

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2005 CA 1979**

**CHARLES R. BANTA, III, JERRY JONES, AND RHEBB  
RYBISKI**

**VERSUS**

**LINDEL TOUPS, L. PHILIP GOUAUX, II, TYRONE  
WILLIAMS, MICHAEL DELATTE, MICHAEL  
MATHERNE, THOMAS LASSEIGNE, MARK  
ATZENHOFFER, AND BRENT CALLAIS**



Judgment Rendered: SEP 20 2006

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On Appeal from the 17<sup>th</sup> Judicial District Court  
In and For the Parish of Lafourche, State of Louisiana  
Trial Court No. 100,486, Section "C"

Honorable Walter I. Lanier, III, Judge Presiding

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**BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.**

## **HUGHES, J.**

Plaintiffs in this action, former members of the Lafourche Parish Council (Council), filed suit against current members of the Council alleging that defendants had usurped their positions on the Council under Louisiana Revised Statutes 42:71-87. Plaintiffs now appeal from the trial court's judgment granting defendants' exceptions raising the objections of no cause of action, no right of action, and no subject matter jurisdiction and denying defendants' motion to strike as moot.

### **FACTS AND PROCEDURAL HISTORY**

Plaintiffs, Charles R. Banta, III, Jerry Jones, and Rhebb Rybiski, were members of the Council for the 2000-2004 term. In autumn 2003, an election was held; the defendants were successfully elected for the 2004-2008 term, but the plaintiffs were not reelected. On January 5, 2004, Mr. Banta, in his capacity as Council chair, called a special meeting for the evening of January 6, 2004 to discuss a number of specified topics relating to unauthorized expenditures by then-Parish President "Buzz" Breaux

Earlier in the day on January 6, 2004, the new members filed a petition for declaratory judgment seeking determination of the proper officeholders at that point and also for a temporary restraining order and preliminary injunction to stop the planned special meeting.<sup>1</sup> (Injunction Lawsuit). The temporary restraining order was granted, blocking the special meeting. The preliminary injunction was set for hearing on January 13, 2004.

Before that hearing, Mr. Banta, Mr. Jones, and Mr. Rybiski sought writs declaring that the trial judge's granting of the temporary restraining order amounted to an abuse of discretion; their application was denied on

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<sup>1</sup> #97,953 "C" in the 17<sup>th</sup> JDC, and 2005 CA 0783 in this court.

January 9, 2004; the Louisiana Supreme Court denied writs on January 12, 2004.

On January 13, 2004, the preliminary injunction hearing commenced. On the same date, Mr. Banta, Mr. Jones, and Mr. Rybiski answered and filed exceptions raising the objections of no cause of action and no right of action regarding the new members' claims for declaratory relief. These responses by Mr. Banta, Mr. Jones, and Mr. Rybiski sought dismissal of the new members' Injunction Lawsuit. At no time during the Injunction Lawsuit proceedings did Mr. Banta, Mr. Jones, and Mr. Rybiski file a reconventional demand requesting either declaratory relief or damages from the new members.

On January 20, 2004 the new members, having formally taken office, filed a motion to voluntarily dismiss the Injunction Lawsuit with prejudice, which motion was granted by the trial judge. The exceptions filed by Mr. Banta, Mr. Jones, and Mr. Rybiski were deemed moot. Mr. Banta, Mr. Jones, and Mr. Rybiski responded by filing motions for new trial, resumption of evidentiary hearing, and to vacate the order of dismissal of the Injunction Lawsuit; these motions were denied as frivolous.

On appeal to this court, we affirmed the trial court's denial of Mr. Banta, Mr. Jones, and Mr. Rybiski's motions in judgments dated September 23, 2005. We found that, as the relief these motions sought, namely, dismissal of the Injunction Lawsuit, had been achieved by the new members' voluntary dismissal, Mr. Banta, Mr. Jones, and Mr. Rybiski's exceptions had been properly dismissed by the trial court. As Mr. Banta, Mr. Jones, and Mr. Rybiski had requested neither declaratory relief nor damages from the new members in the Injunction Lawsuit, no further justiciable controversy existed. Mr. Banta, Mr. Jones, and Mr. Rybiski

sought rehearing in October 2005, which application was denied in November 2005.

Meanwhile, on January 5, 2005 Mr. Banta, Mr. Jones, and Mr. Rybiski filed the action upon which the current appeal is based. This action alleged that the new members' actions in bringing the Injunction Lawsuit in January 2004 had violated Louisiana's Right to Office and Intrusion into Office statutes (LSA-R.S. 42:71-87) and thus abused the legal process, deprived Mr. Banta, Mr. Jones, and Mr. Rybiski of their constitutional rights to due process and to hold office, intentionally inflicted mental anguish and emotional distress upon Mr. Banta, Mr. Jones, and Mr. Rybiski, and intentionally sought to have Mr. Banta, Mr. Jones, and Mr. Rybiski put up to public scorn and ridicule.

In this action, Mr. Banta, Mr. Jones, and Mr. Rybiski sought, as they had not in the Injunction Lawsuit, to have the new members removed from office, to have the offices declared vacant, to have statutory fines assessed against the new members, and to recover damages in tort from the new members. Mr. Banta, Mr. Jones, and Mr. Rybiski also sought to have the Injunction Lawsuit declared null in its entirety, including all effects therefrom, and all proceedings subsequent thereto.

In response to the usurpation action, the new members filed exceptions raising the objections of no right of action, no cause of action, lack of subject matter jurisdiction, and a motion to strike elements of Mr. Banta, Mr. Jones, and Mr. Rybiski's petition. These matters were heard on April 15, 2005 and the trial court rendered its judgment and reasons on June 16, 2005.

The trial court granted the new members' exception raising the objection of no right of action on the grounds that standing in the usurpation

statutes is limited to those persons claiming the right to possess the office in question, not “ordinary citizens” or even taxpayers. As Mr. Banta, Mr. Jones, and Mr. Rybiski were either defeated in the 2003 election (Mr. Jones, Mr. Rybiski) or deemed ineligible to run (Mr. Banta), they had no right of action under the usurpation statutes.

The trial court also granted the new members’ exception raising the objection of no cause of action on the grounds that the specific remedy provided by the usurpation, namely the entitlement to the particular office, could not be awarded on the basis of Mr. Banta, Mr. Jones, and Mr. Rybiski’s petition because the petition sought as remedy only removal of the new members, not a declaration of Mr. Banta, Mr. Jones, and Mr. Rybiski’s entitlement to the offices.

The trial court further found no cause of action in Mr. Banta, Mr. Jones, and Mr. Rybiski’s claims for nullity of the Injunction Lawsuit as neither vices of form nor vices of substance (fraud, ill practice) had been shown by Mr. Banta, Mr. Jones, and Mr. Rybiski:

The New Council Members, in their capacity as plaintiffs in the previous litigation...were certainly entitled to dismiss the suit on their own terms. *Furthermore, herein Plaintiffs* [Mr. Banta, Mr. Jones, and Mr. Rybiski], *as defendants in that suit, did not file a reconventional demand...*Therefore, the judgment dismissing the injunction lawsuit could not have deprived the plaintiffs herein [Mr. Banta, Mr. Jones, and Mr. Rybiski] of any legal rights. (emphasis added)

The trial court rejected Mr. Banta, Mr. Jones, and Mr. Rybiski’s allegations that the new members’ internal communications prior to filing the Injunction Lawsuit violated Louisiana’s Open Meetings laws at LSA-R.S. 42:4.1-4.13. The trial court reasoned that since the new members’ terms had not formally begun when they filed the Injunction Lawsuit, they could not be violating the open meetings laws. The trial court further noted

inconsistency in Mr. Banta, Mr. Jones, and Mr. Rybiski's claims on this issue in that even if the new members were declared usurpers, they could not then be "members of a public body" and thus could not violate the open meetings law anyway.

The trial court concluded that as Mr. Banta, Mr. Jones, and Mr. Rybiski had not shown proper causes of action in their underlying claims of usurpation, annulment, and open meetings violation, their tort claims based on these actions could not stand either. The trial court also granted the new members' exception raising the objection of lack of subject matter jurisdiction. It found that, except for the usurpation claims, all of the claims raised in this action by Mr. Banta, Mr. Jones, and Mr. Rybiski were sufficiently similar to their claims in the Injunction Lawsuit then on appeal to be subject to Louisiana Code of Civil Procedure article 2088. From this judgment, Mr. Banta, Mr. Jones, and Mr. Rybiski have appealed.

## **LAW AND DISCUSSION**

### **Subject Matter Jurisdiction**

The trial court found that it had no subject matter jurisdiction over the bulk of the claims raised in Mr. Banta, Mr. Jones, and Mr. Rybiski's petition, including claims for damages and assessment of fines against the new members, for declarations of forfeiture of office by the new members, and for vacancies of office. The trial court reasoned that these allegations were similar to those then before this court in the appeal of the Injunction Lawsuit. Under Louisiana Code of Civil Procedure article 2088, "The jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested, and that of the trial court attaches, on the granting of the order of appeal. . . . Thereafter, the trial court has jurisdiction in the case only over those matters not reviewable under the appeal...."

We affirm the trial court's ruling on this issue. With exceptions to be addressed *infra*, the claims in this petition mirror those raised by Mr. Banta, Mr. Jones, and Mr. Rybiski in their appeal of the Injunction Lawsuit.<sup>2</sup>

### **Usurpation and Open Meetings Claims**

The trial court ruled that it had subject matter over the usurpation claims raised by Mr. Banta, Mr. Jones, and Mr. Rybiski, but granted the new members' exceptions raising the objections of no cause of action and no right of action. We find no error in these conclusions but assert that the trial court had no subject matter jurisdiction in this respect either. Louisiana Code of Civil Procedure article 425 declares: "A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation." Furthermore, under Louisiana Code of Civil Procedure article 1061, "[t]he defendant in the principal action...shall assert in a reconventional demand all causes of action that he may have against the plaintiff that arise out of the transaction or occurrence that is the subject matter of the principal action."

In this matter, Mr. Banta, Mr. Jones, and Mr. Rybiski's usurpation claims are based entirely on the same set of operative facts at issue in the Injunction Lawsuit, namely, the events of January 5-6, 2004. Thus, these "new" claims represent no more than a different theory of recovery based on the same "transaction or occurrence that is the subject matter of the principal action."

Louisiana Code of Civil Procedure article 3608 provides that damages may be recovered "for the wrongful issuance of a temporary restraining order...on a motion to dissolve or on a reconventional demand." Mr. Banta,

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<sup>2</sup> The new members' original petition for declaratory and injunctive relief was filed in the 17<sup>th</sup> JDC and docketed as #97,953 "C"; it was then appealed to this court and docketed as 2005 CA 0783.

Mr. Jones, and Mr. Rybiski had the opportunity to bring such a motion or make a reconventional demand under the theory of usurpation in the Injunction Lawsuit. They should have and failed to do so, thus they have lost their right to bring this action independently as required by Louisiana Code of Civil Procedure article 1037: “When a person does not assert in an incidental demand the action which he has against a party to the principal action...he does not thereby lose his right of action...*except as provided in Article 1061.*” (setting forth rule for compulsory reconventional demand) (emphasis added).

The trial court rejected Mr. Banta, Mr. Jones, and Mr. Rybiski’s claims that the new members’ communications prior to their filing the Injunction Lawsuit amounted to a violation of Louisiana’s Open Meetings statutory scheme at Louisiana Revised Statutes 42:4.1-4.13. The court reasoned: “New Council Members cannot be declared to have violated the Louisiana Open Meeting Law when they were not public officials at the time of them instituting the Injunction Lawsuit.” Furthermore, the trial court reasoned that even if it had found usurpation on the part of the new members, the open meetings statutes would not have been violated as the new members would not be a valid “public body” and thus not subject to the statutes’ application.

We agree with the trial court and also find that Mr. Banta, Mr. Jones, and Mr. Rybiski’s “open meeting” claims cannot be brought in a new and independent action when they should have been brought as a compulsory reconventional demand in the Injunction Lawsuit. As much as if not more than the usurpation claims, the open meeting claims rest on the same set of facts made subject of that litigation, the events of January 5-6, 2004. Thus, we affirm the ruling of the trial court.



## Nullity

Mr. Banta, Mr. Jones, and Mr. Rybiski have raised a claim in their petition in this matter that the judgment in the Injunction Lawsuit be declared null. Mr. Banta, Mr. Jones, and Mr. Rybiski allege that the new members engaged in fraud or ill practices during the course of the Injunction Lawsuit by trying to “hide” the fact that their commissions declared the effective date of their terms as January 14, 2004 and not January 6, 2004, the occasion of the “first meeting” as suggested by the terms of the parish home rule charter.

The trial court addressed these claims under Louisiana Code of Civil Procedure articles 2001-2006, regarding actions of nullity.<sup>3</sup> It found no vices of form in the Injunction Lawsuit under article 2002 and addressed Mr. Banta, Mr. Jones, and Mr. Rybiski’s vices of substance allegations under article 2004(A): “A final judgment obtained by fraud or ill practices may be annulled.” The court found that, according to jurisprudence, a showing of fraud or ill practice may be grounds for annulment of a judgment if the litigant seeking relief can demonstrate a “deprivation of legal rights” due to the “circumstances under which [the] judgment was rendered.” The trial court noted, however, that the fraud or ill practice must be material to the grounds or manner in which the judgment is obtained. If the fraud or ill practice is “irrelevant to the basis of the decision [such that] the judgment was...not obtained by fraud or ill practice,” the judgment will not be set aside.

The trial court found that even if the new members had concealed information regarding their commissions during the course of the Injunction

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<sup>3</sup> The trial court had subject matter jurisdiction over this particular claim pursuant to Louisiana Code of Civil Procedure article 2004.

Lawsuit, this tactic worked no deprivation of Mr. Banta, Mr. Jones, and Mr. Rybiski's rights in that litigation. As the plaintiffs in that litigation, the new members had every right to dismiss their own suit and as Mr. Banta, Mr. Jones, and Mr. Rybiski had no outstanding reconventional demands remaining for resolution, they had no rights of which to be deprived.

Furthermore, the trial court in this matter found that even if such concealment by the new members had occurred during the course of the Injunction Lawsuit, it was not relevant to the basis for the trial court's judgment ordering dismissal upon the new members' motion to dismiss. The court in this matter noted that because a plain reading of the parish home rule charter specified that the new Council term commenced at the first meeting of the year following the election, the date of January 14, 2004 on the new members' commissions, whether known to the court in the Injunction Lawsuit or not, was not relevant to the basis for the court's judgment of dismissal. We find no error in the trial court's ruling on this issue in this matter. We also note that the commissions of public officers in Louisiana are a matter of public record. We find no error in the ruling of the trial court.

### **Tort Claims**

While the trial court in this matter acknowledged that recovery in tort could be available upon a showing of violations of the usurpation and open meetings laws as well as a successful action for annulment, it found that Mr. Banta, Mr. Jones, and Mr. Rybiski had no cause of action in tort in this matter on the grounds that they had no cause of action in any of the underlying actions (usurpation, open meetings, or nullity). We agree with this reasoning and affirm.

## **CONCLUSION**

We affirm the trial court's dismissal of plaintiffs-appellants' petition in this matter. All costs are to be assessed to plaintiffs-appellants, Charles R. Banta, III, Jerry Jones, and Rhebb Rybiski.

**AFFIRMED.**