

**STATE OF LOUISIANA**  
**COURT OF APPEAL, THIRD CIRCUIT**

**03-1144**

**CATHY DARDEN**

**VERSUS**

**R. CRAIG SMITH & THE FERRIDAY VILLA PARTNERSHIP**

**COOKS, J. concurs in part in the result, and dissents in part.**

I concur with the result reached by the majority opinion, however, I differ with the opinion in two respects. I would not have awarded attorney's fees to Mr. Smith and FVP under La.Code Civ.P. art. 971 or, alternatively, I would have decided the case by way of the motion for summary judgment. The inquiry by the court under La.Code Civ.P.art. 971 is whether the "plaintiff has established a probability of success on the claim" while the test for summary judgment is whether there are any genuine issues of material fact. Both procedural vehicles require an examination of the underlying elements of proof required to support the cause of action. On its face, it may appear only a question of semantics. However, such is not the case, according to the result reached by the majority opinion. La.Code Civ.P. art. 971(B) provides, in relevant part:

In any action subject to Paragraph A of this Article, a prevailing defendant on a special motion to strike shall be entitled to recover reasonable attorney's fees and costs.

By mandating the award of attorney's fees to a prevailing defendant, in every case, as the majority has done, we risk penalizing individuals for asserting their constitutional right to petition the court for redress of an alleged grievance. Although Ms. Darden did not present enough evidence to sustain her cause of action, she had every right to defend her character and reputation against a perceived attack. She had a reasonable belief in the rightness of her cause evidenced by the fact that both the

federal petition and the ethics complaint were resolved in her favor. I would find the award of attorney's fees a discretionary matter based on the individual facts of the case and, in this case, I would have declined an award. This is the view of the Fourth Circuit in *Stern v. Doe*, 2001-0914 (La.App. 4 Cir. 12/27/01), 806 So.2d 98. In *Stern*, a high school student was mistakenly featured on a television program as a truant. He sued the station on a claim of false light, invasion of privacy. The television station filed a motion to strike and asked for attorney's fees. The court found the legislative "intent of this statute is to encourage continued participation in matters of public significance and to prevent this participation from being chilled through an abuse of judicial process." *Id.* at 101. The court used this standard in affirming the trial court's denial of attorney's fees, finding "there is insufficient evidence that plaintiff's claim was attempting to abuse the judicial system." *Id.* at 103. To mandate attorney's fees as a penalty in every case would chill a plaintiff's right to petition the court. If, in the alternative, La.Code Civ.P. art. 971 does mandate an award of attorney's fees in every case to a prevailing defendant, I would have used the motion for summary judgment to decide this case.