19TH JUDICIAL DISTRICT COURT

THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

COREY DELAHOUSSAYE	*	**NUMBER C—646,126**
	*	**DIVISION "I"**
VERSUS		
	*	**SECTION 24**
STATE OF LOUISIANA, ET AL.	*	**JUDGE CALDWELL**

COREY DELAHOUSSAYE'S OPPOSITION MEMORANDUM TO DEFENDANTS' PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION

Corey Delahoussaye submits this opposition memorandum to the peremptory exception of no cause of action filed by the OIG Defendants. The Defendants assert that Petitioner fails to state a cause of action for each and every claim asserted in his petition. For the reasons outlined herein, the exception put forth by the Defendants is meritless and Mr. Delahoussaye urges that it be overruled.

I. Standard of Review

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.[1] The question before the court, 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.[2] The Louisiana Supreme Court explained the standard of review for f a peremptory exception raising the objection of no cause of action in *Kinchen v. Livingston Parish Council*[3] 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

[1] *Home Distribution, Inc. v. Dollar Amusement, Inc.*, 98-1692, (La.App. 1 Cir. 9/24/99) 754 So.2d 1057.

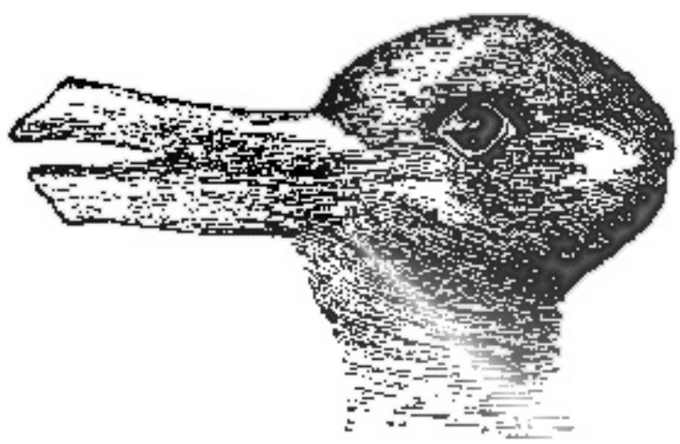
[2] Id.

[3] 07-0478 (La.10/16/07), 967 So.2d 1137, 1138 (*citing Fink v. Bryan*t, 01-0987 (La.11/28/01), 801 So.2d 346, 348-49)

> petition. The peremptory exception of no cause of action is designed to test the legal sufficiency of the petition by determining whether [the] plaintiff is afforded a remedy in law based on the facts alleged in the pleading. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. The exception is 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.
>
> . . .
>
> 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.

It is uncontroverted that the mover has the burden of demonstrating the petition states no cause of action.[4] And when an exception of no cause of action is based on an affirmative defense, the exception should not be sustained unless the allegations of the petition exclude every reasonable hypothesis other than the premise upon which the defense is based.[5] Critically, all facts pled in the petition must be accepted as true.[6]

There is little doubt that this Court sees the foregoing standards of review so frequently that they are not given exgtended consideration. As long as a plaintiff pleads facts that support his theory of the case, the court must accept them as true when considering an exception of no cause of action. The converse of such standard is that the court must disregard the defense's theory of the case when evaluating such exception—even if defendant's theory can be supported by plaintiff's factual allegations. Stated in different terms, if the plaintiff describes the left-side of the below drawing below as duck's beak, then this court must accept such characterization—even though the defendant may have a plausible argument that the left side of the drawing details the ears of a rabbit.



[4] State, Div. of Admin., Office of Facility Planning and Control v. Infinity Sur. Agency, LLC, 10–2264 (La.5/10/11), 63 So.3d 940, 946.

[5] *Adams v. Owens-Corning Fiberglas Corp.*, 2004-1296 (La. App. 1 Cir. 09/23/05); 921 So. 2d 972, 976 *citing West v. Ray*, 26 So. 2d 221, 224 (1946).

Mr. Delahoussaye submits that the Defendants' arguments effectively fail to accept plaintiff's well-plead factual allegations as true and, instead, put forth their own theory of the case to support their exception of no cause of action. In the rubric of the foregoing, the Defendants have taken great pains to describe Mr. Delahoussaye's claims as a rabbit that won't fly, while ignoring the facts that indicate plaintiff's claims describe a duck that is capable of flight. As outlined by the following, Defendants' efforts miss the mark and Mr. Delahoussaye urges this Court to overrule their exception.

I. BACKGROUND

The Defendants' Memorandum in Support attempts to use the facts pled by Mr. Delahoussaye (supplemented with several of their own) to advance their own theory of the case, which can be summarized thusly:

a. Mr. Delahoussaye had a contract with Livingston Parish.

b. Although not referenced or alleged by Mr. Delahoussaye, the Defendants suggest that Plaintiff's contract "was consistent with an agreement between [Livingston Parish] and [the Governor's Office of Homeland Security & Emergency Preparedness (GOHSEP)]."[7]

c. More specifically, Defendants assert "Plaintiff and his company were under state contract with Livingston Parish and/or GOHSEP."[8]

d. Defendants assert that they were authorized to investigate Mr. Delahoussaye and his company because GOHSEP is a "covered agency" and that the OIG is authorized by La. R.S. 49:220.24(B) to investigate contractors and subcontractors of covered agencies.[9]

e. Defendants further suggest that they properly exercised the authority granted to them by the Louisiana legislature when they obtained a subpoena and search warrant to obtain records relating to plaintiff.[10]

f. Defendants repeatedly assert that Mr. Delahoussaye improperly billed the state and that such action "is criminal and/or unlawful conduct under Louisiana law."[11]

g. Due to these alleged "unlawful actions," the OIG argues that Mr. Delahoussaye's claims must fail even if the OIG's conclusions were based on "erroneous assumptions and mathematical miscalculations" because the OIG properly exercised its authority when conducing its investigation.[12]

---

[6] *Rebardi v. Crewboats, Inc.*, 04–0641 (La.App. 1st Cir.2/11/05), 906 So.2d 455, 457.

[7] *See* Defendants' Memorandum in Support, p. 17.

[8] *See* Defendants' Memorandum in Support, p. 17.

[9] *See* Defendants' Memorandum in Support, p. 17.

[10] *See* Defendants' Memorandum in Support, pp. 15 – 16 and 20 – 23.

[11] *See* Defendants' Memorandum in Support, p. 8, 15 and 24.

[12] *See* Defendants' Memorandum in Support, p. 2, and pp. 18 - 19.

h. Accordingly, Defendants argue that Mr. Delahoussaye fails to state a cause of action because they lawfully and properly exercised their legislative authority when they investigated him and accused him of fraudulent and excessive billing under a state contract.

The foregoing selectively references the facts alleged by Mr. Delahoussaye in an attempt to persuade this Court that Mr. Delahoussaye's petition fails to state a viable cause of action. As the following outlines, the Defendants' characterization overlooks and wrongfully discredits the multitude of factual allegations that paint a very different picture of the facts that give rise to the claims asserted herein by Mr. Delahoussaye:

a. Mr. Delahoussaye had a contract with Livingston Parish.

b. The Defendants suggest that Plaintiff's contract with Livingston Parish "was consistent with an agreement between [Livingston Parish] and [the Governor's Office of Homeland Security & Emergency Preparedness (GOHSEP)]."[13]

c. Mr. Delahoussaye's petition, however, only references his contract with Livingston Parish[14] and he had no contract with GOHSEP.

d. Even if this Court were willing to go beyond the face of Mr. Delahoussaye's petition and presume that the OIG had jurisdiction because Mr. Delahoussaye and his company were a contractor or sub-contractor of GOHSEP, such conclusion would be wrong because no entity has a contract with GOHSEP.[15]

e. Notwithstanding Defendants' repeated insistence that it had jurisdiction to investigate Plaintiff, the Amended and Restated Petition details facts that establish that the OIG's investigation of Mr. Delahoussaye was outside of the OIG's legislative authority.[16]

f. Specifically, Mr. Delahoussaye alleges facts that outline that the OIG did not have authority to investigate local governments like Livingston Parish and that it is statutorily required to turn over any investigation to other law enforcement agencies when it finds evidence of purported criminal activity.

g. Moreover, the petition details how the OIG failed to follow statutory requirements and Louisiana law when it obtained subpoenas to obtain Mr. Delahoussaye's records, including medical records (which may only be obtained pursuant to a warrant).

h. The petition further outlines that plaintiff, his counsel and other witnesses all met with the OIG and explained the errors in its assumptions and calculations that led to the charges that Mr. Delahoussaye improperly billed Livingston Parish for his work.[17]

---

[13] *See* Defendants' Memorandum in Support, p. 17.

[14] *See* Amended and Restated Petition, ¶¶ 5 – 8.

[15] Per the testimony of Mr. Ben Plaia, legal counsel for GOHSEP. *See* transcript of the proceedings taken in *State of Louisiana v. Corey Delahoussaye*, 21st JDC No. 30048 before the Honorable Brenda B. Ricks on April 20, 2015. Moreover, contrary to Defendants' suggestion, none of the money at issue was the State's money.

[16] *See* Amended and Restated Petition, ¶¶ 77 – 100.

[17] *See* Amended and Restated Petition, ¶¶ 45 – 53.

i. Contrary to the conclusions of Defendants, Mr. Delahoussaye asserts that the allegations of criminal misconduct were false and unsupported by the evidence relied upon by the OIG.[18]

j. Accordingly, the facts alleged by Mr. Delahoussaye paint a very different picture than that described by Defendants. Based on the allegations in the Amended and Restated Petition, the OIG wrongfully initiated an investigation without jurisdiction to do so, continued such investigation even after the lack of jurisdiction was raised by Plaintiff and his counsel, wrongfully obtained personal records, including medical records, in violation of its statutory authority and State law, and incorrectly concluded that such records supported a conclusion that Mr. Delahoussaye overbilled the State even though witnesses explained how several assumptions giving rise to such conclusions were not supported by any evidence.

k. As a result of the foregoing, the criminal proceedings filed against Mr. Delahoussaye were dismissed for lack of probable cause[19] and all of the evidence obtained by the OIG was suppressed[20] because the court determined that it was obtained improperly[21] and that OIG did not jurisdiction to conduct an investigation of Mr. Delahoussaye.

Accordingly, as addressed by the following in more detail, Mr. Delahoussaye's Amended and Restated Petition for Damages outlines ultimate facts detailing how the OIG's unauthorized and incompetent investigation led him to be wrongfully accused of stealing public funds and dragged through the media as an alleged felon. Furthering the duck/rabbit analogy, the facts outlined by Mr. Delahoussaye describe a very different picture of his claims than the theory put forth by Defendants. Considering that it is Mr. Delahoussaye's facts that must be accepted as true, Mr. Delahoussaye submits that the Defendants' exception of no cause of action is not well-founded.

II. MR. DELAHOUSSAYE ASSERTS A VIABLE CAUSE OF ACTION

Considering that all facts pled in the petition must be accepted as true, Mr. Delahoussaye has asserted the following viable claims: (1) defamation; (2) invasion of privacy; (3) malicious prosecution; (4) abuse of process; (5) abuse of right; (6) Section 1983 and 1988 claims; and (7) negligence. Defendants have not argued their cause of action in the same order that they are pled in Mr. Delahoussaye's petition. For the convenience of the Court, Mr. Delahoussaye addresses Defendants' arguments in the same order as the Defendants rather than addressing the exceptions as they are included in the petition.

[18] *See* Amended and Restated Petition, ¶ 51.

[19] *See* Amended and Restated Petition, ¶ 63.

[20] *See* Amended and Restated Petition, ¶ 68.

[21] *See* Amended and Restated Petition, ¶ 66.

A. Mr. Delahoussaye has a viable defamation claim.

Defendants assert two primary arguments: (a) that Mr. Delahoussaye must prove that the OIG Defendants acted with actual malice; and (b) that the OIG Defendants statements are protected by a qualified privilege. As detailed by the following, the Defendants' complaints are not ripe for resolution via an exception of no cause of action.

1. Actual Malice is Adequately Pled.

Under Louisiana law, defamation is a tort involving the invasion of a person's interest in his or her reputation and good name.[22] In order to prevail on a defamation claim a plaintiff must establish the following elements: (1) a false and defamatory statement concerning another person; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury.[23] The fault requirement is generally referred to in the jurisprudence as malice, actual or implied.[24]

Furthermore, pursuant to Louisiana law, words that expressly or impliedly accuse another of criminal conduct without considering extrinsic facts or circumstances are considered defamatory *per se*.[25] When a plaintiff proves publication of words that are defamatory *per se*, falsity, malice (or fault), and injury are presumed, but may be rebutted by the defendant.[26] Defendants attempt to avoid the presumption of malice and injury by suggesting that Mr. Delahoussaye must prove "actual malice" because he is a private plaintiff whose actions are a matter of public concern."[27] More specifically, Defendants assert that Mr. Delahoussaye must "establish, by clear and convincing evidence, that the OIG Defendants fabricated their findings regarding Delahoussaye's abusive billing practices, or knew they were false and recklessly disregarded their falsity."[28]

Initially, Defendants wrongfully assert that Mr. Delahoussaye must establish that they fabricated their findings to prove actual malice. Rather, the Louisiana Supreme Court has held that statement is made with "actual malice" when it is made with knowledge that the

---

[22] *Costello v. Hardy*, 864 So.2d 129, 139 (La.1/21/04).

[23] *Kennedy v. Sheriff of East Baton Rouge*, 935 So.2d 669, 674 (La. 07/10/06) *quoting Trentecosta v. Beck*, 703 So.2d 552, 559 (La.10/21/97); RESTATEMENT (SECOND) OF TORTS § 558 (1977).

[24] *Costello* , 864 So.2d at 139.

[25] 935 So.2d at 681.

[26] Id.

[27] *See* Defendants' Memorandum in Support, p. 7.

[28] *See* Defendants' Memorandum in Support, p. 9.

statement was false, or with reckless disregard of whether the statements were false or not.[29]

Here, Mr. Delahoussaye has alleged the following in his Amended and Restated Petition:

> 53. Ms. Webb knew, or should have known, that her calculations and associated testimony were false.
>
> 54. Specifically, her testimony at the probable cause hearing on February 23, 2015 revealed a number of troubling assumptions and erroneous conclusions:
>
> a. Initially, Ms. Webb had no information to support the allegations that Petitioner actually filed any public records, a prerequisite to violating La. R.S. 14:133;
>
> b. Ms. Webb repeatedly testified that she reviewed Petitioner's timesheet when determining the amount of hours purportedly falsified by Petitioner;
>
> c. Ms. Webb, however, was reviewing Petitioner's Daily Log;
>
> d. As a result of basing her investigation on the wrong documents, Ms. Webb wrongfully concluded that Petitioner had billed timed that he, in fact, had not actually billed;
>
> e. Ms. Webb wrongfully assumed that Petitioner was at the doctor's office or under general anesthesia when he was actually working;
>
> f. Ms. Webb's wrongfully assumed that Petitioner was going to the tanning bed when he was not, even after she interviewed management at Anytime Fitness who advised her that there was no way to determine whether anyone was actually tanning and that the fobs could not be reliably attributed to a single individual;
>
> g. Ms. Webb wrongfully assumed that Petitioner was playing golf when others were using his membership and she failed to make any effort to support her conclusions that Petitioner was actually playing golf as alleged.
>
> 55. The scope of Ms. Webb's errors was significant and belied actual information that she obtained during the OIG's investigation.
>
> 56. Specifically, Petitioner and his counsel had previously met with Ms. Webb and explained the nature of her wrongful assumptions and errors.
>
> 57. The information provided to Ms. Webb by Petitioner and numerous witnesses conflicted with her testimony at the probable cause hearing.
>
> 58. The information could have been easily verified if Ms. Webb had made any effort to do so.

The foregoing outlines how Ms. Webb had been provided information by Mr. Delahoussaye and his counsel, along with other witnesses, that put her on notice that her conclusions that he

[29] *Kennedy v. Sheriff of East Baton Rouge*, 935 So.2d 669, 675 (La. 07/10/06)

had submitted fraudulent or excessive billings was wrong. Accordingly, the Amended and Restated Petition contains detailed factual allegations that assert that Ms. Webb defamed Mr. Delahoussaye when she testified at the probable cause hearing because she had knowledge that her statements were false, or, at minimum, that she acted with reckless disregard of whether the statements were false or not (*i.e.*, with "actual malice").

Notwithstanding, Mr. Delahoussaye does not concede that he is required to prove actual malice and he takes issue with the Defendants' assertion that his actions were of public concern. Defendants reference Louisiana jurisprudence suggesting that the misuse of public funds is routinely held to be speech about a matter of public concern.[30] None of the cases that Defendants cite, however, were resolved on an exception of no cause of action. Rather, such cases went to trial or were subjects of motions for summary judgment. Furthermore, as detailed *supra*, Mr. Delahoussaye did not have a state contract. The conclusion that he was fraudulently or excessively billing resulted from the OIG's own incompetent and negligent investigation, which are conclusory allegations that are not properly raised by the "face of the papers." The reliance on absence of malice related to a matter of public concern is an affirmative defense:

> When a libel defendant wants to raise an absence of malice defense, it must show that the plaintiff meets the public official or public figure test—a war of definitions that can, in close cases, be the major part of the suit's battle. For a public official, the defendant must show that that plaintiff was more than just a public employee. The cutoff line is a question for the state courts, and they are divided on the status some occupations, such as that of public school teachers. For a public figure, the defendant must show that the plaintiff was a high-profile person or someone who deliberately entered the public eye in an area of public debate. For a person involved in an issue of public concern, the defendant must show that there was the appropriate level of public interest.[31]

The test for triggering the heightened standard is three-fold: the defamatory words must be: (1) subject to first amendment protection (2) on a matter of public concern; and (3) about a person who is a public figure.[32] These are all fact-dependent issues that must be resolved in Mr.

---

[30] *See* Defendants' Memorandum in Support, p. 8.

[31] *See* 22 American Jurisprudence Proof of Facts 3d 305, Affirmative Defenses in Libel Actions (2014).

[32] Notably, the decisions in this regard do not change the standard for what is considered "defamatory;" rather, because Constitutional protections are indicated, those First Amendment protections supersede the normal standard for defamation, requiring a heightened standard before *state action* as a result of that speech is permissible. As stated by Justice Stewart in his concurring opinion in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139; 93 S.Ct 2080; 36 L.Ed.2d 772 (1973), "the First Amendment protects the press from government, but that "it confers no analogous protection on the Government," further explaining in n.7 that "Government is not restrained by the First Amendment from controlling its own expression."

Delahoussaye's favor under the current procedural posture. For present purposes, it is notable that the United States Supreme Court has held that First Amendment protection does not extend to government entities.[33] It has also held that public employees who make statements pursuant to their official duties are not speaking as citizens for First Amendment purposes, therefore "the Constitution does not insulate their communications."[34] Accordingly, even though Mr. Delahoussaye has properly alleged that the Defendants acted with "actual malice," he does not concede that he must prove "actual malice" to prevail on his defamation claims.

2. The privilege is inapplicable here.

In Louisiana, privilege is a defense to a defamation action.[35] A conditional or qualified privilege applies if the statement is made (1) in good faith, (2) on any subject matter of which the person communicating has an interest or in reference to which he has a duty, (3) to a person having a corresponding interest or duty.[36] Societal necessity requires unrestricted communication of such matters without inhibiting free communication in such instances by the fear that the communicating party will be held liable in damages if the good faith communication later turns out to be inaccurate.[37]

Determining whether a qualified privilege exists involves a two-step process.[38] First, it must be determined whether the attending circumstances of a communication occasion a qualified privilege.[39] Second, it must be determined whether the privilege was abused, which requires that the grounds for abuse—malice or lack of good faith—be examined.[40] The second step of determining malice or abuse of the privilege is generally a question of fact for the jury unless only one conclusion can be drawn from the evidence.[41] Accordingly, under Louisiana law, a defendant abuses the privilege if he (1) knows the matter to be false or (2) acts in

---

[33] See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139; 93 S.Ct 2080; 36 L.Ed.2d 772 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the government"); *Id*., at 139, n. 7 ("'The purpose of the First Amendment is to protect private expression'" (quoting T. Emerson, The System of Freedom of Expression 700 (1970)).

[34] *Garcetti v. Ceballos*, 547 U.S. 410, 421; 126 S. Ct. 1951; 164 L. Ed. 2d 689 (2006).

[35] Id.

[36] Id.

[37] Id.

[38] Id.

[39] Id.

[40] Id.

[41] Id.

reckless disregard as to its truth or falsity.[42] Only those statements made with a high degree of awareness of their probable falsity meet the reckless disregard standard.[43] These considerations implicate well-pled allegations in the petition and they are not appropriate for resolution for an exception of no cause of action. When Mr. Delahoussaye's well-pled allegations are accepted as true, it is evident that he has stated a viable defamation claim.

B. Mr. Delahoussaye has a viable invasion of privacy claim.

"An actionable right of privacy occurs only when the defendant's conduct is unreasonable and seriously interferes with the plaintiff's privacy interest."[44] The Defendants factual allegations wrongly suggest that Mr. Delahoussaye was "under general anesthesia and recovering from a tummy tuck" and that he was "at a tanning booth" while illegally billing for his time. If this were the case, then the Defendants' argument might have some merit. Mr. Delahoussaye's allegations, however, establish that such allegations were wrong. Specifically, Mr. Delahoussaye's petition alleges the following facts that support his invasion of privacy claim:

> 92. La. R.S. 49:220.24(F)(2) provides that a subpoena or subpoena duces tecum "shall be issued only upon approval of a judge of the district court of the parish in which the Office of Inspector General is domiciled upon application in writing by the Inspector General. The judge shall issue a written decision within 72 hours after receipt of such application."
>
> 93. The Inspector General did not comply with these requirements and failed to obtain a written decision from the district court authorizing the subpoenas duces tecum issued herein.
>
> 94. Furthermore, in *State v. Skinner,* 10 So. 3d 1212 (La. 2009), the Louisiana Supreme Court ruled that a warrant must be used to obtain medical records.
>
> 95. Accordingly, the Inspector General's use of a subpoena to obtain Petitioner's medical records was a blatant violation of Louisiana law.
>
> 68. That hearing was held on January 14, 2016 and the trial court again suppressed the medical records obtained by the Inspector General because they were improperly obtained and stated the subpoenas that were used by the Inspector General's office failed to articulate the sufficient facts that would rise to the level of reasonable suspicion or constitute a reasonable basis to obtain these records.
>
> 71. Additionally, La. R.S. 49:220.25 provides that "records prepared or obtained by the inspector general in connection with investigations conducted by the inspector general shall be deemed confidential and protected from disclosure."

---

[42] Id.

[43] Id.

[44] *See* Defendants' Memorandum in Support, pp. 13 - 14.

72. This confidentiality requirement is unqualified.

73. Not only does La. R.S. 49:220.25 deem investigation information confidential, it also makes it a "misdemeanor punishable by a fine of not more than two thousand dollars or imprisonment for not more than one year, or both, for the inspector general or any of his employees, or any other public official, corporation, or individual, to make public any such information or record."

74. Nonetheless, in the course of C-Del's dispute with Livingston Parish, it became evident that the Inspector General was sharing records obtained from its investigation with outside parties.

75. Specifically, during the proceedings before United States Civilian Board of Contract Appeals, the private contractors working for Livingston Parish provided the United States Government with copies of Petitioner's private records.

76. The only source for those records was the Inspector General.

When considered as true, these factual allegations plainly state a cause of action for invasion of privacy. Contrary to Defendants' assertion, an exception of no cause of action does not require Mr. Delahoussaye to "establish that the records were false or fictitious and to disprove that they related to a matter of public concern" to avoid dismissal of his claims.

Mr. Delahoussaye alleges that the OIG was without jurisdiction to investigate him and wrongfully concluded that he was improperly billing for his time. Even if the OIG had jurisdiction, it violated statutory law and jurisprudence when it obtained Mr. Delahoussaye's medical records without a warrant and subsequently made the contents of such records public. Accepting the foregoing allegations as true, Plaintiff's allegations properly state a cause of action for invasion of privacy.

C. Mr. Delahoussaye has a viable malicious prosecution claim.

Under Louisiana law, a claim for malicious prosecution requires a Plaintiff to establish: (a) the commencement or continuance of an original criminal or civil judicial proceeding; (b) its legal causation by the present defendants against plaintiff who was the criminal defendant in the original proceeding; (c) its bona fide termination in favor of the present plaintiff; (d) the absence of probable cause for such proceeding; (e) the presence of malice therein; and (f) damages conforming to legal standards resulting to plaintiff.[45] Here, the OIG Defendants contest only three of the foregoing factors: (1) commencement or continuance of a criminal or

[45] *Leblanc v. Pynes,* 46,393 (La.App. 2 Cir. 7/13/11), 69 So. 3d 1273, 1279.

civil proceeding; (2) probable cause; and (3) malice. As the following details, the Defendants' complaints are meritless.

First, the OIG correctly points out that it is not a prosecutorial body and that it did not institute the criminal proceeding against Mr. Delahoussaye. It also points out that the Livingston Parish District Attorney's Office prosecuted Mr. Delahoussaye. Inasmuch, the OIG alleges that Mr. Delahoussaye has failed to plead a cause of action because the OIG did not commence the criminal action against him. The OIG does not point to a single case in support its position. The jurisprudence, however, only requires that a criminal action be commenced—or continued—and it does not restrict cases of malicious prosecution only to prosecutors.

For instance, in *Amos v. Brown*,[46] the Second Circuit affirmed an award of damages on a malicious prosecution claim filed by a man against his former sister-in-law for reporting to the police that he had taken items that belonged to her.[47] Even though the former sister-in-law abandoned the charges and they were ultimately expunged from his record, the court found that he had properly established a proper claim for malicious prosecution against the defendant—a citizen who was neither a prosecutor nor an investigative agency. Additionally, in *Gordy v. Burns*, the United States Fifth Circuit, applying the six Louisiana tort law elements of malicious prosecution, held:

> . . . "prosecutor" is not used narrowly in the modern sense of "prosecuting attorney" but in the sense of *any* person . . . who initiates or procures a criminal proceeding. [Citation omitted]. Consequently, an officer may be liable for malicious prosecution if his "malice results in an improperly motivated prosecution without probable cause" and even if the officer had no direct influence over the prosecuting attorney. [Citation omitted]. In the typical case, an officer maliciously causes a criminal proceeding to be brought by providing false or misleading information to a prosecuting attorney or grand jury. [Citation omitted]. Nevertheless, the obtaining of an indictment will not insulate state actors from a malicious prosecution claim if a grand jury's decision has been "tainted by the malicious actions of the government officials." [Citation omitted].[48]

Inasmuch, the OIG's argument that Mr. Delahoussaye has failed to state a cause of action for malicious prosecution because it is not a prosecutorial body and did not institute the criminal proceedings misstates the applicable law and it is simply wrong. The OIG's argument regarding probable cause is similarly flawed.

---

[46] 36,338 (La.App. 2 Cir. 9/18/2002), 828 So. 2d 138.

[47] *Id.* at 143.

[48] *Gordy v. Burns*, 294 F.3d 722, 728 (5th Cir. 2002).

In his Amended and Restated Petition, Mr. Delahoussaye asserts the following:

> 103. The criminal prosecution of Mr. Delahoussaye was supported only by the Inspector General's investigation, such that it would not have continued without the actions of the Inspector General.
>
> 104. As detailed by the foregoing, Ms. Webb's flawed investigation and her erroneous and wrongful conclusions led to the charges that were filed against Mr. Delahoussaye.
>
> 105. The charges against Mr. Delahoussaye were initially declined by a grand jury.
>
> 106. After a bill of information was subsequently filed by the District Attorney, the district judge found that the charges were not supported by probable cause.
>
> 107. As detailed by the foregoing, the nature and the multitude of errors that plagued the Inspector General's investigation and Ms. Webb's testimony reveal that her allegations of illegal conduct were made with actual malice and with a reckless disregard for the truth (*e.g.,* that she knew, or should have known, that she was incorrect).

Given the current procedural posture of these proceedings, Defendants attempts to argue the existence of probable cause fails to recognize that a district court found that there was no probable cause for the charges against him and that such fact is pled in the petition. Similarly, Defendants complaints about malice are equally wanting and they overlook the allegations already outlined herein detailing how the OIG Defendants undertook this investigation without jurisdiction and the disturbing raid that the OIG conducted at Mr. Delahoussaye's home on July 25, 2013. At minimum, when accepted as true, the foregoing allegations are sufficient to establish that the OIG Defendants acted with malice in their pursuit of Mr. Delahoussaye's alleged misconduct and that the OIG did not have probable cause to pursue the investigation.

D. Mr. Delahoussaye has a viable abuse of process claim.

The OIG contends that the abuse of process claim cannot be maintained against the OIG because it is "an improper expansion of the law." More specifically, the OIG argues that a claim for abuse of process applies only to "a judicial proceeding, such as the filing of a lawsuit or other judicial request for relief," and because such claims must be asserted against the prosecutorial body who filed the criminal proceeding.[49] Such contentions are without merit.

[49] *See* Memorandum in Support, p. 20.

In *Taylor v. State*, the Court recognized a cause of action for "abuse of process" in the context of a Louisiana State Trooper with regard to an investigation he conducted, and the manner in which he went about conducting that investigation.[50] After gathering the information, the Trooper provided the information to the District Attorney.[51] The Trooper did not participate in either the subsequent arrest or prosecution of the plaintiff.[52] In that case, the Trooper at issue was not the "prosecutorial body who filed the criminal proceeding," and his investigation was not "a judicial proceeding, such as the filing of a lawsuit or other judicial request for relief;" both of which the defendant in this case erroneously contends must be true in order to support an claim for abuse of process.

Further, although the plaintiff in Taylor asserted a claim for infliction of emotional distress and did not even specifically assert a claim for malicious prosecution, the court held *sua sponte* that "[t]here seems to be no reason not to recognize a plaintiff's right to recover for damages caused by a defendant's abuse of process when the facts so warrant."[53] The Court's basis for addressing "abuse of process" *sua sponte* was its conclusion that when there are mistakes in an investigation that are "not reasonably justified by the surrounding circumstances . . . the interest of every law-abiding citizen in being free from unwarranted or improper criminal investigation is so great that almost every such investigation might be considered extreme and outrageous."[54] The court determined that reasonable efforts toward crime suppression should not be curtailed by civil liability for simple mistakes, but an investigator "remains obliged to act as a reasonable person would, *taking in all of the circumstances*."

Here, the OIG Defendants suggest that the OIG was a law enforcement agency that was conferred "all investigative powers and privileges appurtenant to a law enforcement agency"[55] to support its argument that its actions with regard to Mr. Delahoussaye were appropriate. Again, the OIG Defendants overlook the well-pled allegations in the petition establishing that

---

[50] 92-230 (La. App. 3d. Cir. 3/31/93) 617 So. 2d 1198

[51] *Id*. at 1201.

[52] *Id*. at 1201-02.

[53] *Id*. at 1205.

[54] *Id*.

[55] *See* Memorandum in Support, p. 20.

it was without jurisdiction to conduct the investigation of Mr. Delahoussaye and that it had an ulterior motive to do so:

> 79. In 2008 the Inspector General was designated a "law enforcement agency," and was provided with limited investigative powers and privileges afforded to full-fledged law enforcement agencies.
>
> 80. The investigative powers and privileges are limited by the Inspector General's statutorily defined purpose and functions.
>
> 81. As stated in La. R.S. 49:220.24(J), the Inspector General is "conferred all investigative powers and privileges appurtenant to a law enforcement agency under state law as necessary and in furtherance of the authority, duty, powers, and functions set forth herein."
>
> 82. The foregoing does not authorize the Inspector General to investigate local governments like Livingston Parish.
>
> 83. Significantly, it is also not within the purpose of the Inspector General's office, or its authority, duty, power, and function as set out in La. R.S. 49:220.24, to conduct criminal investigations or to obtain search warrants.
>
> 84. To the extent the Inspector General has any criminal investigative authority, it is limited to assisting other law enforcement agencies and cooperating with such agencies with regard to further criminal action.
>
> 85. Since C-Del and Petitioner had no contract or other relationship with a covered agency, the Inspector General had no jurisdiction to conduct its investigation.
>
> 86. Furthermore, the Inspector General has no authority to obtain search warrants even when it has jurisdiction to investigate.
>
> 87. La. R.S. 49:220.24(C)(4) provides that "when there is evidence of what may be criminal activity," the inspector general shall report complaints to the proper federal, state, or local agency.
>
> 88. Further, La. R.S. 49:220.24 (K) requires that the referral to the appropriate law enforcement agency occur "[u]pon credible information" of such criminal activity.
>
> 89. Pursuant to La. R.S. 49:220.24(K), the Inspector General is relegated to a "back-seat" role once it determines it has credible information of criminal activity.
>
> 90. Section 49:220.24(K) provides that "[s]ubsequent to notifying the appropriate law enforcement agency, the inspector general may assist the law enforcement agency in conducting the investigation."
>
> 91. In addition to investigation Petitioner outside of its jurisdiction, the Inspector General failed to comply with its own governing authority and Louisiana law when it investigated Petitioner.
>
> 92. La. R.S. 49:220.24(F)(2) provides that a subpoena or subpoena duces tecum "shall be issued only upon approval of a judge of the district court of the parish in which the Office of Inspector General is domiciled

upon application in writing by the Inspector General. The judge shall issue a written decision within 72 hours after receipt of such application."

93. The Inspector General did not comply with these requirements and failed to obtain a written decision from the district court authorizing the subpoenas duces tecum issued herein.

94. Furthermore, in *State v. Skinner,* 10 So. 3d 1212 (La. 2009), the Louisiana Supreme Court ruled that a warrant must be used to obtain medical records.

95. Accordingly, the Inspector General's use of a subpoena to obtain Petitioner's medical records was a blatant violation of Louisiana law.

96. In short, the Inspector General's unlawful investigation led to unfounded criminal charges against Petitioner.

97. Moreover, all of the evidence obtained in support of those charges was suppressed due to the failure of the Inspector General to comply with Louisiana law.

98. At the probable cause hearing on February 23, 2015, Ms. Webb was asked whether she could tell the court of "any contract that [Petitioner] has with an executive department of [the State of Louisiana].

99. Tellingly, Ms. Webb could not identify any contract that would have provided the OIG jurisdiction over Mr. Delahoussaye.

The Defendants rely on their own theory of the case when they assert that "there was nothing illegal or abusive about the process utilized by the OIG."[56] As detailed by the foregoing, the OIG's entire investigation was unlawful and undertaken even as Mr. Delahoussaye raised concerns about its lack of jurisdiction over him. When accepted as true, these allegations state a valid cause of action for abuse of process.

E. Mr. Delahoussaye has a viable abuse of right claim

The Louisiana abuse of rights doctrine applies if one of the following conditions is met: (a) the rights were exercised exclusively for the purpose of harming another or with the predominant motive to cause harm; (b) an absence of a serious and legitimate interest that is worthy of judicial protection; (c) using the right in violation of moral rules, good faith or elementary fairness; or (d) exercising the right for a purpose other than for which it was granted.[57] Contrary to the allegations of the OIG Defendants, Mr. Delahoussaye does not need to establish each of the foregoing elements to state a cause of action for abuse of rights as indicated by the use of "or."

[56] *See* Memorandum in Support, p. 23.

[57] *Deus v. Allstate Ins. Co.,* 15 F.3d 506, 520 (5th Cir. 1994)(quotation omitted).

As the foregoing responses supporting Mr. Delahoussaye's claims for malicious prosecution and abuse of process makes clear, the Petition herein provides specific factual allegations of each of the elements. At minimum, the factual allegations detailing that the OIG Defendants continued their investigation after concerns about their jurisdiction were raised, supports a finding that the OIG Defendants failed to exercise their law enforcement authority in good faith and that they did so for a purpose other than for which it was granted. The OIG Defendants suggestion that the investigation of Mr. Delahoussaye "amounted to a regular use of 'process'" is premised on the wrongful belief that Mr. Delahoussaye had a state contract that provided the OIG jurisdiction and that it wasn't providing the fruits of its investigation to others for use in a suit to defend a FEMA effort seeking to recover more than $50 million that was wrongfully paid in the wake of Hurricane Gustav. Again, Mr. Delahoussaye submits that this exception is meritless.

F. Mr. Delahoussaye has viable claims under 42 U.S.C. 1983.

42 U.S.C. § 1983 imposes liability for violation of rights protected by the United States Constitution, not for violations of duties of care arising out of tort law.[58] In order to prevail in a civil rights action under § 1983, a plaintiff must prove by a preponderance of the evidence that the conduct of the defendants was under the color of state law and that the conduct resulted in a deprivation of rights, privileges, and immunities secured by the United States Constitution or a federal statute, or both.[59] The OIG Defendants do not dispute that their action constituted state action. Rather, their argument focuses on the second element and their claim for qualified immunity. The second requirement of an action brought under § 1983 "is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'"[60]

Here, Mr. Delahoussaye's petition readily meets any heightened standard of pleading. Specifically, as previously discussed, the Petition alleges that the OIG was put on notice about questions regarding its jurisdiction over the investigation of Mr. Delahoussaye. Notwithstanding, the OIG Defendants subsequently wrongfully obtained subpoenas and

---

[58] *Varnado v. Dep't of Empl. & Training, Office of Workers' Comp.*, 95-0787 (La. App. 1 Cir. 06/28/96); 687 So. 2d 1013, 1022 citing *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979); *Ross v. Sheriff of Lafourche Parish*, 479 So. 2d 506, 512 (La. App. 1st Cir. 1985).

[59] *Id.* citing *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981); *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989); *Moresi v. State, Department of Wildlife and Fisheries*, 567 So. 2d 1081, 1084 (La. 1990); *Kyle v. Civil Service Commission*, 588 So. 2d 1154, 1159 (La. App. 1st Cir. 1991)

search warrants that were ruled unlawful.[61] The Defendants failed to comply with La. R.S. 49:220.24(F)(2), which provides that a subpoena or subpoena duces tecum "shall be issued only upon approval of a judge of the district court of the parish in which the Office of Inspector General is domiciled upon application in writing by the Inspector General." Specifically, Defendants did not comply with these requirements and failed to obtain a written decision from the district court authorizing the subpoenas duces tecum issued herein. More importantly, Defendants wrongfully obtained Plaitniff's medical records with a subpoena in violation of the prohibitoin outlined in *State v. Skinner*, 10 So. 3d 1212 (La. 2009), in which the Louisiana Supreme Court made clear that a warrant must be used to obtain medical records. This conduct plainly violates statutory and consitutional rights that any reasonable law enforcement agent would have known about.

On their face, the actions outlined herein constitute violations of due process and unlawful search and seizure implicated by the 14th Amendment. Given that a district court has already ruled that the OIG Defendants lacked jurisdiction to obtain the purported evidence that they obtained regarding Mr. Delahoussaye, the Defendants' suggestion that they "lawfully exercised discretion in the performance of their public duties and are generally protected by qualified immunity"[62] is simply wrong and not supported by the facts alleged in the Petition.

Finally, Mr. Delahoussaye has alleged an infringment upon several protected interest:

> 149. At all times pertinent hereto, Mr. Phares and Ms. Webb were acting under color of authority within the meaning and intent of 42 U.S.C. §1983.
>
> 150. As detailed by the foregoing, Mr. Phares and Ms. Webb went forward with their investigation without jurisdiction to do so.
>
> 151. At all times hereto, Petitioner enjoyed clearly established rights to his good name, reputation, and liberty guaranteed to him under the 14th Amendment of the United States Constitution, in addition to clearly established rights to due process also guaranteed to him under the 14th Amendment of the United States Constitution.
>
> 152. As a result of the actions of Ms. Webb and Mr. Phares, Plaintiff was arrested and summonsed to appear in court and he was wrongfully deprived of his freedom also violating rights secured to him under the 4th Amendment of the United States Constitution.

---

[60] *Id.* citing *Baker v. McCollan*, 443 U.S. at 140, 99 S. Ct. at 2692.

[61] *See* Petition, ¶ 50.

[62] *See* Memorandum in Support, p. 27.

153. Specifically, as outlined in the foregoing, the Inspector General is not authorized by statute to conduct its own criminal investigations, or to obtain search warrants to further its investigations.

154. As outlined herein, Ms. Webb wrongfully obtained a search warrant and subpoenas duces tecum in breach of well-established law.

155. Mr. Phares, as chief investigator, participated in and/or failed to properly supervise Ms. Webb.

156. As a result of violating well-established laws, Mr. Phares and Ms. Webb wrongfully obtained Petitioner's medical records and a multitude of computers and business records that made it impossible for C-Del and Petitioner to conduct business.

157. Notably, Mr. Phares and Ms. Webb never reviewed or used the information wrongfully seized from Petitioner's home in support of the Inspector General's purported investigation.

158. The actions of Mr. Phares and Ms. Webb caused Petitioner to lose work and wrongfully deprived him of property and his ability to perform his work, along with depriving him of his right to privacy and painting him in a false light.

Again, the foregoing outlines ultimate facts that support Mr. Delahoussaye's claims and state a viable cause of action.

G. Mr. Delahoussaye has viable negligence claims.

The OIG asserts that Mr. Delahoussaye's claims for negligence are subject to dismissal because "at least one element of Delahoussaye's negligence claims fails" in that "he cannot prove that OIG breached the applicable standard of care in investigating and reporting its findings.[63] While the OIG correctly points out that La. R.S. 47:220.24 provides for the source of its power, it incorrectly suggests that the statute establishes the standard of care that it must operate under. Instead, as acknowledged in its own reports, the OIG is governed by the Principles and Standards for Offices of Inspector General as promulgated by the Association of Inspector Generals. Although La. R.S. 47:220.24(L) may provide that the OIG "shall do all things necessary to carry out the functions set forth [in the statute]," it is understood that such functions must be carried out lawfully and competently. Moreover, given that the petition alleges that the OIG Defendants acted beyond the scope of their jurisdiction, their suggestion that Mr. Delahoussaye "cannot prove that the OIG breached the applicable standard of care in

[63] *See* Memorandum in Support, p. 30.

investigating and reporting its findings"[64] is incorrect. Accordingly, Mr. Delahoussaye urges the Court to also overrule this exception.

H. Mr. Delahoussaye has viable claims under Respondeat Superior

The OIG asserts that the claim against the OIG "should be dismissed for the same reasons that all Plaintiff's other claims will be dismissed."[65] Conversely, to the extent that Mr. Delahoussaye has demonstrated why the exceptions have no merit, he submits that his reliance on respondeat superior is proper.

I. Mr. Delahoussaye has properly asserted individual claims.

The law is clear that a state is not a person within the meaning of § 1983.[66] State and arms of state government are not persons who may be sued under this section.[67] La. R.S. 13:5102 defines state agencies as any board, commission, department, agency, special district, authority, or other entity of the state. In the instant case, the OIG is an agency of the state within the contemplation of La. R.S. 13:5102. The OIG cannot be held liable for §1983 damages, such that these claims have been properly asserted against the individuals who acted under the color of state action, Mr. Street, Mr. Phares, and Ms. Webb. Again, Mr. Delahoussaye submits that this exception is meritless.

III. CONCLUSION

The OIG Defendants did not have lawful authority to investigate Mr. Delahoussaye. As a result, their attempts to rely on the authority conveyed by La. R.S. 49:220.24(J) is misplaced. Moreover, the Defendants' repeated assertions that Mr. Delahoussaye had a state contract has no basis in fact and directly contradicts the allegations of the petition. As detailed herein, these two incorrect assumptions underlie nearly all of the exceptions put forth by Defendants and evidence that the Defendants have failed to carry their burden to demonstrate that Mr. Delahoussaye's petition states a cause of action.

Despite Defendant's best efforts to characterize Plaintiff's duck as a rabbit, Mr. Delahoussaye's petition outlines viable claims that are properly supported by factual

---

[64] *Id.*

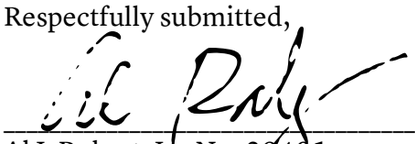
[65] *See* Memorandum in Support, p. 31.

[66] *Varnado v. Dep't of Empl. & Training, Office of Workers' Comp.,* 95-0787 (La. App. 1 Cir. 06/28/96); 687 So. 2d 1013, 1022-23 citing *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989).

[67] *Id. citing Quern v. Jordan,* 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979); *Board of Examiners of Certified Shorthand Reporters v. Neyrey*, 542 So. 2d 56, 66 (La. App. 4th Cir.).

allegations. Accordingly, Mr. Delahoussaye submits that the exception of no cause of action is meritless and urges this Court to overrule it.

Respectfully submitted,



Al J. Robert, Jr., No. 29401
LAW OFFICE OF AL J. ROBERT, JR., LLC
757 St. Charles Avenue, Suite 301
New Orleans, Louisiana 70130
Tel: 504-309-4852
Fax: 877-765-2529
ajr@ajrobert.com

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that the foregoing has been sent by email to all counsel of record via electronic mail this October 6, 2016.

Al J. Robert, Jr.