STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CW 1732

NICHOLAS J. SCHITTONE

VERSUS

BROOKE R. STOMA AND CANDYCE PERRET

Judgment Rendered: MAY 02 2018

* * * * * * * *

On Review from the 15th Judicial District Court[1]
In and for the Parish of Lafayette
State of Louisiana
No. 2017-2405

Honorable Marilyn C. Castle, Judge Presiding

* * * * * * * *

Alan K. Breaud
Timothy W. Basden
Lafayette, Louisiana

Attorneys for Defendants/Relators
Brooke R. Stoma, Candyce Perret,
and Perret for Judge Campaign, LLC

J. Kirk Piccione
Brenda S. Piccione
Lafayette, Louisiana

Attorneys for Plaintiff/Respondent
Nicholas J. Schittone

BEFORE: HIGGINBOTHAM, HOLDRIDGE AND PENZATO, JJ.

[1] This case was transferred from the Third Circuit Court of Appeals to this court by Order of the Louisiana Supreme Court.

PER CURIAM

In this writ application, defendants/relators, Brooke R. Stoma ("Stoma"), Candyce Perret, and Perret for Judge Campaign, LLC (collectively "Perret"), challenge the ruling of the trial court which denied defendants' special motion to strike pursuant to La. Code Civ. P. art. 971. For the following reasons, we reverse the ruling of the trial court and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Nicholas J. Schittone ("Schittone"), filed this action for defamation asserting that Stoma and Perret caused to be published, on television and radio, a commercial advertisement supporting the candidacy of Candyce Perret in a judicial election.[2] Schittone alleged that the advertisements contained defamatory statements about him, accusing him of being abusive toward his children and his former spouse, Stoma. Although Schittone acknowledged that his name was not used in the commercial, he alleged the content of the commercial made it obvious to his family, friends, and acquaintances that he was the subject of these accusations. According to the petition, the commercial made certain allegations as to the handling of the divorce and child custody case between Schittone and Stoma by Susan Theall ("Theall"), the district court judge presiding therein. Schittone asserted a cause of action for defamation, alleging the statements and publications made by Stoma and Perret were false and done with malice and full knowledge of the falsehood.

[2] Candyce Perret was a candidate in a runoff election for an open seat on the Third Circuit Court of Appeal. Her opponent in the runoff was Susan Theall, a former district court judge.

Defendants[3] filed a special motion to strike pursuant to La. Code Civ. P. art. 971 seeking dismissal of Schittone's action, asserting this action was properly the subject of such a motion and that Schittone could not meet his burden of proving a probability of success on his alleged claims. Schittone filed a memorandum in opposition to the special motion to strike, attaching thereto a number of affidavits. He also filed an evidentiary motion to strike internet posts and articles submitted by defendants in support of their special motion to strike. At the hearing on this matter, the trial court instructed the parties to focus on the threshold issue of whether the matter involved an issue of public interest. With regard to the evidentiary matters before the court, the trial court sustained Schittone's objection to the internet posts and articles, and excluded those documents from evidence. Schittone sought to introduce into evidence the affidavits attached to his memorandum in opposition to the special motion to strike, at which time counsel for defendants objected, referencing an evidentiary motion to strike he had filed prior to the hearing.[4] The trial court failed to render a ruling on Schittone's motion to introduce the affidavits into evidence and defendants' evidentiary objections, although the affidavits were not admitted into evidence.

After taking this matter under advisement, the trial court denied defendants' special motion to strike by judgment dated July 20, 2017. The trial court found that Schittone was not a candidate for office and was not connected to either candidate and that Stoma's dispute with Schittone over child custody/divorce

---

[3] This court notes that the special motion to strike was filed by Stoma and Candyce Perret, and at the time of its filing, Perret for Judge Campaign, LLC was not a party. Subsequently, Schittone filed a first amended petition which added Perret for Judge Campaign, LLC as a defendant. Thereafter, supplemental filings pertaining to the special motion to strike were filed on behalf of all defendants. None of the parties have asserted as error the ruling on the special motion to strike as to all defendants herein.

[4] This court notes that the evidentiary motion to strike referenced by defendants is not contained within the record of this proceeding, although counsel also lodged the objection during the hearing.

issues was a private dispute between private parties, not a matter of public interest or concern. Accordingly, the trial court found that defendants failed to establish that Schittone's cause of action arose from an act in the exercise of their right of free speech regarding a public issue, and dismissal pursuant to La. Code Civ. P. art. 971 was unavailable. The judgment awarded attorneys' fees to Schittone, as mandated by La. Code Civ. P. art. 971, with said attorney fee award to be cast in a supplemental judgment. A judgment casting defendants with attorney fees in the amount of $9,475.00 was signed on August 22, 2017.

ASSIGNMENTS OF ERROR

Defendants assert that the trial court erred in: (1) holding that this action did not arise from any act in furtherance of the right of petition or free speech in connection with a public issue and that the provisions of La. Code Civ. P. art. 971 did not apply; (2) denying the special motion to strike and failing to dismiss the claims asserted against defendants; (3) not awarding attorneys' fees to Stoma and Perret; and (4) awarding attorneys' fees to Schittone.

LAW AND DISCUSSION

Louisiana Code of Civil Procedure article 971 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 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.
>
> * * *
>
> 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:

* * *

(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.

The granting of a special motion to strike presents a question of law. Appellate review of a question of law is simply a review of whether the trial court was legally correct or legally incorrect. On legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law and renders a judgment on the record. *Starr v. Boudreaux*, 2007-0652 (La. App. 1st Cir. 12/21/07), 978 So. 2d 384, 388. Louisiana Code of Civil Procedure article 971 was enacted by the legislature as a procedural device to be used in the early stages of litigation to screen out meritless claims brought primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for redress of grievances. *Id.* Article 971 establishes a burden-shifting mechanism, whereby once the mover has established that a cause of action against him arises from an act by him in furtherance of the exercise of his right of free speech in connection with a public issue, the burden then shifts to plaintiff to demonstrate a probability of success on his claim. *Id.* at 388-89.

Article 971 belongs to the class of statutes known as "anti-SLAPP statutes" and applies in a very specific situation—when a litigant has brought a cause of action, typically alleging defamation, in an effort to chill the First Amendment

speech of its target. SLAPP is an acronym for Strategic Lawsuits Against Public Participation. *Stabiler v. Louisiana Business, Inc.*, 2016-1182 (La. App. 1st Cir. 9/26/17), 232 So. 3d 555, 557, n.1, writ denied, 2017-1824 (La. 12/15/17), 231 So. 3d 639.

Article 971 was enacted by La. Acts 1999, No. 734, §1. Section 2 of the Act provided:

> 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.* (Emphasis added).

In this case, the commercials consist of a woman[5] speaking, and although the television commercial showed a woman picking up some toys with reference to "Sarah, Victim of Domestic Violence" on the screen, the face of the woman was not shown, and no names or identities of the woman, her former husband or children were provided. Schittone's name was not stated in the commercials. The content of the television commercial was as follows:

> When we left my abusive ex-husband I thought our nightmare had ended. Then we walked into Susan Theall's courtroom. She refused to even look at the evidence of abuse to my children, or reports from their doctor, and awarded joint custody to their abuser. The abuse continues to this day, and we live in fear because of Susan Theall. She does not protect children and isn't fit to ever be a judge again. [Appears on screen: Paid for by Perret for Judge Campaign.]

The content of the radio commercial was as follows:

> When I finally found the courage to leave my abusive ex-husband, I thought me and my children's nightmare had ended. Then we walked into Susan Theall's courtroom. She refused to even look at the evidence of abuse to my children. She didn't want to be bothered with pictures of their bruises or written reports from their doctor. Instead, Theall awarded joint custody to the man we thought we had

[5] Stoma subsequently acknowledged that she provided the voice-overs in the commercials.

> escaped. She wouldn't even let me go back to our home to get my baby's crib. You cannot imagine the helpless feeling as a mother to have to send your children to their abuser every week as they cry and beg you not to go. As they tell you that if they weren't alive, they wouldn't have to go to their dad's anymore. We live in constant fear every day because of Susan Theall. She does not protect children and Susan Theall is not fit to ever be a judge again. Paid for by Perret for Judge Campaign.

Defendants argue that Schittone's claims arise from acts of free speech regarding a public issue, describing the statements as a person's perception of the actions of a judge who presided over the custody proceedings involving her children, and the statements were relevant to the public decision of which judicial candidate to vote for in the election. Defendants further argue that the statements were directed at the judicial candidate, not Schittone, and the circumstances of the divorce/custody case were only relevant to provide general context. Schittone counters that he is a private citizen, the divorce/custody proceeding was a private matter, and he was not involved in the campaign between Perret and Theall, and accordingly, Stoma's accusations do not constitute a public issue.

The term "public issue" is not defined by La. Code Civ. P. art. 971. However, in addressing the meaning of what constitutes a "public issue" within the context of this article, the Louisiana Supreme Court turned to jurisprudence of the United States Supreme Court, which described speech on matters of public concern as speech "relating to any matter of political, social, or other concern to the community." *Shelton v. Pavon*, 2017-0482 (La. 10/18/17), 236 So. 3d 1233, 1241, citing *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). The United States Supreme Court stated that whether speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. *Connick*, 461 U.S. at 147-48.

Although not a case dealing with an anti-SLAPP statute, the Supreme Court discussed the issue of what constituted speech on a matter of public concern, which

is "at the heart of the First Amendment's protection," in *Snyder v. Phelps*, 562 U.S. 443, 451-52, 131 S.Ct. 1207, 1215, 179 L.Ed.2d 172 (2011), a case involving members of a church picketing at the funeral of a deceased soldier. "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[,]'" and accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* at 452. (Citations omitted). In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said and how it was said. *Id.* at 454. "The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id.* at 453. (Citations omitted).

In *Snyder*, some signs used by the picketers plainly related to broad issues of interest to society at large, e.g. "God Hates the USA/Thank God for 9/11" and "America is Doomed,", while other signs could have been viewed as containing messages specifically directed to this soldier or his family, e.g. "You're Going to Hell" and "God Hates You." Nevertheless, the Court found that, even if a few of the signs were viewed as directed specifically to this soldier or family, it would not change the fact that the "overall thrust and dominant theme" of the demonstration spoke to broader public issues. *Id.* at 454. The Court noted its lack of concern that the church members' speech on public matters was in any way contrived to insulate speech on a private matter from liability, observing that there was no pre-existing relationship or conflict between the church members and the soldier that might suggest the speech on public matters was intended to mask an attack on the soldier over a private matter, contrasting *Connick*, 461 U.S. 138, in which it was found that certain speech by a public employee was a matter of private concern

when it followed upon the heels of a transfer notice. *Snyder*, 562 U.S. at 455. Certainly, in this case, there is the pre-existing relationship between Schittone and Stoma, but there is no evidence of any pre-existing relationship between Schittone or Stoma and Perret.

Although some of the cited jurisprudence does not arise in the framework of an anti-SLAPP motion, courts have indicated that personal motivation does not necessarily transform speech from that made in connection with a public issue into a purely private issue. In *Connick*, 461 U.S. 138, although the Court found that the bulk of the questionnaire at issue did not fall within the realm of matters of public concern, noting plaintiff did not seek to inform the public that the District Attorney's office was not discharging its responsibilities, and that the focus of the questions was to gather ammunition for another round of controversy with her superiors, the Court found that one question in the questionnaire did "touch upon" a matter of public concern, and as a result, the Court reached the next phase of the inquiry therein as to whether the District Attorney was justified in discharging plaintiff. *Connick*, 461 U.S. at 149. See also *Johnson v. Lincoln University of the Commonwealth of Higher Education*, 776 F.2d 443, 451 (3d Cir. 1985) ("[T]he mere fact that an employee's statement is an 'outgrowth of his personal dispute' does not prevent some aspect of it from touching upon matters of public concern, as *Connick* itself makes clear....If, in fact, the employee's speech is largely composed of matters of only personal concern, that becomes relevant when the balancing is done, not in the determination whether the speech touches upon matters of public concern."); and *Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1038-39 (10th Cir. 2013) ("Any such motivation [to harm Spacecon], however, does not necessarily render the messages conveyed by the film matters of purely private rather than public concern....[W]hile there is

some evidence Bensinger's motive in making the film may have been to harm Spacecon, the content, context, and, arguably, the form of the film (a documentary meant to be shown to the public), support the conclusion the messages involve matters of public concern.")

In *Lamz v. Wells*, 2005-1497 (La. App. 1st Cir. 6/9/06), 938 So. 2d 792, this court addressed the applicability of La. Code Civ. P. art. 971 in the context of a judicial campaign and a defamation action between the two candidates. Lamz argued that Wells made defamatory statements against him which were not the protected free speech contemplated by La. Code Civ. P. art. 971, but this court noted that falsity is an element of the defamation claim to be proved by Lamz after the burden shifts to him. With regard to the nature of the speech at issue, this court, applying the language of the article broadly, found no error in the trial court's determination that Wells' conduct of distributing campaign literature constituted an act in furtherance of his right of free speech in connection with a public issue, and was properly subject to a special motion to strike. *Lamz*, 938 So.2d at 797.

In *Cross v. Facebook, Inc.*, 14 Cal.App.5th 190, 222 Cal.Rptr.3d 250 (Ct. App. 2017), review denied (Oct. 25, 2017)[6], Knight (also known as Cross) was a recording artist, and as part of his marketing, independent contractors would travel throughout the country in vans featuring Knight's name and logo, promoting his music and merchandise. Following two separate accidents where drivers fell asleep at the wheel, causing two deaths and one serious injury, a publicly available Facebook page called "Families Against Mikel Knight" was created, apparently by a person or persons related to the victims. Commenters began posting statements

[6] California was the first state to adopt an anti-SLAPP statute and the Louisiana and California statutes are "virtually identical." *Shelton*, 263 So. 3d at 1245 (Weimer, J., dissenting); *Thomas v. City of Monroe Louisiana*, 36,526 (La. App. 2d Cir. 12/18/02), 833 So. 2d 1282, 1286.

about Knight, who demanded that Facebook remove the pages, and it refused, resulting in the lawsuit. Facebook responded with an anti-SLAPP motion to strike. In concluding that the plaintiffs' lawsuit was based on an issue of public interest, i.e. the danger of trucks on highways driven by sleep-deprived drivers, the California court opined:

> [T]he focus of the speaker's conduct should be the public interest.... Nevertheless, it may encompass activity between private people.
>
> "We look for 'the *principal thrust* or *gravamen* of the plaintiff's cause of action.' We 'do not evaluate the first prong of the anti-SLAPP test solely through the lens of a plaintiff's cause of action.' The 'critical consideration' is what the cause of action is '*based on.*' (Citations omitted). *Cross*, 14 Cal.App.5th at 199-200.

In examining the content, form, and context of the speech at issue in this matter, in light of the whole record and keeping in mind the legislature's directive that the provisions of La. Code Civ. P. art. 971 are to be broadly construed, we find that although the speech in this case may encompass activity between private people, the speech at issue does arise from acts of defendants in furtherance of their right to free speech in connection with a public issue or issue of public interest. The context of the speech at issue herein was the realm of a campaign advertisement for an elected judicial office. The First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971)). The form of the speech was both a radio and a television advertisement, broadcast to the public. The content of the speech contained statements directed to the handling of the divorce/custody case by then-Judge Theall, i.e. that she refused to look at evidence, she awarded joint custody, she would not let the woman go back to the home to get her child's crib, she did not protect children, and she was not fit to be a judge

again, and also contained the statements at issue herein, i.e. references without names to "my abusive ex-husband," awarding of joint custody to the children's abuser, continuing abuse, and evidence of abuse to the children. A review of the advertisements at issue discloses that the television commercial used the fictitious name "Sarah," it did not show the face of the speaker, and other than then-Judge Theall's name appearing on a portion of the documents shown, the documents did not otherwise disclose any names. The radio commercial likewise did not disclose any names, other than Theall.

We further find that while a private issue may have been mentioned in the political commercial, the principal thrust or focus of the speech at issue herein was directed to Theall's candidacy and campaign for the judicial office, a matter of public interest. Although the advertisements may have included statements concerning activity between private people, they were done in an effort to disguise, rather than publicize, such identities, thus bolstering the finding that the focus was the judicial campaign, not the private individuals. We find the trial court erred in finding that the speech at issue was not properly the subject of a special motion to strike and further find that the causes of action asserted herein by Schittone against Stoma and Perret arise from acts of those persons in furtherance of their right of free speech under the United States and Louisiana Constitutions in connection with a public issue or a matter of public concern.

Nevertheless, even when La. Code Civ. P. art. 971 applies, the special motion to strike may be denied if the plaintiff establishes a probability of success on the claim, and the burden shifts to plaintiff to do so, once the article is found applicable under the first prong of the inquiry. In this case, the trial court did not reach the second inquiry as to Schittone's probability of success. Moreover, as noted above, the trial court failed to rule on Schittone's motion to introduce into

evidence the affidavits attached to his memorandum in opposition to the special motion to strike and defendants' evidentiary objections thereto.[7] Given the lack of evidence, we are unable to address Schittone's probability of success. Accordingly, we find that this matter should be remanded to the trial court for resolution of any outstanding evidentiary issues and for a determination of whether Schittone has borne his burden of establishing a probability of success on his claims, as well as any award of attorneys' fees.

CONCLUSION

For the foregoing reasons, the judgment of the trial court which denied the special motion to strike is reversed, and the judgment awarding attorneys' fees to plaintiff, Nicholas J. Schittone, is vacated, and this matter is remanded to the trial court for further proceedings in accordance with this judgment.

JULY 20, 2017 JUDGMENT REVERSED; AUGUST 22, 2017 JUDGMENT VACATED; REMANDED.

[7] We note that silence in a judgment as to any issue placed before the trial court is deemed a rejection of the claim and the relief sought is presumed to be denied. *Schoolhouse, Inc. v. Fanguy*, 2010-2238 (La. App. 1st Cir. 6/10/11), 69 So. 3d 658, 664. However, in this case a denial of both Schittone's motion to introduce the affidavits and defendants' motion to strike same would be inconsistent.