NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 1956

MARY E. ROPER

VERSUS

JOHN CHANDLER LOUPE AND THE CONSOLDATED GOVERNING BODY OF THE CITY OF BATION ROUGE AND THE PARISH OF EAST BATON ROUGE

Judgment Rendered: OCT 2 8 2016

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 638,786

The Honorable Timothy E. Kelley, Judge Presiding

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Baton Rouge and Parish of East
Baton Rouge

* * * * *

BEFORE: PETTIGREW, MCDONALD, AND DRAKE, JJ.

DRAKE, J.

Mary E. Roper, the former Parish Attorney for East Baton Rouge Parish, filed a suit for defamation against John Chandler Loupe and the Consolidated Governing Body of the City of Baton Rouge and the Parish of East Baton Rouge (City-Parish), alleging that Loupe, a member of the Metropolitan Council for the City-Parish (Metro Council), made false statements about her causing the Metro Council to terminate her as Parish Attorney. The defendants filed a Special Motion to Strike pursuant to La. C.C.P. art. 971. The trial court granted the defendants' motion and dismissed Roper's claims. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

On April 22, 2015, Roper filed suit against Loupe and the City-Parish for defamation. The petition details animosity between Loupe and Roper beginning in November of 2008. The trial court ruled that any allegations concerning activity prior to April 22, 2014, one-year before the filing of the petition, were prescribed as tortious claims, which included paragraphs 6 through 109 of Roper's petition. On appeal, Roper details events between Loupe and her between 2008-2010 as evidence supporting her claim that in 2014, Loupe acted out of malice and in retaliation for Roper's failure to comply with Loupe's repeated requests that Greg Rome be given a position in the Parish Attorney's office.

Roper served as the Parish Attorney from August 2008 through September 2014, at which time she was removed from that position following a public hearing and a vote of the Metro Council. Roper filed this defamation lawsuit seeking damages for the allegedly defamatory statements made by Loupe during a Metro Council meeting held on September 10, 2014, which led to her removal as the Parish Attorney. Roper alleged that the statements by Loupe were made during

the Metro Council meeting and were aired on public television during that meeting.

In response to the defamation suit, the defendants filed a Special Motion to Strike pursuant to La. C.C.P. art. 971, seeking dismissal of Roper's claims and requesting attorney's fees and costs. Roper opposed the Special Motion to Strike and attached an affidavit and exhibits to her opposition. The trial court set the hearing on the Special Motion to Strike for July 6, 2015.

On June 22, 2015, Roper requested that subpoenas be issued to five City-Parish officials requiring them to appear as witnesses at the July 6, 2015 hearing. In response, the defendants filed a Motion to Quash, claiming that pursuant to La. C.C.P. art. 971(A)(2), the trial court could only consider the pleadings and supporting and opposing affidavits, not live testimony. Roper then sought to continue the July 6, 2015 hearing to "allow for limited discovery", which included taking the depositions of the subpoenaed witnesses. The trial court granted the Motion to Quash and denied the Motion to Continue the hearing.

The defendants also filed a Motion to Strike Exhibits/Attachments,[1] pertaining to numerous exhibits attached to the affidavit of Roper filed in Opposition to the Special Motion to Strike. At the July 6, 2015 hearing, the trial court granted the Motion to Strike Exhibits/Attachments. The trial court also granted the Special Motion to Strike and ordered that Roper pay the attorney's fees and costs of defendants. A judgment to that effect was signed on July 29, 2015.

Roper filed a motion for new trial, which was denied by the trial court on August 18, 2015. Roper appeals from the July 29, 2015 judgment and the denial of the motion for new trial.

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[1] The Motion to Strike Exhibits/Attachments is not to be confused with the Special Motion to Strike pursuant to La. C.C.P. art. 971.

ALLEGED ERRORS

Roper claims that the trial court erred in granting Defendants' Special Motion to Strike and dismissing her claims; granting Defendants' Motion to Quash; denying Plaintiff's Motion for Continuance to allow for Limited Discovery; and granting Defendants' Motion to Strike Exhibits/Attachments.

LAW AND DISCUSSION

Special Motion to Strike

The special motion to strike is governed by La. C.C.P. art. 971, which provides:

> 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.
>
> C. (1) The special motion may be filed within ninety days of service of the petition, or in the court's discretion, at any later time upon terms the court deems proper.
>
> (2) If the plaintiff voluntarily dismisses the action prior to the running of the delays for filing an answer, the defendant shall retain the right to file a special motion to strike within the delays provided by Subparagraph (1) of this Paragraph, and the motion shall be heard pursuant to the provisions of this Article.
>
> (3) 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.

The granting of a special motion to strike presents a question of law. Appellate review regarding questions of law is simply a review of whether the trial court was legally correct or legally incorrect. *Thinkstream, Inc. v. Rubin,* 2006-1595 (La. App. 1 Cir. 9/26/07), 971 So. 2d 1092, 1100, *writ denied*, 2007-2113 (La. 1/7/08), 973 So. 2d 730. 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. *Thinkstream,* 971 So.

2d at 1100. Because the granting of a Special Motion to Strike pursuant to La. C.C.P. art. 971 involves issues of law, appellate courts conduct a *de novo* review of the trial court's application of the law. *Aymond v. Dupree,* 2005-1248 (La. App. 3 Cir. 4/12/06), 928 So. 2d 721, 726, *writ denied,* 2006-1729 (La. 10/6/06), 938 So. 2d 85.

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 v. Wells,* 2005-1497 (La. App. 1 Cir. 6/9/06), 938 So. 2d 792, 796. Article 971 was enacted by the legislature as a procedural device to be used early in legal proceedings to screen out meritless claims brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. *Thinkstream,* 971 So. 2d at 1100; *Aymond,* 928 So. 2d at 727. Accordingly, Article 971 provides that a cause of action against a person arising from any act 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. *Lamz,* 938 So. 2d at 796.

Under the shifting burdens of proof established by Article 971, the mover must first establish that the cause of action against him arises from an act by him in the exercise of his right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue. If the mover satisfies this initial burden of proof, the burden then shifts to the plaintiff to demonstrate a probability of success on the claim. *Thinkstream,* 971 So. 2d at 1100.

Thus, we first consider the defendants' initial burden as the moving party to demonstrate that the subject matter of the suit stems from an action relating to free speech and in relation to a public issue. The petition complains of conversations

Roper had with Loupe after he was an elected member of the Metro Council, meetings regarding the Parish Attorney's office, an investigation conducted by the Metro Council regarding the parish Attorney's office, an investigation related to software owned by the City-Parish, and allegedly defamatory statements made by Loupe during a Metro Council meeting that led to Roper's termination by the City-Parish. It is undisputed that the cause of action against the defendants arose from an act by Loupe in furtherance of the right of petition or free speech on a public issue, as Loupe made the allegedly defamatory statements in public at a Metro Council meeting that was aired on television. The defamatory statements involved the employment of the Parish Attorney, Roper, which was a matter of public interest. When the subject matter of the case is a matter of public interest, the case is subject to the provisions of Article 971. *Aymond,* 928 So. 2d at 727 (board members renewing or not renewing the employment contract of attorney for the board was a public issue); *Lamz,* 938 So. 2d at 797 (oral and written statements regarding a judicial candidate for city court held to be in the public interest); *Thinkstream,* 971 So. 2d at 1100-1101 (statements made by law firm in an appeal were of a public interest). Furthermore, as noted by defendants in this appeal, Roper does not assign as error the trial court's determination that her claim arises out of Loupe's exercise of free speech under the United States or Louisiana Constitution in connection with a public issue. Any issue for review which has not been briefed may be considered abandoned by the court of appeal. Uniform Rules of Louisiana Courts of Appeal, Rule 2-12.4(B)(4).

Probability of Success

Once defendants met their initial burden of proof, the burden shifted to Roper to establish the probability of success on her claim against the defendants through the pleadings and supporting affidavits stating the facts upon which the liability is based. La. C.C.P. art. 971(A). Defamation involves the invasion of a

person's interest in his or her reputation and good name. *Sova v. Cove Homeowner's Ass'n, Inc.*, 2011-2220 (La. App. 1 Cir. 9/7/12), 102 So. 3d 863, 873. To maintain a cause of action for defamation, a plaintiff must prove: (1) defamatory words; (2) publication; (3) falsity; (4) malice, actual or implied; and (5) resulting injury. If any one of these required elements is lacking, plaintiff's cause of action fails. *Starr v. Boudreaux*, 2007-0652 (La. App. 1 Cir. 12/21/07), 978 So. 2d 384, 389. Moreover, the "publication" element of a defamation action requires publication or communication of defamatory words to someone other than the person defamed. *Wisner v. Harvey*, 1996-0195 (La. App. 1 Cir. 11/8/96), 694 So. 2d 348, 350. Defamatory words are those that harm the reputation of another so as to lower him in the estimation of the community or to deter others from associating with him. *Thinkstream*, 971 So. 2d at 1101.

Whether a particular statement is objectively capable of having a defamatory meaning is a legal issue to be decided by the court, considering the statement as a whole, the context in which it was made, and the effect it is reasonably intended to produce in the mind of the average listener. *Bell v. Rogers*, 29,757 (La. App. 2 Cir. 8/20/97), 698 So. 2d 749, 754. Insofar as a plaintiff is a public official, the Louisiana Supreme Court has observed that, "[a] public official plaintiff cannot recover for a defamatory statement relating to his or her official conduct, even if false, unless the public official proves actual malice by clear and convincing evidence." *Davis v. Borskey*, 1994-2399 (La. 9/5/95), 660 So. 2d 17, 23 (citing *Kidder v. Anderson*, 354 So. 2d 1306, 1308 (La. 1978), *cert. denied,* 439 U.S. 829, 99 S.Ct. 105, 58 L.Ed.2d 123 (1978)).

In Louisiana, defamatory words have traditionally been classified into two categories: those that are defamatory per se and those that are susceptible of a defamatory meaning. *Kennedy v. Sheriff of East Baton Rouge*, 2005-1418 (La. 7/10/06), 935 So. 2d 669, 674-675. Words which expressly or implicitly accuse

another of criminal conduct, or which, by their very nature tend to injure one's personal or professional reputation, even without considering extrinsic facts or surrounding circumstances, are considered defamatory per se. *Kennedy,* 935 So. 2d at 675. When a plaintiff proves publication of words that are defamatory per se, the elements of falsity and malice are presumed, but may be rebutted by the defendant. *Kennedy,* 935 So.2d at 675. Injury may also be presumed. *Kennedy,* 935 So.2d at 675.

When the words at issue are not defamatory per se, a plaintiff must prove, in addition to defamatory meaning and publication, the elements of falsity, malice, and injury. *Starr,* 978 So. 2d at 389. In cases involving statements made about a public figure, where constitutional limitations are implicated, a plaintiff must prove actual malice, i.e., that the defendant either knew the statement was false or acted with reckless disregard for the truth. *Starr,* 978 So. 2d at 390.

To establish a reckless disregard for the truth, the plaintiff must show that the false publication was made with a high degree of awareness of probable falsity, or that the defendant entertained serious doubt as to the truth of his publication. *Tarpley v. Colfax Chronicle,* 1994-2919 (La. 2/17/95), 650 So. 2d 738, 740. Further, conduct which would constitute reckless disregard is typically found where a story is fabricated by the defendant, is the product of his imagination, or is so inherently improbable that only a reckless man would have put it in circulation. *Starr,* 978 So. 2d at 390.

Therefore, in accordance with cited jurisprudence, in cases involving statements made on an issue of public concern against a media defendant or statements made about a public figure, a plaintiff must prove all elements of his cause of action for defamation, including actual malice, and may not rely on any presumption based on the fact that the words are defamatory per se. *Starr,* 978 So. 2d at 390. A "public figure" can be even a non-public official who is intimately

involved in the resolution of important public questions or who, by reason of his or her fame, shapes events in areas of concern to society at large. *Kennedy,* 935 So. 2d at 676 n.4. Candidates for judicial office qualify as public officials. *Lamz,* 938 So. 2d 798 n.4. Although this court previously held that Roper was not a public official with regard to removal of public officials from office pursuant to La. R.S. 42:1411, *et seq.,* she is a public figure for purposes of defamation since she was intimately involved in the resolution of important public questions. *See Roper v. East Baton Rouge Metropolitan Council,* 2015-0178 (La. App. 1 Cir. 11/6/15), 183 So. 3d 550, 554, *writ denied,* 2015-2231 (La. 2/5/16), 186 So. 3d 1166).

We first note that the petition of Roper contains 181 numbered paragraphs. The trial court ruled that any allegations contained in paragraphs 6-109 were prescribed, as defamation claims prescribe by the one-year prescriptive period governing tortious actions. La. C.C. art. 3492. As Roper does not assign the ruling on prescription as error, this court will not address this ruling and will consider the allegations made in paragraphs 6-109 prescribed.[2]

We also note that Roper alleges that several news organizations published articles concerning the investigation of the software issue. However, the trial court ruled that the news articles were hearsay and struck the paragraphs pertaining to these articles from the petition and from an affidavit filed by Roper. As this issue has not been appealed, it is not before this court.

Roper also alleges that she was called into a meeting with Loupe to discuss the software issue. As all the conversations between Roper and Loupe were private, we do not find that any of these paragraphs contain the necessary element of unprivileged publication to qualify as defamation. To be actionable, the words must be communicated or "published" to someone other than the plaintiff. *Greene*

[2] Roper states in her brief to this court that some of the paragraphs were offered as background information to show the deviousness (and thus malice) of the later statements.

v. State ex rel. Dep't of Corr., 2008-2360 (La. App. 1 Cir. 6/19/09), 21 So. 3d 348, 351.

The remaining allegations in the petition pertain to a Metro Council meeting which took place on September 10, 2014, to consider removing Roper as the Parish Attorney. Roper alleges that at this meeting, Loupe "publically fabricated facts, defaming Roper's integrity and respect in the community, all in an attempt to have her removed as the Parish Attorney." This exact statement is also contained in the affidavit Roper filed in opposition to the defendants' Special Motion to Strike. Roper alleges that at this meeting, Loupe discussed investigations into her office from previous years concerning prosecution of DWI cases and her having an active law practice, in addition to being the Parish Attorney. Roper also alleges that Loupe went on public television at the Metro Council meeting and "insinuated that Roper was in collusion with" the City-Parish employee being investigated and "would not have had a lawful reason to e-mail the source code to her husband but for having a criminal intent." Roper claims that Loupe stated that she would not have been "'caught' if not for another company attempting to sell the City-Parish its own software back." Roper avers that by using the word "caught," Loupe was trying to insinuate criminal activity. She specifically stated:

> In essence, Loupe publicly accused Roper of criminal collusion...in spite of the fact that he had no evidence to suggest there was any truth to his allegations and the allegations were, in fact, utterly false. His comments in full context were as follows:
>
>> With regards to the software issue, I did my own investigation as I told Mary I would do. Her excuse for giving the software to her husband who has a software business on the side, and sending it to her home e-mail address was that she needed him to parse the models to be represented and sent to the copyright patent office. She did this the night before and e-mailed it the next morning. So our IT department pulled up for me the screen shot of what she sent to herself and her husband at her home address. And it's the same thing that she e-mailed the next morning. There were no changes made to it. If she needed her husband's expertise there was a

> means to do that. There was a way to do that. She didn't do that and she would not have been caught had another employee [not] tried to sell us our own software. That's correct. The software that Ms. Roper distributed, a company approached the [C]ity[-][P]arish [and] asked us to buy it back for $500,000.00. I think that's a problem.

In her affidavit, Roper quotes from the television interview of Loupe and from the Metro Council meeting.

The trial court determined that Roper did not meet her burden of showing a probability of success for three reasons: (1) Loupe's words were protected by the legislative privilege; (2) Roper was unable to establish actual malice by clear and convincing evidence; and (3) Loupe was protected by a statutory absolute and/or qualified privilege.

Absolute Privilege

Even if the plaintiff makes a *prima facie* showing of the essential elements of defamation, there is no recovery if the defendant shows that the statement was true or that the statement was protected by an absolute or qualified privilege. *Thomas v. City of Monroe Louisiana*, 36,526 (La. App. 2 Cir. 12/18/02), 833 So. 2d 1282, 1288. The trial court determined that Roper had no probability of success, pursuant to Article 971, since it concluded that Loupe's statements were constitutionally protected by the legislative privilege contained in Louisiana Constitution Article III, § 8 of the Legislative Privileges and Immunities Clause, which states:

> A member of the legislature shall be privileged from arrest, except for felony, during his attendance at session and committee meetings of this house and while going to and from them. **No Member shall be questioned elsewhere for any speech in either house.** (Emphasis added).

This article has been held to constitute "an absolute bar to interference when members are acting within the legislative sphere." *Ruffino v. Tangipahoa Par. Council*, 2006-2073 (La. App. 1 Cir. 6/8/07), 965 So. 2d 414, 417. Furthermore,

this court in *Copsey v. Baer,* 593 So. 2d 685 (La. App. 1 Cir. 1991), *writ denied,* 594 So.2d 876 (La. 1992), examined the origin of the legislative privilege in Article III, § 8 and concluded that inquiries into the motivation for legislative actions ran afoul of Article III, citing an opinion by the United States Supreme Court, which held in *United States v. Gillock,* 445 U.S. 360, 366-67, 100 S.Ct. 1185, 1190, 63 L.Ed.2d 454 (1980), that "the Clause protects against inquiry into the acts that occur in the regular course of the legislative process and into the motivation for those acts." *Copsey,* 593 So. 2d at 687. The prohibition contained in Article III, § 8 extends not only to the Louisiana legislature but also other legislative bodies such as the legislative bodies of parish and city governments. *Ruffino,* 965 So. 2d at 417.

The "privileges and immunities clauses in both the state and federal constitutions are identical." *Copsey,* 593 So. 2d at 688. In interpreting Article III, § 8, Louisiana courts look to federal jurisprudence interpreting Article I, § 6, clause 1, the Speech and Debate Clause of the United States Constitution. *Copsey,* 593 So. 2d at 688. Roper also cites to *Ruffino,* 965 So. 2d at 417, for the proposition that the protection afforded by Article III, § 8 extends to bodies other than the Louisiana legislature, including legislative bodies of the parish and city governments. However, Roper argues that the proceedings in regard to the termination of Roper as Parish Attorney were administrative proceedings outside the legislative sphere, which are not protected by legislative immunity.

While the protection afforded legislators by the federal Speech and Debate Clause of U.S. Const. Art. 1, § 6 has been interpreted as extending "beyond pure speech or debate in either House," the extension "must be an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings." *Gravel v. United States,* 408 U.S. 606, 624, 92 S.Ct. 2614, 2626-27, 33 L.Ed.2d 583 (1972) (citations omitted). Legislators are

not immune for defamation contained in "'news letters' to constituents, news releases and speeches delivered outside Congress," *United States v. Brewster,* 408 U.S. 501, 512, 92 S.Ct. 2531, 2537, 33 L.Ed.2d 507 (1972), or other "transmittal of ... information by individual Members in order to inform the public." *Hutchinson v. Proxmire,* 443 U.S. 111, 133, 99 S.Ct. 2675, 2687, 61 L.Ed.2d 411 (1979). Even where the alleged libel is read from an official committee report, the legislator is not immune, and the court "cannot accept" that a legislator "must be free to disseminate [actionable material], no matter how injurious to private reputation." *Doe v. McMillan,* 412 U.S. 306, 316, 93 S.Ct. 2018, 2026, 36 L.Ed.2d 912 (1973). The federal Fifth Circuit has ruled that a legislator does not enjoy immunity for statements made during an interview about a controversy currently before that legislator's committee. *See Williams v. Brooks,* 945 F.2d 1322, 1331 (5th Cir. 1991), *cert. denied,* 504 U.S. 931, 112 S.Ct. 1996, 118 L.Ed.2d 592 (1992). The Supreme Court has cautioned to be "careful not to extend the scope of the protection further than its purposes require," *Forrester v. White,* 484 U.S. 219, 224, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988).

Roper avers that the test to determine whether a legislator was acting within a "legitimate legislative sphere" is the "functional test," which examines the nature of functions with which a particular official or class of officials have been lawfully entrusted. *Forrester,* 484 U.S. at 224, 108 S.Ct. at 542. In *Forrester,* the Court held that a judge was acting in his administrative capacity, not judicial capacity, when he demoted and discharged a court employee. *Forrester,* 484 U.S. at 229, 108 S.Ct. at 545. Roper asserts that applying the functional test of *Forrester* the action of firing Roper was administrative, not legislative. She claims that all the debate centered on the termination of one specific individual, not a legislative function, such as the vote on a budgetary ordinance or an elimination of the position of Parish Attorney. Roper cites numerous cases pertaining to the finding

of no legislative immunity for the firing of certain public officials when those claims were based on 42 U.S.C. § 1983 or Title VII discrimination.[3] This court notes that *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), does not stand for the proposition asserted by Roper that there is no legislative immunity for a member of Congress for firing of a staff employee. Instead, we find no United States Supreme Court cases that have explicitly decided whether the firing or hiring of a member of a legislator's staff qualifies as a "legitimate legislative activity." In *Davis,* a United States Congressman terminated a deputy administrative assistant because of her gender. The Court held that the plaintiff had a cause of action and that damages were the appropriate remedy, but the Court refused to address whether legislative immunity protected the legislator from the suit since the Court of Appeals did not rule on the issue. *Davis,* 442 U.S. at 236 n.11, 99 S.Ct. at 2272 n.11.

Defendants urge this court to adopt the approach used by the court in *Agromayor v. Colberg,* 738 F.2d 55, 58-60 (1st Cir. 1984), *cert. denied,* 469 U.S. 1037, 105 S.Ct. 515, 83 L.Ed.2d 405 (1984), for determining whether a legislator's employment decisions are immune from suit. The *Agromayor* court stated that immunity should apply only to a personnel decision concerning an employee with "enough opportunity for 'meaningful input' into the legislative process," but warned that courts should not inquire too deeply into "the functions performed by a particular personal legislative aide, inasmuch as such an inquiry itself threaten to undermine the principles that absolute immunity were intended to protect. *Agromayor*, 738 F.2d at 60. However, *Agromayor* was decided before the Supreme Court's decision in *Forrester.* Furthermore, the Fifth Circuit has stated,

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[3] Roper relies on *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); *Alexander v. Holden,* 66 F.3d 62 (4th Cir. 1995); *Gross v. Winter,* 876 F.2d 165 (DC Cir. 1989); *Robertson v. Mullins,* 29 F.3d 132 (4th Cir. 1994); and *Negron-Gaztambide v. Hernandez-Torres,* 35 F.3d 25, 27 (1st Cir. 1994), *cert. denied,* 513 U.S. 1149, 115 S.Ct. 1098, 130 L.Ed.2d 1066 (1995).

> When determining who is entitled to absolute immunity, the [Supreme] Court has taken what has been termed a "functional approach."...The [Supreme] Court "consult[s] the common law to identify those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation that some form of absolute immunity from civil liability was needed to ensure that they are performed 'with independence and without fear of consequences.'"

Loupe v. O'Bannon, 824 F.3d 534, 538 (5th Cir. 2016) (citing *Rehberg v. Paulk,* ___U.S. ___, 132 S.Ct. 1497, 1502, 182 L.Ed.2d 593 (2012); *Burns v. Reed,* 500 U.S. 478, 486, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), quoting *Pierson v. Ray,* 386 U.S. 547, 554, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967)). The Speech and Debate Clause "obviously covers core legislative acts-'how [a Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee.'" *Fields v. Office of Eddie Bernice Johnson,* 459 F.3d 1, 9 (D.C. Cir. 2006), *cert. denied,* 550 U.S. 511, 127 S.Ct. 2018, 167 L.Ed.2d 898 (quoting, *United States v. Brewster,* 408 U.S. 501, 526, 92 S.Ct. 2531, 2544, 33 L.Ed.2d 507 (1972)).

In *Tenney v. Brandhove,* 341 U.S. 367, 377, 71 S.Ct. 783, 789, 95 L.Ed. 1019 (1951), the Court recognized that investigations, whether by standing or special committees, are an established part of representative government. The Court stated:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and voice, and to embody the wisdom and will of its constituents...The informing function of Congress should be preferred even to its legislative function.

Tenney, 341 U.S. at 377 n.6, 71 S.Ct. at 788 n.6 (quotation omitted). Furthermore, the Court stated, "[t]o find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Tenney,* 341 U.S. at 378, 71 S.Ct. at 789.

We also find instructive the case of *Williams v. Johnson*, 597 F. Supp. 2d 107, 113-14 (D.C. Cir. 2009), which held that a councilman was entitled to absolute immunity from a subpoena issued for her statements at a council meeting and a private meeting. The subpoena sought testimony and documents directly related to the councilman's alleged investigation into the employing agency's wrongdoing, and whether the councilman's activities in relation to that investigation were within the sphere of protected legislative activities. The court stated:

> Accordingly, "in determining whether legislative immunity applies, the critical question is whether the action at issue was undertaken within the 'legislative sphere.' " *Alliance for Global Justice,* 437 F.Supp.2d at 36. The Clause "obviously covers core legislative acts-'how [a Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee.' " *Fields v. Off. of Eddie Bernice Johnson,* 459 F.3d 1, 9 (D.C. Cir. 2006) (quoting *United States v. Brewster,* 408 U.S. 501, 515, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972)). In addition, the Supreme Court has held that the Clause also protects "legislative acts" that are "an integral part of the deliberative and communicative processes by which Members participate in committee and [legislative] proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters" within their jurisdiction. *Gravel v. United States,* 408 U.S. 606, 625, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). To that end, the D.C. Circuit has provided a non-exhaustive list of legislative acts protected by the Speech or Debate Clause, including at the least: "delivering an opinion, uttering a speech, or haranguing in debate; proposing legislation; voting on legislation; making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas; holding hearings; and introducing material at Committee hearings." *Fields,* 459 F.3d at 10-11 (internal citations, quotation marks, and footnotes omitted).

Additionally, legislative investigations, both formal and informal, have been held to be protected by the Speech and Debate Clause. *Williams,* 597 F. Supp. 2d at 113-14. "'The power to investigate...plainly falls within' the legislative sphere." *Williams,* 597 F. Supp. 2d at 114 (quoting *Eastland v. U.S. Servicemen's Fund,* 421 U.S. 491, 504, 95 S.Ct. 1813, 1822, 44 L.Ed.2d 324 (1975)).

The cases relied upon by Roper are inapposite to the present case which is a defamation case, not a termination case. At issue are the **statements** made during

an investigative hearing, not whether the vote to terminate by the entire Metro Council was discriminatory. This court has already determined that Roper was an at-will employee that could be terminated without the Metro Council meeting the comprehensive statutory scheme relating to the removal of public officials contained in La. R.S. 42:1411, *et seq*. *Roper v. East Baton Rouge Metropolitan Council,* 2015-0178 (La. App. 1 Cir. 11/6/15), 183 So. 3d 550, 555, *writ denied,* 2015-2231 (La. 2/5/16), 186 So. 3d 1166. The case currently before this court pertains to the allegedly defamatory statements made by Loupe. We are not determining whether the employment or personnel decision was in the legislative sphere, but whether the **statements** made by Loupe during the Metro Council meeting were in the legislative sphere.

Section 11.01 of the City-Parish Plan of Government specifically provides for the appointment of the Parish Attorney by the Metro Council, and Section 2.13 allows the Metro Council to remove any officer or employee it appointed. The Metro Council has the authority to remove any officer or employee appointed by it after a hearing, which may be public at the option of the person to be removed. Loupe, as a member of the Metro Council, was entitled to participate in any investigation of the Parish Attorney and/or in the removal hearing.

This court has stated that the "privilege extends to freedom of speech in the legislative forum, and when members are acting within the 'legitimate legislative sphere,' the privilege is an absolute bar to interference." *In re Arnold,* 2007-2342 (La. App. 1 Cir. 5/23/08), 991 So. 2d 531, 542. The legislative privilege is to be read broadly to effectuate its purposes. *Arnold,* 991 So. 2d at 542.

Applying the functional approach, as suggested by Roper, we agree with the trial court that Loupe was acting within the legislative sphere in participating in an investigatory hearing to determine whether to terminate Roper. What is at issue in this case is exactly what the Supreme Court has determined to be core legislative

acts-"how [Loupe] spoke, how he debated, how he voted, or anything he did in the chamber or in committee." *See Brewster,* 408 U.S. at 526, 92 S.Ct. at 2544.

The cases relied upon by Roper regarding administrative decisions in the firing of an employee were all done outside a legislative committee or outside judicial functions. We have already stated that *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) did not address the issue of whether legislative immunity protected the legislator, since the Court of Appeals did not rule on the issue. In *Alexander v. Holden,* 66 F.3d 62 (4th Cir. 1995), the issue before the court was whether there was legislative immunity for county commissioners firing a county employee based on race and political affiliation when the employee filed suit for discrimination under 42 U.S.C. §§ 1981 and 1983. In *Gross v. Winter,* 876 F.2d 165 (DC Cir. 1989), the court found no legislative immunity for the city council's firing of an employee when she made claims under 42 U.S.C. § 1983. The court also addressed a defamation claim since a councilman called the employee "incompetent" during a press conference. However, this statement was made outside the legislative sphere, as it was made during a press conference, not during a council meeting. In *Roberson v. Mullins,* 29 F.3d 132 (4th Cir. 1994), the issue was the termination of a county public works superintendent and whether that termination violated 42 U.S.C. § 1983. In *Negron-Gaztambide v. Hernandez-Torres,* 35 F.3d 25, 27 (1st Cir. 1994), *cert. denied,* 513 U.S. 1149, 115 S.Ct. 1098, 130 L.Ed.2d 1066 (1995), the court determined that the legislators' decision to replace an employee was an administrative act, not a legislative act. Roper also relies on *Cotton v. Banks,* 310 Mich.App. 104, 872 N.W.2d 1 (2015), which again involved whether a wrongful termination decision fell within the legislative sphere for purposes of absolute immunity.

We find the above cases distinguishable from the present facts, since those cases all involve whether the decision to terminate was an administrative act. All of the allegations in the petition in the present case involve **statements** made during a Metro Council meeting in an investigative function of the Metro Council, which is within the legitimate legislative sphere. Therefore, the trial court did not err in finding that absolute immunity applies to the actions of Loupe.

Given the above ruling, the discussion of the parties regarding whether Roper could establish actual malice or whether Loupe was entitled to either an absolute privilege pursuant to La. R.S. 14:50 or a qualified privilege pursuant to La. R.S. 14:49 is moot, and we decline to address these issues.

Motion to Quash

Roper claims that the trial court erred in granting the defendants' Motion to Quash the subpoenas she sought to issue to present live testimony at the hearing on the special Motion to Strike. This court has stated, "[t]he trial court is required by law to decide the [La. C.C.P.] art. 971 motion on the basis of 'the pleadings and supporting and opposing affidavits.'" A plaintiff is required to establish "a probability of success" on a claim of defamation with the necessary documents. *Britton v. Hustmyre*, 2009-0847, p. 12 (La. App. 1 Cir. 3/26/10) (unpublished), 2010 WL 1170222. *Williams v. New Orleans Ernest N. Morial Convention Center,* 2011-1412 (La. App. 4 Cir. 5/11/12), 92 So. 3d 572, 579, *cert. denied,* ___U.S.___, 133 S.Ct. 2033, 185 L.Ed.2d 896 (2013), has held that the trial court erred in eliciting testimony for a hearing on an Article 971 motion, and that instead, the trial court should have afforded the plaintiff an "opportunity to brief his argument and to provide supporting documentation of his position to the court."

Both parties rely upon the *Aymond* case in which the plaintiff was denied an opportunity to present live testimony at an Article 971 hearing. Defendants assert

that *Aymond* holds that live testimony is not permitted in an Article 971 hearing. Roper claims that *Aymond* does not stand for the proposition that live testimony is absolutely prohibited in an Article 971 hearing, since the appellate court noted that the trial court did not believe presenting live testimony would result in a different outcome. *Aymond,* 928 So. 2d at 733. We note that the third circuit specifically stated:

> The trial court apparently did not believe that calling these men as witnesses or allowing further discovery would result in a different outcome. As previously indicated, a trial court's decisions regarding discovery are not to be disturbed absent an abuse of discretion. In this case, the special motion to strike is to be granted based upon the pleadings and affidavits, and this is what the trial court did.

Aymond, 928 So. 2d at 733. We agree with the third circuit, as we also stated in *Britton,* that an Article 971 hearing is to be based on pleadings and affidavits, not on live testimony. Therefore, the trial court did not err in granting the Motion to Quash.

Motion for Continuance to Allow for Limited Discovery

The denial of a motion for continuance will not be disturbed absent a showing of an abuse of discretion by the trial court. *Newsome v. Homer Memorial Medical Center,* 2010-0564 (La. 4/9/10), 32 So. 3d 800, 802. Article 971(D) requires that discovery proceedings be stayed upon the filing of a notice of motion made pursuant to Article 971. "The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion." La. C.C.P. art. 971(D). The trial court, "for good cause shown, **may** order that specified discovery be conducted." La. C.C.P. art. 971(D) (emphasis added).

When used in a statute, the word "may" is permissive and denotes discretion. *Blake Int'l v. State*, 2015-0164 (La. App. 1 Cir. 9/18/15), 182 So. 3d 169, 177. Roper fails to specify any "good cause" shown to the trial court to lift the mandatory stay. Roper admits in brief that the trial court had discretion as to

whether to allow her to conduct discovery. There is no specification by Roper as to how the trial court abused this discretion. Therefore, this assignment of error is without merit.

Motion to Strike Exhibits/Attachments

Roper claims that the trial court erred in granting the defendants' Motion to Strike Exhibits/Attachments with regard to news media reports.[4] The trial court granted the motion based on hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. La. Code Evid. 801. Hearsay is not admissible except as otherwise provided by this Code or other legislation. La. Code Evid. Art. 802.

Roper attached and quoted numerous news articles in her affidavit filed in opposition of the Special Motion to Strike. Roper used the news articles in an attempt to establish a probability of success on her defamation claim. However, none of the articles were authored by Roper. *See State v. Harper,* 1993-2682 (La. 11/30/94), 646 So. 2d 338, 342 (newspaper article was inadmissible hearsay when offered as proof of the matter asserted); *Russell v. Amiss,* 386 So. 2d 656, 658 (La. App. 1 Cir. 1980) (statement in a newspaper article "that the sheriff's office was the source of the erroneous report is the rankest hearsay, and is entitled to no weight."); *Abadie v. Metro. Life Ins. Co.,* 2000-344 (La. App. 5 Cir. 3/28/01), 784 So. 2d 46, 76, *writs denied,* 2001-1533, 2001-1534 (La. 12/14/01), 804 So. 2d 642, 2001-1543, 2001-1544, 2001-1629 (La. 12/14/01), 804 So. 2d 643, 2001-1853, 2001-1931 (La. 12/14/01), 804 So. 2d 644, and *cert. denied,* 535 U.S. 1107, 122 S.Ct. 2318, 152 L.Ed.2d 1071 (2002) (newspaper article inadmissible hearsay).

[4] The trial court also excluded a report attached to Roper's affidavit, as well as portions of her affidavit that cited to the inadmissible media reports and report. Roper does not assign as error or address the trial court's exclusion of the report or the portions of her affidavit. Therefore, that is not before us on appeal.

Roper has not set forth any law that would allow hearsay to be part of an affidavit. Therefore, this assignment is without error.

CONCLUSION

For the above and foregoing reasons, the trial court's judgment of July 29, 2015, in favor of defendants, John Chandler Loupe and The Consolidated Governing Body of The City of Baton Rouge and The Parish of East Baton Rouge, and the trial court's judgment of August 18, 2015, denying the motion for new trial, are affirmed. Costs of this appeal are assessed against plaintiff, Mary E. Roper.

AFFIRMED.