NOT DESIGNATED FOR PUBLICATION

TONY FENNELLY	*	**NO. 2002-CA-2758**
VERSUS	*	**COURT OF APPEAL**
RAND RAGUSA, BIG MOUTH MEDIA, INC. AND TRIBE	*	**FOURTH CIRCUIT**
NEW ORLEANS D/B/A TRIBE MAGAZINE	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 96-15325, DIVISION "F-10"
Honorable Yada Magee, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, III, and Judge Dennis R. Bagneris, Sr.)

MURRAY, J., DISSENTS AND ASSIGNS REASONS

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AFFIRMED

Plaintiff/appellant, Tony Fennelly, brought an action against defendants/appellees, Rand Ragusa, Big Mouth Media, Inc. and Tribe New Orleans, d/b/a Tribe Magazine, for defamation, false light invasion of privacy and breach of contract. After appellant presented her case in a bench trial, a Motion for Involuntary Dismissal was granted in favor of appellees, dismissing appellant's action.

FACTS AND PROCEDURAL HISTORY:

Appellant, a mystery writer and astrologer, submitted an astrology column to be considered for publication in the premier issue of Tribe Magazine in October 1995. After negotiations with Yvette Beaugh, the editor of the magazine, appellant's column was accepted; and the parties agreed that appellant would receive $100.00 for each monthly column published by the magazine. The parties did not enter into a written contract.

It is undisputed that the version of the column that ran in the October issue was changed into a satirical astrology column by appellees. Appellant was credited as the source of the article. Appellant was not notified of the changes and was never paid the $100.00 for writing the column. Appellant

submitted no further columns to the magazine. At appellant's request, a retraction/apology was published in the May 1996 issue of Tribe Magazine.

Appellant filed suit on September 17, 1996 for defamation, false light invasion of privacy, and breach of contract for non-payment of the agreed upon compensation. A judge trial was held on July 22 and 23 of 2002. Appellant attempted to present Carolyn Bufkin (Ms. Bufkin) as an expert witness in the field of astrology and the "marketing of astrology", but the trial judge refused to qualify the witness an expert. Appellees were granted an involuntary dismissal, pursuant to La. C.C.P. art.1672 B, dismissing appellant's claims for defamation and false light invasion of privacy. The trial court expressly stated that appellant failed to carry her burden of proof by a preponderance of evidence on the claims of defamation, false light invasion of privacy and breach of contract.

Appellant was granted her request for back compensation in the amount of $100.00 plus interest and costs. The court assessed the compensation claim against Big Mouth Media, Inc., but not against the publisher of the magazine, Rand Ragusa, (Ragusa) as requested by appellant. Appellant's motion for a new trial was denied without a hearing, and this timely appeal followed.

ARGUMENT:

Appellant's first assignment of error states that the trial court erred in granting an involuntary dismissal in favor of appellees. Appellant submits that this is a right to privacy or false light tort action, as it involves an appropriation of appellant's name for appellees' use in such a manner as to place appellant in a false light before the public. In support of her position, appellant cites Melder v. Sears Roebuck and Co., 98-0939, p.13 (La. App. 4 Cir. 3/31/99), 731 So. 2d 991, 1000. As noted by the court in Melder, the right to privacy,

> embraces four different interests, each of which may be invaded in a different manner: 1) the appropriation of an individual's name or likeness for the use or benefit of defendant; 2) an unreasonable intrusion by the defendant upon the plaintiff's physical solitude or seclusion; 3) publicity that unreasonably places the plaintiff in a false light before the public; and 4) unreasonable public disclosures of embarrassing private facts.

Id. at 13. Appellant further relies on Perere v. Louisiana Television Broadcasting Corp., 97-2873, p.4 (La. App. 1 Cir. 11/6/98), 721 So. 2d 1075, 1078, wherein the court stated, "the publicity need not be defamatory in nature, but must be objectionable to a reasonable person under the circumstances and must contain either falsity or fiction."

Appellant submits that the column published in the October issue of Tribe Magazine unreasonably cast appellant in a false light. In particular, appellant asserts that the article made a mockery of astrology and associated

her name with a humiliating piece of writing that was untrue to her writing standards, her dedication to astrology and to her moral values.

Appellant further argues that the apology printed by the magazine, and introduced into evidence, provided the facts necessary to establish the tort of false light invasion of privacy. Specifically, appellant contends that appellees admitted the following facts in the apology: 1) the magazine commissioned appellant to write a monthly astrology column, 2) appellant provided a serious astrology column, 3) the magazine decided that the column did not fit its needs, 4) the published column contained some of appellant's technical information but instead of the practical advice offered by appellant, the magazine substituted irreverent jokes, 5) appellant was credited as the source for the column, and 6) appellant was never notified of the change.

Appellant contends that the uncontroverted facts presented at trial make it clear that appellees' conduct was unreasonable and gave rise to an action for false light invasion of privacy. It is therefore argued by appellant that the trial court erred in dismissing her claim.

Appellant, in her second assignment of error, argues that the trial court erred by not assessing her back wage claim against Ragusa, personally. It is submitted by appellant that Ragusa failed to present evidence that he was

only an employee of the corporation that owned Tribe Magazine or that Big Mouth Media, Inc. was indeed the corporate owner of the magazine. Further, appellant asserts that Ragusa cited no authority in support of his position that a publisher is not liable for wages.

Appellant's third assignment of error submits that the trial court erred in not qualifying appellant's witness as an expert. Appellant claimed that she suffered economic loss from the negative publicity, and also that she did not receive the increase in business that good publicity would have generated. To show how a good astrology column can generate business, appellant attempted to call a local astrologer and columnist, Carolyn Bufkin, as an expert in astrology and in the "marketing of astrology." Ms. Bufkin testified that she was able to calculate from her own experience the amount of business that one can expect from writing an astrology column.

In opposition to this appeal, appellees contend that the trial court's granting of an involuntary dismissal regarding appellant's claims for invasion of privacy and defamation was correct and well supported by the evidence. Moreover, appellees assert that appellant failed to present sufficient evidence at trial to prove the essential elements of any one of her claims with the exception of her claim for $100.00 in back compensation.

Appellees submit that in Stern v. Doe, 2001-0914 (La. App. 4 Cir.

12/27/01), 806 So. 2d 98, this Court held that for a plaintiff to succeed with a false light tort action, the publicity "must be objectionable to a reasonable person under the circumstances and must contain either falsity of fiction." Appellees contend that appellant failed to establish the element of falsity. Specifically, appellees point out that the magazine's credit of appellant as the "source" of the column was not actually false. Appellees contend that appellant admitted at trial that parts of her draft were incorporated into the finished column, and that some of her technical information was used in the column.

Appellees contend that the trial court correctly found that appellees' actions were not unreasonable, and as a finding of fact, that determination should not be overturned absent a showing of manifest error. In this case, appellees submit that the portrayal of appellant as a source for the column was not unreasonable. Further, appellees argue that their conduct was not unreasonable in light of the fact that appellant purposely availed herself to a public forum, with the knowledge that the magazine would retain editorial privilege and the right to make changes to the work submitted. Additionally, appellees assert that appellant should have been aware that the magazine was interested in the entertainment value of the column.

Although not addressed on appeal by appellant, appellees submit to

the court that appellant also failed to satisfy the burden of proof on her claim for defamation. Appellees cite Easter Seal Soc. For Crippled Children and Adults of Louisiana, Inc., v. Playboy Enterprises, Inc., 530 So. 2d 643 (La. App. 4 Cir. 8/16/88), for the position that appellant failed to make the required showing of malice on the part of appellees. Appellees point out that the trial court specifically found no evidence of malice, and accordingly, dismissed the defamation claim.

Appellees further assert that appellant's second assignment of error has no merit. Particularly, appellees argue that to hold Ragusa personally liable for the $100.00 back compensation award would have been contrary to the well-established law that an individual shall not be held liable for the debts of a corporation. La. R.S. 12:219, La. R.S. 12: 93; Young v. Adolph, et al, 02-67 (La. App. 5 Cir. 5/15/02), 821 So. 2d 101, 107. Moreover, appellees submit that appellant produced no evidence to suggest that Ragusa had any personal involvement with appellant or her article, and that appellant established no factual basis for piercing the corporate veil.

Finally, appellees submit that the trial court was completely within its authority to refuse to accept Ms. Bufkin as an expert. Appellees contend that the qualification of a witness as an expert is within the sound discretion of the trial court, and that the decision may not be reversed unless clearly

wrong. Breeden v. Valencia, Inc., 557 So. 2d 302, 304 (La. App. 4 Cir. 1/16/90).

Appellees contend that Ms. Bufkin's projected testimony as to what she earned from her own astrology column was irrelevant and could not support appellant's claims of loss of future earnings. Therefore, appellees argue that the trial court correctly determined that Ms. Bufkin's testimony, as to the benefits of having a monthly astrology column, was irrelevant.

STANDARD OF REVIEW:

The trial court has vast discretion in determining whether a directed verdict or involuntary dismissal should be granted. Cangiano v. Forte Hotels, Inc, 2000-40 (La. App. 4 Cir. 10/31/00), 772 So. 2d 879, 881, citing New Orleans Property Development, Ltd. v. Aetna Casualty & Surety Company, 93-0692 (La. App. 1 Cir. 4/8/94), 642 So. 2d 1312. In reviewing the trial court's granting of an involuntary dismissal, this court must consider whether, in viewing all the evidence, reasonable minds could reach a contrary verdict. Id.

The trial court's determination that appellant failed to produce sufficient evidence to support her claims of false light invasion of privacy and defamation is a factual issue, and we must therefore evaluate the findings of the trier of fact under the manifest error or clearly wrong

standard. Stobart v. State Through Department of Transportation and Development, 617 So. 2d 880 (La. 1993).

The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. Cosse v. Allen-Bradley Co., 601 So. 2d 1349, 1351 (La. 1992). Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, reasonable inferences of fact should not be disturbed upon review where conflicts exist in the testimony. Rosell v. ESCO, 549 So. 2d 840 (La. 1989).

DISCUSSION:

After a thorough review of the record, we do not find that the trial court committed manifest error. Significantly, appellant failed to present sufficient evidence to support her claim for false light invasion of privacy. Louisiana law recognizes a cause of action for false light invasion of privacy. Smith v. Arkansas Louisiana Gas Co., 26-180 (La. App. 2 Cir. 10/26/94), 645 So.2d 785, 790. The cause of action arises from publicity that unreasonably places the plaintiff in a false light before the public. In analyzing a claim for invasion of privacy, the three elements to be considered are a privacy interest, falsity, and unreasonable conduct. Perere v. Louisiana Television Broadcasting Corp., 2000-1656 (La. App. 1 Cir.

9/28/01), 812 So.2d 673. In the instant case we find that appellant did not have an expectation of privacy when she submitted her astrology column to be published in a magazine, knowing that the magazine retained editorial privilege over her writing. We further find that naming appellant as the source of the article was not a falsity. When questioned at trial, appellant admitted that some of her information was incorporated into the final column, and that she was the source for that information.

We further find that while appellees' actions might have embarrassed appellant, the conduct was not unreasonable under the circumstances. Basically, appellees changed appellant's serious astrology column into a satirical one without informing her and listed appellant as the source of the column. The trial court did not find appellees' conduct to be unreasonable, and after a review of the record, we agree with that finding.

The trial court's finding that appellant failed to produce sufficient evidence on her claim for defamation is also supported by the record. Appellant presented nothing to the court to show malice on the part of appellees. Defamation is an invasion of a person's interest in his reputation and good name. To prevail in a defamation action, a plaintiff must prove defamatory words, publication, falsity, malice (actual or implied) and resultant injury. The failure of any of these elements of proof is fatal to the

action. Moore v. Cabaniss, 29-834 (La. App. 2 Cir. 9/24/97), 699 So.2d 1143.

Appellant contends that the trial court erred in not assessing her compensation claim against Ragusa personally. We no not find error in the trial court's ruling. It is an undisputed fact that appellant never received the $100.00 compensation promised for writing the column. Appellant presented no evidence, however, to show that Ragusa should be personally liable. Appellant testified that she dealt only with Yvette Beaugh, the editor of Tribe Magizine, and that she did not meet Ragusa until after this lawsuit was filed.

The record before the trial court demonstrates that although Ragusa was the publisher for the magazine, he did not bind himself personally for the debt. Corporations are distinct legal entities, separate from the individuals who comprise them. La. R.S. 12:219; La. R.S. 12:93. If the officers and directors of the corporation do not purport to bind themselves individually, they do not incur personal liability for the debts of the corporation. An exception to this rule arises when an officer or director, acting through the corporation, defrauds or deceives a third party. Further, the corporate creditor has the burden of proving that the corporate agent is liable for the debt. Nicholson Management & Consultants, Inc. v. Bergman,

96-0557 (La. App. 4 Cir. 9/25/96), 681 So.2d 471. Applying these principles to the facts before us, we find no manifest error in the trial court's conclusion that the corporation, and not Ragusa, was liable for appellant's compensation claim.

Finally, we find no error in the trial court's refusal to qualify appellant's witness as a expert. Appellant attempted to have Ms. Bufkin qualified in the field of astrology and the "marketing of astrology" in order to prove how publicity from an astrology column can economically affect an astrologer's business. The trial court ruled that although Ms. Bufkin might be qualified as an expert in astrology, the validity of astrology was not relevant to the case. The trial court further stated that the things that appellant was attempting to show would be better proven by someone in the field of marketing or advertising. Ms. Bufkin admitted to having no expertise in either marketing of advertising.

The qualification of a witness as an expert is within the sound discretion of the trial court, and that decision may not be reversed unless clearly wrong. Roberts v. Tiny Tim Thrifty Check, 367 So.2d 64 (La. App. 4 Cir.1979). Further, as stated in Succession of Armshaw v. Succession of Marbury, 428 So.2d 1180, 1182 (La. App. 5 Cir.1983), quoting Carvell v. Winn, 154 So. 2d 788, 791 (La. App. 3 Cir. 1963),

[I]t is also largely within the discretion of the trial judge to determine

the competency of expert witnesses to testify to specialized areas on inquiry not necessarily within his general competency to give an opinion as an expert, or at least not shown to be so by the facts of the record.... [T]he court must have some discretion to limit the witness's testimony as an expert to the actual field of his expertise and as applicable to the facts of the particular litigation, then before it....

After a thorough review of the record, and for the reasons stated above, we find no manifest error in the ruling of the trial court.

Accordingly, the judgment is affirmed.

AFFIRMED