NOT DESIGNATED FOR PUBLICATION

ELIANA MCCAFFERY-LEON	*	**NO. 2000-CA-2304**
VERSUS	*	**COURT OF APPEAL**
KEITH ORTH, CLEAN PRO CARPET AND UPHOLSTERY CARE, INC. AND JANE DOE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-12040, DIVISION "E-9"
Honorable Gerald P. Fedoroff, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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AFFIRMED

Eliana McCaffery-Leon [hereinafter "Eliana McCaffery"] appeals the trial court's dismissal of her lawsuit against defendants, Keith and Linda Orth and Clean-Pro Carpet and Upholstery Care, Inc. James McCaffery, spouse of Eliana McCaffery, appeals the portion of the trial court's judgment awarding Keith and Linda Orth damages on their third party/ reconventional demand against him. For the reasons that follow, we affirm the trial court's judgment.

FACTS

On October 6, 1997, Byron Usand, an independent contractor working for Clean-Pro, arrived at the McCaffery's home to perform carpet cleaning services. While Mr. Usand was helping Mrs. McCaffery move large furniture in Mrs. McCaffery's bedroom, a service requested by Mrs. McCaffery although generally not included in the carpet cleaning price, an open bottle of nail polish on the dresser fell and spilled on the off-white carpet. The parties dispute who, if anyone, was responsible for the spill. They agree, however, that the spilled polish was not on the carpet when Mr.

Usand arrived at the house. Mr. Usand did admit that before the nail polish incident occurred, he accidentally broke a small, purse-sized mirror that slid to the floor from beneath a stack of stuff on the dresser when Mr. Usand rested his paperwork on the stack.

Mr. Usand called Linda Orth at Clean-Pro to find out how to remove the nail polish stain, and was told to use a chemical solvent. He testified that he offered to clean the stain for $10.00 instead of the usual $35.00, and Mrs. McCaffery agreed. According to Mrs. McCaffery, however, Mr. Usand did not tell her the price until after he had begun working on the stain. The cleaning process did not completely remove the stain, but according to Mr. Usand, it made the stain "barely noticeable." When Mr. Usand had finished, Mrs. McCaffery accused him of having spilled the polish and refused to pay the $10.00. At that point, they agreed that no further carpet cleaning services would be performed that day, and Mr. Usand left the house. He testified that he went across the street and called Linda Orth and explained what had happened.

Linda Orth then called Mrs. McCaffery. According to Mrs. McCaffery, Linda Orth apologized for the broken mirror and offered to pay for it, an offer she declined, but never mentioned the $10.00. About twenty minutes later, Keith Orth, the president of Clean-Pro, called Mrs. McCaffery

and was very angry because she had refused to pay, telling Mrs. McCaffery he was going to call the police. Shortly thereafter, Mr. Orth called the police and asked them to meet him at the McCaffery home to redress a "theft of services." He then went to the McCaffery home and sat across the street in his truck with Mr. Usand, whom he had asked to meet him there as a witness, and waited from four to five hours for the police to arrive. Mrs. McCaffery was extremely upset that the police had been called, and became more upset when she went out to her car intending to go pick up her children from school, and Mr. Orth approached her and told her she could not leave until the police arrived. Mrs. McCaffery called her husband James, who came home from work to be with her. When the police finally arrived, they talked with the parties outside the house. After being apprised of the situation, the police determined that it was a civil dispute, declined to intervene, and left.

According to the evidence presented, James McCaffery, an attorney, then embarked on a campaign designed to ruin the Orths' business and teach Keith Orth a lesson. Mr. McCaffery wrote letters to Dupont, Scotchgard, Visa, Mastercard, and the Berry Company (publisher of the Yellow Pages) informing them that Clean-Pro had fraudulently used the Dupont oval logo in its advertisements and that the Orths were guilty of extortion and other

outrageous conduct. He also contacted some of the Orths' competitors to inform them that they had a cause of action against Clean-Pro under the Louisiana Unfair Trade Practices law, and wrote Gayle Wang of the Kenner Office of Occupational Licenses to complain that the Orths were illegally operating their business out of their home in a residential area and were operating without a license. There was no evidence introduced at trial to show that any of these allegations by Mr. McCaffery were true. To the contrary, Mr. Orth testified that he spent about three months trying to resolve the situation with Dupont, which resulted in Dupont concluding that Clean-Pro had unintentionally displayed the Dupont oval logo rather than the Dupont TEFLON trademark because of confusion in Dupont's own guidelines. A letter to that effect written to Mr. Orth by Dupont's Senior Trademark Counsel was introduced into evidence.

PROCEEDINGS BELOW

On July 10, 1998, Eliana McCaffery filed the instant lawsuit against Clean-Pro, Keith Orth and Linda Orth alleging extortion and intentional infliction of emotional distress. Clean-Pro and the Orths filed a reconventional demand against Eliana McCaffery alleging defamation and a third party demand against James McCaffery alleging defamation and intentional infliction of emotional distress. A bench trial was held June 12,

2000, and the trial court rendered judgment June 16, 2000, dismissing Eliana McCaffery's petition, dismissing the defendants' reconventional demand against Eliana McCaffery, and awarding Keith and Linda Orth each $5,000.00 plus interest on the defendants' third party demand against James McCaffery. In written reasons for judgment, the trial court stated that Mr. McCaffery had set out to ruin the Orths' business and had written numerous letters to third parties making allegations of fraud and other illegal activity on the part of the Orths, none of which were true; the court concluded that Mr. McCaffery's conduct amounted to intentional infliction of emotional distress, which entitled the Orths to damages.

DISCUSSION

Eliana and James McCaffery have each filed a brief in this appeal. Eliana McCaffery asserts eight assignments of error regarding the trial court's dismissal of her suit, some of which are similar and overlapping. For instance, in five assignments, Mrs. McCaffery argues that the trial court erred: by failing to find that Keith Orth's repeated phone calls to the police constituted harassment; by failing to find that the Orths' manner of trying to collect the debt was abusive and tortious; by failing to rule that the Orths were guilty of intentional infliction of emotional distress; by believing Keith Orth's testimony that he thought it was acceptable in Louisiana to call the

police to collect a civil debt because it had been acceptable in Florida to do so; and finally, by finding that there was no truth to the allegation that the defendants had fraudulently used the Dupont logo.

The errors complained of in these five assignments result from the trial court's evaluation of the facts and evidence adduced at trial, and are therefore subject to the manifest error standard of review. See *Cantor v. Koehring Co.*, 283 So.2d 716, 724 (La. 1973). Considering the evidence, we cannot say that any of these four determinations is clearly wrong. The tape of the four phone calls Keith Orth made to the police reflects that he was checking to make sure that the police were actually coming and to get an estimate of how much longer he would have to wait outside the McCaffery home. Moreover, the trial court evidently believed Mr. Orth when he testified that his motivation was simply to collect the debt, and that he had used this method effectively in Florida. The record reflects that the trial judge himself pointedly questioned Keith Orth about the motivation for his actions. We will not interfere in the trial court's determinations of credibility. Similarly, the trial court heard Eliana McCaffery's testimony about the incidents of that day and made a factual determination that the Orths' conduct did not amount to intentional infliction of emotional distress. We find the trial court's determinations to be reasonable in light of the

evidence, especially considering the fact that once he learned the police would not intervene, Keith Orth walked away and took no further action, presumably willing to let the matter drop at that point. We also find reasonable the trial court's determination that there was no truth to Mrs. McCaffery's allegation of fraud; Keith Orth testified that there was no intent to defraud in his use of the Dupont logo, and the letter from Dupont confirmed his testimony.

In two other assignments, Eliana McCaffery contends the trial court erred by failing to find that the defendants were guilty of unfair trade practices and of extortion. We reject these contentions because there is no factual support in the record for either of them.

Finally, Eliana McCaffery contends that the trial court erred in failing to follow this court's decision in *Lucas v. Ludwig*, 313 So.2d 12 (La. App. 4th Cir. 1975). We agree with the trial court, which stated in its reasons for judgment that the case is factually distinguishable. Unlike in *Lucas*, the police in the instant case never entered the McCaffery home. The trial court therefore did not err in failing to award Eliana McCaffery damages for invasion of privacy.

With regard to his appeal of the trial court's decision to award damages to the Orths on their third party demand, James McCaffery asserts

six assignments of error. Again, some of these assignments are related.

First, Mr. McCaffery argues the trial court erred in denying his exceptions of prematurity and failure to state a cause of action. Both exceptions were based on James McCaffery's assertion that any action against him based on his conduct while representing his wife cannot be considered until after the termination of his wife's lawsuit. Appellant specifically relies on *Montalvo v. Sondes*, 93-2813 (La. 5/23/94), 637 So.2d 127. The Court in *Montalvo* held that before a nonclient can maintain an intentional tort suit against his adversary's attorney based on the filing of a pending lawsuit, the underlying suit must have terminated in favor of the nonclient. *Id*. at 131. However, there are important distinctions between the instant situation and *Montalvo* that Mr. McCaffery ignores. Defendants' claim against James McCaffery for defamation and intentional infliction of emotional distress is not solely, or even primarily, based upon the filing of Eliana McCaffery's lawsuit; rather, it is based upon his conduct outside of the lawsuit, mainly his letters and other direct contact with third parties by which he sought to ruin the Orths' personal and business reputation. Moreover, we do not find that James McCaffery was acting solely as his wife's attorney, as his conduct went beyond the realm of ordinary legal representation and took on a personal tone, which could be attributed only to

his role as Eliana McCaffery's spouse. We find, therefore, that the trial court did not err by refusing to maintain James McCaffery's exceptions.

In two additional assignments of error, James McCaffery argues that the trial court was clearly wrong in finding that his conduct rose to the level required to support a finding of intentional infliction of emotional distress under the law, and that the trial court was clearly wrong in awarding Linda Orth damages for same. The Louisiana Supreme Court has stated that in order to recover for intentional infliction of emotional distress, the plaintiff must establish that the conduct of the defendant was "extreme" and "outrageous;" that the emotional distress suffered by the plaintiff was severe; and that the defendant desired to inflict such distress or knew that such would be substantially certain to result from his conduct. See *Nicholas v. Allstate Ins. Co*., 99-2522, p.5-6 (La. 8/31/00), 765 So.2d 1017, 1022 (citing *White v. Monsanto*, 585 So.2d 1205, 1209 (La.1991). Whether the conduct of James McCaffery rose to this level and whether Linda Orth suffered severe emotional distress are factual determinations of the trial court subject to the manifest error standard of review. We find that the trial court's conclusions were not unreasonable considering the evidence. James McCaffery's campaign of revenge was documented not only by the numerous letters he wrote, but also by his own testimony. We cannot say it

was wholly unreasonable for the trial court to conclude that going to such lengths to achieve revenge under these circumstances was outrageous. Similarly, Linda Orth testified that James McCaffery's conduct caused her severe anxiety over her family's financial future, created problems in her marriage, and placed her in constant fear that Mr. McCaffery would show up at her home in a rage. This testimony is sufficient to support the trial court's award. Therefore, we do not find that the trial court committed manifest error as urged by the appellant.

Finally, James McCaffery makes two assignments of error related to evidentiary rulings of the trial court. First, he argues that the trial court erred by admitting an exhibit submitted by the defendants which was not produced prior to trial. The exhibit in question is a letter to Keith Orth from a representative of the Dupont Company dated June 9, 2000, three days prior to trial. Considering the time frame, it was well within the trial court's discretion to admit this letter, even though it was not produced prior to trial, especially considering its probative value with regard to the Orths' defamation claim. Secondly, James McCaffery contends the trial court erred by severely limiting his cross-examination of Keith Orth on the subject of how the stress on Orth's wife had affected their sex life. Again, we find that the trial court was well within its discretion to prevent Mr. McCaffery

from asking the questions he proposed, especially considering that the disruption in their married life was only a small portion of the damages claimed by the Orths. Moreover, had the trial court exceeded its discretion in this respect, which we do not believe it did, we would have found the error to be harmless in that there was sufficient evidence to support the awards absent Mr. Orth's testimony about his sex life.

CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

AFFIRMED