

# Reconvention for Defamation in the Pleadings: Toward Responsible Litigation

J. David Garrett

---

### Repository Citation

J. David Garrett, *Reconvention for Defamation in the Pleadings: Toward Responsible Litigation*, 36 La. L. Rev. (1976)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol36/iss3/6>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

a right in a manner inconsistent with the social aim or objective of the right.<sup>44</sup> Although Louisiana courts have not yet utilized the concept of abuse of rights as suggested by Joserand in the area of landlord-tenant relations, such an application would provide a sound, logical basis for the prohibition of retaliatory conduct by a residential lessor.

Even though present Louisiana law does provide possibilities for the prohibition of retaliatory lessor conduct, Louisiana courts have not yet utilized these options. Legislation prohibiting such conduct would not only provide protection for the residential lessee but would also be consistent with the civilian concept of abuse of rights while providing needed specificity in the law governing the landlord and tenant relationship.

*John R. Gardner*

#### RECONVENTION FOR DEFAMATION IN THE PLEADINGS: TOWARD RESPONSIBLE LITIGATION

Defamation has been described as "an invasion of the interest in reputation and good name."<sup>1</sup> In Louisiana this interest receives such high regard that,<sup>2</sup> in contrast to the majority of common law states,<sup>3</sup> Louisiana courts extend only a qualified privilege to statements made by a party or his

---

has been applied to lease agreements in instances where the lessor has a stipulation in the lease barring the lessee from subletting or assigning his lease. *Mayrand* at 1011.

44. *Mayrand* at 1000.

---

1. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 111 at 737 (4th ed. 1971) [hereinafter cited as PROSSER].

2. *E.g.*, *Kennedy v. Item Co.*, 213 La. 347, 372, 34 So. 2d 886, 895 (1948) (interest in reputation is an "inalienable right of every man to be protected . . .").

3. In order to be protected under the common law absolute privilege, an otherwise defamatory statement made in judicial pleadings need only be relevant to the issue in question to be nonactionable. Thus, if relevant, a false statement made with malice in judicial pleadings would be protected by the common law privilege, but not by the Louisiana qualified privilege. *See, e.g.*, *MacLarty v. Whiteford*, 30 Colo. App. 378, 496 P.2d 1071 (1972); *Finish Allatoona's Interstate Right, Inc. v. Burruss*, 131 Ga. App. 572, 206 S.E.2d 679 (1974); *Sanders v. Leeson Air Cond. Corp.*, 362 Mich. 692, 108 N.W.2d 761 (1961); *Bromund v. Holt*, 24 Wis. 2d 336, 129 N.W.2d 149 (1964); 50 AM. JUR. 2D, *Libel and Slander* § 238 (1970).

attorney in judicial proceedings.<sup>4</sup> Therefore in Louisiana defamatory statements made in pleadings may create a valid cause of action in favor of a party injured by the statements.<sup>5</sup> A conflict now exists between the Second and Fourth Circuit Courts of Appeal on the question of whether the requirements of final determination of the principal suit, applicable to malicious prosecution, also obtains in actions for defamation in the pleadings.<sup>6</sup> This note will analyze the different approaches taken by these courts and attempt to determine which approach best protects all the interests involved.

In Louisiana the cause of action for defamation consists of a statement that was in fact defamatory,<sup>7</sup> that was communicated to at least one other person,<sup>8</sup> that was false<sup>9</sup> and made with malice,<sup>10</sup> and that produced damages.<sup>11</sup> After proving the statement was defamatory and communicated, the plaintiff is entitled to certain evidentiary presumptions concerning the remaining elements of his cause of action.<sup>12</sup>

---

4. *E.g.*, *Waldo v. Morrison*, 220 La. 1006, 58 So. 2d 210 (1952); *Sabine Tram Co. v. Jurgens*, 143 La. 1092, 79 So. 872 (1918); *Lescale v. Joseph Schwartz Co.*, 116 La. 293, 40 So. 708 (1905); *Oakes v. Alexander*, 135 So. 2d 513 (La. App. 2d Cir. 1961). *See also* *Jones v. Davis*, 233 So. 2d 310 (La. App. 2d Cir. 1970) (holding that LA. R.S. 13:3415 (1950), which provides that parties are not responsible for defamatory statements made by their attorneys, is not applicable to statements made in pleadings).

5. *E.g.*, *Waldo v. Morrison*, 220 La. 1006, 58 So. 2d 210 (1952); *Lescale v. Joseph Schwartz Co.*, 116 La. 293, 40 So. 708 (1905); *Sunseri v. Shapiro*, 138 So. 2d 661 (La. App. 4th Cir. 1962); *Oakes v. Alexander*, 135 So. 2d 513 (La. App. 2d Cir. 1961).

6. *Compare* *Calvert v. Simon*, 311 So. 2d 13 (La. App. 2d Cir. 1975), and *Udell, Inc. v. Ascot Oils, Inc.*, 177 So. 2d 178 (La. App. 2d Cir. 1965), *with* *Viera v. Kwik Home Services, Inc.*, 266 So. 2d 732 (La. App. 4th Cir. 1972).

7. *E.g.*, *Fellman v. Dreyfous*, 47 La. Ann. 907, 17 So. 422 (1895); *Spotorno v. Fourichon*, 40 La. Ann. 423, 4 So. 71 (1888); *Rougeau v. Firestone Tire & Rubber Co.*, 274 So. 2d 454 (La. App. 3d Cir. 1973); *Comment, Defamation: A Compendium*, 28 LA. L. REV. 82, 90 (1967) [hereinafter cited as *Defamation*].

8. *E.g.*, *Sanders v. Times-Picayune Pub. Co.*, 168 La. 1125, 123 So. 804 (1929); *Briggs v. Harrison*, 152 La. 724, 94 So. 369 (1922); *Rougeau v. Firestone Tire & Rubber Co.*, 274 So. 2d 454 (La. App. 3d Cir. 1973).

9. *E.g.*, *Harris v. Minvielle*, 48 La. Ann. 908, 19 So. 925 (1896); *Spotorno v. Fourichon*, 40 La. Ann. 423, 4 So. 71 (1888); *Rougeau v. Firestone Tire & Rubber Co.*, 274 So. 2d 454 (La. App. 3d Cir. 1973).

10. *E.g.*, *Ford v. Jeane*, 159 La. 1041, 106 So. 558 (1925); *Sas Jaworsky v. Padfield*, 211 So. 2d 122 (La. App. 3d Cir. 1968).

11. *Id.*

12. A presumption of malice and falsity must be rebutted by the defendant and the plaintiff need not prove damages in pecuniary form. *See Defamation* at 91-92.

Of the several defenses available to the defendant in an action for defamation,<sup>13</sup> two are relevant when the cause of action is based upon defamatory pleadings. First, truth of the statement is an absolute defense in civil defamation.<sup>14</sup> Second, the judicial privilege protects statements made in judicial proceedings that are material to the issues in controversy<sup>15</sup> and made with probable cause<sup>16</sup> and without malice.<sup>17</sup>

While an action for malicious prosecution is similar to the action for defamation in that it may arise under the same factual situation and it affords protection to the individual's interest in his community relations, the misuse of the judicial process, rather than abusive language, is the basis of the malicious prosecution action.<sup>18</sup> The elements of a cause of action in malicious prosecution include malicious institution,<sup>19</sup> without probable cause,<sup>20</sup> of the proceeding on which the complaint is based, and termination in favor of the party complaining in the malicious prosecution action.<sup>21</sup>

The Second Circuit Court of Appeal held in *Udell, Inc. v. Ascot Oils, Inc.*,<sup>22</sup> and recently in *Calvert v. Simon*,<sup>23</sup> that an action based on defamation in the pleadings cannot be entertained prior to final determination of the initial suit. In *Udell*, the court supported its holding with the assertion that "a cause for action for defamatory statements set forth in the pleadings of a civil action does not arise or come into existence until final determination of such suit,"<sup>24</sup> a rule which

---

13. See *Defamation* at 92-94.

14. *E.g.*, LA. R.S. 13:3602 (1950); *Deshotel v. Thistlewaite*, 240 La. 12, 121 So. 2d 222 (1960); *Smith v. Lyons*, 142 La. 975, 77 So. 896 (1918).

15. *E.g.*, *Dunn v. Southern Ins. Co.*, 116 La. 431, 40 So. 786 (1906); *Lescale v. Joseph Schwartz Co.*, 116 La. 293, 40 So. 708 (1905).

16. *E.g.*, *Waldo v. Morrison*, 220 La. 1006, 58 So. 2d 210 (1952); *Oakes v. Alexander*, 135 So. 2d 513 (La. App. 2d Cir. 1961).

17. *Id.*

18. *Cf.* PROSSER § 120.

19. *E.g.*, *Mullen v. Gause*, 161 La. 461, 109 So. 31 (1926); *Whittington v. Gibson Discount Center*, 296 So. 2d 375 (La. App. 2d Cir. 1974); *Southern Pipe & Supply Co. of Miss., Inc. v. Koonce*, 255 So. 2d 252 (La. App. 2d Cir. 1971).

20. *E.g.*, *Wasserman v. Louisville & Nashville R.R. Co.*, 28 F. 802 (E.D. La. 1886); *Southern Pipe & Supply Co. of Miss., Inc. v. Koonce*, 255 So. 2d 252 (La. App. 2d Cir. 1971).

21. *E.g.*, *Scott v. Citizens' Hdwe & Furn. Co.*, 180 La. 473, 156 So. 469 (1934); *Southern Pipe & Supply Co. of Miss., Inc. v. Koonce*, 255 So. 2d 252 (La. App. 2d Cir. 1971).

22. 177 So. 2d 178 (La. App. 2d Cir. 1965).

23. 311 So. 2d 13 (La. App. 2d Cir. 1975).

24. 177 So. 2d at 179-80, and cases cited therein.

originated prior to the adoption of the Code of Civil Procedure in 1960. It was then not possible to bring a reconventional demand for defamation in the pleadings because under the Code of Practice of 1870 the cause upon which reconvention was based had to arise out of the same transaction and be in esse and not in its embryonic stages.<sup>25</sup> The second circuit reasoned that the 1960 Code of Civil Procedure was adopted as remedial, procedural legislation and therefore could not create a cause of action that had not existed prior to its adoption.<sup>26</sup> Although the court's reasoning is logically consistent, its basic premise confuses the elements of two distinct causes of action by applying the malicious prosecution requirement of final determination of the initial suit to actions for defamation.

A close reading of the cases cited by the second circuit as authority in *Udell* weakens its argument for combining the elements of the actions for malicious prosecution and defamation. In *Carnes v. Atkins Bros. Co.*,<sup>27</sup> combined actions for malicious prosecution and defamation in the pleadings were met with a plea of prescription. The Louisiana Supreme Court's response on appeal, creating the legal fiction that the injury produced by defamatory statements does not arise until the original case has been terminated and the relevancy of the statement determined, ignores the damage actually inflicted at the time of communication. *W. B. Thompson & Co. v. Gosserand*<sup>28</sup> dispensed with the issue simply by citing two earlier cases. The first, *Lebovitch v. Joseph Levy & Bros. Co.*,<sup>29</sup> applied without explanation the malicious prosecution rule requiring final determination of the initial action to allegations of defamation in the pleadings. The second, *Lescage v. Joseph Schwartz Co.*,<sup>30</sup> stated:

*Conceding* such a rule [requiring the application of the malicious prosecution final determination rule to defamation] to obtain in cases like the present one, where libel is charged to have been contained in judicial allegations, such a rule could not be applied in the instant

---

25. La. Code of Practice art. 375 (1870).

26. 177 So. 2d at 181.

27. 123 La. 26, 48 So. 572 (1909).

28. 128 La. 1029, 55 So. 663 (1911).

29. 128 La. 518, 54 So. 978 (1911).

30. 116 La. 293, 40 So. 708 (1905).

case where the plaintiff was not a party to the suit wherein the allegations . . . were made.<sup>31</sup>

The statement is only dictum, rather than an affirmative mandate concerning the application of the malicious prosecution rule to defamation in the pleadings. Thus, cited authority for the rule applied by the second circuit in *Udell* does not give convincing reasons for altering the defamation cause of action by adding the final determination element applicable to malicious prosecution.

Underlying the approach taken by the second circuit is the policy of providing the party making the alleged defamatory statements the opportunity to prove the truth of the statements "unencumbered by the necessity of defending himself before he has a chance to be heard. . . ."<sup>32</sup> Protecting the judicial privilege and insuring unhampered access to the judicial process provide additional policy considerations supporting the rule requiring final determination of the initial suit.

The Fourth Circuit Court of Appeal, in *Viera v. Kwik Home Services, Inc.*,<sup>33</sup> allowed an action for defamation in the pleadings to be brought by reconventional demand, thus prior to the final determination of the principal suit. In advancing this different approach the court correctly distinguished the actions for malicious prosecution and defamation. The basis of the action for malicious prosecution, according to the fourth circuit, is the "malicious commencement or continuance of a suit, without probable cause, for the purpose of harrassment,"<sup>34</sup> whereas defamation is founded upon a "statement tending to harm a person's reputation."<sup>35</sup> Final determination of the suit upon which the action is based is an essential element of malicious prosecution. In contrast, the final determination of the initial suit might have no bearing on an action for defamation in the pleadings because the party who made the statements could prevail on the merits and still be liable for immaterial defamatory statements.<sup>36</sup>

---

31. *Id.* at 306, 40 So. at 712 (emphasis added).

32. *Calvert v. Simon*, 311 So. 2d 13, 16 (La. App. 2d Cir. 1975).

33. 266 So. 2d 732 (La. App. 4th Cir. 1972), *cert. denied*, 263 La. 368, 268 So. 2d 258 (1972), for procedural reasons, with Justices Barham, Tate and Dixon dissenting, being of the opinion that the lower court had erred in its decision.

34. 266 So. 2d at 734.

35. *Id.*

36. For example, in a hypothetical case, Fire Insurance Co. defends a suit

Another factor influencing the fourth circuit's conclusion is that the fiction that the damages do not arise until final determination of the principal suit denies the defamed party his constitutional right of access to the judicial process.<sup>37</sup> As stated previously, damages caused by defamation actually arise at the time of publication; thus, the injured party is forced to endure his damages until final determination and loses interest that would have accrued had the cause of action been granted at the time the statement was made.<sup>38</sup>

The approach taken by the fourth circuit seems better reasoned in both law and policy. First, it recognizes the distinction between defamation and malicious prosecution by refusing to require final resolution of the principal demand prior to hearing the action based on defamation in the pleadings. Second, it allows the action for defamation to be brought through reconventional demand, producing judicial expediency by allowing the same judge to hear both the main and reconventional demands, avoiding the needless expense of repeating testimony in a later trial.<sup>39</sup> Third, the *Viera* ap-

---

on one of its policies by claiming first that the policy does not cover the destroyed structure, and in the alternative, that the fire was set intentionally by the insured for the purpose of defrauding the insurance company. It is determined at trial that the structure was not covered by the policy. If the alternative allegation was made without probable cause and with malice, the insurance company would be liable for judicial defamation even though it prevailed on the merits.

37. 266 So. 2d at 735. LA. CONST. art. I, § 22 provides: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or *unreasonable delay*, for injury to him in his person, property, reputation, or other rights" (emphasis added). Although a literal reading of the article supports the court's argument, certainly delay in the interest of justice or judicial efficiency would not be considered unreasonable.

38. LA. CODE CIV. P. art. 1921 provides, "The Court shall award interest in the judgment . . . as provided by law." LA. R.S. 13:4203 (1950), states, "Legal interest shall attach from date of judicial demand, on all judgments, sounding in damages, 'ex delicto' . . ." Defamation is undeniably tortious in nature; therefore, postponement of judicial demand results in a loss of interest.

39. The action for defamation in the pleadings may be brought in a separate suit filed while the principal suit is pending, according to the *Viera* rule. In addition, LA. CODE CIV. P. art. 1038 allows the court to "separate trial of the principal and incidental actions." Thus, if the interests of the parties would be prejudiced or if simultaneous trial of the main demand and the reconventional demand for defamation would be inefficient, the judge could order separation.

proach avoids postponement of the injured party's recovery and affords greater protection to the litigant's right not to be defamed. The integrity of the judicial privilege is not threatened by the *Viera* approach because material allegations may still be made without fear of liability. Furthermore, the *Viera* rule affects only the procedural means to recovery, not the determination of whether a statement is actionable.

Perhaps the most significant advantage provided by the *Viera* rationale is that it discourages irresponsible litigation. Granting a more convenient and economical method of enforcing his cause of action to the defamed party would force the parties in litigation to be more precise and responsible in their pleadings and thus avoid unnecessary injury.

*J. David Garrett*

#### MINOR'S MARRIAGE CONTRACT—ABSOLUTE NULLITY?

A sixteen-year-old unemancipated minor and her future husband executed a prenuptial agreement renouncing the community of acquets or gains.<sup>1</sup> The father of the bride refused to join his wife and daughter in signing the marriage contract. When the husband instituted a divorce action thirteen years later, the wife reconvened for a partition of the community property, alleging that the separate property agreement was invalid due to her minority at the time of its execution and the absence of her father's assistance and sig-

---

1. A prenuptial agreement, commonly referred to as a marriage contract, is an agreement entered into by a couple stipulating the financial and property aspects of the marriage. S. LITVINOFF & W. TÊTE, LOUISIANA LEGAL TRANSACTIONS AND THE CIVIL LAW OF JURIDICAL ACTS 77 (1969) [hereinafter cited as LITVINOFF & TÊTE]. LA. CIV. CODE art. 2325 permits couples to stipulate property regimes of their own design provided "they be not contrary to good morals." LA. CIV. CODE art. 2332 provides that the community of gains exists by operation of law when there is no stipulation to the contrary prior to the marriage. Marriage contracts are governed by strict requirements. LA. CIV. CODE art. 2328 provides that they must be by notarial act and article 2329 provides that they cannot be altered after the marriage, except that couples moving to this state are given a one-year period in which to make a marriage contract. LA. CIV. CODE art. 2329. See H. DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 118 (1945), in which the writer suggests that post-nuptial contracts would make it possible for spouses dissatisfied with the community property system to change it and thus prevent "possible friction" in their marriage.