ROBERT BURNS

VERSUS

ANNA DOW

NUMBER 603.248 DOCKET: 24

19[TH] JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

* *

MEMORANDUM IN OPPOSITION TO SPECIAL MOTION TO STRIKE OR, IN THE ALTERNATIVE, AN EXCEPTION OF NO CAUSE OF ACTION

NOW UNTO COURT comes Plaintiff, Robert Edwin Burns, in proper person, who submits to this Honorable Court this Memorandum in Opposition to Defendant's Special Motion to Strike or, in the Alternative, an Exception of No Cause of Action which is scheduled for hearing on Monday, September 26, 2011 at 9:30 a.m.

In paragraph five (5) of Defendant's motion, Defendant states that she "advised the Board that this complaint against the Board needed to be discussed at the next meeting of the State Board." Therefore, by her own admission, Defendant not only acquiesced to the placement of the item on the Board's agenda, she admits that she advised that it be placed on the agenda.

As covered in Plaintiff's initial pleadings, this action was taken with **zero** investigation into the truthfulness of any of Ms. Bonnette's complaint letter.

Plaintiff again reiterates that both Defendant and then-LALB Chairman Comer, who resigned from the LALB effective June 17, 2011, readily admitted that they had no proof whatsoever of any of Ms. Bonnette's accusations. Plaintiff again reiterates Defendant Dow stating, on tape: **"The situation is that I must assume that she [Ms. Bonnette] must have something. Otherwise, she would not be sending this letter."**

In addressing Defendant's reference to *Hebert v. Louisiana Licensed Professional Vocational Rehabilitation Counselors et al.*, a key statement in that referenced case is that "the court determined that because **the statements of Mr. Arceneaux were made in good faith,** with [sic] there was a public interest in filing the complaint [sic –sentence fragment]. Therefore, the special motion to strike would apply." Mr. Bonnette, whose statements were clearly made in a bad faith attempt to discredit Plaintiff, can hardly be viewed as similar in circumstance. The reality is that Ms. Bonnette even lashed out at Rep. Damon Baldone in a videotaped Legislative Committee Hearing on Tuesday, May

18, 2010 in saying he must have "buyer's remorse," which prompted Chairman Wooten to interrupt her and state, "that's not relevant." Furthermore, Defendant Dow was at that Legislative Hearing and heard Ms. Bonnette's testimony and was aware of it at the she considered Ms. Bonnette's complaint referenced in this petition. Ms. Bonnette initially contacted Plaintiff on July 26, 2011 stating that, if he didn't remove his webpages regarding shill bidding from his website, "I am going to sue the s#*^ out of you!" As was stated on the webpage Ms. Bonnette referenced and emphasized by Petitioner at the August 2, 2010 LALB meeting, Plaintiff never even referenced Ms. Bonnette by name and instead merely referenced an auction conducted in Thibodaux, Louisiana in which Rep. Damon Baldone alleges a shill or phantom bid was deployed in an attempt to artificially inflate his bid by $50,000. Because it was evident the LALB was in no way prepared to implement more stringent penalties for shill bidding, Plaintiff chose to voluntarily amend his company's listing and purchase agreements to incorporate a "no-shill guarantee." Many auctioneers in Louisiana, including Ms. Bonnette, are enraged at the action of Petitioner, notwithstanding the fact that shill bidding is illegal in Louisiana (but punishable by only as a misdemeanor and maximum fine of $500) and the fact that Steve Proffitt, legal counsel for J. P. King, arguably the most dominant real estate auction firm in the world, has repeatedly published articles strongly denouncing the practice of shill bidding.

A statement is deemed to be made in good faith when it is made with reasonable grounds for believing it to be true: *Davis v. Benton (La.App. 1 Cir. 2/23/04), 874 So.2d 185*. Such reasonable grounds were **completely** nonexistent in this case, and both Defendant Dow and then-Chairman Comer readily admitted on tape that they had no foundation whatsoever to believe that Ms. Bonnette's statements were true. For Defendant Dow to cite *Hebert v. Louisiana Licensed Professional Vocational Rehabilitation Counselors et al* and the rationale the Court used in granting the Motion to Strike and attempt to apply the circumstances to the present case is nothing short of astounding, particularly in light of Exhibits P-4 and P-5 which were supplied to Defendant Dow prior to the LALB meeting of August 2, 2010. In fact, Plaintiff was **repeatedly** told at that August 2, 2010 LALB meeting not to read the contents of the letter he composed the day before the meeting, P-5, into the record despite his attempts

to do so. Defendant Dow and others wanted to bury their heads in the sand and submit only the scurrilous accusations of Ms. Bonnette, who was not even present at the meeting, and shut off Plaintiff's attempts to refute them because they could easily see there was no reasonable grounds whatsoever to believe Ms. Bonnette's statements were made in good faith and they didn't want that fact being so readily exposed.

Regarding the aforementioned case of *Davis v. Benton,* in that case, as with Defendant's motion, Benton filed a Special Motion to Strike based on Louisiana Code of Civil Procedure 971.

The case entailed a complaint filed against Baton Rouge Police Officer Victoria Davis for allegedly harassing visitors at a home owned by Mr. Barrett Benton and which he leased to his tenant, Ms. Tausha Lee. Ms. Lee telephoned Mr. Benton and complained that Officer Davis' actions of routinely requesting the driver's licenses and insurance papers of visitors to Ms. Lee's home constituted harassment. Officer Davis contended she was merely performing her patrol duties in the neighborhood in which she also resided and alleged that the visitors were playing music which was too loud.

In the Davis case, Mr. Benton filed a written complaint with Baton Rouge Police Chief Pat Englade. Police Chief Englade submitted an Affidavit stating that a full investigation of the matter was conducted in a confidential manner through the Baton Rouge Police Department's Internal Affairs unit. He further stated that, pursuant to departmental policies, the complaint was treated as a citizen's complaint and processed only through the appropriate channels of investigation within the police department. He averred that the complaint was handled in a confidential manner and no information regarding the complaint was released or published to the general public. He also averred that the complaint was not made known to any members of the police department, except as needed to implement an investigation and then only to the appropriate chain of command over Officer Davis.

The trial court granted Mr. Benton's Motion to Strike stating that Benton's complaint constituted free speech. The Order granting the Motion to Strike was appealed, and the appeals court affirmed the lower court's granting of the motion.

Plaintiff takes no issue with Ms. Bonnette's right to free speech to institute any complaint of any nature, and Plaintiff further concurs with the Court's rationale for

granting the Order to Strike in the Davis case and refrain from sending a chilling message regarding the public's right to participate in matters of public interest. The key difference between Plaintiff's case and *Davis v. Benton*, however, is the manner in which Ms. Bonnette's complaint was processed (or, more appropriately, lack of any processing), how it was immediately disseminated, and the fact there was **zero** investigation into Ms. Bonnette's allegations before, during, or after the three-working-day period during which it was received by the LALB and discussed in an open forum. Furthermore, Defendant Dow's statement that that "mover did speak about the letter at the Board meeting in open session at the request of Plaintiff, who had been provided a copy of the letter, only to advise the Board of a potential claim being filed against the Board by Ms. Bonnette" is highly misleading in the Plaintiff did not request that anyone speak about the complaint nor disseminate it and, in fact, stated in P-4 that it would seem Defendant Dow and then-Chairman Comer would possess sufficient "common sense" to refrain from any such discussion until the matter had been investigated. What Defendant Dow is essentially saying in Paragraph 10 is that the Board, at her advisement, was going to discuss the matter no matter what, and that "at the request of Plaintiff" only references Plaintiff's insistence that it take place in an open forum. Plaintiff insisted upon that because, at the January 26, 2009 LALB meeting (Plaintiff's third as a Board Member), Defendant Dow permitted the LALB to go into an Executive Session which was later criticized by the Inspector General's Office to be an apparent violation of Louisiana's Open Meetings Laws. It was as a result of an email to Ms. Dow, still retained by Plaintiff, denouncing Ms. Dow's action (she very much actively participated in that discussion) of January 26, 2009 which prompted strict adherence to the 24-hour notice Defendant Dow now touts that the LALB follows.

Defendant Dow has routinely relayed that she often handles investigations herself (and even relayed as much on tape at the August 2, 2010 LALB meeting) and, when matters can be resolved or dissolved, the LALB is never even made aware of the complaints in such situations. Instead of following a similar procedure in the case of Plaintiff, however, she merely, by her own admission, relayed the matter needed to be presented to the Board notwithstanding that Plaintiff had relayed important rebuttals, to wit (see Exhibit P-5): Ms. Bonnette publicly acknowledging Plaintiff's presence at one

of her auctions and even promoting an auction he was to conduct the next week. Is this a logical action for someone who later claims Plaintiff was "harassing my staff" and "stalking" her? In Plaintiff Exhibit P-4, Plaintiff stated that "I feel certain that these two individuals (Defendant Dow and then-Chairman Comer) would possess sufficient common sense that would have dictated postponement of that agenda item until the September meeting at which time they would be in possession of more corroborating evidence." Sadly, Defendant Dow did lack that common sense; furthermore, no corroborating evidence has been obtained in the ensuing year since the item was placed on the LALB agenda. The bottom line is that Defendant Dow **unequivocally knew** that Ms. Bonnette's statements were made in bad faith and she too engaged in an act of bad faith in recommending that the item be placed on the LALB agenda for discussion knowing the statements were made in bad faith.

As referenced in the original petition, Plaintiff, even under the limited timeframe he was provided to respond, did issue both extensive email and extensive formal letter responses to Ms. Bonnette's allegations. Defendant Dow was provided copies of both of those documents, a fact which she does not even challenge (or even mention, for that matter) in her Motion. Defendant Dow chose to blatantly ignore these documents (Exhibits P-4 and P-5).

Rather than conducting a professional investigation as was the case in *Davis vs. Benton*, which Ms. Dow was perfectly capable of doing, Ms. Dow, by her own admission, advised the Board to charge full-steam ahead with **zero** corroborating evidence, notwithstanding the fact Plaintiff repeatedly pleaded with Defendant and her client, the LALB, to obtain more facts before doing so as evidenced by Plaintiff Exhibits P-4 and P-5. Further, Defendant's assertion that Plaintiff could have insisted upon Executive Session for discussion is moot as such a scenario would have entailed all Board Members and would have been an even worse "lynch mob" mentality than was the case in the open meeting where the proceeding was recorded (Ms. Dow is steadfast that no recording of Executive Sessions transpire, a practice which Plaintiff resoundingly criticized in the aforementioned email regarding the January 26, 2009 LALB meeting.

Plaintiff will demonstrate through discovery and trial that Defendant Dow has a consistent pattern of being passive when it comes to dealing with LALB members with whom she has favor and aggressive with others with whom she has disfavor.

Plaintiff will demonstrate to this Honorable Court that Defendant was not pleased with Plaintiff for having challenged her recommendation of a Private Investigator for hire by the LALB. Defendant Dow purported at the May 17, 2010 LALB meeting to have solicited proposals from "a number" of investigators. Plaintiff subsequently sought, via certified letter dated May 22, 2010, a list of such solicitations. After stating in the opening sentence of her response to Plaintiff that, "By answering your letter, I do not admit to being subject to your request. However, after speaking with Chairman Comer, please be advised...." Ms. Dow then admitted she'd sought proposals from only two (2) investigators (and one of those was from Mark Gravel, who is from Alexandria). Furthermore, the one the LALB hired based upon Defendant Dow's recommendation (and whom she admitted to having a past working relationship) charged an hourly rate 350% higher than the LALB's previous Private Investigator. Plaintiff firmly believes that this kind of conduct regarding intentional and materially misleading statements to the LALB, wherein Ms. Dow, through voice inflection and emphasis, portrayed that she had solicited numerous proposals for the position, creates an obvious appearance of potential impropriety on the part of the Board, Ms. Dow, and the named investigator. Plaintiff referenced that fact at the August 2, 2010 LALB meeting and stated his strong belief that the Private Investigator position should be redone to include advertising for the position. Even Mr. Asmussen, the Private Investigator chosen under the less-than-desirable circumstances, stated he would have no objection to reconsideration given the fact there was such a limited search for the position. Plaintiff will also provide documentation of numerous other issues to which he took exception with Ms. Dow's handling of various LALB matters, and thereby demonstrate that Defendant Dow had a strong motivation in joining the "lynch mob" mentality that existed at the August 2, 2010 LALB meeting during which Ms. Bonnette's scurrilous accusations were aired. In doing so, Defendant Dow failed miserably to maintain any level of objectivity whatsoever regarding the Bonnette complaint, failed to adhere to her role as a gatekeeper regarding ensuring

complaints have merit or truthfulness, and acted in a manner that is nothing short of irresponsible and reckless.

Defendant Dow's statement that much of Plaintiff's petition entails actions of others is irrelevant. While Plaintiff is certainly free to name other Defendants in his petition, he has no obligation to do so. In fact, Plaintiff, who is a CPA (inactive), has analyzed the cost of pursuing claims against others involved in the episode, including Ms. Bonnette, and he has ascertained that the likelihood of actually collecting on a judgment rendered against those potential other Defendants doesn't justify the expense of even serving those potential Defendants with the petition. Defendant Dow, however, is welcome to file a petition of her own against Ms. Bonnette or any other party whom she may feel misled her or the LALB regarding statements made about Plaintiff that then resulted in Plaintiff's cause of action against Defendant.

Ms. Dow cannot merely hide behind Louisiana Code of Civil Procedure Article 971 to assert blanket immunity from her obligation to advise her client, the LALB, to investigate the validity of any complaint prior to charging head-strong forward with public dissemination of scurrilous accusations as Ms. Dow, by her own admission in her Motion, states that she did in this case. That Code, though intended by the Legislature to be interpreted broadly so as to allow free speech, does not serve as a shield for reckless behavior by public bodies, nor does it serve as a shield for reckless behavior by the counsel employed by those public bodies. An appropriate analogy would be, in the *Davis v. Benton* case referenced previously, for Benton to have complained of Davis harassing his tenant's visitors by asking for driver's licenses and insurance papers, then Officer Davis presenting strong evidence that she merely drove her squad car along the street and never even interacted with those visitors, and yet Chief Englade deciding that fact was irrelevant and that Davis would be made an example of in front of the entire police department. That analogy is why Plaintiff contends it is patently absurd for Defendant Dow to even suggest Ms. Bonnette's complaints were made in anything resembling good faith and that circumstances of the current case have any resemblance to the case she cites of *Hebert v. Louisiana Licensed Professional Vocational Rehabilitation Counselors et al.*

Further, as referenced previously, Ms. Dow varies between passive and aggressive treatments regarding LALB members depending upon whether she has favor with that Board Member or disfavor. In fact, Ms. Dow carries that tendency beyond mere differing in passive and aggressive tactics, and this fact will be readily demonstrated to the Court regarding a present situation entailing the Chairman of the LALB, Ms. Tess Steinkamp. Ms. Dow has submitted to Plaintiff emails which were also provided to Ms. Sarah Olcott, Director of Boards and Commissions, stating that Ms. Steinkamp wasn't even employed by New Orleans Auction Galleries leading up to the time it filed bankruptcy on April 1, 2011 with, at the time of the filing, 50+ unpaid consignors, debts exceeding $4 million, and assets of only $500,000 (and approximately $150,000 of those assets in the form of a worthless intercompany receivable). To the contrary, Plaintiff has demonstrated through the initial filing of the Statement of Financial Affairs of that Bankruptcy that, at the bottom of page seven (7) of that filing, Ms. Steinkamp was listed as Vice President, Secretary, Treasurer, and Director and that she wasn't terminated from those positions until March 20, 2011 (12 days prior to the bankruptcy filing). Further, prior to Board Member Freddie Phillips attempting to report at the July 18, 2011 LALB meeting that Ms. Steinkamp, clearly acting in her capacity as an employee of New Orleans Auction Galleries, repeatedly assured Mr. Jacob Kansas, an attorney representing Latter & Blum, that a check for payment of auction proceeds would be forthcoming pursuant to an assignment agreement, Ms. Steinkamp had been instructed by Ms. Dow to read Auctioneering Licensing Law Section 3121 to Mr. Phillips informing him that "any false testimony may result in disciplinary action against your license." In taking this approach where it concerns Ms. Steinkamp, Ms. Dow is effectively serving as Ms. Steinkamp's defacto defense attorney. Ms. Steinkamp is currently the longest-serving active LALB member, and she and Ms. Dow enjoy a long-lasting friendship, and that fact appears to be clouding Ms. Dow's judgment regarding her requirement to maintain objectivity regarding Ms. Steinkamp. Furthermore, Ms. Dow never uttered one word about Auctioneering Licensing Law Section 3121 during the August 2, 2010 LALB meeting when **numerous** false statements were made regarding Plaintiff in a lynch-mob setting in which 30-40 audience member auctioneers and others chimed with chants like, "Amen," and "And that's the truth!" Similarly, she failed to assert any such

Auctioneering Licensing Law statute when, in that same meeting, Board Member Freddie Phillips' character was assassinated by former LALB Chairman Buster Gay (who himself resigned from the LALB in late February or early March of 2011), who falsely accused Rev. Phillips of having diverted $7,000 of his church's funds to a stranger. To this day, former Chairman Gay has not even had so much as a warning of potential license ramifications for his reckless remarks. Plaintiff intends to prove during trial that Ms. Dow's vastly differing treatment of Members of the same Board, particularly combined with Plaintiff's challenging of her handling of LALB matters, will clearly demonstrate that Defendant Dow was perfectly capable of subjecting Plaintiff to unfavorable treatment regarding permitting the scurrilous accusations to be presented despite common sense dictating it was not appropriate. Furthermore, Ms. Dow had a motive for such seemingly inexplicable behavior on her part: retribution for Plaintiff challenging so many aspects of her handlings of LALB matters.

From the day Plaintiff first began serving on the LALB, he clashed repeatedly with Defendant Dow regarding her blatant ignoring of Louisiana's Open Meetings Laws (including an illegal Executive Session on January 26, 2009 wherein Plaintiff's character was assassinated and Plaintiff himself then educated Ms. Dow on the requirements of Title 42 regarding sending the 24-hour advanced notice and permitting him to insist that such discussion transpire in an open forum), highly questionable handling of public records requests, her assertion that Board Members have less rights to LALB documents than do members of the general public (which Plaintiff maintains is patently absurd), and even the fact Defendant Dow sternly refuses to have Executive Sessions recorded (which played a **huge** role in Plaintiff's decision to decline any such Executive Session for August 2, 2010) which likely motivated Ms. Dow to advise the Board to place the item on the agenda even though she readily admitted on tape that she had no proof whatsoever of Ms. Bonnette's accusations. In short, as stated in Plaintiff's petition (paragraph 20), "It is believed that these accusations were authorized for dissemination by Defendant Dow in a bad faith attempt to discredit Petitioner, both personally and professionally, and that the authorization of dissemination given by Defendant Dow was done with actual malice."

Because the facts of this case are in no way similar whatsoever to *Davis v. Benton*, Plaintiff respectfully submits that, were this Honorable Court to grant Defendant's Motion to Strike, it would send a chilling message to any current or prospective member of any Board or Commission that the general counsel of that Board or Commission is free to ignore his or her role as a gatekeeper to keep false and scurrilous accusations from merely advancing in a haphazard fashion before the public body on which they serve or aspire to serve. Such a message would, in the strong opinion of Plaintiff, send a message loud and clear to prospective members of such Boards and Commissions that serving on them should be avoided at all possible costs. That message, in turn, would do all citizens of Louisiana a huge disservice by curtailing well-qualified prospective members from even considering serving. Plaintiff can already supply a list of auctioneers who would be extremely well-qualified to serve on the LALB; however, Plaintiff regularly videotapes LALB meetings (and audio taped meetings prior to commencing with videotaping in September of 2010) and provides interested auctioneers with a direct link to a webpage having links to these videos. Those well-qualified auctioneers have stated to Plaintiff that they would never even consider serving on the LALB given what they have seen on these videos, and that mentality would only be spread further among Louisiana auctioneers were the Court to permit Defendant's Motion to Strike to be granted.

Finally, Plaintiff requests that Defendant's Motion be denied based on the concluding condition of CCP 971A(1), "unless the court determines that the plaintiff has established a probability of success on the claim." Plaintiff submits that he has established a probability of success on his claim and also asserts that all Defendant has demonstrated to this Honorable Court to refute that probability is an attempt to absolve herself of any obligation to serve as gatekeeper and conduct an investigation into a complaint's validity prior to proceeding head-strong with dissemination of the complaint and her attempts to utilize CCP 971A(1) as a shield for having failed to do so and, as such, is asserting the Code for a purpose other than what it was intended and totally contrary to the circumstances under which the Court ruled in *Davis vs. Benton* in granting Benton's Motion to Strike. Additionally, as a result of that probability of success,

Defendant's alternative remedy of Exception for No Cause of Action should also be denied.

WHEREFORE, petitioner, ROBERT EDWIN BURNS, prays that this Honorable Court deny Defendant's Special Motion to Strike and Defendant's alternative of Exception for No Cause of Action.

Respectfully Submitted,

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Robert Edwin Burns

Certificate of Service:

I certify that a copy of the foregoing has been served upon counsel for all parties to this proceeding by mailing the same to each by First Class United States Mail, properly addressed and postage prepaid on this 2nd day of September 2011.

Robert Edwin Burns