act with candor towards the tribunal by filing pleadings which they knew to be false and contain false information and more importantly were fabricated in violation of [the] authorizing statute of LSBPIE in contravention of professional code of conduct and ethics, Rules 3.3 and 8.4 obstructing orderly administration of justice.

13.

> All defendant attorneys and individuals herein are personally liable as each knowingly and intentionally with full and actual knowledge caused an illegal, forced, fabricated document to be filed into these judicial proceedings a public record in violation of LSA R.S. 14:132; R.S. 14:133. . . .

Although the trial court, in granting the exception of no cause of action, cited the qualified privilege in its reasons for judgment, the jurisprudence is unclear on whether a qualified privilege defense properly can be asserted on an exception of no cause of action.[8] Nonetheless, the same policy concerns underlie both the *Montalvo* heightened-pleading standard and the qualified privilege. Explaining the relationship between the two, this court in *Milling, Benson, Woodward, Hillyer, Pierson & Miller L.L.P. v. Am. Marine Holding Co*., 98-1462 (La. App. 4 Cir. 3/3/99), 729 So.2d 139, 141-42, observed as follows:

> 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. *Penalber v. Blount*, 550 So.2d 577 (La. 1989); *Montalvo v. Sondes*, 93-2813 (La. 5/23/94), 637 So.2d 127. Accordingly, there is a qualified privilege accorded attorneys in a judicial proceeding. *Freeman v. Cooper*, 414 So.2d 355 (La. 1982). In order for the privilege to apply, the alleged

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[8] A qualified privilege is an affirmative defense to a defamation claim that must be specifically pled. *Costello v. Hardy*, 03-1146, p. 16 (La. 1/21/04), 864 So.2d 129, 142 (observing that the qualified privilege "raises a new matter which, assuming the allegations in the petition to be true, constitutes a defense to the defamation action and will have the effect of defeating the defamation claim" and that qualified privilege must be specially pled); *Brandon v. Lockheed Martin Corp*., 06-0237 (La. App. 4 Cir. 9/13/06) (*unpub*.), 2006 WL 6912986, *4, n. 3 (observing that "[b]ecause evidence outside the petition is required to establish the qualified privilege applies, the determination of whether a qualified privilege applies cannot be made on an exception of no cause of action"); *Williams v. Touro Infirmary*, 578 So.2d 1006, 1009-10 (La. App. 4th Cir. 1991) (observing that qualified privilege defense could not be raised on an exception of no cause of action "because the only affirmative defenses that may be so asserted are those which are disclosed by the petition itself, *e.g*., absolute privilege"); *Gianfala v. Allemand,* 444 So.2d 150 (La. App. 1st Cir.1983) (observing that qualified privilege defense could not be raised by the peremptory exception of no cause of action because in order to establish a qualified privilege defense the defendant must introduce evidence of good faith).

> defamatory statement must be material and must be made with probable cause and without malice." . . .
>
> In *Miskell v. Ciervo*, 557 So.2d 274 (La. App. 4th Cir. 1990), our Court upheld the trial court's sustaining of an Exception of No Cause of Action on behalf of both the attorneys and the insurer. Those defendants were sued for allegedly defaming the insured by pursuing a fraud defense in a prior action. The rationale employed by our Court in that decision was based on the fact that the basis for the alleged defamatory allegations were set forth in the pleadings and were not made maliciously. Likewise, the third party demand Derbes filed on behalf of AMHC in the instant case laid out the facts on which it was based. Therefore, it should also be viewed as made in good faith and without malicious intent.

Id. Additionally, this court observed, in *Jacobs v. O'Bannon*, 472 So.2d 180, 182 (La. App. 4th Cir. 1985), the following:

> 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 is concluded, more defamation suits would follow to obtain satisfaction for offensive statements made in the first defamation suit.

Id.[9]

In considering an exception of no cause of action, the allegations of the petition are dispositive. La. C.C.P. art. 931 (providing that "[n]o evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action"). In his petition, Mr. Alexander alleges that the statements in the C & D Order were made "with full knowledge of the falsity" and that the statements were intentionally made to harm him and to tarnish his reputation and "without [other] purpose." Given these allegations, we find that Mr.

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[9] This court also observed, in *Jacobs*, that "the offensive statements constitute just a few words from a lengthy brief" and that "[t]he 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." *Id.*; *see also Schmidt v. Cal-Drive Int'l, Inc.*, 240 F.Supp.3d 532 (W.D. La. 2017) (finding that the qualified privilege applied to defamatory statements appearing in a petition to rescind a settlement agreement filed in the trial court).

Alexander has pled sufficient facts not only to satisfy the *Montalvo* heightened-pleading standard, but also to withstand a qualified privilege defense, even assuming it could be invoked on an exception of no cause of action.[10]

In sum, the trial court legally erred in maintaining the exception of no cause of action and dismissing the State Defendants and the Burglass Defendants on that basis. The only remaining issue is whether the trial court erred in granting the motions for summary judgment.

Summary Judgment—Lack of Service

Mr. Alexander contends that the summary judgments the trial court granted in this case are absolute nullities because the motions filed by the Blue Williams Defendants, the Deutsch Kerrigan Defendants, and Ms. Kovac were not served on him by the sheriff.[11] In support, Mr. Alexander relies on *Ainsworth v. Ainsworth*, 03-1626 (La. App. 4 Cir. 10/22/03), 860 So.2d 104, which held that "[a] motion for summary judgment is a pleading that requires an answer and proper service by the sheriff." *Id.*, 03-1626, p. 8, 860 So.2d at 112. Mr. Alexander's reliance on *Ainsworth* is misplaced.

Ainsworth was decided before the 2015 amendment to the summary judgment provisions, which expressly address the requirements for service of a motion for summary judgment. As amended in 2015, La. C.C.P. art 966(B)(1)

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[10] *See Lentini v. Nw. Louisiana Legal Servs., Inc.*, 36,620, p. 6 (La. App. 2 Cir. 3/5/03), 841 So.2d 1017, 1021 (observing that "[a]ccepting as true the allegation that Vaughan and NLLS filed pleadings containing defamatory *per se* statements with the goal of injuring the economic interests of the plaintiffs, we conclude that the plaintiffs' petition adequately alleges an intent by Vaughan and NLLS to cause direct harm to plaintiffs"); C*f. Montalvo v. Sondes*, 637 So.2d 127, 131 (La. 1994) (observing that "Sondes' allegations that the malpractice suit filed by Bickford and Matthews is 'frivolous' and was instigated and continued in 'bad faith' are mere conclusions unsupported by facts").

[11] Mr. Alexander acknowledges that he was properly served with the Burglass Defendants' motion for summary judgment, which was served on him by the sheriff.

provides that "[a] motion for summary judgment and all documents in support of the motion shall be filed and served on all parties in accordance with [La. C.C.P.] Article 1313 not less than sixty-five days prior to trial." Article 1313 provides that "if a pleading or order sets a court date, then service shall be made by registered or certified mail, or as provided in [La. C.C.P.] Article 1314." Article 1314 addresses service by the sheriff. Read together, Articles 966(B)(1) and 1313(C) provide that proper service of a motion for summary judgment may be made in one of two ways: (i) by registered or certified mail (Article 1313(C)); or (ii) by the sheriff (Article 1314).[12]

Given the 2015 Amendment to the summary judgment provisions, two of the defendants' four motions for summary judgment were properly served. The Burglass Defendants' motion was served by the sheriff, as reflected by a return in the record; the Blue Williams Defendants' motion was served by certified mail, as reflected by counsel's affidavit. Neither the Deutsch Kerrigan Defendants nor Ms. Kovac, however, cite to any evidence of proper service of their motions for summary judgment. Instead, they argue that Mr. Alexander waived service either by making a general appearance or by failing to file a written exception. This argument is unpersuasive.[13] We, thus, find that the trial court erred in granting the motions for summary judgment filed by the Deutsch Kerrigan Defendants and Ms.

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[12] *See Cambrie Celeste LLC v. Starboard Mgmt., LLC*, 16-1318, pp. 14-15 (La. App. 4 Cir. 11/6/17), 231 So.3d 79, 87, *writ denied*, 17-2041 (La. 2/2/18), 235 So.3d 1110 (recognizing that service of a motion for summary judgment is now proper if served in the manner provided in La. C.C.P. art. 1313—"either by registered or certified mail or as provided in Article 1314").

[13] In *State v. Kee Food, Inc.*, 17-0127, p. 5 (La. App. 1 Cir. 9/21/17), 232 So.3d 29, 32, *writ denied*, 17-1780 (La. 12/5/17), 231 So.3d 632, cited by the Deutch Kerrigan Defendants, the court held that the plaintiff waived the objection because the plaintiff not only failed to file a written exception, but "also failed to orally object to service of process at the hearing on the motion for summary judgment." *Id.* Here, in contrast, Mr. Alexander orally objected at the hearing.

Kovac.[14] As to the remaining defendants—the Blue Williams Defendants and the Burglass Defendants—the application of the qualified privilege is the dispositive issue.

Summary Judgment—Application of the Qualified Privilege

Regarding the merits of the motions for summary judgment, Mr. Alexander's sole argument is that the qualified privilege issue is not suitable for summary judgment. He contends that summary judgment is inappropriate in this context given that application of the qualified privilege requires a determination of intent. He emphasizes that in *Jones v. Gov't Employees Ins. Co*., 16-1168, p. 13 (La. App. 4 Cir. 6/14/17), 220 So.3d 915, 925, this court held that summary judgment "is inappropriate for judicial determination of subjective facts, such as . . . intent." *Id*. Mr. Alexander thus submits that the trial court's judgment granting the defendants' motions for summary judgment should be reversed.

Contrary to Mr. Alexander's contention, the granting of a motion for summary judgment on issues of intent is not precluded; rather, Louisiana jurisprudence has recognized that "'summary judgment based on subjective facts like intent is rarely appropriate.'" *Indulge Island Grill, L.L.C. v. Island Grill, L.L.C*., 16-1133, p. 5 (La. App. 4 Cir. 5/10/17), 220 So.3d 154, 158 (citing *Fiveash v. Pat O'Brien's Bar, Inc*., 15-1230, p. 1 (La. App. 4 Cir. 9/14/16), 201 So.3d 912, 914). Indeed, "Louisiana courts have recognized that, while 'rare', summary judgment may be granted on subjective intent issues when no issue of material fact

[14] Insofar as Mr. Alexander's argument that the trial court should have continued the hearing, we note, as the defendants point out, that Mr. Alexander failed to request a continuance. For this reason, we decline to address this argument for the first time on appeal.

exists concerning the pertinent intent." *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, pp. 28-30 (La. 7/5/94), 639 So.2d 730, 751-52.

"In a defamation case, appellate courts review a grant of a motion for summary judgment *de novo* using the same criteria district courts consider when determining if summary judgment is proper."[15] *Jacobs v. The Oath for Louisiana, Inc.*, 16-1060, p. 7 (La. App. 4 Cir. 6/22/17), 221 So.3d 241, 246, *writ denied*, 17-1478 (La. 11/13/17), 229 So.3d 926, *cert. denied*, 138 S.Ct. 2574, 201 L.Ed.2d 293 (2018) (citing *Kennedy v. Sheriff of E. Baton Rouge*, 05-1418, p. 25 (La. 7/10/06), 935 So.2d 669, 686.). The standard for obtaining a summary judgment is set forth in La. C.C.P. art. 966(A)(3), which provides that "[a]fter an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law."

This court has noted that, "in reviewing summary judgments, we remain mindful of which party bears the burden of proof." *Orleans Parish School Bd. v. Lexington Ins. Co.*, 12-0095, p. 6 (La. App. 4 Cir. 8/28/13), 123 So.3d 787, 790. The burden of proof on a motion for summary judgment is governed by La. C.C.P. art 966(D)(1), which provides as follows:

> The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more

[15] "Because of the chilling effect on the exercise of free speech, defamation actions have been found particularly susceptible to summary judgment." *Hakim v. O'Donnell*, 49,140, p. 16 (La. App. 2 Cir. 6/25/14), 144 So.3d 1179, 1190. Summary judgment is "a useful tool and an effective screening device for avoiding the unnecessary harassment of defendants by unmeritorious actions which threaten the free exercise of rights of speech and press." *Hakim*, 49,140, pp. 16-17, 144 So.3d at 1190.

> elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law.

"The determination of whether a fact is material turns on the applicable substantive law." *Roadrunner Transp. Sys. v. Brown*, 17-0040, p. 7 (La. App. 4 Cir. 5/10/17), 219 So.3d 1265, 1270 (citing *Smith*, 93-2512, p. 27, 639 So.2d at 751).

As noted at the outset of this opinion, this is a defamation suit. Mr. Alexander alleges publication of statements—the C & D Order—accusing him of criminal conduct. Under the traditional defamation rules of Louisiana,[16] publication of such statements would be considered defamatory *per se*, and "the elements of falsity and malice (or fault) would, as a result, be presumed, shifting the burden of proof to defendant to rebut the adverse presumption." *Kennedy*, 05-1418, p. 5, 935 So.2d at 675. In this case, however, the defendants have asserted a qualified privilege. "'In effect assertion of a qualified privilege constitutes a rebuttal of the allegation of malice.'" *Smith*, 93-2512, p. 19 (La. 7/5/94), 639 So.2d 730, 746 (quoting *Boyd v. Community Center Credit Corp.,* 359 So.2d 1048, 1050

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[16] The traditional defamation rules of this state are not disputed here. To establish a defamation cause of action, the plaintiff must allege the following four elements: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury. *Trentecosta v. Beck*, 96-2388, p. 10 (La. 10/21/97), 703 So.2d 552, 559. "If even one of the required elements of the tort is lacking, the cause of action fails." *Costello*, 03-1146, p. 12, 864 So.2d at 140.

Additionally, the jurisprudence divides defamatory words into two categories: (i) those that are susceptible of a defamatory meaning; and (ii) those that are defamatory *per se*. *Brungardt v. Summitt*, 08-0577, p. 8 (La. App. 4 Cir. 4/8/09), 7 So.3d 879, 885. "The Supreme Court stated that '[w]ords which expressly or implicitly accuse another of criminal conduct, or which by their very nature tend to injure one's personal or professional reputation, even without considering extrinsic facts or surrounding circumstances, are considered defamatory per se.'" *Brungardt*, 08-0577, p. 8, 7 So.3d at 885 (quoting *Costello*, *supra*). "If publication of words that are defamatory *per se* is proven, the elements of falsity, malice, fault, and injury are presumed, but they can be rebutted." *Id.*, 08-0577 at pp. 8-9, 7 So.3d at 885. Finally, "even when a plaintiff makes a prima facie showing of the essential elements of defamation, recovery may be precluded if the defendant shows either that the statement was true, or that it was protected by a privilege, absolute or qualified." *Costello*, 03-1146, p. 15, 864 So.2d at 141.

(La. App. 4th Cir.1978)). The qualified privilege, when successfully asserted, results in a shifting of the burden of proof back to the plaintiff to rebut the privilege.

In addressing qualified privileges in general, the jurisprudence has adopted the following two-step analytical framework:

> First, it must be determined whether "the attending circumstances of a communication occasion a qualified privilege," which means that a determination must be made of whether the requirements for invoking the privilege are satisfied. The second step of the analysis requires a determination of whether the privilege was abused, which requires that the grounds for abuse—malice or lack of good faith—be defined. While the first step is generally determined by the court as a matter of law, the second step of determining abuse of a conditional privilege or malice is generally a fact question for the jury "[u]nless only one conclusion can be drawn from the evidence."

Smith, 93-2512, p. 18 (La. 7/5/94, 639 So.2d 730, 745 (internal citations omitted).

Here, the existence of the qualified privilege is undisputed; both the jurisprudence and statutory law of this state recognize that statements by attorneys and their clients in judicial proceedings generally are subject to a qualified privilege. Contrary to Mr. Alexander's allegation in his petition that the C & D Order "had absolutely nothing to do with the current litigation on writ," the C & D Order was attached to Mr. Alexander's petition that he filed in the *Centanni* case. The C & D Order therefore was material to the earlier litigation. Step one is met. The narrow issue here is whether step two—an abuse of the privilege—is met. Given the qualified privilege was successfully asserted, the burden of proof was on the plaintiff—Mr. Alexander—to establish an abuse of the privilege. *Kennedy*, 05-1418, p. 20, 935 So.2d at 683 (citing *Smith*, 93-2512, p. 20 (La. 7/5/94), 639 So.2d 730, 746).

In determining whether the privilege was abused, "the courts have focused on two factors: one, that the plaintiff has the burden of proving malice or lack of good faith; and two, that the definition of malice or lack of good faith in this context is predominately one of objective reasonableness." *Smith*, 93-2512, p. 19, 639 So.2d at 746.[17]

Summarizing the general malice-based (reckless disregard for the truth) approach for establishing an abuse of the privilege, one court observed:

> A privilege is abused if the publisher (a) knows the matter to be false, or (b) acts in reckless disregard as to its truth or falsity.
>
> Mere negligence as to the falsity (or lack of reasonable grounds for believing the statement to be true) is not sufficient to prove abuse of the conditional privilege. Instead, knowledge or reckless disregard as to falsity is necessary for this purpose. Failure to investigate does not present a jury question on whether a statement was published with reckless disregard for the truth. Under this standard, even proof of gross negligence in the publication of a false statement is insufficient to prove reckless disregard.
>
> In considering the definition of "reckless disregard," . . . the Supreme Court has explained that only those false statements made with a high degree of awareness of their probable falsity meet the reckless disregard standard. . . . The Supreme Court stated that reckless disregard requires a plaintiff to prove that the publication was deliberately falsified, or published despite the publisher's awareness of probable falsity. The Supreme Court has noted that there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

Hakim v. O'Donnell, 49,140, pp. 14-15 (La. App. 2 Cir. 6/25/14), 144 So.3d 1179, 1189 (Internal citations omitted).

In deciding whether an abuse of the privilege has been established, the Supreme Court in *Smith* noted that "[a]nother definitional approach is to avoid altogether attempting to define the overused term 'malice.'" *Smith*, 93-2512, p. 24,

[17] "An abundance of Louisiana jurisprudence exists recognizing the appropriateness of summary judgment disposition of this issue [of whether the privilege was abused] in the conditional [or qualified] privilege context." *Smith*, 93-2512, p. 19, n. 16, 639 So.2d at 746 (collecting cases).

639 So.2d at 749. Under this alternative approach, "the conditional privilege is abused 'if [the actor] does not act for the purpose of protecting the interest for the protection of which the privilege is given.'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 603).[18]

Applying these principles, we find that Mr. Alexander cannot establish an abuse of the privilege under the undisputed facts. The motivating purpose for the defendants' publication—attachment of the C &D Order to their joint writ application—was for a purpose the privilege was intended to protect. The defendants attached a copy of the C & D Order to their joint writ application because it was an attachment to Mr. Alexander's petition commencing the underlying case, the *Centanni* Case. As the Blue Williams Defendants contend, "[a]ll defendant[s] did was use a copy of the plaintiff's own document, that he had already placed in the record." Indeed, as the State Defendants point out, the defendants were required to attach a copy of the C & D Order to their joint writ application because Mr. Alexander attached the document to his petition to annul in the *Centanni* Case. UNIF. RULES LA. APP. COURTS, Rule 4-5(C)(8) (providing that parties are required to attach to their writ applications "a copy of each pleading on which the judgment, order, or ruling was founded, including the petition(s) in civil cases").

For these reasons, the trial court did not err in granting the motions for summary judgment filed by the Blue Williams Defendants and the Burglass Defendants.

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[18] *See also* RESTATEMENT (SECOND) OF TORTS § 603 (1977) (observing that "[o]ne who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another abuses the privilege if he does not act for the purpose of protecting the interest for the protection of which the privilege is given."

DECREE

For the foregoing reasons, the judgment of the trial court granting the motion for summary judgment filed by the Blue Williams Defendants and the Burglass Defendants is affirmed. The judgment of the trial court maintaining the peremptory exception of no cause of action filed by the State Defendants and the Burglass Defendants is reversed. The judgment of the trial court granting the motions for summary judgment filed by the Deutsch Kerrigan Defendants and Ms. Kovac are reversed. This matter is remanded to the trial court for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED