UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WOODWARD HARBOR L.L.C. and LSU HEALTH FOUNDATION NEW ORLEANS	*	**CIVIL ACTION NO. 2:23-CV-05824**
	*	**JUDGE: BRANDON S. LONG**
versus	*	**MAG. JUDGE: EVA J. DOSSIER**
CITY OF MANDEVILLE and JASON ZUCKERMAN, INDIVIDUALLY	*	**DIVISION: O (3)**

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REPLY MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR ATTORNEY'S FEES ON BEHALF OF JASON ZUCKERMAN AND CITY OF MANDEVILLE

Defendants Jason Zuckerman and the City of Mandeville respond to the oppositions filed by Woodward Harbor L.L.C. ("Woodward")[1] and LSU Health Foundation New Orleans ("LSU")[2] and reply in further support of their renewed motion for reasonable attorney's fees.[3]

I. Plaintiffs do not object to the amount of fees sought; the Court should order the full amount.

As a preliminary note, neither plaintiff disputes the *amount* of fees.[4] Thus, if the Court is satisfied that the movers meet the legal test, it should award the full amount requested: $42,926.18 in fees and $2,321.87 in costs.[5]

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1 R. Doc. 111, Woodward's opposition.

2 R. Doc. 112, LSU's opposition.

3 R. Doc. 107, renewed motion for attorney's fees.

4 R. Doc. 111, Woodward's opposition, p. 14 n.17 ("Woodward Harbor does not challenge the amount of [Flanagan] Partners LLP's fees."); *see generally* R. Doc. 112, LSU's opposition (failing to object to the amount sought).

5 R. Doc. 107, renewed motion for attorney's fees, p. 2.

If the Court finds that some of the plaintiffs' asserted claims were not frivolous, however, the Court should engage in an issue-by-issue analysis to determine which claims merit attorney's fees.[6] In other words, if the plaintiffs convince the Court that one of their claims was *not* frivolous, that does not mean that no fees should be awarded. Instead, the amount sought should be reduced to account for their non-frivolous claims.

II. Woodward's assertion that it had to file a lawsuit within 30 days is mistaken.

Woodward states that it "filed its Complaint within 30 days as required by Article 4.3.4 of the [Comprehensive Land Use Regulation Ordinance, the] CLURO."[7] It asserts that although it was unsuccessful, it had to work within that tight timeframe so "[i]t cannot be denied that in those 30 days, Woodward Harbor presented all of the facts available to it and presented viable causes of action."[8]

But the cited provision does *not* require the filing of a lawsuit within 30 days—much less for individual claims against a council member on federal statutory grounds. Instead, that provision requires an appeal to be filed with the "Zoning Commission within thirty (30) days after the decision has been rendered."[9] It is only after the Zoning Commission has made its decision that an

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6 *Buisson Creative Strategies, LLC v. Roberts*, No. 15-6272, 2018 WL 1070118, at *2 (E.D. La. Feb. 27, 2018) ("If a suit involves both frivolous and non-frivolous claims, a court may grant reasonable fees to the prevailing defendant only for costs that the defendant would not have incurred but for the frivolous claims. Accordingly, a court must assess the frivolity of each claim individually.") (citing *Fox v. Vice*, 563 U.S. 826, 836 (2011) and *Greco v. Velvet Cactus, LLC*, No. 13-3514, 2014 WL 6684913, at *2 (E.D. La. Nov. 25, 2014)).

7 R. Doc. 111, Woodward's opposition, p. 2.

8 *Id.* at p. 8 ("In the present matter, although Woodward Harbor was unsuccessful in this case, it had reasonable grounds to bring its suit and Woodward Harbor was required by the City's Ordinance to bring suit within 30 days.").

9 CLURO art. 4.3.4.1.(1) ("Any person aggrieved by a decision of any of the officers, departments, or City staff that administer the provisions of these land use regulations may appeal to the Zoning Commission within thirty (30) days after the decision has been rendered. If a building or structure

aggrieved person can file a writ of certiorari for review in the district court of the parish.[10]

So not only did Woodward provide a mistaken narrative for its urgency in filing this frivolous lawsuit, but it also failed to follow the procedural remedies allowed to it before rushing into federal court.

III. Nearly a year after their claims were dismissed, the plaintiffs still cannot point to precedent showing a "clearly established" right that would disturb the application of qualified immunity.

Once qualified immunity is invoked, the plaintiffs bear the burden to disprove it.[11] To do so, the plaintiffs have to point to the violation of a "clearly established" right.[12] "[E]xisting precedent must have placed the statutory or constitutional question *beyond debate*."[13] The plaintiffs knew they carried this burden as they tried (and failed) to meet it in their opposition to Mr. Zuckerman's motion to dismiss.[14]

Now, nearly a year after having lost their bid to keep the claims against Mr. Zuckerman alive, LSU cites an unpublished, non-controlling 2015 Fifth Circuit case, *Da Vinci Investment, Lim-*

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is believed by the Building Inspector to be unsafe or dangerous, the Planning Director may limit the time for such appeal to a shorter period with the consent of the Mayor."), available at https://www.cityofmandeville.com/sites/default/files/fileattachments/planning_and_development/page/2483/cluro6-25-15_revised_ordin.25-11_protected_trees.pdf.

10 *Id.* art. 4.3.4.7 ("Any person or persons, or any officer, department, board, bureau or any other agency of the community jointly or severally aggrieved by any decision of the Zoning Commission may present to the District Court of the parish, within thirty (30) days after filing of the decision in the office of the Board, a writ of certiorari asking for such relief and under such rules and regulations as are provided for such matters in appropriate legislation of the state.").

11 *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009) ("Although nominally an affirmative defense, the plaintiff has the burden to negate the assertion of qualified immunity once properly raised.").

12 *Bustillos v. El Paso Cnty. Hosp. Dist.*, 891 F.3d 214, 222 (5th Cir. 2018).

13 *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); emphasis added).

14 R. Doc. 30, plaintiffs' opposition to motion to dismiss, pp. 19–20 (citing a trio of cases).

ited Partnership v. Parker, for the first time in this litigation.[15] There is no indication that it relied upon the case (or even knew about it) before this opposition.

But *Da Vinci* is nonprecedential and distinguishable. For starters, the landowner sued *all* the council members who voted against the project in their individual and official capacities.[16] Here, the plaintiffs singled out Mr. Zuckerman in his individual capacity (even though he was one of five votes on a unanimous council to deny the proposed development). Mr. Zuckerman could not have acted on his own, but the plaintiffs still singled him out in this lawsuit.

Further, *Da Vinci*'s analysis of *legislative immunity*, which is not an issue reached by this Court, is unhelpful.[17] This Court applied qualified immunity and held that the plaintiffs could not show a violation that was clearly established.[18] LSU's citation to a case rejecting the application of absolute legislative immunity does not move the needle on the crucial issue here: whether the plaintiffs had a clearly established right that would bar qualified immunity. In other words, a case rejecting the application of absolute legislative immunity does not show that the plaintiffs had a clearly established right that would bar qualified immunity.

The *Da Vinci* court did analyze qualified immunity and held that the council members were entitled to it on the substantive due process claims.[19] But the court denied qualified immunity on

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15 R. Doc. 112, LSU's opposition, p. 5. LSU attempts to distance itself from the early pleadings in this case, but that is no excuse for joining a case asserting frivolous claims. *Id.* at pp. 4–5 ("As the Court is aware, undersigned counsel did not get involved in this matter until over 16 months after the Complaint was filed and over 14 months after Mr. Zuckerman's Rule 12(b)(6) motion to dismiss was filed. That was over a year after the pleadings were closed on the Motion to Dismiss.").

16 *Da Vinci Inv., Ltd. P'ship v. Parker*, 622 F. App'x 367, 369 (5th Cir. 2015).

17 *Id.* at 371–73.

18 R. Doc. 69, order and reasons, p. 1.

19 *Da Vinci*, 622 F. App'x at 376.

the equal protection claim because the council members failed to address the issue in their initial brief.[20] So based on that waiver and the allegations in the pleadings, the equal protection claim survived.[21] At best then, LSU has cited a factually dissimilar case where the council members' waiver of an argument frustrated the application of qualified immunity to some claims. They have not cited a controlling case[22] that puts the constitutional question in this case "beyond debate."[23]

Next, both LSU and Woodward cite *Buisson Creative Strategies, LLC v. Roberts*[24] in which the court declined to award attorney's fees. That case is distinguishable because it was heavily litigated. While ultimately unsuccessful, the plaintiff's claims against the individual council member were not completely groundless and were dismissed under legislative immunity only a month before the scheduled trial.[25] The extensive litigation included the preparation of a pretrial order; and motions for preliminary injunction, for summary judgment, to quash a deposition, and in limine.[26] The court was persuaded by the fact that "briefing on the motion for summary judgment extended nearly a year after Defendant waived service and well into significant discovery practice."[27] In contrast, the claims in this case were dismissed at the Rule 12 stage.

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20 *Id.* at 376–77.

21 *Id.*

22 *See, e.g., Wilson v. Layne*, 526 U.S. 603, 617 (1999) ("Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.").

23 *Bustillos v. El Paso Cnty. Hosp. Dist.*, 891 F.3d 214, 222 (5th Cir. 2018).

24 R. Doc. 111, Woodward's opposition, pp. 7–8; R. Doc. 112, LSU's opposition, p. 11 (citing *Buisson*, No. 15-6272, 2018 WL 1070118 (E.D. La. Feb. 27, 2018).

25 *Buisson*, 2018 WL 1070118, at *1–2.

26 *Id.* at *1.

27 *Id.* at *2. Further, in *Buisson*, the defendants reversed course and decided not to enforce the ordinance that was being challenged. That decision eliminated the plaintiff's standing and required dis-

IV. Both plaintiffs try to reframe their losses as wins; their claims failed because they were "frivolous, unreasonable, and without foundation."

Woodward makes much of the fact that it did not amend its complaint.[28] It highlights that it "does not challenge this Honorable Court's decision to refuse to allow it to amend its Complaint."[29] But Woodward *did* request leave to amend its complaint, which this Court denied as futile.[30] Its compliance with this Court's order does not make its case any more defensible.

For its part, LSU argues that "[t]he claims here were dismissed because the Court found that Plaintiffs did not identify clearly established precedent that placed Mr. Zuckerman's alleged conduct beyond debate, not because the legal theories were indisputably foreclosed."[31] But its argument is circular. The claims against Mr. Zuckerman are foreclosed precisely *because* there is no clearly established precedent. That is how qualified immunity works. It is "frivolous, unreasonable, [and] without foundation" to sue on a claim that has no legal support. And the plaintiffs had access to all the information they needed to determine that before singling out Mr. Zuckerman in their suit.

V. Litigation should not be weaponized as a tool to damage a public official in a re-election year.

Neither plaintiff explains why Mr. Zuckerman was sued in his individual capacity.[32] Even

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missal of the claims. *Id.* at *3. In this case, the defendants did not change their decision, but stood by the City Council's vote. There was no material change that affected the plaintiffs' claims. The claims were frivolous to begin with.

28 R. Doc. 111, Woodward's opposition, pp. 9–11.

29 *Id.* at p. 9.

30 R. Doc. 69, order and reasons, pp. 18–19 (explaining "Sucette's failure to give any indication that it could plead facts sufficient to overcome Zuckerman's qualified-immunity defenses").

31 R. Doc. 112, LSU's opposition, pp. 10–11.

32 Perhaps understanding the deficiencies in its complaint, Woodward now asserts that Mr. Zuckerman's employer is "a competitor of the design builder for the proposed project." R. Doc. 111, Woodward's opposition, p. 3. That assertion is irrelevant because it was never pleaded. Woodward

assuming there were merit to their claims, the recovery would have been the same by suing the City. There was nothing to gain *in litigation* by adding Mr. Zuckerman to this lawsuit.

But there was much to gain in the political arena. The plaintiffs made a strategic decision to target an elected official, in his individual capacity, in a re-election year.[33] And Mr. Zuckerman's eventual victory was not a foregone conclusion.[34] The at-large election for two council seats was hotly contested. The top contender took 36% of the vote while Mr. Zuckerman took the second spot with 33%. His next closest opponent took 31%.[35]

This frivolous lawsuit interfered with Mr. Zuckerman's official duties. The taxpayers of the City of Mandeville should not be left with the bill to combat that vindictive strategy.

VI. Conclusion

The plaintiffs' case was "frivolous, unreasonable, and without foundation." No amount of

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cites one paragraph of the complaint in support. But nothing in that paragraph alleges that Mr. Zuckerman's employer was a competitor. R. Doc. 1, verified complaint, ¶ 69 ("Zuckerman is an architect and often stated to many that his employer could have prepared better plans for the project than those submitted by the Defendants. Thus, Zuckerman substituted his personal preferences and bias to kill the project instead of applying the Comprehensive Plan and CLURO in a reasonable manner."). This is just a post-hoc rationalization trying to make the plaintiffs' case seem better than it was. And it would not matter. No case holds that public officials cannot use their personal experience to help decide issues.

[33] Sara Pagones, *Meet the 5 candidates running in three Mandeville City Council races March 23*, NOLA.COM (Feb. 26, 2024), https://www.nola.com/news/northshore/5-candidates-seek-three-open-seats-on-mandeville-council/article_cfeedbf2-d10b-11ee-9686-afc0eaee4aa0.html (describing Mr. Zuckerman's inclusion on the March 23, 2024 ballot).

[34] Kim Chatelain, *Mandeville Mayor Clay Madden, City Council members sworn in*, NOLA.COM (July 1, 2024), https://www.nola.com/news/communities/mandeville-mayor-clay-madden-city-council-members-sworn-in/article_31486bc2-35b9-11ef-b268-83d3896ad6fd.html (noting Mr. Zuckerman's election).

[35] Bob Warren, *Mandeville voters decided three City Council races Saturday. See how they voted.*, NOLA.COM (Mar. 23, 2024), https://www.nola.com/news/northshore/mandeville-voters-decide-three-city-council -races-saturday/article_001d15f0-e88b-11ee-8d79-0bb3bb01c12b1.html ("Complete but unofficial results in that race show Discon had 36% of the vote, Zuckerman had 33% and Burguieres had 31%.").

reframing or post-hoc legal arguments changes the fact that their claims against Mr. Zuckerman did not have a leg to stand on from the beginning. The plaintiffs are still unable to identify any controlling precedent that would have put Mr. Zuckerman on notice that voting against their business interests, along with a unanimous Mandeville City Council, would subject him to personal liability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of March, 2026, the foregoing motion was filed online through the CM/ECF system which transmits an electronic copy to all counsel of record.

/s/ Thomas M. Flanagan