

NOT DESIGNATED FOR PUBLICATION

JAMES MCCULLUM * **NO. 2000-CA-2020**
VERSUS * **COURT OF APPEAL**
REGIONAL TRANSIT * **FOURTH CIRCUIT**
AUTHORITY AND ABC * **STATE OF LOUISIANA**
INSURANCE COMPANY

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-7316, DIVISION "G-11"
HONORABLE ROBIN M. GIARRUSSO, JUDGE

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JUDGE MAX N. TOBIAS, JR.
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(COURT COMPOSED OF JUDGE MICHAEL E. KIRBY, JUDGE TERRI F. LOVE, AND JUDGE MAX N. TOBIAS, JR.)

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AFFIRMED

In this defamation suit, the plaintiff, James McCullum, appeals a trial court judgment rendered in favor of the defendants, Regional Transit Authority (“RTA”), Transit Management of Southeast Louisiana, Inc. (“TMSEL”), and Dudley Payne.

TMSEL operates the bus service in Orleans Parish for the RTA. The plaintiff was a TMSEL mechanic for over 13 years who normally worked the day shift. He often volunteered to work the night shift as a cleaner due to a shortage of cleaners. Mr. Payne was the supervisor of the night shift cleaners.

On the night of 17 July 1997, Mr. Payne was inspecting a bus that Mr. McCullum had cleaned, during which he discovered a Piggly Wiggly grocery bag filled with RTA rider coupons and \$1,945 in one dollar bills. During an exchange between Mr. Payne and the plaintiff, it was alleged that

Mr. McCullum made certain inculpatory statements and attempted to leave the bus with the bag. The plaintiff was subsequently arrested and charged with theft and attempted theft. On 21 April 1998, the plaintiff was acquitted of all charges.

As the result of these events, Mr. McCullum was suspended without pay. After his acquittal, he sought reinstatement through his union representative. The RTA refused and then terminated him for having “unauthorized possession” of RTA funds. This reason was placed in writing to the union and on the plaintiff’s various separation papers. When the plaintiff applied for unemployment benefits, TMSEL objected. After an Administrative hearing, benefits were awarded.

Mr. McCullum filed the instant suit for defamation, intentional infliction of emotional distress, malicious prosecution, and invasion of privacy. After a bench trial, the judge found in favor of the defendants. In the reasons for judgment, the court stated:

There is absolutely no evidence that Dudley Payne lied about the plaintiff’s actions and statement maliciously to frame the plaintiff. The plaintiff admitted that Payne had no animosity or known motive to lie about him. Defendants were, therefore, in good faith in reporting the incident to the police or to the unemployment office. The

RTA never prevented plaintiff from seeking other employment, nor did the plaintiff attempt to mitigate his own alleged damages. There is not extreme or outrageous conduct on the part of the RTA. As such, the case is dismissed.

On appeal, the plaintiff argues that the trial court applied an erroneous legal standard by holding that he failed to prove that Mr. Payne lied. The plaintiff claims that because he was falsely accused of committing a criminal act, Mr. Payne's words were *per se* defamatory and the defendants failed to rebut the presumption of malice. In addition, Mr. McCullum argues that the RTA's failure to reinstate him after his acquittal demonstrates its lack of good faith. Further, he claims that the trial court erred in failing to find that he proved his other causes of action of intentional infliction of emotional distress, malicious prosecution, and invasion of privacy. Finally, the plaintiff appeals the trial court's failure to award damages.

Our review of the record indicates that the facts presented by each side to the police during the criminal and unemployment benefits proceedings, as well as at trial, were contradictory. We briefly review the evidence presented during the underlying proceedings.

According to the defendants, Mr. Payne was inspecting the buses in Lot Two at the New Orleans East Transit facility, which should have already

been cleaned. Mr. Payne entered Bus 97239 and found it dirty. He went to the service aisle and discovered that Mr. McCullum had serviced the bus. Upon returning to the bus, Mr. Payne encountered the plaintiff, who appeared nervous. The plaintiff asked Mr. Payne why he was on the bus, who responded by asking if the plaintiff had cleaned it. After saying “yes,” Mr. Payne told him that he had done a poor job. Mr. McCullum tried to get Mr. Payne to leave the bus, but Mr. Payne told him to return to the bus he was cleaning and he (Mr. Payne) would clean Bus 97239. The plaintiff, however, insisted on staying. Finally, Mr. Payne told him to get some rags to clean the dashboard, and the plaintiff left the bus.

Mr. Payne was suspicious of the plaintiff’s behavior. He inspected the driver’s area and found a Piggly Wiggly grocery bag filled with money and transfers in the compartment under the driver’s seat. Mr. Payne called the Transit Police on his radio.

While Mr. Payne was reporting the incident, Mr. McCullum returned to the bus and turned off the interior lights, pleading with Mr. Payne to say it was a false alarm. Mr. Payne replied that he could not do so. The plaintiff said that he had been with the RTA for years and would be implicated

because he had serviced the bus. The plaintiff again asked Mr. Payne to turn his “back on it.” The plaintiff then got onto his knees and said, “I’m begging you, people’s lives are involved. People need this money. My family, what about my family?” Mr. Payne continued talking with police. Suddenly, Mr. McCullum grabbed the money from the compartment and began leaving the bus. Mr. Payne ordered him twice to put it back; the plaintiff finally complied and left the bus.

When the police arrived, Mr. Payne reported the incident. The officers arrested the plaintiff. He was charged with theft and attempted theft and unsuccessfully prosecuted by the Orleans Parish District Attorney’s Office.

Mr. McCullum was suspended without pay and later terminated for “unauthorized possession of RTA/TMSEL funds,” in violation of company policy. The termination was based on the plaintiff’s seizure of the bag of money and his attempted flight from the bus.

Conversely, the plaintiff claims that none of the events as related by Mr. Payne occurred. He consistently maintains that he has no idea how the money got onto the bus and that he never touched the bag at any time. He

claims that he did not make any statements to Mr. Payne indicating his possible involvement with, or knowledge of, the money. He claims that everything said by Mr. Payne is false, although he admits that he does not think that Mr. Payne or anyone else at the RTA has any personal bad feelings against him.

The record also reveals that two different keys were used to remove money from the RTA buses: a probe key to access the fare box and an echo-key to access the cash box, which was inside the fare box. At one time, there were two echo-keys. However, as Mr. Payne testified at trial, on 17 July 1997, one of the keys was locked in storage and the second had been missing for “quite some time.” From his inspection of the Piggly Wiggly grocery bag, Mr. Payne believed that its contents were removed from a fare box of one or more of the buses.

The elements of defamation are defamatory words, publication, falsity, malice, and resulting injury. *Cangelosi v. Schwegmann Brothers Giant Super Markets*, 390 So. 2d 196, 198 (La. 1980). Statements that accuse a person of criminal conduct are defamatory *per se*, which generally relieves a plaintiff of the need to prove malice. *Landrum v. Board of*

Commissioners, 95-1591, p. 11 (La. App. 4 Cir. 11/27/96), 685 So. 2d 382, 390. However, a qualified privilege which defeats a claim for defamation exists where the allegedly defamatory statement is made (1) in good faith; (2) on a matter for the person making the communication has an interest or duty; or (3) to a person with a corresponding interest or duty. *Kelly v. West Cash & Carry Bldg. Materials*, 99-0102, p. 11 (La. App. 4 Cir. 10/20/99), 745 So. 2d 743, 752. “Good faith” exists where the communicator has reasonable grounds to believe the statement to be true. *Id.*

The manifest error-clearly wrong standard governs our review of this matter. The trial court heard two completely different versions of what occurred on 17 July 1997. Based on the reasons for judgment, the trial judge believed Mr. Payne and not the plaintiff. When a finding is based on a credibility determination, the manifest error standard demands great deference to the fact finder who has observed the witnesses’ demeanor and tone of voice which weighs heavily in favor of the fact finder’s understanding of the testimony. *Nuckley v. Gail M. Woods, Inc.*, 94-2190 (La. App. 4 Cir. 4/26/95), 654 So. 2d 840, 842. When a fact finder’s finding is based on its decision to credit the testimony of one of two or more

witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. *Rosell v. ESCO*, 549 So. 2d 840, 845 (La. 1989).

Because the trial court believed Mr. Payne's testimony and found that the defendants acted in good faith in reporting the incident to the police and the unemployment office, Mr. McCullum failed to carry his burden of proving defamation. Concomitantly, he failed to carry his burden of proving intentional infliction of emotional distress, malicious prosecution, and invasion of privacy.

Accordingly, for the above reasons, we affirm the trial court's judgment in favor of defendants.

AFFIRMED