NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 2009

TYRONE J. WHITE

VERSUS

DR. CHRISTOPHER E. CENAC

Judgment Rendered: June 8, 2007

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Appealed from the
32nd Judicial District Court
in and for the Parish of Terrebonne
State of Louisiana
Suit Number 147,117
The Honorable John R. Walker

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

GAIDRY, J.

This matter originated with the filing of a "Petition for Damages" by the plaintiff, Tyrone White, against Dr. Christopher E. Cenac (Dr. Cenac), an orthopedist who had provided medical expert testimony for the defense in Mr. White's separate and prior suit for personal injury. Mr. White's petition alleged that the testimony Dr. Cenac provided in White's personal injury trial was grossly negligent, maliciously false, and contained erroneous medical conclusions, which caused him to lose his case. Mr. White appeals a judgment that granted Dr. Cenac's exceptions raising the objections of no cause and no right of action, and dismissed, with prejudice, Mr. White's action for damages. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Prior Lawsuit

Mr. White was the plaintiff in a separate and previous suit for damages entitled "Tyrone White v. Roland Price, Goodyear Auto Service Center, and Travelers Indemnity Company" (Case # 87,697, 17th Judicial District Court, Parish of Lafourche), which arose out of an automobile accident on June 21, 1999, as a result of which Mr. White alleged he had sustained personal injuries. Dr. Cenac testified in that trial as an expert witness on behalf of the defendants regarding the existence and extent of Mr. White's alleged injuries. Also testifying at the trial were two of the plaintiff's physicians, who also provided expert medical testimony regarding those same issues on Mr. White's behalf. After a week-long trial, a unanimous jury returned a verdict against Mr. White, finding that he had not sustained personal injures as a result of that accident. Plaintiff then filed a "Motion for New Trial and/or JNOV and/or Additur," asserting claims that

Dr. Cenac's testimony at the trial was negligent, purposely false, and that his medical conclusions were incorrect in light of the medical records provided. The trial court denied that motion, rendering very thorough and detailed written reasons for judgment, concluding that the jury had decided all issues by a fair interpretation of the evidence presented and there was no merit to any of plaintiff's claims. Plaintiff appealed that judgment to this court, which affirmed, finding the judge was legally correct in denying the new trial and JNOV. *White v. Price*, 2003-2414 (La. App. 1st Cir. 10/29/04). Writs were denied by the Supreme Court. 2005-1910 (La. 11/28/05), 916 So.2d 150.[1]

The Current Lawsuit

Less than one month later, on December 23, 2005, Mr. White filed this suit against Dr. Cenac, asserting the same allegations regarding Dr. Cenac's testimony that he had previously asserted in his motion for new trial and JNOV, and also in his appeal from the judgment in his personal injury suit.

Dr. Cenac filed exceptions raising the objections of no cause and no right of action, prescription, and a motion for sanctions and costs. As a basis for the exceptions raising the objections of no cause of action and no right of action, Dr. Cenac asserted he is entitled to absolute immunity from civil liability for testimony given at a civil trial, and he further alleged that he owed no legal duty of care to the plaintiff. He contended in the alternative that any cause of action, *if one was stated*, was filed more than one year from plaintiff's knowledge that "damage" was sustained and, thus, had

[1]Implicit in the jury verdict, the trial court's ruling on the motion for new trial or JNOV, and this court's ruling affirming that judgment is a finding that the jury weighed the credibility and the testimony of all of the witnesses, including Dr. Cenac, and that these findings were supported by the record. The plaintiff's failure to state a cause of action precluded any consideration of other negligence issues; however, we note that the foregoing finding would certainly also preclude a finding that Dr. Cenac's testimony legally caused the plaintiff any damage.

prescribed. Finally, he claimed an imposition of sanctions, as well as attorneys fees and costs, was warranted in that the petition filed by Mr. White naming Dr. Cenac as defendant had no basis in law or fact and was filed solely to harass him. Prior to a hearing on the aforementioned exceptions and motion, plaintiff filed a motion for summary judgment, which Dr. Cenac opposed. The matters were all heard on March 31, 2006; the trial court rendered a final judgment dated April 10, 2006, denying plaintiff's motion for summary judgment and defendant's exception of prescription, but granting the exceptions of no cause of action and no right of action, dismissing, with prejudice, the plaintiff's suit. This appeal by Mr. White followed.

DISCUSSION AND ANALYSIS

Mr. White, in brief, presents the sole issue he raises on appeal as follows:

> Does gross negligence and/or intentional incorrect testimony of an expert, that is the sole basis for a claimant to lose a damage case, give rise to a claim for negligence against the doctor expert for the damages that he has sustained as a result of this negligent testimony?

The trial court concluded, as a matter of law, on the basis of immunity first, and a lack of duty second, that the answer to the issue presented by the plaintiff at trial and again on appeal is a resounding no. For all of the following reasons, we agree with the trial court and find that the plaintiff herein fails to state a cause of action. Based on this finding, we pretermit any discussion regarding the exception raising the objection of no right of action, and affirm the judgment.

Standard of Review

In reviewing a judgment of the district court relating to an exception of no cause of action, appellate courts should conduct a *de novo* review

because the exception raises a question of law and the lower court's decision is based solely on the sufficiency of the petition. *Wright v. Louisiana Power & Light*, 2006-1181, p. 15 (La. 3/9/07), 951 So.2d 1058, 1069.

After our review of the applicable law, we find, as did the trial court, no law to support the plaintiff's claims. Indeed, plaintiff cites absolutely no law to support his claim that the trial court erred in granting the exception of no cause of action.[2]

Dr. Cenac is Entitled to Absolute Immunity as a Matter of Law

The history and policy reasons for the longstanding and broad tradition of witness immunity in Louisiana law was fully discussed in *Marrogi v. Howard*, 2001-1106 (La. 1/15/02), 805 So.2d 1118. Although the issue in that case was whether witness immunity extends to one's *own* ("friendly" or retained) witness, and the court decided that issue in the negative, its discussion and analysis with respect to the immunity as applied to adverse witnesses is instructive on the matter before us. The Court provided:

> In Louisiana, the affirmative defense of witness immunity or privilege has evolved from the jurisprudence. Since the 1800s, this court has recognized the rule that, at least in the context of ... suits against adverse witnesses, immunity from a civil action attaches to a witness in judicial or quasi-judicial proceedings. ... The policy basis ... has been explained as follows: "The administration of justice requires the testimony of witnesses to be unrestrained by liability to vexatious litigation. The words they utter are protected by the occasion, and cannot be the foundation for an action... ." "[C]ommunications made in judicial or quasi-judicial proceedings carry an absolute privilege so that witnesses, bound by their oaths to tell the truth, may speak freely without fear of civil suits for damages."

Id. (Citations and footnotes omitted).

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[2] Despite filing a nineteen-page brief with this court, the only law presented by the appellant is: the general negligence statute, C.C. art. 2315; a student written law review article in which the writer posits personal disagreement with the law and policy reasons why the law should not be the way that it is; and one case [*Russ v. Jones*, 580 So.2d 1098, (La. App. 4th Cir. 1991)] for the basic proposition that "the value of an expert witness' opinion depends on the existence of the facts on which it is predicated." Not only do these cited authorities provide no support for plaintiff's argument, but notably, none of these citations even addresses the issues of immunity or duty upon which the judgment being appealed was based.

Moreover, witness immunity is an "absolute privilege" because the privilege protects the witness from civil suit *regardless of malice or falsity.* *Id.* at 1125. (Emphasis added.) It has long been recognized that all that is required by Louisiana law for absolute immunity to attach is that the witnesses' testimony or declarations must be pertinent and material. *Id.* at 1126.

Courts in Louisiana have not limited the immunity to defamation and libel/slander cases, but apply it broadly. Specifically, in a case very similar to the one before us, absolute immunity was applied in a retaliation case against an adverse, expert witness. *Moity v. Busch*, 368 So.2d 1134, 1135 (La. App. 3rd Cir. 1979). In *Moity*, the plaintiff claimed the expert witness for the defense in a prior suit for damages gave testimony against him that was defamatory and reflected untrue results. In affirming summary judgment granted in favor of the defendant expert witness, the third circuit applied absolute immunity and further stated that the accepted qualified expert was "free to give his opinion whether others might disagree with his conclusions or not." *Id.* at 1136.

Finally, this circuit also has recognized the entitlement to absolute immunity granted to witnesses for testimony offered at a civil trial. In *Zuber v. Buie*, 2002-1718 (La. App. 1st Cir. 5/9/03), 849 So.2d 559, a mother brought a defamation action against a private detective who had prepared a report that was entered into evidence against the mother in a custody dispute with her child's father. The basis of the mother's suit against the investigator was that the report prepared by him and submitted into evidence "contained numerous inaccuracies and innuendos that were damaging." *Id.* at 560. Her suit was dismissed on a motion for involuntary dismissal on the basis that the investigator was entitled to absolute immunity. *Id.* at 561. This court affirmed, citing the well-established language that "Louisiana law

grants an absolute privilege to non-litigant witnesses in a judicial proceeding when their testimony is pertinent and material to the proceeding," *Id.*, reasoning, "[t]he administration of justice and its objective to uncover the truth support the application of witness immunity." *Id.* at 563.

In this case, it is essentially undisputed as a matter of fact that Dr. Cenac's testimony as an adverse, expert witness in Mr. White's personal injury suit was "pertinent and material" to the issues presented. At issue in that trial were the cause and extent, if any, of Mr. White's personal injuries. Dr. Cenac testified as a duly qualified expert in orthopedic surgery who offered his opinion about Mr. White's claimed injuries. Even if in dispute, the record fully supports a finding that Dr. Cenac's testimony was both pertinent and material; thus, he is entitled to immunity. The trial court's judgment granting Dr. Cenac's exceptions raising the objection of no cause and no right of action on this basis is affirmed.

We note that the application of immunity to an adverse witness, in this case, Dr. Cenac, does not leave a plaintiff without a remedy. Although we do not have the record of the previous trial, it is apparent from the record and arguments before us that plaintiff's counsel had the opportunity to fully cross-examine and impeach Dr. Cenac on any of the alleged misstatements and falsities. Moreover, plaintiff's counsel was entitled to request and have the court conduct a *Daubert* hearing to test the qualifications of Dr. Cenac and get a judicial determination that he was an appropriate, qualified expert witness.[3] It appears that this alternative remedy may not have been pursued

[3] Finally, it is noteworthy to mention that plaintiff sought review of the very same issues presented herein as part of his appeal to this court of the judgment denying him relief in his personal injury action. Thus, the plaintiff benefited from our review of those issues in that appeal. Indeed, had there been any merit to plaintiff's contentions regarding the egregiousness of Dr. Cenac's testimony and the damaging effect it had on the jury, this court would have found that the trial court in that matter erred in not granting a new trial or JNOV.

by plaintiff's counsel; however, that is no basis for allowing this baseless suit in the absence of a viable cause of action.

Although the judgment dismissing the plaintiff's case is affirmable solely on the holding and application of absolute immunity, we find that the separate alternative bases for the trial court's judgment are equally affirmable, and raise significant issues worthy of consideration in this appeal.

No Legal Duty Owed by Dr. Cenac

Although the plaintiff has alleged in this matter that Dr. Cenac's conduct as a witness in his prior personal injury case was "grossly negligent" presumably within the purview of La. C.C. art. 2315, the plaintiff has failed to allege or submit any evidence or authority that Dr. Cenac owed him any duty, much less, that any such duty was breached. The trial court expressly found that Dr. Cenac owed no duty to Mr. White, stating, "Dr. Cenac does not have a duty, in this matter, ... [h]e is called as an expert witness. He has the right to render an opinion."

The threshold issue in any negligence action is whether the defendant owed the plaintiff a duty, and whether a duty is owed is a question of law. *Hanks v. Entergy Corporation*, 2006-477 p. 21 (La. 12/18/06), 944 So.2d 564, 579. As noted above, not only has the plaintiff failed to even allege a duty owed to him by Dr. Cenac, but also he fails to cite any legal authority for such a duty. Indeed, our review of the record and the jurisprudence confirms that no such authority exists; no duty is owed here. Dr. Cenac was not the plaintiff's treating or consulting physician; rather, he was the independent medical examiner retained by the defendants in Mr. White's personal injury suit to offer his expert medical opinion regarding Mr. White's condition and the existence and extent of his injuries. As noted by

our supreme court in *Marrogi*, *supra,* in discussing the rationale for the granting of absolute immunity to adverse witnesses, "we have identified the protected interest as the administration of justice and its objective to uncover the truth." We find this rationale equally applicable to a determination of whether any duty is owed under these circumstances and conclude that it is not.

CONCLUSION

For the foregoing reasons, the trial court's dismissal of plaintiff's claims by granting the exception raising the objection of no cause of action, on the basis of either immunity and/or a finding of no legal duty owed, is correct as a matter of law; therefore, it is hereby affirmed.[4] Costs of this appeal are assessed to Mr. White.

AFFIRMED.

[4] The record before us is inexplicably silent on the defendant's motion for sanctions and attorneys fees. Although requested by Dr. Cenac and scheduled for hearing on the same date as defendant's other exceptions and plaintiff's motion for summary judgment, no arguments were made in support of or in opposition thereto, and no mention of this motion is made in the trial court's ruling or in the judgment itself. While we find this matter certainly borders on the type of frivolousness for which sanctions may be awarded, and had an award been made we would have been constrained to affirm it, we also note that the defendant has neither objected to the trial court's failure to rule on that motion, nor has he filed an answer to the appeal or a separate appeal requesting such a ruling to be made. Therefore, the issue, albeit with merit, is simply not before us.