

2003 WL 25934267 (La. Dist. Ct.) (Trial Motion, Memorandum and Affidavit)

District Court of Louisiana.

7th Judicial
Concordia Parish

Cathy DARDEN,

v.

R. Craig SMITH and the Ferriday Villa Partnership.

No. 38,311.
April 1, 2003.

Memorandum in Support of Motion to Strike and for Summary Judgment or for Partial Summary Judgment

Hayes, Harkey, Smith & Cascio, 2811 Kilpatrick Boulevard, Post Office Box 8032, Monroe, Louisiana 71211-8032, Telephone: (318) 387-2422, Facsimile: (318) 388-5809, [Thomas M. Hayes, III](#), No. 6685, Attorney for R. Craig Smith.

Long Law Firm, L.L.P., 4041 Essen Lane, Suite 500, Baton Rouge, Louisiana 70809, Telephone: (225) 922-5110, Facsimile: (225) 922-5105, [David Guerry](#), No. 14980, Attorney for Ferriday Villa Partnership.

MAY IT PLEASE THE COURT:

Defendants, R. Craig Smith and Ferriday Villa Partnership, have filed a Motion to Strike plaintiff's suit pursuant to the provisions of [La. Code of Civil Procedure Article 971](#). They also seek summary judgment or partial summary judgment. This brief is submitted in support of these motions.

Background

At all times pertinent to this suit, Cathy Darden (hereafter "Darden") was a public official. She was and is an elected member of the Concordia Parish Policy Jury (hereafter "Police Jury.")

In 1998, the Ferriday Villa Partnership (hereafter "FVP"), a partnership in commendam, through its general partner, R. Craig Smith (hereafter "Smith"), made application to the Police Jury for a building permit, for the purpose of constructing a low income housing project on Lincoln Road in Concordia Parish, Louisiana. At a Police Jury meeting on July 27, 1998, several citizens opposed the project. The Police Jury voted to oppose the project because it was to be constructed on Lincoln Road. Its secretary sent a letter to Smith requesting him to find another site. Its stated reasons at that time were concerns over "sewer problems, Fire Marshal approval, and safety due to an inadequate road."

On August 24, 1998, the Police Jury denied the application because sewerage and water had not been approved. Thereafter, the Police Jury continued to delay approval of the application. Even when sewer and water issues had been resolved in July, 2000, the Police Jury denied the application. The Concordia Sentinel reported on the Police Jury meeting of July 19, 2000 and noted: Cathy Darden, a juror who opposed the Smith project previously, said she will continue to oppose it for a number of reasons.

"I just think it will put too many people in that location," she said. "But I know the building permit will be approved because the Town of Ferriday has agreed."

“It concerns me that we will have a housing project for he **elderly** and another for low-income residents all living in the same area,” Darden said.

“A majority of the people I represent feel the same way, she added.

Thereafter, at a meeting on August 28, 2000, the Police Jury again denied the application for the permit. On November 30, 2000, more than two years after FVP first applied for the permit, FVP filed a suit in the United States District Court, Western District of Louisiana, Alexandria Division, entitled “Ferriday Villa Partnership, a Partnership in Commendam, v. Concordia Parish Policy Jury, through its president Charley Blaney, Charley Blaney individually, Carey Cook, Gene Allen, Willie Dunbar, Randy Temple, Cathy Darden, Melvin Ferrington, Rodney Smith, and Tommy Tiffie” (hereafter “the federal suit”). In the suit, FVP asserted that it had first been denied a permit in August, 1998 due to the fact that water and sewerage had not been approved; and that after the Town of Ferriday approved a resolution authorizing sewage and water services to the project on July 12, 2000, the Police Jury again refused a permit on August 28, 2000. FVP asserted that the Police Jury and its members had violated FVP's right to equal protection and due process, and that the Police Jury and its members acted out of racial motivation which had a racially discriminatory impact upon the Parish and its citizens. Following the filing of the suit, the Concordia Sentinel published a single article about the lawsuit.

On March 12, 2001, Smith filed a confidential Ethics Complaint against Cathy Darden with the Louisiana Board of Ethics, requesting an investigation into possible violations of the Code of Governmental Ethics. Specifically, Smith truthfully stated that Darden voted against the Ferriday Villa housing project while employed by Macon Ridge Economic Development Region, Inc. (hereafter “Macon Ridge”), a competitor of FVP, which had also applied to the Police Jury for a building permit to construct apartments for the **elderly** on Lincoln Road at the same time that FVP sought its building permit for construction of low income housing on Lincoln Road. In the confidential Ethics Complaint, Smith truthfully stated that Darden was not present at the time the Police Jury voted on the Macon Ridge project. All of the factual allegations in the Ethics Complaint were true.

The Police Jury finally issued a building permit to FVP on September 20, 2001, after FVP had placed \$20,000 in escrow for infrastructure components, a requirement imposed on FVP by the Police Jury, but not imposed upon Macon Ridge. FVP continued to pursue the federal suit for damages that arose from the nearly three year delay in the issuance of the permit and because the Police Jury had treated the application by Macon Ridge differently than it had treated the application by FVP. On January 28, 2002, Judge F. A. Little dismissed FVP's suit. He ruled that although the Policy Jury had engaged in disparate treatment of applications for building permits by FVP and Macon Ridge, the Policy Jury nevertheless had a rational governmental basis for its disparate treatment.

Following the dismissal of this suit, Darden brought the present suit against Smith and FVP. She alleges that the statements made in the federal law suit were false, and that she was defamed by the suit which was communicated to the Concordia Sentinel which thereafter published false statements from the lawsuit. She also alleges that the charges asserted in the Ethics Complaint were false, and that the filing of the Ethics Complaint defamed her. Additionally, she asserts that the filing of the suit and Ethics Complaint were done for the purpose of inflicting upon her severe emotional distress, and that the federal lawsuit constitutes malicious prosecution.

Attachments to this Motion

Attached to this motion as Exhibits are the following:

A. Exhibit A is a copy of a letter from the Secretary of the Police Jury to Smith dated July 28, 1998.

B. Exhibit B is a copy of an article published in the Concordia Sentinel on July 19, 2000 about FVP's efforts at obtaining a building permit, and Cathy Darden's opposition to the issuance of the permit.

- C. Exhibit C is a copy of the federal suit filed November 13, 2000.
- D. Exhibit D is an undated copy of an article published in the Concordia Sentinel about the federal suit filed by FVP.
- E. Exhibit E is a copy of the Ethics Complaint, which is dated March 8, 2001.
- F. Exhibit F is a copy of an April 24, 2001 letter of the Louisiana Board of Ethics notifying Darden of a confidential investigation.
- G. Exhibit G is a copy of a September 28, 2001 confidential letter of the Louisiana Board of Ethics notifying Darden's counsel that no violation was found and closing the file on the complaint.
- H. Exhibit H is a copy of the Pretrial Stipulation filed in the federal suit by counsel for the Police Jury and counsel for FVP.
- I. Exhibit I is a copy of Judge Little's Ruling dated January 28, 2002 granting summary judgment against FVP in the federal suit.
- J. Exhibit J is the affidavit of R. Craig Smith.

Motion to Strike and Summary Judgment

In defamation cases, in order to survive a motion for summary judgment, a defamation plaintiff must produce evidence of sufficient quality and quantity to demonstrate that he likely will be able to meet his burden of proof at trial. Without such evidence, there is no genuine issue of material fact, and summary judgment should be granted. *Sassone v. Elder*, 626 So.2d 345, 351 (La. 1993).

In 1999, the Legislature enacted the Special Motion to Strike as a specialized defense motion that can be used in actions arising from exercise of a person's right of petition or free speech. The article appears to have codified the summary judgment standard in defamation cases; it also adds a right to collect attorney fees. It provides as follows:

[Art. 971](#). Special motion to strike

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, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the proceeding, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

B. In any action subject to Paragraph A of this Article, a prevailing defendant on a special motion to strike shall be entitled to recover reasonable attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award reasonable attorney's fees and costs to a plaintiff prevailing on the motion.

C. The special motion may be filed within sixty days of service of the petition, or in the court's discretion, at any later time upon terms the court deems proper. The motion shall be noticed for hearing not more than thirty days after service unless the docket conditions of the court require a later hearing.

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.

E. This Article shall not apply to any enforcement action brought on behalf of the state of Louisiana by the attorney general, district attorney, or city attorney acting as a public prosecutor.

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.

These are four reported decisions involving application of this special motion. In [Stern v. Doe, 2001-0914\(La.App.4 Cir. 12/27/01\); 806 So.2d 98](#), a high school student, whose processing at a parish truancy enforcement center was aired by a television station on a news broadcast, brought a “false light” invasion of privacy action against the television station. The district court granted the television station's special motion to strike and peremptory exception of no cause of action. The Court of Appeals affirmed, ruling that the special motion to strike could be applied in the student's “false light” invasion of privacy action against the television station and that the student failed to establish a probability of success on his claims and thus, the television station's special motion to strike and exception of no cause of action were properly granted. The court noted that the legal standards for the cause of action were well established, the facts in the case were undisputed, and the purpose of the special motion to strike is to review frivolous and meritless claims at a very early stage in legal proceedings.

In [Venson v. City of Marksville, 2001-1078 \(La. App. 3 Cir. 2/6/02\); 812 So.2d 687](#), a nightclub owner sued a noise complainant for, among other things, defamation and violation of his constitutional rights, alleging that the defendant had made unfounded complaints about noise from plaintiff's nightclub, resulting in prosecution of plaintiff for violation of municipal noise ordinances. After plaintiff was acquitted, he brought suit against defendant, who moved to strike under [Article 971](#). The lower court denied the motion. The Court of Appeal reversed and remanded with instructions to the trial court to address the elements of falsity and malice and to re-determine *whether the plaintiff had established a probability of success after considering those issues*. The trial court then issued additional reasons for ruling wherein it addressed the elements of falsity and malice, concluding

that the noise complaints made by the defendant were more probably than not false, raising a legal presumption of malice. The Court of Appeal then reversed the trial court on the finding of malice stating that the “element of malice, actual and implied, is totally absent in this case.”

In *Lee v. Pennington*, 2002-0381 (La.App.4 Cir. 10/16/02); 830 So.2d 1037, a police officer brought a defamation action against public officials and media outlets that reported the officer's arrest on rape charges. The trial court dismissed his suit on a special motion to strike under a statute barring strategic law suits against public participation (The Anti FLAPP Statute). The court of appeal affirmed the ruling; finding that the media reports were truthful and not defamatory, that the media did not invade the officer's privacy, and that there was no tort of racial profiling in the media.

Finally, in *Thomas v. City of Monroe Louisiana*, 36,526 (La. App. 2 Cir. 12/18/02); 833 So.2d 1282, the Court of Appeal for the Second Circuit affirmed the trial court's dismissal on a special motion to strike a defamation suit by a City of Monroe administrative official against a television station and the police department arising from publication of a police report that plaintiff had been accused of lewd conduct at a cinema. The court noted that plaintiff held a position of responsibility in city government, and that allegations of criminal conduct were relevant to his fitness for office. Because the complaint against plaintiff was a matter of public interest, it warranted application of the special motion to strike, *and plaintiff was required to show a probability of success on his claim for defamation*. As plaintiff lacked evidence of actual malice, dismissal was affirmed.

Plaintiff's Burden of Proof in a Defamation Action

Under Louisiana law, in order for a person to maintain an action for a defamatory statement, there must be a showing of (1) defamatory words; (2) publication; (3) falsity; (4) actual or implied malice; and (5) resulting injury. *Guilbeaux v. Times of Acadiana, Inc.*, 693 So.2d 1183 (La. App. 3 Cir. 1997). When the person asserting defamation is a public official acting in his official capacity, he must show *actual malice*, either knowledge of the falsity, or reckless disregard for whether it was false or not. *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

Expressions of opinion generally cannot form the basis for a defamation action because they are neither true nor false. *Maggio v. Liztech Jewelry*, 912 F. Supp. 216 (E.D. La. 1996). An expression of opinion may be actionable only if it expressly states or implies the existence of underlying facts, which are themselves false, defamatory, and made with actual malice. *Sassone v. Elder*, 626 So.2d 345 (La. 1993). “Truthful facts which carry a defamatory implication can only be actionable if the statements regard a private individual *and* private affairs. Where public officers and public affairs are concerned, there can be no libel by innuendo.” *Fitzgerald v. Tucker*, 1998-2313, 13 (La. 6/29/99); 737 So.2d 706, 717. (Citations omitted; emphasis in original.) See also *Milkovich v. Lorraine Journal Co.*, 497 U.S. 1 (1990).

Furthermore, plaintiff can have no recovery if the statement was protected by an absolute or qualified privilege. *Connor v. Scroggs*, 35,521 (La. App. 2 Cir. 6/12/02); 821 So.2d 542. If the communication is qualifiedly or conditionally privileged, recovery can only be had on a showing of actual malice. *Thomas v. City of Monroe Louisiana*, 36,526 (La. App. 2 Cir. 12/18/02); 833 So.2d 1282.

Louisiana has long recognized that judicial allegations are not libelous and actionable unless shown to have been false, maliciously made, and without probable cause. *Waldo v. Morrison*, 220 La. 1006, 58 So.2d 210 (1952); *Lescale v. Schwartz*, 118 La. 718, 43 So. 385 (1907) and 116 La. 293, 40 So. 708 (1906). *Adserv Corp. v. Lincecum*, 385 So.2d 432 (La. App. 1 Cir. 1980). Statements made in the course of a judicial proceeding are subject to a qualified privilege if the statements are material to the proceeding, and are made with probable cause and without malice. *Rogers v. Ash Grove Cement Co.*, 34,934 (La. App. 2 Cir. 11/2/01); 799 So.2d 841; *Freeman v. Cooper*, 414 So.2d 355 (La.1982). Additionally, there is a heightened pleading requirement when suing for defamation in the context of a judicial proceeding. This heightened standard requires the plaintiff to allege facts in his petition that show malice or an intent to cause direct harm to the plaintiff. *Montalvo v. Sondes*, 93-2813 (La.5/23/94), 637 So.2d 127.

Moreover, there is an increased burden of proof in a defamation suit by a public official. *Davis v. Borskey*, 92 2339 (La. App. 1 Cir. 8/22/94); 643 So.2d 179, held that a public official may not recover for defamatory statements relating to his official conduct, even if false, unless he proves by *clear and convincing* evidence that the statement was made with actual malice or with reckless disregard for whether it was false.

Thus, in order to overcome this special motion to strike and in order to defeat summary judgment, plaintiff must establish the probability of success at trial by evidence of “sufficient quantity and quality.” She must establish that she has clear and convincing evidence that the factual allegations of the suit were false; that the defendants made the allegations with knowledge that they were false or that defendants recklessly disregarded the falsity of the allegations; and that the judicial allegations were made without probable cause. Further, because plaintiff is a public figure, and because the subject of the alleged defamatory statements were matters of public concern, she can only recover damages for opinions if the defendants expressly stated false facts in support of those opinions, and if she establishes that defendants knew of the false implications, or acted with reckless disregard for the truth. *Milkovich v. Lorraine Journal Co.*, 497 U.S. 1 (1990).

Statement of Undisputed Material Facts

1. The Concordia Parish Police Jury is a public body.
2. At all times pertinent hereto, Darden was an elected member of the Concordia Parish Police Jury and is therefore a public official.
3. In 1998, FVP, through its general partner, Smith, made application to the Police Jury for a building permit for the purpose of constructing a single, low income housing project on property it owned on Lincoln Road in Concordia Parish, Louisiana.
4. The project was designed to serve low-income citizens, a high percentage of whom are black citizens.
5. Caucasian citizens of the parish opposed the application.
6. The Police Jury opposed the application at a meeting on July 27, 1998.
7. The Police Jury denied the application on August 24, 1998, on the stated grounds that sewerage and water had not been approved.
8. Sewerage and water were approved by the Town of Ferriday in July, 2000.
9. The Police Jury again denied FVP's application on August 28, 2000.
10. In the summer of 2000, Macon Ridge also sought a building permit from the Police Jury for construction of apartments for the **elderly** on Lincoln Road, across the street from the proposed FVP site.
11. The Police Jury approved the Macon Ridge application and granted it a permit on July 17, 2000.
12. The Police Jury required FVP to pay \$20,000 into an escrow account for sewer improvements, but did not require Macon Ridge to escrow funds for sewer improvements.
13. The Police Jury gave disparate treatment to the applications of FVP and Macon Ridge.

In 2000, while Darden served on the Police Jury and during the time that the Police Jury considered Macon Ridge's application for a building permit, Darden was employed by or associated with Macon Ridge.

15. FVP filed its federal suit against the Police Jury and its members on November 30, 2000.
16. On March 12, 2001, Smith filed an Ethics Complaint against Cathy Darden before the Louisiana Board of Ethics.
17. The Ethics Complaint was confidential and no public disclosure was made of the Ethics Complaint.
18. The Ethics Complaint truthfully stated that plaintiff was employed by Macon Ridge, that Macon Ridge was a competitor of FVP, that plaintiff voted against the FVP project, and that she did not participate in the Police Jury vote on the Macon Ridge permit request.
19. The Police Jury granted a building permit to FVP on September 20, 2001.
20. The United States District judge expressly found that there had been disparate treatment of the two applications for building permits, but ruled that the Police Jury had a rational governmental basis for that disparate treatment.
21. The factual allegations in the federal suit and in the Ethics Complaint solely concerned a public body and officials and matters relating to their public actions.
22. Plaintiff has insufficient evidence to establish the elements of a cause in defamation.
23. Plaintiff has no evidence that she suffered extreme and severe emotional distress, an element necessary for her recovery of damages for intentional infliction of emotional distress.
24. Plaintiff has no evidence to establish the elements of a cause of action for malicious prosecution.

Argument on Motion to Strike and Summary Judgment

Darden claims that the federal law suit and the Ethics Complaint were defamatory, but she fails to assert facts which show actual malice on the part of defendants, or facts which establish an intent by defendants to harm Darden. She also fails to assert facts which establish a lack of probable cause for the judicial statements. For these reasons, Darden fails to establish a cause of action in defamation against defendants. *Montalvo v. Sondes, supra; Rogers v. Ash Grove Cement Co., supra.*

Further, an examination of the allegations of the federal suit and plaintiff's assertions about the Ethics Complaint shows that Darden cannot establish the elements of defamation with respect to either the Ethics Complaint or the suit.

1. *The Ethics Complaint.* The Ethics Complaint is absolutely privileged. In *Goldstein v. Serio*, 496 So.2d 412 (La. App. 4 Cir. 1986), the Fourth Circuit held that former clients' communications about their attorneys to the State Bar Association were absolutely privileged and could not form the basis for a defamation action, in that a disciplinary proceeding conducted by the Professional Responsibility Committee was like a judicial proceeding. In the same way, the complaint filed by Smith to the governmental ethics committee should be deemed absolutely privileged. It cannot form the basis for a defamation action.

Moreover, the Ethics Complaint was not published. Thus, plaintiff cannot establish an essential element of her proof that she was defamed by the Ethics Complaint. La. R.S 42:1141 (E)(12) states that the records that the Louisiana Board of Ethics obtains in connection with investigations and private hearings shall be deemed confidential and privileged. Sub-part (13)(a) provides that information concerning a private investigation or private hearing of the Louisiana Board of Ethics may not be disclosed without the written request of the person investigated. *Broussard v. Commission on Ethics for Public Employees*, 461 So. 2d 1227 (La. App. 1 Cir. 1984) establishes that the complaint itself is privileged and confidential and cannot be made a matter of public record unless the commission determines that there is sufficient information to warrant consideration of the matter

at a public hearing. Thus, Darden's claim that she was defamed by the Ethics Complaint cannot succeed because she cannot establish publication.

Finally, plaintiff cannot establish a claim in defamation on the Ethics Complaint because she cannot establish falsity of the statements or clear and convincing evidence of actual malice. A complete copy of the Complaint is attached. Smith's complaint to the Ethics Committee merely expressed a belief that, in his opinion, the facts he stated constituted a possible violation of the rules of governmental ethics.

In summary, Smith's statements in the Ethics Complaint should be afforded an absolute privilege. The statements were not published; and Darden cannot establish that any statement made in the Ethics Complaint was false, or that Smith had knowledge of the falsity, or reckless disregard for the falsity of any statement made.

2. *The Federal Lawsuit.* The underlying factual assertions made by FVP in the federal suit were true. Over a two year period, the Police Jury had voted against the grant of a building permit. The suit expresses the conclusion of FVP that the denial of its application for a building permit was discriminatory and racially motivated. This conclusion was based on facts made known to or obvious to Smith, consisting of the following:

- the project was for housing of low income citizens, most of whom are black;
- white citizens opposed FVP's request for a building permit;
- the opponents pressured one of the sellers not to honor her obligation to sell, as a consequence of which that seller delayed the sale;
- the opponents opposed the issuance of the permit at the Police Jury meeting in July, 1998;
- the Police Jury acquiesced in the opposition to the permit and denied the permit in 1998;
- The Police Jury repeatedly denied the permit to FVP but quickly granted a permit to Macon Ridge;
- when FVP was finally told it would be granted a permit, it was on condition that it escrow \$20,000 for infrastructure work, a condition not placed on Macon Ridge;
- the Macon Ridge complex was designed to serve the **elderly**, whereas FVP intended to provide low income housing which would serve a high percentage of black citizens;

It is important to note that the FVP permit was not granted until after it had filed the federal lawsuit.

The allegations in the federal lawsuit of racial discrimination and racially discriminatory effect on the citizens of the parish were reasonably inferred from the facts identified above and in the affidavit of Craig Smith. There was a reasonable basis for the conclusion of discriminatory conduct and a basis for believing that the stated reasons for denial of the permit were pretextual. Dismissal of the present defamation suit is appropriate because FVP and Smith believed the allegations of the federal suit were true, and because plaintiff has neither evidence of falsity, nor evidence of nor even allegations of actual malice.

Dismissal of this action is also proper on the basis of the doctrine set out in the *Jones v. Modissett*, 151 La.639, 92 So.144 (La. 1921), a landmark case which held that allegations in a suit for an injunction against the Police Jury, and a prayer for judgment against the Jury and its individual members, were allegations against the Police Jury as a body, and not libelous against any member of the Police Jury, unless specific facts were alleged about the conduct of particular members. In the present case, the underlying federal lawsuit named the Police Jury and its individual members, but alleged that the Police Jury as a whole denied

the building permit and that the denial was based on discriminatory policies toward entities that provide federally assisted low income housing. There was no specific complaint of individual wrongdoing made against Darden or any other juror in the federal suit other than that they voted against the permit. It cannot serve as the basis for a defamation claim against FVP.

The statements in the suit were expression of opinion fairly inferred from facts. The statements were made against the Police Jury as a body, and not against Darden specifically. These facts alone compel dismissal; but beyond this, plaintiff cannot establish actual malice.

In *Davis v. Borskey*, (supra), which held that a public official must prove by *clear and convincing* evidence that the offensive statement was made with actual malice or with reckless disregard for whether it was false, the court held that the term “actual malice” refers to publication of a defamatory statement with knowledge of its falsity, and that the official must demonstrate that the defendant acted with a high degree of awareness as to the probable falsity of the defamatory statement. The plaintiff in this matter has no evidence to show that Smith and FVP had any awareness of falsity of any statement FVP made in connection with the law suit. See also *Landry v. Roberson Advertising Service, Inc.*, 95-0095 (La.App.4 Cir. 8/23/95); 660 So.2d 194. (Summary judgment affirmed in favor of defendants sued by political candidate who brought a defamation action against his opponent and his opponent's campaign worker for defamatory newspaper advertisement.)

Henderson v. Richardson, 26,526 (La.App. 2 Cir. 1/25/95); 649 So.2d 134, upheld summary judgment in favor of the defendants in an action by the mayor of Winnfield who alleged that defendant, a homeowner, had falsely asserted that the mayor was present when the homeowner's home was damaged by police officers during the execution of a search warrant. The court ruled that the mayor failed to show actual malice and that the lower court's ruling in favor of the mayor was therefore erroneous.

In conclusion, Darden's suit must fall. Because she is a public official, any opinions in the federal lawsuit cannot serve as a basis for a defamation claim by her. She cannot establish that the factual allegations of the suit were false. She cannot carry the heavy burden of establishing actual malice by clear and convincing evidence. Therefore, the motions to strike and for summary judgment should be granted.

Intentional Infliction of Emotional Distress

In order to prevail on a claim of intentional infliction of severe emotional distress, the plaintiff must show that the actions taken by the defendants were extreme and outrageous and of a type that would normally lead a person of average sensibilities to suffer extreme and severe emotional distress. A suit itself is not conduct that justifies or supports this tort. “The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. . . . Liability does not attach where the actor has done no more than to insist upon his legal rights in a permissible way, even though he is aware that such insistence is certain to cause emotional stress.” *White v. Monsanto Co.*, 585 So.2d 1205, 1209-10 (La. 1991), rehearing denied.

In addition to proof of outrageous and extreme conduct, the plaintiff must show that she actually did suffer extreme emotional distress. “The distress suffered must be such that no reasonable person could be expected to endure it. Liability arises only where the mental suffering or anguish is extreme.” *White, supra*.

Plaintiff is a member of the Concordia Parish Police Jury. Part of her job is to consider and vote on issues which can sometimes be controversial. The fact that a party dissatisfied with the decision of the Police Jury might file suit in an attempt to reverse the decision is not only foreseeable, but is an everyday part of any governmental body's day to day experience. There is simply nothing extreme or outrageous about bringing a law suit to force the issuance of a building permit denied for over three years and to right a wrong in the denial of that permit.

Finally, the plaintiff has no evidence that she actually suffered extreme emotional distress as a result of the law suit or the ethics complaint. Thus, her cause of action on this ground is subject to dismissal under the present rules governing summary judgment because she cannot meet her burden of establishing a probability of success on the claim.

Malicious Prosecution and Abuse of Process

Under Louisiana law, the essential elements for the tort of **abuse** of process are (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular prosecution of the proceeding. *Eicke v. Eicke*, 517 So.2d 1067 (La.App. 3 Cir. 1987). Louisiana recognizes a civil action for malicious prosecution, but only when a clear case is established as where justice has been perverted for gratification of private malice, and it must be shown that the prior litigation ended in victory for the present plaintiff, and that it was commenced without probable cause and with malice. *Blanchard v. Employer's Liability Assurance Corp.* 197 So.2d 386 (La.App. 2nd Cir. 1967).

In this case, the alleged malicious prosecution was in the filing of the action against the Police Jury and its individual members. As was noted above, the allegations made by the FVP that it was subjected to disparate treatment in the handling of its request for a building permit were found to be true by the judge in that case. Although the federal judge found that the Police Jury had a rational basis for the disparate treatment, that finding does not mean that there was no probable cause for the filing of the lawsuit. The facts expressed above show that there was probable cause to believe that racially discriminatory actions had taken place. Moreover, as explained above, plaintiff has no proof of the other essential element of her claim, actual malice. Under the present summary judgment rules, her claim of malicious prosecution should be dismissed.

Attorney Fees

La. C.C.P. Article 971B specifically states that a prevailing defendant on a special motion to strike *shall* be entitled to recover reasonable attorney fees and costs. The legislature's use of the mandatory "shall" in this article requires this court to grant judgment for reasonable attorney fees and costs. Movers request that a separate hearing be conducted to determine the amount thereof.

Conclusion

Plaintiff's suit should be dismissed because she cannot carry her burden of proof at trial. She lacks evidence to establish that the factual allegations were false. The opinions regarding discriminatory motive cannot serve as a basis for defamation because plaintiff is a public official. She cannot establish by clear and convincing evidence that the lawsuit was filed with actual malice. She cannot establish that the allegations were made against her specifically, rather than against the Police Jury and all of its members as a body. She cannot establish that the Ethics Complaint was anything other than a privileged communication, that it contained false statements made with actual malice, or that the Ethics Complaint was published. She cannot establish the elements of the torts of **abuse** of process or malicious prosecution. Finally, she cannot establish the elements of a claim for intentional infliction of emotional distress. For all of these reasons, this motion to strike, for summary judgment and for attorney fees and costs should be granted.