

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 0989

BILLY JOE PATTON

VERSUS

ROBIN O'BANNON, ASSISTANT DISTRICT ATTORNEY FOR
ASCENSION PARISH AND GATEHOUSE NEWS SERVICE

Judgment Rendered: December 21, 2011.

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On Appeal from the
23rd Judicial District Court,
In and for the Parish of Ascension,
State of Louisiana
Trial Court No. 95,041

The Honorable Thomas J. Kliebert, Jr., Judge Presiding

* * * * *

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* * * * *

BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

BJP
TMH
RHB

CARTER, C.J.

Plaintiff, Billy Joe Patton, appeals from a judgment of the district court granting the special motion to strike filed by defendants, Robin O'Bannon, GateHouse Media Louisiana Holdings, Inc., *The Gonzales Weekly Citizen*, *The Donaldsonville Chief*, and Mike Reed. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff filed a petition against Ascension Parish Assistant District Attorney Robin O'Bannon (ADA O'Bannon) and GateHouse Media Louisiana Holdings, Inc., *The Gonzales Weekly Citizen*, *The Donaldsonville Chief*, and Mike Reed (hereinafter collectively referred to as the "Press Defendants"). The petition requested damages for alleged defamatory statements in a press release issued by the district attorney's office regarding plaintiff's convictions for aggravated kidnapping and forcible rape and the subsequent publication of newspaper articles written in reliance on the press release. In response, ADA O'Bannon and the Press Defendants filed a special motion to strike under Louisiana Code of Civil Procedure Annotated article 971. After a hearing, the district court granted the special motion to strike and dismissed plaintiff's suit with prejudice. Plaintiff then filed a motion for new trial, which was denied.

Plaintiff now appeals.¹

¹ Plaintiff filed a motion to appeal from the district court's judgment denying his motion for new trial. The denial of a motion for new trial is an interlocutory and non-appealable judgment. However, because it is clear from plaintiff's brief that the appeal was intended to be an appeal from the judgment on the merits, we consider the appeal of the denial of the motion for new trial as an appeal of the judgment on the merits. Thus, we will treat the appeal accordingly. See *Carpenter v. Hannan*, 01-0467 (La. App. 1 Cir. 3/28/02), 818 So. 2d 226, 228-29, writ denied, 02-1707 (La. 10/25/02), 827 So. 2d 1153.

DISCUSSION

Plaintiff sets forth twenty-two assignments of error in support of his position that the district court improperly granted the special motion to strike. Through these assignments of error, plaintiff contends the motion was improperly granted because the defendants did not meet their initial burden of proof on the special motion to strike, he was not allowed to present evidence at the hearing on the motion, and the district court failed to consider various motions he filed.

Article 971 Special Motion to Strike

The granting of a special motion to strike pursuant to Article 971 presents a question of law. *Lamz v. Wells*, 05-1497 (La. App. 1 Cir. 6/9/06), 938 So. 2d 792, 795. Appellate review regarding questions of law is simply a review of whether the trial court was legally correct or legally incorrect. *Lamz*, 938 So. 2d at 795. 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 judgment on the record. *Id.*

The special motion to strike is governed by Article 971, which provides, in pertinent part, as follows:

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.

(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.

* * *

D. All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this Article. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. Notwithstanding the provisions of this Paragraph, the court, on noticed motion and for good cause shown, may order that specified discovery be conducted.

* * *

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:

* * *

(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.

The intent of Article 971 is to encourage continued participation in matters of public significance and to prevent this participation from being chilled through an abuse of judicial process. *Lamz*, 938 So. 2d at 796. Article 971 was enacted by the legislature as a procedural device to be used early in the legal proceedings to screen out meritless claims brought primarily to chill the valid exercise of the constitutional rights of freedom of speech. *Starr v. Boudreaux*, 07-0652 (La. App. 1 Cir. 12/21/07), 978 So. 2d 384, 388.

Pursuant to Article 971, a cause of action against a person arising from any act in furtherance of the person's right of 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. La. Code Civ. Proc. Ann. art. 971A(1). Accordingly, 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 under the United States or Louisiana Constitution in connection with a public issue, the burden then shifts to the plaintiff to demonstrate a probability of success on his claim. *Starr*, 938 So. 2d at 388-89.

Thus, we first consider the defendants' initial burden as the moving parties, i.e., demonstrating that the subject matter of the suit against them stems from an action relating to free speech and in relation to a public issue. To that end, Article 971A(2) provides that the court will consider the pleadings and affidavits in making its determination. The Press Defendants submitted affidavits of the editors of *The Gonzales Weekly Citizen* and *The Donaldsonville Chief* in support of the special motion to strike, wherein the editors stated that the published newspaper articles were written in reliance on the press release issued by the Ascension Parish District Attorney's Office and that they did not doubt the truth of the substance in the press release. A copy of the press release and news articles were attached as exhibits to the affidavits. The editor of *The Donaldsonville Chief* stated that no changes, edits, or alterations were made to the press release and that it was reprinted verbatim. The editor of *The Gonzales Weekly Citizen* stated that he edited the press release slightly for publication, mainly by paraphrasing a few of

the longer paragraphs. He further stated that the newspaper article merely summarized the information in the press release to conform to the newspaper's space limitations and did not embellish any of the factual information contained in the press release.

ADA O'Bannon did not submit any affidavits, but argued at the hearing on the special motion to strike that submission of a press release to a newspaper by a public official is protected speech under the First Amendment. In the factually analogous case of *Lee v. Pennington*, 02-0381 (La. App. 4 Cir. 10/16/02), 830 So. 2d 1037, *writ denied*, 02-2790 (La. 1/24/03), 836 So. 2d 52, the Fourth Circuit Court of Appeal affirmed the district court's dismissal of plaintiff's suit pursuant to Article 971. In *Lee*, a press release detailing the plaintiff's arrest and charge was issued by the police department and published by newspapers. The plaintiff filed suit for defamation against the media and several public officials, including the district attorney. The district court granted the defendants' Article 971 special motion to strike and dismissed the suit, finding the defendants had a constitutional right to inform the public about a subject of public concern and public record. *Lee*, 830 So. 2d at 1044. Similarly, in the instant case, the plaintiff's convictions are a subject of public concern and public record, and the defendants had a constitutional right to inform the public.

We find no error in the district court's determination that the issuance of a press release by the district attorney's office and publication of newspaper articles in reliance on that press release constituted acts in furtherance of the defendants' free speech rights in connection with a public issue under Article 971F(1). Because the press release and newspaper articles fall within the category of speech addressed in Article 971, the suit filed by the plaintiff was subject to the special

motion to strike, unless the district court determined that the plaintiff established a probability of success on his defamation claim.

To prevail on a claim of defamation, the plaintiff has the burden of proving by a preponderance of the evidence five essential elements: (1) defamatory words, (2) publication, (3) falsity, (4) malice, and (5) resulting injury. *Lee*, 830 So. 2d at 1045. If any one of these required elements is lacking, the plaintiff's cause of action falls. *Starr*, 978 So. 2d at 389. In opposition to the Article 971 motion, the plaintiff offered no affidavits, but argued, among other things, that the press release and newspaper articles included false statements regarding the details of his prior convictions and his divorce.² Falsity is an element of a defamation claim to be proved by plaintiff after the burden shifts to him. *Lamz*, 938 So. 2d at 797.

Plaintiff does not refute that he was convicted of the prior crimes. Instead, he refutes the underlying details of those convictions and whether he was rightfully convicted. For example, he disputes the description of one of his victims as a "neighbor," the dates he was working in Louisiana, and the date of his divorce.

Based on our review of the record and considering the applicable law, the plaintiff failed to meet his burden that he would be able to satisfy the elements of a defamation action against defendants, namely, that the publications were false. Moreover, even if his victim were improperly referred to as his neighbor, the plaintiff fails to establish any probability of success on his defamation claim. The "neighbor" reference and other alleged falsities are not defamatory, there is no indication that ADA O'Bannon or the Press Defendants acted with malice, and

² Plaintiff alleges he was not allowed to introduce evidence in opposition to the special motion to strike. Plaintiff filed a motion requesting a copy of a district court transcript and affidavits therein from a prior conviction. These affidavits are not in the record before this court, but plaintiff argues they would show his conviction was improperly obtained. The introduction of affidavits regarding the underlying details of the plaintiff's conviction would not change the truth of the fact that the plaintiff was convicted.

there is no possibility of injury as a result of the publications. Moreover, these alleged falsities regarding the underlying details of the plaintiff's prior convictions were immaterial for the purpose of assessing the truth as to whether he was convicted. Thus, we find no error in the district court's grant of the special motion to strike pursuant to Article 971.

Plaintiff also complains that the district court failed to consider various motions he filed, including a request for jury instructions and a request that discovery be completed. In its final judgment, the district court denied the plaintiff's fifteen outstanding motions "in light of the Court's decision to grant Defendants' Special Motions to Strike." Because this matter did not proceed to trial, the outstanding motions became moot. The district court properly denied the motions upon the grant of the special motion to strike and dismissal of the plaintiff's suit. Accordingly, this argument has no merit.

CONCLUSION

For the above reasons, we affirm the district court's judgment granting the plaintiff's special motion to strike and dismissing this action with prejudice. Plaintiff also filed with this court a "Motion Requesting Judicial Demand on Partial Judgment Under La. Civ. Code Art. 2924," which is more in the nature of a response brief. For the reasons herein stated, the motion is denied. All costs of this appeal are assessed against Plaintiff/Appellant, Billy Joe Patton.

MOTION DENIED; AFFIRMED.