

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 0464

CYNTHIA D. SAMUEL

VERSUS

**CHRISTINE FALGOUST REMY, PERSONALLY AND AS
DIRECTOR OF/AND THE REMY FIRM, A/K/A CHRISTINE REMY
AND ASSOCIATES, P.L.C.; CHARLES N. BRANTON,
PERSONALLY; CHARLES N. BRANTON, L.L.C.; BRANTON &
ASSOCIATES, LLC; ABC INSURANCE COMPANY; EFG
INSURANCE COMPANY; XYZ INSURANCE COMPANY; AND
TUV INSURANCE COMPANY**

Judgment Rendered: **AUG 31 2016**

**Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 2013-15489**

The Honorable Martin E. Coady, Judge Presiding

**Cynthia D. Samuel
New Orleans, Louisiana**

**Plaintiff/Appellant
In Proper Person**

**Gus A. Fritchie, III
New Orleans, Louisiana**

**Counsel for Defendants/Appellees
Christine Falgoust Remy, the Remy
Firm, and Christine Remy and
Associates, P.L.C.**

**James G. Wyly, III
Thear J. Lemoine
Gulfport, Mississippi**

**Counsel for Defendants/Appellees
Charles N. Branton, Charles N.
Branton, LLC, and Branton &
Associates, LLC**

BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

sum
McDonald, J. concurs.

THERIOT, J.

This is a companion case to **Samuel v. Remy**, 15-0465 (La. App. 1 Cir. --/--/--) (unpublished), handed down this same date. For the following reasons, we affirm the trial court's judgment granting special motions to strike in favor of the defendants-appellees and ordering the dismissal of the plaintiff-appellant's claims with prejudice.

FACTS AND PROCEDURAL BACKGROUND

The plaintiff-appellant, Cynthia D. Samuel, initiated this suit by filing a petition for damages against the defendants-appellees, Christine Falgoust Remy, her law firm, and insurers (together "Remy defendants") and Charles N. Branton, his law firm, and insurers (together "Branton defendants") (collectively "the defendants"). Samuel's suit derives from allegedly defamatory statements and allegations made by the defendants in motions for sanctions and supporting memoranda filed against her in a separate family law matter previously pending before the Twenty-Second Judicial District Court, docket no. 2012-13474 ("the original domestic proceeding").

The original domestic proceeding involved a dispute between two parents concerning custody of their minor child. In that proceeding, Samuel served as counsel for the minor child's mother. During the course of Samuel's representation of the child's mother, it became apparent that the child's maternal grandparents sought to intervene in the suit. Samuel thus contacted Christine Falgoust Remy to suggest she undertake representation of the child's grandparents in their proposed intervention. Remy declined to accept representation of the grandparents and recommended another attorney to Samuel.

Thereafter, on September 6, 2012, Samuel filed a motion to recuse the trial judge in the original domestic proceeding on grounds that the judge had

received improper *ex parte* communications and documents calculated to influence her actions and decision. Samuel claimed that the trial judge's improper consideration of communications and documents biased her and prejudiced her impartiality. Samuel further claimed that the trial judge's bias and prejudice was evidenced by a pattern of unfavorable rulings.

Samuel subpoenaed fifteen witnesses to testify at the recusal hearing, including Remy. Before the trial court heard arguments on the motion to recuse, Samuel contacted Remy by phone. Remy recorded their phone conversation without Samuel's knowledge. The phone conversation lasted for approximately two hours. Samuel subsequently contacted Remy multiple other times by voicemail and text message. Remy hired Charles N. Branton as her attorney to represent her, in her capacity as a subpoenaed witness, at the recusal hearing.

At the hearing on the motion to recuse, Samuel questioned Remy about their conversation. Remy testified that Samuel's communications were threatening and intimidating. The trial court denied Samuel's motion to recuse, finding, among other things, that there was no evidence the trial judge had improperly received or considered *ex parte* communications or documents in connection with the proceeding.

The minute entry from the recusal hearing in the original domestic proceeding indicates that, in open court, Branton orally moved for sanctions against Samuel pursuant to La. C.C.P. art. 863. The trial court responsively indicated that Branton would have to file a written motion. Branton accordingly filed a written motion for sanctions and incidental relief with supporting memorandum on behalf of Remy on November 21, 2012. Branton later filed a supplemental motion for sanctions with supporting memorandum on behalf of Remy on April 4, 2013. The motions for

sanctions were premised upon the same operative facts concerning Samuel's alleged misconduct in the original domestic proceeding. The record does not indicate whether the trial court acted on the motions for sanctions.

On November 21, 2013, Samuel filed the instant suit against the defendants, raising claims sounding in "defamation, slander, abuse of process, harassment, malicious prosecution, intentional infliction of emotional distress, etc." Samuel asserted that the defendants had acted in a manner that caused "false, defamatory, slanderous, and insulting accusations" about her to be published in the public record in the original domestic proceeding. Samuel detailed the allegedly defamatory statements in her petition. The statements included allegations made by the defendants accusing Samuel of repeatedly contacting Remy in an attempt to intimidate and/or threaten her into supporting a frivolous motion to recuse as well as allegations accusing Samuel of engaging in willful abuse of process by subpoenaing Remy to testify at the hearing on a motion to recuse without just cause.

The Branton defendants responded to this suit by filing exceptions of no cause of action, no right of action, and prematurity, as well as a special motion to strike. The Remy defendants responded by filing exceptions of no cause of action, no right of action, a motion for summary judgment, and a special motion to strike.¹ The trial court heard arguments on the several exceptions and motions, took the matters under advisement, and, on April 24, 2014, signed comprehensive written reasons for judgment granting each of the exceptions and motions.² Thereafter, on May 28, 2014, the trial court

¹ Pursuant to a motion filed on March 24, 2014, the Branton defendants joined in and adopted by reference the exceptions of no cause of action and no right of action, the motion for summary judgment, the special motion to strike, and the memorandum in support submitted by the Remy defendants.

signed a written judgment in accordance with its written reasons for judgment, ordering the dismissal of Samuel's claims with prejudice.

The trial court's May 28, 2014 judgment did not address the defendants' entitlement to reasonable attorney fees and costs as the prevailing parties on the special motions to strike under La. C.C.P. art. 971. In addition, although the trial court had indicated in its written reasons for judgment that there was no just cause for delay and that its written judgment would be certified as a final judgment, the trial court's May 28, 2014 judgment did not contain the required designation of finality required for appeal under La. C.C.P. art. 1915(B).

Before the trial court signed its May 28, 2014 judgment, however, the defendants filed separate motions for attorney fees and costs as the prevailing parties on the special motions to strike. In addition, after the trial court signed its May 28, 2014 judgment, the Branton defendants filed a "motion for new trial" for the limited purposes of seeking an assessment of attorney fees. The trial court allowed the parties to file memoranda on the motions seeking attorney fees, took the matter under advisement, and, on September 29, 2014, signed a final judgment awarding the Remy defendants and the Branton defendants each \$3,000 in attorney fees, plus costs of court, as the prevailing parties on the special motions to strike in accordance with La. C.C.P. art. 971, thereby disposing of all remaining issues in this case.

Samuel timely filed a motion and order for suspensive appeal from the trial court's final judgment on October 29, 2014. The trial court granted Samuel's single motion and order for suspensive appeal, but, for unknown reasons, the clerk of court for the trial court forwarded two notices of appeal to this court. The matter was thus docketed as separate appeals under

² We note that the trial court denied an exception of prescription raised by the Branton defendants in memoranda but which had not been filed as an exception in the record.

consecutive docket numbers. The trial court's May 28, 2014 judgment was lodged as the subject of this appeal, docket no. 2015 CA 0464 ("Samuel I"), while the trial court's September 29, 2014 judgment was lodged as the subject of the companion appeal, docket no. 2015 CA 0465 ("Samuel II").

ASSIGNMENTS OF ERROR

Samuel raises the following twelve assignments of error,³ which are reproduced below without originally supplied emphasis:

1. The trial court erred as a matter of law when he failed to recognize or apply the legal distinction, in a defamation case, between statements of opinion made by defendant Remy during her September 2012 testimony from defendants' statements of fact made in pleadings in November 2012, by doing so, the trial court omitted several steps in the correct legal analysis.
2. The trial court erred in [*sic*] as a matter of law by skipping the prerequisite step in the legal analysis, the determination of whether the defamatory statements were true or false.
3. The trial court erred as a matter of law by failing to make the proper inquiry in determining actual malice, whether the defendant knew the statements were false or acted in reckless disregard to their falsity, and whether they were palpable to the issues in the underlying litigation, which determines malice and the application of the qualified privilege.
4. The trial court erred as a matter of law in finding that the plaintiff had no right of action because she was not in the class of plaintiffs to whom the law grants relief in a defamation action, and in so finding, the trial court erred by failing to make the prerequisite finding that the statements made were in regard to Samuel's "in relation to his or her official conduct," [*sic*] when he applied the higher standard after he deemed Samuel as a "public figure" and "public official."
5. The trial court erred as a matter of law in denying plaintiff's abuse of process claim when he failed to apply the legal test to determine the sufficiency of the cause of action, and failed to

³ In light of the issues fully briefed on appeal, we interpret Samuel's several assignments of errors as challenging the trial court's judgment granting the special motions to strike, the motion for summary judgment, and the exceptions of no cause of action and prematurity. In the interest of judicial efficiency, we only address the dispositive special motions to strike and preterm consideration of the alternative assignments of error.

give the plaintiff the benefit of the legal presumption of “ulterior purpose” once plaintiff demonstrated the “irregular use of process.”

6. The trial court erred as a matter of law by granting witness immunity to defendant Remy based on the erroneous finding that the statements made in the motions for sanctions were “consistent with Remy’s sworn testimony” elicited during the recusal hearing, and in so doing and in failing to distinguish statements of opinion and statements of fact, it therefore caused the court to erroneously conclude that Samuel introduced no evidence that the allegations in Remy’s motion against Samuel “allege any criminal conduct on the part of Samuel.”
7. The trial court erred as a matter of law in dismissing plaintiff’s claim for malicious prosecution as premature, and granting the defendants’ exception of no right of action, when the interruption of prescription applies to parties, not to attorneys.
8. The trial court erred as a matter of law in failing to do the proper analysis when considering a no cause of action exception, when he considered additional evidence rather than ruling solely on the face of the petition as required by law, and further, the trial court made impermissible conclusions rather than assuming all well pled allegations are true, which is the proper analysis, when considering a no cause of action exception.
9. The trial court erred as a matter of law when he dismissed plaintiff’s lawsuit with prejudice upon his finding that plaintiff failed to state a cause of action, rather than ordering amendment to the petition.
10. The trial court erred in giving weight to the defendants [*sic*] assertions and allegations because neither defendant submitted any affidavit to controvert the affidavits submitted by the plaintiff.
11. The trial court erred as a matter of law in applying the incorrect standard in denying plaintiff’s claim for negligent infliction of emotional distress wherein the trial court used the standard applicable to intentional infliction of emotional distress, and he erred in granting summary judgment as to plaintiff’s claim for intentional infliction of emotional distress because that issue was well plead, when the issue of defendants’ intent is a genuine issue of material fact to be resolved at trial.

12. The trial court erred as a matter of law by using the standard set out in the **Lamz** case, when the facts of the case sub judice are significantly different, and equally important, the evidence in this case supports a contrary finding than the **Lamz** case, and when Samuel was not a candidate as defined by law at the time the defamatory statements were made, and therefore the court erred in finding that Samuel was a “public figure” and a “public official.”

STANDARD OF REVIEW

The trial court’s judgment granting the special motions to strike raises questions of law for appellate review. In a case involving the determination of legal issues alone, we must apply the *de novo* standard of review, under which the trial court’s legal conclusions are not entitled to deference. See Lamz v. Wells, 05-1497 (La. App. 1 Cir. 6/9/06), 938 So.2d 792, 795. See also Williams v. New Orleans Ernest N. Morial Convention Center, 11-1412 (La. App. 4 Cir. 5/11/12), 92 So.3d 572, 575, cert. denied, 133 S.Ct. 2033, 185 L.Ed. 896 (2013).

DISCUSSION

We begin our discussion by addressing the unique procedural posture of this case in order to determine whether the instant appeal is properly before us. As explained above, Samuel timely filed a motion and order for suspensive appeal following rendition of the trial court’s final judgment, wherein she requested review of the trial court’s May 28, 2014 judgment and September 30, 2014 judgment. The trial court granted Samuel’s single motion and order for suspensive appeal, but, for unknown reasons, the clerk of court for the trial court forwarded two notices of appeal to this court. The trial court’s two judgments were then docketed as the subject of separate appeals under consecutive docket numbers.

The docketing of this matter as the subject of two separate appeals led to significant confusion concerning the issues pending appeal in each of the companion cases and ultimately resulted in the partial dismissal of the appeal in **Samuel II**. The record before us reflects that, following the lodging of the records in **Samuel I** and **Samuel II**, the clerk's office for this court forwarded two notices of lodging to the parties, notifying them, in pertinent part, that the appellant's briefs in both appeals were due on or before April 12, 2015. Samuel failed to timely file an appellant's brief in either appeal, and our clerk's office accordingly sent out two notices of abandonment to Samuel pursuant to Uniform Rules – Courts of Appeal, Rule 2-8.6. The first notice, dated May 8, 2015, related to **Samuel I**, whereas the second notice, dated May 11, 2015, pertained to **Samuel II**.

On May 11, 2015, the date of the issuance of the notice of abandonment in **Samuel II**, Samuel filed an appellant's brief bearing the docket number of **Samuel I**. In brief, Samuel assigned error as to the trial court's interlocutory ruling ordering the dismissal of her claims with prejudice and addressed the trial court's final judgment relating to the award of attorney fees. Though Samuel addressed the trial court's interlocutory ruling and final judgment in her brief in **Samuel I**, she failed to separately file an appellant's brief in **Samuel II** prior to the deadline contained in the second notice of abandonment. Thus, on July 6, 2015, we issued an order of dismissal in **Samuel II**, dismissing the appeal as abandoned. Two days later, on July 8, 2015, we issued a corrected order of dismissal, clarifying that the appeal was dismissed as to Samuel only and maintaining the defendants' answers to the appeal lodged in **Samuel II**.⁴

⁴ We note that the Remy defendants filed duplicative answers regarding the trial court's award of attorney fees bearing the docket numbers of both **Samuel I** and **Samuel II**. We

We have previously had occasion to explain that a trial court's judgment granting a defendant's special motion to strike under La. C.C.P. art. 971 constitutes an interlocutory judgment that is reviewable in the appeal taken from the subsequent final and appealable judgment granting the defendant attorney fees as the prevailing party on the special motion to strike. See Davis v. Benton, 03-0851 (La. App. 1 Cir. 2/23/04), 874 So.2d 185, 188 n.1. The approach articulated by this court in **Davis** comports with the general proposition that, absent a designation under La. C.C.P. art. 1915(B), interlocutory judgments rendered during the progression of a suit can only be appealed with the final judgment in the suit. See Devers v. Southern Univ., 97-0259 (La. App. 1 Cir. 4/8/98) 712 So.2d 199, 209. See also Nicholson v. Holloway Planting Co., 262 So.2d 176, 178 (La. App. 1 Cir. 1972) (explaining that an appeal from a final judgment "carrie[s] with it appeals from all prior interlocutory judgments rendered in the proceeding.").

Ordinarily, as in **Davis**, *supra*, we would review the merits of a prejudicial interlocutory judgment in an appeal from a final judgment rendered in a suit, and, relatedly, we would regard dismissal of an appeal taken from a final judgment as dispositive of all issues pending appellate review. However, we are mindful that, in this case, Samuel properly filed a single motion and order for suspensive appeal following rendition of the trial court's final judgment and that the trial court's interlocutory judgment was separately docketed as the subject of the instant appeal due to no fault of the parties.⁵ Further, we note that appeals are constitutionally guaranteed and

defer consideration of the Remy defendants' answer to **Samuel II**, wherein both of the defendants' answers to the appeal were maintained. See Samuel II, 15-0465, p. ---.

⁵ We note that, on April 28, 2015, this court, *ex propriu motu*, found an apparent defect in the appeal taken in **Samuel I** and issued a rule to show cause order. In part, the rule to show cause order noted that the trial court's May 28, 2014 judgment appeared to be a partial judgment without the necessary designation of finality required for appeal.

avored in the law. See La. Const. art. V, §§ 5, 10. See also **U.S. Fire Ins. Co. v. Swann**, 424 So.2d 240, 244 (La. 1982). Because the record clearly establishes that Samuel sought to preserve her right to seek review from the trial court's adverse interlocutory judgment, and because no undue prejudice results to the defendants by maintenance of the instant appeal, we elect to consider the merits of the trial court's interlocutory judgment herein pursuant to our discretionary authority under La. C.C.P. art. 2164.⁶

Article 971 – Special Motion to Strike

Having found that this appeal remains properly before us, we now turn to consider the correctness of the trial court's judgment granting the defendants' special motions to strike. The special motion to strike is a specialized defense motion akin to a motion for summary judgment. The legislature created the special motion to strike as a procedural device to be used early in legal proceedings to screen out meritless claims brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. **Lamz**, 938 So.2d at 796.

The special motion to strike is governed by La. C.C.P. art. 971, which provides, in pertinent part:

A. (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that

Approximately eight months after rendition of the final judgment in this suit, on May 19, 2015, the trial court purported to certify its interlocutory ruling as final and appealable under La. C.C.P. art. 1915(B). We decline to consider the propriety of the trial court's certification, because, at the time of the certification, the interlocutory judgment was already subject to appellate review, since, "[a]fter judgment on the merits, an interlocutory judgment becomes a part of the final decree and [is] subject to review on appeal." See In re T.A.S., 04-1612 (La. App. 1 Cir. 10/29/04) 897 So.2d 136, 139.

⁶ Louisiana Code of Civil Procedure art. 2164 states, in pertinent part: "The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal."

the plaintiff has established a probability of success on the claim.

(2) In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability of success on the claim, that determination shall be admissible in evidence at any later stage of the proceeding.

B. In any action subject to Paragraph A of this Article, a prevailing party on a special motion to strike shall be awarded reasonable attorney fees and costs.

* * *

F. As used in this Article, the following terms shall have the meanings ascribed to them below, unless the context clearly indicates otherwise:

(1) “Act in furtherance of a person’s right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue” includes but is not limited to:

(a) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.

(b) Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official body authorized by law.

(c) Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.

(d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(2) “Petition” includes either a petition or a reconventional demand.

(3) “Plaintiff” includes either a plaintiff or petitioner in a principal action or a plaintiff or petitioner in reconvention.

(4) “Defendant” includes either a defendant or respondent in a principal action or a defendant or respondent in reconvention.

The legislature enacted La. C.C.P. art 971 through Acts 1999, No. 734, § 1. Section 2 of Acts 1999, No. 734 provides as follows:

The legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. The legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, it is the intention of the legislature that the Article enacted pursuant to this Act shall be construed broadly.

The moving party on a special motion to strike bears the initial burden of demonstrating that the subject matter of the suit stems from his actions in furtherance of his right of petition or free speech in connection with a public issue. See Lamz, 938 So.2d at 797. If the moving party makes a *prima facie* showing that his comments were constitutionally protected and in connection with a public issue, the burden then shifts to the plaintiff to demonstrate a probability of success on the claim. If more than one claim is alleged in the petition, the court should examine the probability of success of each claim individually, and if the plaintiff can demonstrate a probability of success on any claim, then the motion must fail. **Yount v. Handshoe**, 14-919 (La. App. 5 Cir. 5/28/15), 171 So.3d 381, 386.

Here, we find that the trial court correctly held that all of Samuel’s claims were subject to the provisions of La. C.C.P. art. 971. As cited above, the statutory language of Article 971 dictates that the special motion to strike

applies to all causes of action against a person “arising from any act of that person in furtherance of the person’s right of petition or free speech[,]” and defines such an act as including, in pertinent part, “[a]ny written or oral statement or writing made before a ... judicial proceeding,” and “[a]ny written or oral statement or writing made in connection with an issue under consideration or review by a ... judicial body[.]” La. C.C.P. art. 971(F)(1)(a) and (b). Because Samuel’s claims all arose from the defendants’ actions undertaken in the course of judicial proceedings, the trial court did not err in finding that all of Samuel’s claims were subject to special motions to strike. In order to determine whether the trial court properly granted the defendants’ special motions to strike, we move on to analyze the facts of this case in light of the law applicable to each of the individual claims raised by Samuel in her petition.⁷

Defamation

Defamation is a tort involving the invasion of a person’s interest in his or her reputation and good name. There are four essential elements to establish a defamation cause of action: 1) a false and defamatory statement concerning another; 2) an unprivileged publication to a third party; 3) fault on part of the publisher (negligence or greater), and 4) resulting injury.

Cyprien v. Bd. of Sup’rs ex rel. University of Louisiana System, 08-1067 (La. 1/21/09), 5 So.3d 862, 866.

⁷ Though Samuel ostensibly pled additional causes of action sounding in “harassment” and “slander,” we find these claims to be encompassed in her causes of action for intentional infliction of emotional distress and defamation. See White v. Monsanto Co., 585 So.2d 1205, 1210 (La. 1991) (“Recognition of a cause of action for intentional infliction of emotional distress in a workplace environment has usually been limited to cases involving a pattern of deliberate, repeated harassment over a period of time.”); **Sova v. Cove Homeowner’s Assn., Inc.**, 11-2220 (La. App. 1 Cir. 9/7/12), 102 So.3d 863, 873 (“A claim of libel or slander is generally a claim of defamation, since defamation occurs through either libel or slander.”). Thus, like the trial court, we limit our discussion to those causes of action sounding in defamation, abuse of process, malicious prosecution, and intentional infliction of emotional distress.

In brief, Samuel argues that the trial court erred by granting the special motions to strike her defamation cause of action. In relevant part, she claims to have presented sufficient evidence tending to establish that the defendants' allegations and statements at issue were false and that the defendants caused these statements to be published in the public record with reckless disregard as to their truth or falsity.⁸

It is uncontested that the defendants filed motions for sanctions and supporting memoranda against Samuel in the original domestic proceeding under La. C.C.P. art. 863. The defendants requested sanctions be imposed against Samuel for her allegedly improper actions in subpoenaing Remy to testify at a recusal hearing without any factual or legal basis and in communicating with Remy in an apparent attempt to threaten and/or intimidate Remy into supporting the frivolous recusal motion. Branton, as undersigned counsel for Remy, averred that Samuel's actions showed a "deliberate disregard" for the law.

Samuel presented no evidence to suggest that the defendants' statements made in the motions for sanctions and supporting memoranda were defamatory. The evidence in the record reveals that the allegedly defamatory statements primarily reflect the defendants' subjective impressions regarding Samuel's conduct, which are not actionable in defamation. See Ray v. City of Bossier City, 37,708 (La. App. 2 Cir. 10/24/03), 859 So.2d 264, 275, writs denied, 03-3214 and 03-3254 (La. 2/13/04), 867 So.2d 697 ("A pure statement of opinion, which is based

⁸ Samuel also contends that the trial court erred in imposing the heightened burden applicable to "public figures" and in finding that the allegedly defamatory statements were subject to a qualified privilege. On appeal, we do not address Samuel's status as a public figure or the applicability of the conditional privilege that applies to certain minimally offensive allegations made in the course of judicial proceedings, because we find that Samuel failed to establish a probability of success on her defamation claim under the ordinarily applicable burden detailed in *Cyprien, supra*.

totally on the speaker's subjective view ... usually will not be actionable in defamation."").

Furthermore, to the extent that Samuel complains of statements or allegations that do state or imply the existence of underlying facts, Samuel presented no evidence to demonstrate that the defendants' statements were actually untrue. The statements and allegations at issue were consistent with Remy's sworn testimony and the trial court's finding in the domestic proceeding that Samuel's motion to recuse was entirely without merit. Therefore, the trial court did not err in granting the special motions to strike Samuel's defamation claim.

Abuse of Process

In order to establish an abuse of process claim, the plaintiff must establish: 1) the existence of an ulterior purpose; and 2) a willful act in the use of process not proper in the regular prosecution of the proceeding. See Waguespack, Seago and Carmichael (A PLC) v. Lincoln, 99-2016 (La. App. 1 Cir. 9/22/00), 768 So.2d 287, 290-91. Regular use of process cannot constitute abuse, even though the user was actuated by a wrongful motive, purpose, or intent, or by malice. Absent a showing of abuse through an illegal, improper, or irregular use of process, there is no cause of action for abuse of process. **Waguespack**, 768 So.2d at 292.

On appeal, Samuel asserts that the trial court erred by granting the special motions to strike her abuse of process claim. She argues that she established a probability of success by presenting evidence that the defendants improperly moved for sanctions under La. C.C.P. art. 863 in a proceeding where they were not parties and in response to the issuance of a subpoena.

Louisiana Code of Civil Procedure art. 863 governs the signing of pleadings and the trial court's authority to impose sanctions. Article 863 provides, in relevant part:

A. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address.

B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading, and that to the best of his knowledge, information, and belief formed after reasonable inquiry, he certifies all of the following:

(1) The pleading is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

(2) Each claim, defense, or other legal assertion in the pleading is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law.

(3) Each allegation or other factual assertion in the pleading has evidentiary support or, for a specifically identified allegation or factual assertion, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(4) Each denial in the pleading of a factual assertion is warranted by the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

* * *

D. If, upon motion of any party or upon its own motion, the court determines that a certification has been made in violation of the provisions of this Article, the court shall impose upon the person who made the certification or the represented party, or both, an appropriate sanction which may include an order to pay to the other party the amount of the reasonable

expenses incurred because of the filing of the pleading, including reasonable attorney fees.

* * *

The plain language of La. C.C.P. art. 863 directs that its provisions apply to “pleadings.” Pursuant to La. C.C.P. art. 852, the only types of pleadings allowed in civil actions are petitions, exceptions, written motions, and answers. Consequently, a trial court may not impose sanctions against an attorney under La. C.C.P. art. 863 for his wrongful issuance of a subpoena. See Dautat v. Trinity Universal Ins. Co. of Kansas, 95-1235 (La. App. 3 Cir. 3/6/96), 670 So.2d 785, 790-91. See also Maxie v. McCormick, 95-1105 (La. App. 1 Cir. 2/23/96), 669 So.2d 562, 564 (finding La. C.C.P. art. 863 inapplicable concerning wrongful notice of deposition). Moreover, the statutory language of La. C.C.P. art. 863 only authorizes a trial court to impose sanctions *sua sponte* or upon the motion of “any party.” Accordingly, the jurisprudence indicates that a non-party has no right of action to pursue a motion for sanctions under La. C.C.P. art. 863. See Voiter v. Guidry, 14-276 (La. App. 5 Cir. 12/16/14), 166 So.3d 262, 272, writ denied, 15-0118 (La. 4/10/15), 176 So.3d 1032.

We acknowledge that the defendants appear to have procedurally erred by filing motions for sanctions in the original domestic proceeding under La. C.C.P. art. 863. Nevertheless, Samuel failed to present evidence tending to establish that the defendants’ conduct constituted a willful abuse of process. Mere evidence of procedural error does not establish a probability of success on an abuse of process claim. See Simon v. Perret, 619 So.2d 155, 157 (La. App. 3 Cir. 1993) (“[I]mproper procedure does not, in and of itself, give rise to an abuse of process claim.”). Accord Fidelity Bank & Trust Co. v. Hammons, 540 So.2d 461, 466 (La. App. 1 Cir.), writ

denied, 544 So.2d 402 (La. 1989) (finding procedurally improper judicial enforcement of a promissory note through executory process did not constitute an abuse of right where plaintiff's conduct did not evidence an intent to harm defendant). Thus, we find that the trial court did not err in granting the special motions to strike Samuel's abuse of process claim.

Malicious Prosecution

In an action for malicious prosecution, the plaintiff must establish the following six elements: 1) the commencement or continuance of an original criminal or civil judicial proceeding; 2) its legal causation by the present defendant against plaintiff who was defendant in the original proceeding; 3) its bona fide termination in favor of the present plaintiff; 4) the absence of probable cause for such proceeding; 5) the presence of malice therein; and 6) damage conforming to legal standards resulting to plaintiff. **Ferrant v. Parish of Tangipahoa ex rel. Coroner's Office**, 01-2278 (La. App. 1 Cir. 6/21/02), 822 So.2d 118, 120.

In brief, Samuel contends that the trial court erred in granting the special motions to strike her malicious prosecution claim. She argues that the trial court erroneously assumed she was not a member of the class of persons to whom the law afforded the malicious prosecution cause of action and asserts that she presented evidence sufficient to establish a probability of success on her malicious prosecution claim. We disagree.

The evidence plainly supports the trial court's finding that Samuel could not present evidence to establish the requisite elements of a malicious prosecution cause of action. Namely, none of the parties to this lawsuit were parties to the original judicial proceeding, so there was no bona fide termination of an original proceeding in favor of Samuel. Additionally, Samuel presented no evidence tending to establish that the defendants'

actions were undertaken in bad faith or prompted by malice. Consequently, the trial court did not err in granting the special motions to strike Samuel's malicious prosecution cause of action.

Intentional Infliction of Emotional Distress

In order to recover damages for intentional infliction of emotional distress, the plaintiff must establish the following three elements: 1) the conduct of the defendant was extreme and outrageous; 2) the plaintiff suffered severe emotional distress; and 3) the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. **Cortes v. Lynch**, 02-1498 (La. App. 1 Cir. 5/9/03), 846 So.2d 945, 951.

Courts require evidence of truly outrageous conduct before allowing a claim for intentional infliction of emotional distress to even be presented to a jury. **Nicholas v. Allstate Ins. Co.**, 99-2522 (La. 8/31/00), 765 So.2d 1017, 1024-25. Conduct that is merely tortious or even illegal does not rise to the level of being extreme and outrageous. **Nicholas**, 765 So.2d at 1025.

Here, the trial court did not err by granting the special motions to strike Samuel's intentional infliction of emotional distress claim, because Samuel presented no evidence indicating that the defendants' actions in filing motions for sanctions constituted sufficiently reprehensible conduct to sustain an intentional infliction of emotional distress cause of action. Though Samuel did present affidavit evidence indicating that she had suffered emotional distress as a result of the circumstances surrounding this dispute, the defendants' conduct falls far short of that previously found to be adequately extreme and outrageous so as to support an intentional infliction of emotional distress claim. See generally **Nicholas**, 765 So.2d 1026-28

(reviewing a wealth of jurisprudence to exemplify severity of circumstances necessary to sustain an intentional infliction of emotional distress claim).

Moreover, even if we were to accept Samuel's contention that the defendants' conduct was extreme and outrageous, Samuel presented no evidence that the defendants desired to inflict emotional distress or knew that their actions would cause severe emotional distress. Therefore, we find that the trial court did not err in granting the special motions to strike Samuel's claim of intentional infliction of emotional distress.

DECREE

For the foregoing reasons, we affirm the trial court's judgment granting the defendants-appellees' special motions to strike and ordering the dismissal of the plaintiff-appellant's claims with prejudice. Costs of this appeal are assessed to the plaintiff-appellant, Cynthia D. Samuel.

AFFIRMED.