NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1923

EVERHOME MORTGAGE COMPANY

VERSUS

JOHN G. DIAZ, CHARLEE REED JONES, and CHARLES ROBERT JONES

Judgment Rendered: DEC 21 2011

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On Appeal from the Civil District Court
for the Parish of Orleans
Docket No. 2007-3690, Division "I-14"

The Honorable Piper Griffin, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Gaidry, J. - concurs
McDonald, J. concurs.

HUGHES, J.

This is an appeal from a judgment[1] of the Civil District Court for the Parish of Orleans that entered judgment in favor of plaintiff-in-reconvention/appellee, Charles Robert Jones and against defendant-in-reconvention/appellant, Everhome Mortgage Company (Everhome), holding Everhome liable to Mr. Jones for the amount of $25,000 in damages for defamation.[2] For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On April 23, 2007 Everhome filed a petition in the Civil District Court for the Parish of Orleans for the seizure and sale of the property located at 4000 Davey Street, Unit 504, New Orleans, Louisiana, due to non-payment and default of the note and mortgage thereon. Listed as defendants in the suit were John G. Diaz, Charlee Jones, and Charles Robert Jones. Mr. Jones was described in the petition as being a defendant *in rem*[3] only. After being served with the petition, Mr. Jones attempted to contact Everhome's attorney of record by telephone. Mr. Jones left a message with a receptionist, advising that he had been improperly named as a defendant in the suit since he and his wife were separate in property. Mr. Jones did not receive a return call.

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[1] While the judgment determined the liability and damages on the defamation claim, we note that the judgment states that the court "defers ruling on the issue of attorney's fees." We find that in essence, the trial court bifurcated trial of the liability and damages on the defamation claim from the trial of the issue of attorney's fees. The record does not reflect that any party objected to this bifurcation. Thus, the judgment rendered as to liability and damages on the defamation claim is a partial final judgment that is separately appealable under LSA-C.C.P. art. 1915(A). See **Riverside Transportation, Inc. v. Burke**, 2007-2175 (La. App. 1 Cir. 12/23/08) (unpublished opinion.)

[2] Mr. Jones is a sitting judge of the Fourth Circuit Court of Appeal for the State of Louisiana. This appeal was transferred to this court by order of the Louisiana Supreme Court following the en banc recusal of the judges of the Fourth Circuit.

[3] *In rem* is a technical term used to designate proceedings or actions instituted against the thing, in contradistinction to personal actions, which are said to be *in personam*. *Black's Law Dictionary*, [pg. 900] (Rev. 4th ed. 1968).

Thereafter, on June 23, 2007, Mr. Jones was served with a notice of seizure and sale. He again attempted to contact Ms. Mentz by telephone to advise of the error. After Mr. Jones left another message, Ms. Shelly Senia, the "foreclosure team lead" at the law firm representing Everhome, attempted to return Mr. Jones's call, and left a message with his secretary. On June 25, 2007 Mr. Jones returned Ms. Senia's call, but was unsuccessful in his attempts to speak to anyone handling the foreclosure action. Another detailed message was left with the receptionist. No attempt was made to return this call.

On June 30, 2007 the notice of sale of the property was published in the New Orleans *Times-Picayune*, listing Mr. Jones as a defendant in the action. There was no specification that he was a defendant *in rem* only. Mr. Jones again phoned Everhome's attorney and advised the receptionist that an injunction would be sought. On July 2, 2008 Mr. Jones, through his attorney, filed a petition for an injunction to halt the seizure and sale of the property, and a reconventional demand for damages for defamation. A hearing was held on the injunction request on July 14, 2007. Thereafter, Everhome amended its petition and removed Mr. Jones as a defendant in the foreclosure proceeding. On February 4, 2009 a trial on the claim for defamation was held and the Civil District Court rendered judgment in favor of Mr. Jones, awarding him $25,000 in damages. Everhome appeals and asserts the following assignments of error:

A. The trial court erred in finding that Jones proved the elements of a claim for defamation.

B. The trial court erred in refusing to allow EverHome's evidence and testimony regarding the underlying foreclosure suit.

C. The trial court erred in failing to consider Jones's comparative fault.

D. The trial court abused its discretion in awarding excessive general damages to Jones.

LAW AND ANALYSIS

I. Evidentiary Errors

In its second assignment of error, Everhome challenges the trial court's ruling in excluding certain evidence and testimony. If, upon review, we find that the trial court committed an evidentiary error that interdicts the fact-finding process, we are required to then conduct a *de novo* review. As such, alleged evidentiary errors should be addressed first on appeal, inasmuch as a finding of error may affect the applicable standard of review. **Wright v. Bennett**, 2004-1944 (La. App. 1st Cir. 9/28/05), 924 So.2d 178, 182.

This circuit has previously noted that LSA-C.E. art. 103(A) provides, in part, that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." **Wright**, 924 So.2d at 183. "The proper inquiry for determining whether a party was prejudiced by a trial court's alleged erroneous ruling on the admission or denial of evidence is whether the alleged error, when compared to the entire record, had a substantial effect on the outcome of the case. If the effect on the outcome of the case is not substantial, reversal is not warranted." **Wright**, 924 So.2d at 183. Generally, the trial court is granted broad discretion in its evidentiary rulings and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. **Wright**, 924 So. 2d at 183, citing **Turner v. Ostrowe**, 2001-1935 (La. App. 1 Cir. 9/27/02), 828 So.2d 1212, 1216, writ denied, 2002-2940 (La. 2/7/03), 836 So.2d 107.

The transcript of the trial evidences that the lower court refused to allow questioning regarding the loan that fell into default, resulting in Everhome's underlying foreclosure suit. While Everhome contends that it was unduly prejudiced by the exclusion of that testimony, we note that it was neither disputed that Ms. Jones and Mr. Diaz defaulted on the note secured by the mortgage, nor is it relevant to the issue of whether Mr. Jones was erroneously listed in the suit as a defendant. We find that the exclusion of that evidence, when compared to the record as a whole, had no substantial effect on the outcome of the case. Consequently, the trial court did not abuse its discretion in excluding it and there is no merit to this assignment of error.

II. Defamation

Defamatory words are defined as words which tend to harm the reputation of another so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her. **Kosmitis v. Bailey**, 28,585 (La. App. 2 Cir. 12/20/96), 685 So.2d 1177, 1180. To be actionable, defamatory words must be published, or conveyed to, someone other than the plaintiff. **Kosmitis**, 685 So.2d at 1180. Words which expressly or implicitly accuse another of criminal conduct, or which by their very nature tend to injure one's personal or professional reputation, are considered defamatory on their face, or defamatory *per se*. **Elmer v. Coplin**, 485 So.2d 171, 176-77 (La. App. 2 Cir.), writ denied, 489 So.2d 246 (La. 1986).

While a plaintiff must usually prove the words to be false and said with malice, or lack of a reasonable belief in the truth of the statement, if the words are defamatory *per se*, the elements of falsity and malice are presumed. **Kosmitis**, 685 So.2d at 1180. The element of injury may also be presumed. **Costello v. Hardy**, 03-1146 (La. 1/21/04), 864 So.2d 129, 139.

However, when the words are not defamatory *per se*, the plaintiff must prove, in addition to defamatory meaning and publication, the elements of falsity, malice, and injury. **Costello**, 864 So.2d at 140, **Kosmitis**, 685 So.2d at 1180.

Malice, or a lack of a reasonable belief in the truth of the statement, can be implied, and may be inferred from the circumstances surrounding the communication. Only if the statement is made about a public figure on a matter of public concern must the plaintiff prove actual malice, that is, that the defendant either knew that the statement was false or acted with reckless disregard for the truth. See **Romero v. Thomson Newspapers**, 94-1105 (La. 1/17/95), 648 So.2d 866, U.S. cert. denied, 515 U.S. 1131, 115 S.Ct. 2556, 132 L.Ed.2d 810 (1995).

The injury resulting from a defamatory statement may include nonpecuniary or general damages such as injury to reputation, personal humiliation, embarrassment, and mental anguish even when no special damage, such as loss of income, is claimed. **Costello**, 864 So.2d at 141, **Kosmitis**, 685 So.2d at 1180. Regardless of the type of injury asserted, a plaintiff must present competent evidence of the injuries suffered and show that the statements were a substantial factor in causing those injuries. **Costello**, 864 So.2d at 141, **Kosmitis**, 685 So.2d at 1181.

In defense of a claim for defamation, a defendant can either show that the statement was true, or that the statement was protected by a privilege, either absolute or qualified. **Costello**, 864 So.2d at 141. For instance, statements in the course of a judicial proceeding are subject to a qualified privilege if the statements are material to the proceeding, and are made with probable cause and without malice. **Freeman v. Cooper**, 414 So.2d 355, 359 (La. 1982). However, the existence of a qualified privilege is an

affirmative defense and must be specially pleaded. LSA-C.C.P. art. 1005. It cannot be raised for the first time on appeal. Everhome did not assert a defense based on qualified immunity until its brief to this court and thus it cannot be considered on appeal. See **Costello**, 864 So.2d at 142.

A. Defamatory Meaning and Publication

The threshold issue for this court to decide is whether the words were defamatory. Whether a particular statement is objectively capable of having a defamatory meaning is a legal issue to be decided by the court, considering the statement as a whole, the context in which it was made, and the effect it is reasonably intended to produce in the mind of the average listener, or in this case, reader. **Sassone v. Elder**, 626 So.2d 345, 352 (La. 1993), **Kosmitis**, 685 So.2d at 1180. Therefore, our review of whether the statement is objectively capable of having a defamatory meaning is subject to a *de novo* review and the trial court's determination of this issue is not entitled to any deference. However, if this issue is resolved in favor of Mr. Jones, the actual reader's subjective understanding or perception of the communication as defamatory becomes a factual issue, to which this court must apply a manifest error standard of review and under which much discretion is afforded to the decision of the trial court.

It is undisputed that Everhome published a Notice of Sale of the Davis property in the Times Picayune. Consequently, we need not analyze the publication element of the claim; it certainly exists in this case. In the advertisement, Everhome included the caption of the related foreclosure action that listed Mr. Jones as a party defendant. We conclude that those words are objectively capable of having a meaning that would tend to harm Mr. Jones in the estimation of the community. Specifically, listing a person as a party defendant in the context of a foreclosure action would have the

effect of and would be reasonably intended to lead the average reader to believe that Mr. Jones either failed to pay, or could not pay, his mortgage. Therefore, we have no difficulty concluding that the words, as written in this context, are objectively capable of having a defamatory meaning.

B. Malice

We next look to the malice element of this claim, and the pivotal issue in this appeal. The question is whether Everhome had a reasonable belief in the truth of its statement. For the answer, we look to the circumstances surrounding the publication.

Mr. and Mrs. Jones were married on December 21, 1991. Prior to the marriage, the two executed a marriage contract agreement wherein they agreed that they "shall be and remain in separate property" and renounced all provisions of the Louisiana Revised Statutes dealing with the community of acquets and gains. They specifically stated that "any and all property and effects...acquired during marriage ... [are] declared separate property." The agreement was filed and recorded in the records of the Parish of Orleans, pursuant to LSA-C.C. art. 2332[4], and is therefore effective against third parties.

On May 29, 2002, Mr. Diaz and Ms. Jones executed an Act of Sale and Assumption of Mortgage wherein Mr. Diaz sold to Ms. Jones one-half ownership interest in the Davey Street property. The agreement was filed into the public records.

[4] **Article 2332 Effect toward third persons**

> A matrimonial agreement, or a judgment establishing a regime of separation of property is effective toward third persons as to immovable property, when filed for registry in the conveyance records of the parish in which the property is situated and as to movables when filed for registry in the parish or parishes in which the spouses are domiciled.

Mr. Diaz and Ms. Jones thereafter defaulted on the note and mortgage. Everhome instituted proceedings against Mr. Diaz, Ms. Jones, and Mr. Jones. Everhome relied upon the original note executed by Mr. Diaz, and the assumption of the mortgage, executed by Ms. Jones. Because Louisiana is a community property state, Everhome cites to LSA-C.C. art. 2340[5] to support its inclusion of Mr. Jones as a defendant. The Sale and Assumption of Mortgage did not specify that the property was to be separate property of Ms. Jones.

However, Mr. Jones phoned Everhome on at least three occasions, each time notifying it of its error and repeatedly informing it that he and his wife were separate in property. He was never able to speak with anyone other than a receptionist. Ms. Shelly Senia, the team leader of the foreclosure department at Everhome's attorney's office, testified that while she did attempt once to return Mr. Jones' phone call, they did not attempt to contact Mr. Jones to verify his assertions regarding ownership, but instead they would have reviewed the Act of Sale and Assumption at issue and then moved forward, depending on their findings.

Everhome proceeded with the publication of the notice of the sale in the Times Picayune, naming Mr. Jones as a party defendant, and with no specification that he was a defendant *in rem* only.

The trial court found that Mr. Jones was wrongly sued by Everhome in connection with the Everhome mortgage, and that Everhome had actual knowledge of the dispute, as admitted by its own corporate representative during the trial. The court therefore found that Everhome published the

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[5] **Art. 2340. Presumption of community**

> Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property.

Notice of Foreclosure with "reckless disregard for the probable falseness of its claim." Under these circumstances, we cannot hold that the trial court committed error in reaching the conclusion that Mr. Jones met his burden of proof and established all of the elements necessary for a claim of defamation.

C. Injury and Damages

We now turn to the last two elements of defamation: injury and damages. As stated above, injury resulting from a defamatory statement may include nonpecuniary or general damages such as injury to reputation, personal humiliation, embarrassment, and mental anguish even when no special damages such as loss of income are claimed. **Costello**, 864 So.2d at 141, **Kosmitis**, 685 So.2d at 1180. An award of damages in a defamation case is left to the great discretion of the trier of fact and should not be disturbed absent a showing of manifest error. **Connor v. Scroggs**, 35,521 (La. App. 2 Cir. 6/12/02), 821 So.2d 542, 552.

On appellate review, damage awards will be disturbed only when there has been a clear abuse of that discretion. The initial inquiry must always be directed at whether the trial court's award for the particular injuries and their effects upon the particular injured person is a clear abuse of the trier of fact's much discretion. **Cole v. State, Department of Public Safety and Corrections**, 2003-2269 (La. App. 1 Cir. 6/25/04), 886 So.2d 463, 465, writ denied, 2004-1836 (La. 10/29/04), 885 So.2d 589.

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. Reasonable persons frequently disagree about the measure of general damages in a particular case. 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). Only after making a finding that the record supports that the lower court abused its much discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion afforded that court. **Coco v. Winston Industries, Inc.,** 341 So.2d 332, 335 (La. 1977).

At the trial on this matter, testimony was offered by various friends, family, and colleagues of Mr. Jones. Mr. Jones testified that he has been a judge of the Fourth Circuit Court of Appeal for the State of Louisiana for eighteen years, as of the date of the trial. The Vietnam veteran explained that he had "lost" credit in the past, and thus realized the importance of good credit and has guarded it closely since that time.

Before he married Ms. Jones, he insisted on a marriage contract for the purpose of protecting them both financially. The contract was filed and recorded with "The Office of Notarial Archive" in December of 1991 and has been available to the public since that time. He viewed the *Times-Picayune* advertisement as "a public proclamation that I'm unable to handle my financial affairs, such that I'm being foreclosed upon." He stated that his family reads the paper every day and that they questioned him regarding the article. He was also given the article by his law clerk. He was fearful that the action was "going to have a very negative impact on [his] credit." He described that he felt "helpless" and was insulted that no one returned his phone calls. He was very concerned that his name would be called out at the sheriff's sale in the lobby of the Civil District Court for the Parish of

Orleans, where he is well-known. He was also concerned about the possibility of being liable for a deficiency judgment. Overall, he was "humiliated" and felt that a "persistent opinion has to be resulting from the article that ran, that I'm unable to handle my financial affairs."

Edward Lombard, a fellow judge at the Fourth Circuit Court of Appeal and a personal friend of Mr. Jones for greater than fifty years, also testified regarding his close relationship with Mr. Jones. Therein, he described Mr. Jones, as a result of the ad, "sullen." He stated that "[i]t was common knowledge that there was a lawsuit involving a [j]udge in the building." After the article ran, "He was distraught, he was upset." Mr. Lombard confirmed that copies of the paper were passed around the office, and that Mr. Jones altered his work schedule as a result, working at the office in the evenings, and that he also quit "working out" for three or four months. This testimony was further corroborated by Alvin Jones, the brother of Mr. Jones, who recalled that Mr. Jones had missed a family birthday party for one of the grandchildren, and had also only briefly stopped by the family Mother's Day gathering, following the advertisement.

Mr. Jones confided in his brother his worries that the suit would impact his ability to help his son in Chicago and his grandson. In the months following the Everhome suit, Mr. Jones would call Alvin Jones from his office late at night. Alvin Jones said that his brother "was not able to relax" and was "extremely upset."

Hebert Evans, Jr., another lifelong friend of Mr. Jones described him as "withdrawn" and "subdued" as a result of the advertisement. Mr. Evans stated that he had seen the article and that "it's affected him very, very greatly."

The plaintiff also submitted the testimony of Brandy Simpson, a loan officer, who confirmed that the plaintiff contacted her because of a concern regarding his credit report and the impact that the pending foreclosure proceeding might have on his credit status.

In awarding damages to Mr. Jones, the trial court, in its written reasons, stated:

> Mr. Jones produced evidence of his mental anguish, including embarrassment, humiliation and change in habits as a result of the actions of Everhome, and his feared and perceived harm to his reputation and his credit worthiness. He gave testimony of the steps he had taken to try to safeguard his credit and his belief that those steps were useless in light of the actions of Everhome. Based upon the above cases, the Court finds that given the facts established by the plaintiffs, an award of $25,000 would fairly compensate Mr. Jones for his damages in this case.

After a thorough review of the award, we cannot say that the trial court abused its discretion. We cannot say that that the award is excessive. We note the range of awards by various Louisiana courts in defamation cases, and further that the supreme court has consistently denied review of like awards. See **Connor v. Scroggs**, 35,521 (La. App. 2 Cir. 6/12/02), 821 So.2d 542 ($35,000), **Melancon v. Hyatt Corporation**, 589 So.2d 1186 (La. App. 4 Cir. 1991), writ denied, 592 So.2d 411 (La. 1992) ($10,000), **Wattigny v. Lambert**, 408 So.2d 1126 (La. App. 3 Cir. 1981), writ denied, 410 So.2d 760 (La. 1981), cert. denied, 457 U.S. 1132, 102 S.Ct. 2957, 73 L.Ed.2d 1349 (1982) ($15,000), **Thomas v. Busby**, 95-1147 (La. App. 3 Cir. 3/6/96), 670 So.2d 603, judgment vacated on other grounds, 96-0891 (La. 5/17/96), 673 So.2d 601 ($25,000), **Trentecosta v. Beck**, 95-0096 (La. App. 4 Cir. 2/25/98), 714 So.2d 721, writs denied, 98-1578 and 98-1585 (La. 10/09/90), 726 So.2d 28 ($50,000), **Steed v. St. Paul's United Methodist Church**, 31,521 (La. App. 2 Cir. 2/24/99), 728 So.2d 931, writ

denied, 99-0877 (La. 5/07/99) ($$90,000), **McHale v. Lake Charles American Press**, 390 So.2d 556 (La. App. 3 Cir. 1980), cert. denied, 452 U.S. 941, 101 S.Ct. 3085, 69 L.Ed.2d 955 (1981) ($150,000).

III. Comparative Fault

Everhome further contends that the trial court erred in its failure to find Mr. Jones liable for any comparative fault for his failure to produce the separate property agreement prior to the publication. While Everhome cites no authority, we note that in **Veazey v. Elmwood Plantation Assocs., Ltd.**, 93-2818 (La. 11/30/94); 650 So.2d 712, 717, the supreme court found that the Louisiana comparative fault law is broad enough to encompass the comparison of negligent and intentional torts in an appropriate factual setting. However, without discussing the effects of **Veazey** in a defamation case such as the one at hand, we note that the trial court found the following:

> Mr. Jones testified that he made several attempts at reaching Ms. Mentz, the attorney on the case. After he was unable to speak to her, he left her a detailed message wherein he told her of the separate property regime and that he had no ownership interest in the foreclosed property. He also indicated that if necessary he would file something to stop them from going forward with the foreclosure in its current form. He introduced evidence of these attempts in the form of the telephone record from the Fourth Circuit and a telephone message from Shapiro & Mentz, both dated before publication of the Notice of Foreclosure.
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> Ms. Senia not only corroborated Mr. Jones' assertion that he had contacted Everhome as early as April 22, 2008; but also the fact that his messages included an assertion that he was not the recorded owner of the property in question. Further, despite receiving messages from Mr. Jones, as late as June 25, 2008, (five days before publication of the foreclosure) Everhome proceeded with its foreclosure without any attempt at confirming Mr. Jones' assertions and/or amending its Petition to reflect any correction in that regard.

Assuming that comparative fault should apply in this case, we find no manifest error in the trial court's decision not to assess any comparative fault

to Mr. Jones under these facts. Mr. Jones made numerous attempts to contact Everhome and informed it of the separate property agreement, filed in the public records, and available to Everhome at any time. There is no merit to this assignment of error.

CONCLUSION

For the reasons assigned herein, the judgment of the Civil District Court for the Parish of Orleans is affirmed. All costs of this appeal are assessed to the plaintiff/defendant-in-reconvention/appellant, Everhome Mortgage Company.

AFFIRMED.