

SHELLY M. JAMBON AND
QUEEN BESS BAY, LLC

NO. 21-C-626

VERSUS

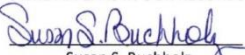
FIFTH CIRCUIT

QUEEN BESS BAY OWNERS
ASSOCIATION, INC., ET AL.

COURT OF APPEAL

STATE OF LOUISIANA

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
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Susan S. Buchholz
First Deputy, Clerk of Court

December 03, 2021

Susan Buchholz
First Deputy Clerk

IN RE QUEEN BESS BAY OWNERS ASSOCIATION, INC., RAYMOND GAUBERT, MICHELLE CARRION,
KENNY LEMOINE, AND JOHN VICTORY

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE DANYELLE M.
TAYLOR, DIVISION "O", NUMBER 817-069

Panel composed of Judges Jude G. Gravois,
Marc E. Johnson, and Hans J. Liljeberg

WRIT GRANTED; JUDGMENT VACATED AND REMANDED

Defendants, Queen Bess Bay Owners Association, Inc. (the “Owners Association”), Raymond Gaubert, Michelle Carrion, Kenny Lemoine and John Victory (collectively referred to as the “defendants”), seek review of the trial court’s August 23, 2021 judgment denying their La. C.C.P. art. 971 motion to strike the lawsuit filed against them by plaintiffs, Shelly M. Jambon and Queen Bess Bay, LLC (“QBB”). For reasons stated more fully below, we grant the writ application, vacate the trial court’s judgment and remand for further proceedings.

This matter involves a lawsuit in which plaintiffs allege defendants made intentional misrepresentations regarding property dispute issues to the Grand Isle Town Council and filed a lawsuit they did not intend to pursue, in order to delay the approval of plaintiffs’ permit to develop the Kings Kove subdivision. Plaintiffs’ petition includes claims for intentional misrepresentation, abuse of process, interference with contractual relationships and conspiracy. In response, defendants filed a motion to strike plaintiffs’ claims pursuant to La. C.C.P. art. 971, alleging that the subject matter of the lawsuit stems from their actions in furtherance of their right of petition and free speech in connection with a public issue – that is their opposition to QBB’s development of the Kings Kove subdivision. Defendants further argued that plaintiffs could not establish a probability of success on their claims and that plaintiff, Shelly Jambon, did not have a real or actual interest in her individual capacity.

In their opposition to the motion to strike, plaintiffs argued that defendants could not bear their initial burden of proving that their lawsuit arose from an act in

furtherance of their right of petition or free speech on an issue of public concern. Plaintiffs further argued, in the alternative, that they can demonstrate a reasonable probability of success on one or more of their claims.

Following a hearing, the trial court entered a judgment on August 23, 2021, granting the motion to strike in part and denying it in part. Specifically, the trial court granted the motion to strike with respect to Paragraph 6 of plaintiffs' petition, which included a general allegation about defendants voicing opposition to the Kings Kove subdivision. The trial court dismissed this allegation with prejudice. The trial court denied the motion to strike in all other respects, including defendants' request to dismiss the individual claims of Shelly Jambon.

Appellate courts review special motions to strike with the *de novo* standard of review because it involves issues of law and examines whether the trial court was legally correct. *Yount v. Handshoe*, 14-919 (La. App. 5 Cir. 5/28/15), 171 So.3d 381, 384. The Louisiana legislature enacted La. C.C.P. art. 971 to screen out meritless claims pursued to chill one's constitutional rights of petition or free speech in connection with a public issue. *Frigon v. Universal Pictures, Inc.*, 17-993 (La. App. 1 Cir. 6/21/18), 255 So.3d 591, 600, *writ denied*, 18-1868 (La. 1/18/19), 262 So.3d 896. La. C.C.P. art. 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.

(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.

Courts apply a two-part burden-shifting analysis in determining whether to grant a motion to strike filed pursuant to La. C.C.P. art. 971. *Yount*, 171 So.3d at 385. The burden of proof begins with the party filing the motion to strike to prove that the cause of action arises from an act in the exercise of his right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue. *Id.* 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 entire record. *Id.*

If the mover makes a *prima facie* showing his petition or speech is constitutionally protected and in connection with a public issue, the burden shifts to the plaintiff to demonstrate a probability of success on the claim. *Id.* In those cases where more than one claim is alleged in the petition, courts examine the probability of success of each claim individually. *Id.*; *Melius v. Keiffer*, 07-189 (La. App. 4 Cir. 3/12/08), 980 So.2d 167, 172. By its terms, La. C.C.P. art. 971 applies to a *cause of action*, not to isolated allegations within a petition with which a litigant takes issue. *Gebre v. City of New Orleans*, 14-904, 14-905

(La. App. 4 Cir. 10/7/15), 177 So.3d 723, 733; *Louisiana Crisis Assistance Ctr. v. Marzano-Lesnevich*, 878 F.Supp.2d 662, 669 (E.D. La. 7/9/12).

It is unclear from the trial court's written judgment, as well as from the oral reasons provided at the hearing, whether the trial court followed the two-part burden shifting analysis explained above and first determined that defendants made a *prima facie* showing their petition or speech was constitutionally protected and in connection with a public issue. We further note that it appears the trial court reviewed the allegations in the petition, rather than the specific causes of action in deciding to grant the motion to strike in part and deny it in part.

Furthermore, in their writ application, defendants point out that the minute entry from the hearing on the motion to strike indicates the exhibits attached to their motion to strike were offered, filed and introduced into evidence, but plaintiffs' exhibits were not. According to the minute entry and transcript provided to this Court, plaintiffs' exhibits, including their supporting affidavits and transcripts from the Grand Isle City Council meetings, were not introduced into evidence.

Exhibits not properly and officially offered and admitted into evidence cannot be considered, even if they are physically filed into the trial court record. *Denoux v. Vessel Mgmt. Services, Inc.*, 07-2143 (La. 5/21/08), 983 So.2d 84, 88; *Wood Materials, LLC v. City of Harahan*, 17-142 (La. App. 5 Cir. 10/2/17), 228 So.3d 293, 295-96. Except as otherwise provided by law, documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal. *Denoux*, 983 So.2d at 88.¹ Appellate courts are courts of record and may not review evidence that is not in the appellate record, or receive new evidence. *Id.*; La. C.C.P. art. 2164.

Our review of the transcript from the hearing on the motion to strike indicates that the trial court relied on plaintiffs' exhibits in rendering its decision on the motion to strike. Accordingly, we find the trial court erred by ruling on the motion to strike under these circumstances in the absence of properly admitted evidence. *See Calamia v. Parish of Jefferson*, 19-270 (La. App. 5 Cir. 12/30/19), 288 So.3d 278, 280.

For these reasons, we grant the writ application for the limited purpose of vacating the trial court's August 23, 2021 judgment and remand for further proceedings on defendants' motion to strike.

Gretna, Louisiana, this 3rd day of December, 2021.

HJL
JGG
MEJ

¹ An exception exists with respect to summary judgment motions as La. C.C.P. art. 966(D)(2) provides that the court shall consider any documents to which no objection is made.

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
HANS J. LILJEBERG
JOHN J. MOLAISSON, JR.

JUDGES



FIFTH CIRCUIT

101 DERBIGNY STREET (70053)

POST OFFICE BOX 489

GRETNA, LOUISIANA 70054

www.fifthcircuit.org

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CLERK OF COURT

21-C-626

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24th Judicial District Court (Clerk)

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Savannah W. Smith (Respondent)

Kyle L. Potts (Relator)

William H. Dunkelman, Jr. (Respondent)

David S. Daly (Respondent)

Elliot M. Lonker (Respondent)

MAILED

Timothy G. Schafer (Respondent)

Attorney at Law

328 Lafayette Street

New Orleans, LA 70130

David J. Shelby, II (Respondent)

Attorney at Law

Post Office Box 2471

Baton Rouge, LA 70821

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