NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 1489

JANICE M. HORNOT

VERSUS

LEONARD CARDENAS III

Judgment Rendered: JUN 20 2008

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 534,772

Honorable William A. Morvant

* * * * * * * *

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and
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Counsel for Defendant/Appellee
Leonard Cardenas III

* * * * * * * *

BEFORE: WHIPPLE, GUIDRY, GAIDRY, McCLENDON,
AND HUGHES

Hughes, J., concurs.

GUIDRY, J.

This case arises out of a claim by a personal injury client against her former attorney for alleged actions and/or omissions designed to cause her emotional and mental distress and anguish, for fraudulent acts, and for return of documents, pleadings, papers, deposition transcripts, and funds in defendant's possession relating in any manner to the case in which defendant represented plaintiff. Defendant attorney, Leonard Cardenas, reconvened alleging that he was entitled to attorney fees and out-of-pocket expenses in connection with his representation of plaintiff in the underlying personal injury action, and that he was entitled to general and special damages for plaintiff's intentional infliction of emotional distress and defamation of him. Plaintiff appeals a trial court judgment maintaining defendant's reconventional demands and additionally imposing sanctions against her pursuant to La. Code Civ. P. art. 863.[1] For the following reasons, we affirm in part and vacate and remand in part.

FACTS AND PROCEDURAL HISTORY

Janice Hornot, an attorney, was injured in an automobile accident that occurred in March 1996. In approximately October 2001, she contacted Mr. Leonard Cardenas to represent her in connection with that accident. Previously, Ms. Hornot was represented by another attorney who filed suit on her behalf and conducted preliminary discovery.

Mr. Cardenas sent Ms. Hornot a letter dated October 26, 2001, in which he discussed accepting her as a client. Despite acknowledging the many obstacles in her case, which he pointed out defendants would assuredly use to

[1] Plaintiff does not appeal that portion of the trial court judgment that dismisses all of her claims.

their advantage,[2] Mr. Cardenas expressed a belief that her claims were legitimate and a willingness to represent her after a thorough review of all file materials. Moreover, Mr. Cardenas expressed a willingness to accept a discounted contingency fee.

Mr. Cardenas sent Ms. Hornot another letter on October 30, 2001, to discuss the issues raised in the recent deposition of Dr. Steven Bailey, a neurosurgeon that Ms. Hornot had seen on two occasions. As expected, the defense attorney asked the doctor to assume certain things, including Ms. Hornot's extensive medical history, the fact that she did not initially report an injury in connection with this accident, and that she did not seek medical treatment for an extended period of time. With all the assumptions, Dr. Bailey testified that he could in no way relate Ms. Hornot's symptoms of which she complained to the March 1996 automobile accident. Mr. Cardenas raised concerns that Ms. Hornot's expectations concerning the case may not be realistic, and he requested that she give some serious consideration to an amount of money that she would accept in settlement of the matter.

In a letter to Ms. Hornot dated January 10, 2002, Mr. Cardenas again discussed the possibility of settling her personal injury case. He stated that "I believe that the insurance company may be willing to pay up to, but probably no more than, $100,000 if we push the matter." He suggested making a settlement demand of $185,000.00. Mr. Cardenas also addressed his proposed fee. He stated "as a professional and personal courtesy and favor to you, I am

[2] These obstacles were noted to be:

1) Reporting no injury to the investigating police officer;
2) Failing to receive any medical attention or treatment for approximately fifteen months after the accident;
3) Having two intervening accidents before receiving medical treatment, one involving a fall and the other a rear-end accident about one month prior to her first medical visit following the subject accident;
4) An extensive preexisting medical history, including prior cervical fusion and the degenerative and progressive nature of that condition; and
5) An apparent diagnosis of carpal tunnel syndrome prior to this accident.

willing to reduce my fee to 17.5% of the gross amount recovered." Mr. Cardenas requested that Ms. Hornot sign and date the letter if the strategy and fee agreement were acceptable to her.[3]

Ms. Hornot testified that she gave Mr. Cardenas verbal authority to make a settlement offer of $200,000.00. She also verbally agreed to a contingency fee of 17.5%. Thereafter, Mr. Cardenas advised Ms. Hornot that the defense attorney in the personal injury litigation was not interested in responding to the settlement offer at that point, but would rather take the case to mediation.

Ms. Hornot was reluctant to mediate her claims. In a voice mail that Ms. Hornot left for Mr. Cardenas, she indicated that she would not attend mediation unless the defendant would bear the entire cost of the mediation, and she also felt that everyone was "ganging up" on her. In response to the voice mail, Mr. Cardenas sent Ms. Hornot a letter dated March 12, 2002. Mr. Cardenas expressed increasing concern that he would not be able to represent Ms. Hornot to her satisfaction. In that letter, he advised Ms. Hornot that if he did not hear from her within two days, he would withdraw from his representation of her. Ultimately, Ms. Hornot agreed to attend the mediation with Mr. Cardenas as her counsel. Ms. Hornot's personal injury claim was settled at the mediation for $95,000.00.

After the mediation, Ms. Hornot essentially avoided Mr. Cardenas' requests to come to his office to execute the release and receipt in order for him to disburse the settlement funds. Mr. Cardenas wrote to Ms. Hornot on more than one occasion to inform her that defense counsel was in the process of filing a Motion to Enforce the Settlement and, ultimately, the motion was

[3] Ms. Hornot neither signed nor returned the copy of the letter.

filed. In correspondence dated July 12, 2002, Mr. Cardenas urged Ms. Hornot to contact him immediately or he would withdraw as counsel.

At trial, Ms. Hornot testified that she felt coerced into attending mediation. Ms. Hornot testified that over the course of the attorney-client relationship, Mr. Cardenas informed her that that there was talk or mention of "insurance fraud" against her by defense counsel. This allegedly arose from the fact that Ms. Hornot gave testimony in a deposition to the effect that she did not seek treatment for the injuries she allegedly sustained in the accident for some twenty-two months, because she did not have health insurance and did not want to create a preexisting medical condition for insurance purposes. Ms. Hornot testified that although she knew that she had not committed insurance fraud, she was very concerned about the allegations and felt that the mediation would be unfair. She also testified that she asked Mr. Cardenas to propound discovery concerning the allegations to ascertain the basis for them. Ms. Hornot testified that she was distressed to learn that Mr. Cardenas had not investigated the insurance fraud allegation prior to the mediation, but she conceded that Mr. Cardenas himself had never accused her of committing insurance fraud. However, she testified that she felt constantly distressed about this unsupported allegation looming out there. Ms. Hornot testified that Mr. Cardenas pressured her into mediation and essentially used the allegations of insurance fraud as leverage to get her to settle the case.

On the issue of Mr. Cardenas' entitlement to attorney fees in connection with his representation of her in the personal injury litigation, Ms. Hornot testified that she did not feel that Mr. Cardenas should be entitled to collect a legal fee because he breached the duty of good faith and fair dealing towards her by failing or refusing to investigate and/or clarify the source of the insurance fraud allegations made against her. Yet, Ms. Hornot later testified

that the 17.5% contingency fee was reasonable, and she had expressed acquiescence to it. However, she was adamant that she never gave Mr. Cardenas permission to endorse the settlement check and deposit it into his trust account.

Concerning the allegation that Mr. Cardenas failed to return her papers, pleadings, documents, et cetera, Ms. Hornot reluctantly conceded that she, or someone on her behalf, picked up her file on April 8, 2003, and it contained everything except tax returns. Notably, she was unable to testify with certainty whether Mr. Cardenas was ever in possession of her tax returns.

Mr. Cardenas' testimony concerning the mediation and his representation of Ms. Hornot was entirely different. Mr. Cardenas testified that when he first met Ms. Hornot she was "pretty pitiful," and he thought she needed a lawyer. He testified that she came in crying and desperate and begged him to take her case. Mr. Cardenas further testified that he felt "honored" that another attorney so desperately wanted him to represent her.

On the issue of a contingency fee contract, Mr. Cardenas readily admitted that he erred in not getting a signed contract. However, he was dealing with an attorney, a "sophisticated person," and he never dreamed he would end up in the position of having to fight for his attorney fees. Moreover, he testified that Ms. Hornot gave him express permission to endorse the settlement check and deposit it into his trust account.

Mr. Cardenas testified that he believed that Ms. Hornot voluntarily participated in the mediation and settled her case. Mr. Cardenas believed that mediation was in her best interest because the gap in medical treatment was devastating to her case, and this, coupled with her unsatisfactory or suspicious explanation for why she waited so long to seek medical treatment, was problematic. Mr. Cardenas testified that he did not believe that Ms. Hornot

would intentionally seek to conceal her medical history from whatever health care insurer she might obtain, but the statement that she did not want to create a preexisting condition would certainly be utilized against her by any good defense attorney.

Moreover, Mr. Cardenas testified that he never used the term "insurance fraud," nor did the defense attorney. Mr. Cardenas told Ms. Hornot that the defense attorney simply stated that he intended to use her explanation for lack of medical treatment against her. Mr. Cardenas testified that this whole "insurance fraud" thing blew up only after Ms. Hornot decided that she was dissatisfied with the amount of the settlement reached at mediation.

Regarding the $95,000.00 settlement, Mr. Cardenas testified that this was one of the biggest coups he had ever accomplished as a lawyer. He testified that Ms. Hornot praised him all the way back to Baton Rouge from New Orleans and gave him a big hug when she got out of the car. Mr. Cardenas expressed shock and dismay when Ms. Hornot sued him in Civil District Court in New Orleans.[4]

Mr. Cardenas testified that he felt defamed by the allegations made by Ms. Hornot that accused him of fraud and of harming her in his role as her attorney. Mr. Cardenas testified that his reputation as an attorney is everything to him, and that such allegations have caused him harm and will cause him harm in the future if he seeks public office. Moreover, he was compelled to disclose these two lawsuits to the National Board of Trial

[4] Ms. Hornot filed a previous suit against Mr. Cardenas in Orleans Parish seeking declaratory judgment that he made statements accusing her of conduct that was criminal or unethical or sanctionable. Mr. Cardenas reconvened, alleging that the allegations in her complaint were defamatory. The Honorable Ethel Simms Julien declined to issue declaratory judgment in favor of Ms. Hornot and rendered judgment for Mr. Cardenas in the amount of $7,500.00 on the defamation claim. Ms. Hornot appealed the damage award and Mr. Cardenas answered the appeal and claimed that he was entitled to a higher damage award. The Fourth Circuit Court of Appeal affirmed. See **Hornot v. Cardenas**, 2006-1341 (La. App. 4th Cir. 10/3/07), 968 So.2d 789. Although the causes of action alleged in the instant suit are different, the nature of the evidence and testimony elicited in the instant case and in the civil district court case appear to be virtually the same.

Advocacy for certification purposes and to financial institutions that lend him money to finance his practice.

The trial court rendered judgment in favor of Mr. Cardenas and against Ms. Hornot, finding without hesitation that Ms. Hornot did not come remotely close to carrying her burden of proof as to any one of the allegations contained in her petition. Additionally, the trial court held that Mr. Cardenas proved his claim of defamation[5] against Ms. Hornot and awarded him $20,000.00. Finally, the trial court imposed La. Code Civ. P. art. 863 sanctions against Ms. Hornot in the amount of $10,000.00, finding that the mere signing and filing of the pleading in this matter constituted a blatant violation of the provisions of that article.

DISCUSSION

ASSIGNMENTS OF ERROR

Ms. Hornot has raised several assignments of error on appeal. Plaintiff's first three assignments of error allege that the trial court committed manifest error in imposing La. Code Civ. P. art. 863 sanctions, because she was not given reasonable notice of a sanctions hearing, and because a sanctions hearing was not conducted. She further alleges the trial court erred in denying her motion for new trial based on these alleged deficiencies. Logically, we will address plaintiff's remaining assignments of error first and then return to a discussion of Article 863 sanctions.

Motion to Continue Trial

Ms. Hornot alleges that the trial court erred in denying her motion to continue the trial because: (1) she reasonably believed that an attorney that she contacted would appear to represent her; (2) she was not prepared to go

[5] The trial court found that the allegations contained in Ms. Hornot's pleadings against Mr. Cardenas were clearly defamatory per se. Moreover, the court held that the fact that the allegations were printed in the petition constitutes publication.

forward with trial on a pro se basis; (3) it was her first request for a continuance; (4) she needed additional time to secure new counsel; and (5) the opposing party would suffer no prejudice by a continuance. Louisiana Code of Civil Procedure article 1601 provides that "[a] continuance may be granted in any case if there is good ground therefor." Therefore, under this article, a continuance rests within the sound discretion of the trial court. Sparacello v. Andrews, 501 So.2d 269, 273 (La. App. 1st Cir. 1986), writ denied, 502 So.2d 103 (La. 1987). A trial court must look to the facts of each case when a motion to continue has been requested. Among the factors a trial court considers before granting a continuance are diligence, good faith, and reasonable grounds. Id.

Ms. Hornot, an attorney practicing law in excess of twenty years, had signed every pleading in the record as counsel of record. Ms. Hornot moved for a continuance of trial, for the first time, on the morning of trial based on her trial counsel not appearing. Yet, Ms. Hornot admitted on the record that she attempted to hire counsel ***just two days*** prior to trial. Moreover, she had no authority to enroll this other attorney as counsel of record.[6]

The trial judge denied the motion, noting that even if another attorney had enrolled as counsel of record for Ms. Hornot on the morning of trial, he would not have granted a continuance. Moreover, the court noted that the parties selected the trial date at a pretrial conference on August 22, 2006, and the fact that Ms. Hornot waited over a year after filing her suit to try to obtain counsel was not an exercise in due diligence.

[6] The trial judge placed a call to this attorney, Mr. Alexander, who informed him that Ms. Hornot had first contacted him twenty-four hours previously concerning representation of her in this matter. Mr. Alexander signed a motion to enroll but told her not to file it until he had a chance to review the file. After reviewing the file, he made a decision not to represent Ms. Hornot. Mr. Alexander advised that he communicated this to both Ms. Hornot and Mr. Saunders (counsel for Mr. Cardenas). Mr. Alexander further advised that he was in trial in Iberville Parish that date and could not have been in East Baton Rouge Parish in any event.

The trial court has great discretion in granting or denying a motion for continuance, and its ruling will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. Sparacello, 501 So.2d at 274. Based on the facts and circumstances herein, we find the trial court did not abuse its discretion in denying plaintiff's motion for continuance.

Defamation

Ms. Hornot alleges that the trial court erred in finding that the allegations of her petition were defamatory per se to Mr. Cardenas.[7] Defamation is a tort that involves the invasion of a person's interest in his or her reputation and good name. Fitzgerald v. Tucker, 98-2313, p. 10 (La. 6/29/99), 737 So.2d 706, 715. The elements necessary to establish a defamation cause of action are: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault, requiring negligence or greater, on the part of the publisher; and (4) resulting injury. Trentecosta v. Beck, 96-2388, p. 10 (La. 10/21/97), 703 So.2d 552, 559 (citing Restatement (Second) of Torts § 558 (1977)). A communication is defamatory if it tends to harm the reputation of another so as to lower the person in the estimation of the community or to deter others from associating or dealing with the person. Id. (citing Restatement (Second) of Torts § 559 (1977)).

In Louisiana, defamatory words traditionally have been classified into two categories: those that are defamatory per se and those that are susceptible of a defamatory meaning. Costello v. Hardy, 2003-1146, p. 13 (La. 1/21/04), 864 So.2d 129, 140. Words that expressly or implicitly accuse another of criminal conduct, or that by their very nature tend to injure one's personal or

[7] Again, we note that Ms. Hornot has not appealed that portion of the trial court judgment that dismisses her claims finding that she did not come remotely close to carrying her burden of proof as to any of the claims made against Mr. Cardenas.

professional reputation, even without considering extrinsic facts or surrounding circumstances, are considered defamatory per se. When a plaintiff proves publication of words that are defamatory per se, the elements of falsity and malice (or fault) are presumed, but may be rebutted by the defendant. The element of injury may also be presumed. Costello, 2003-1146 at pp. 13-14, 864 So.2d at 140.

Defamatory words are, by definition, words that tend to harm the reputation of another so as to lower the person in the estimation of the community, to deter others from associating or dealing with the person, or otherwise expose the person to contempt or ridicule. Words that convey an element of personal disgrace, dishonesty or disrepute are defamatory. See Fitzgerald, 98-2313 at p. 11, 737 So.2d at 716. Herein, Ms. Hornot accused Mr. Cardenas, in a public record pleading, of fraud, of suppressing the truth, and of refusing to return her file materials and her funds. The trial court found that such allegations on their face are of the kind that could potentially injure Mr. Cardenas' professional reputation. Moreover, the court determined that the words were false and "clearly, this was done with malice and intent, and ... with total and unfettered disregard for the truth...."

It is a well-established legal principle that a court of appeal may not set aside a trial court's findings of fact in the absence of manifest error or unless it is clearly wrong. Ferrell v. Fireman's Fund Insurance Co., 94-1252, p. 4 (La. 2/20/95), 650 So.2d 742, 745. Based on our review of the record, we cannot say that the trial court was clearly wrong. These words clearly convey an element of dishonesty and impute that Mr. Cardenas lacked integrity or acted unethically. Moreover, we do not find that the trial court committed manifest error in rejecting Ms. Hornot's argument that her allegations were protected by a qualified privilege. Ms. Hornot contends that she cannot be

held liable for defamation for allegations made in a judicial proceeding based on her *good faith, reasonable* belief that they were true or made without malice (citing Freeman v. Cooper, 414 So.2d 355 (La. 1982)). The operative words here are *good faith* and *reasonable*. Based on our thorough review of the record, we cannot say that the trial court's finding that there was no factual basis for any of the allegations made by Ms. Hornot was wrong.

Quantum

Louisiana Civil Code article 2324.1 provides:

> In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury.

The assessment of the appropriate amount of damages is a question of fact entitled to great deference on review. Wainwright v. Fontenot, 2000-0492, p. 6 (La. 10/17/00), 774 So.2d 70, 74. In fact, the discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award of general damages. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. Youn v. Maritime Overseas Corp., 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994).

At trial, Mr. Cardenas testified that he felt personally damaged and that any political aspirations he may have had may have been damaged. He also expressed humiliation at having to report the lawsuit to the National Board of Trial Advocacy and his financial lenders.

The trial court's award of damages was based on credibility determinations and, of necessity, left largely to discretion. Accordingly, we affirm this award.

Louisiana Code of Civil Procedure Article 863 Sanctions

With respect to the imposition of La. Code Civ. P. art. 863 sanctions, Ms. Hornot alleges that the trial court committed error by not affording her reasonable notice of a hearing, by failing to conduct a sanctions hearing, and by denying her motion for new trial related to this issue.

Louisiana Code of Civil Procedure article 863 provides:

> A. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address.
>
> B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact; that it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.
>
> C. If a pleading is not signed, it shall be stricken unless promptly signed after the omission is called to the attention of the pleader.
>
> D. If, upon motion of any party or upon its own motion, the court determines that a certification has been made in violation of the provisions of this Article, the court shall impose upon the person who made the certification or the represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.
>
> E. **A sanction authorized in Paragraph D shall be imposed only after a hearing at which any party or his counsel may present any evidence or argument relevant to the issue of imposition of the sanction.** [Emphasis added].
>
> F. A sanction authorized in Paragraph D shall not be imposed with respect to an original petition which is filed within sixty days of an applicable prescriptive date and then voluntarily dismissed within ninety days after its filing or on the date of a hearing on the pleading, whichever is earlier.

Under La. Code Civ. P. art. 863(E), no sanctions can be imposed unless there is a hearing first. However, the article is silent with respect to the issue of notice. We have held, however, that due process requires that reasonable notice be given. Lee v. Woodley, 615 So.2d 349, 352 (La. App. 1st Cir.), writ denied, 618 So.2d 411 (La. 1993). Such notice would not have to be in writing, and actual notice would be sufficient. Id.

Ms. Hornot contends that the issue of Article 863 sanctions was raised for the first time in closing arguments when counsel for Mr. Cardenas urged the court to impose Article 863 sanctions against her.[8] Although Mr. Cardenas' reconventional demand generally prays for all relief allowed by law, we note that he did not file a pleading to specifically request Article 863 sanctions. In any event, even assuming Ms. Hornot had actual notice of Mr. Cardenas' intent to pursue sanctions, La. Code Civ. P. art. 863(E) mandates a "hearing" before sanctions may be imposed. We find that Ms. Hornot was not afforded a hearing before sanctions were imposed; therefore, we remand this matter to the trial court for a full evidentiary hearing on the issue of Article 863 sanctions.

CONCLUSION

For the foregoing reasons, we affirm that portion of the trial court judgment denying Ms. Hornot's motion for continuance and awarding plaintiff-in-reconvention, Leonard Cardenas, damages for defamation. The award of Article 863 sanctions is vacated, and this matter is remanded to the

[8] Also pending before this Court is a Motion to Supplement Record on Appeal filed by Ms. Hornot. The motion notes that the record on appeal does not include a transcript of closing arguments, which contains argument concerning Article 863 sanctions. The motion seeks to supplement the record on appeal with the transcript of closing arguments. The motion to supplement is granted.

trial court for a hearing on the issue of sanctions. The costs of this appeal are assessed equally to Janice Hornot and Leonard Cardenas.

AFFIRMED IN PART; VACATED AND REMANDED IN PART. MOTION TO SUPPLEMENT RECORD ON APPEAL GRANTED.