NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

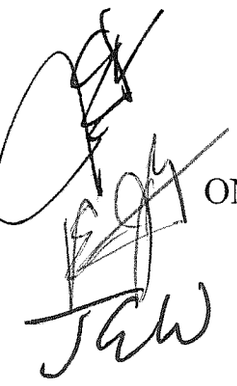
FIRST CIRCUIT

2006 CA 0566

ROSELYN OUBRE

VERSUS

TAMEKA SAXON, FRANKLIN COVEY COMPANY, GREGORY PERSINGER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, AND JOHN ANDERSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY



DATE OF JUDGMENT: February 9, 2007

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
(NUMBER 521,764 "F #22"), PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE TIMOTHY E. KELLEY, JUDGE

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: AFFIRMED.

KUHN, J.

Plaintiff-appellant, Roselyn Oubre, appeals the trial court's judgment, sustaining an exception sustaining the objection of no cause of action and dismissing her claims against defendants, Franklin Covey Company (Franklin Covey) and its manager, Tameika Saxon.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Oubre filed a petition for damages alleging that merchant Franklin Covey had received an order for several items, including two leather satchels. The order was placed on May 31, 2003 by the LSU Department of Geology and secured for payment by an LSU LaCarte credit card. Three days later, on June 3, 2003, the order was retrieved from Franklin Covey, ostensibly without any identification of the person retrieving the order or verification of the credit card used to secure the order.

Several weeks later, LSU questioned the purchase of the two satchels and contacted LSU police, who subsequently sent two officers to investigate, which included the questioning of Oubre a 20-year employee with the LSU Department of Geology. Oubre claims that she had no knowledge of the transaction and did not have access to a LaCarte credit card.

Naming Franklin Covey and its store manager, Saxon, as defendants,[2] Oubre's petition averred that she was unlawfully detained and wrongfully accused of having driven the person who retrieved the order to and from Franklin Covey.

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[1] Saxon's first name is correctly spelled "Tameika."

[2] The LSU police officers who investigated the matter were also named as defendants in this lawsuit.

She alleged that she "was held, against her will, for a period of several hours, during which time, she was repeatedly interrogated ..., accused of having drugs, and monitored while she used the restroom." Oubre's petition averred that prior to her interrogation and detention by the LSU police officers, Franklin Covey and Saxon claimed that "a black female drove a 'dark' SUV." Saxon was then presented with a photographic lineup, advised that the "suspect" was among the photographs, and asked to identify one of them. The photographic lineup contained Oubre's photograph as well as that of several other black females. Oubre alleged upon information and belief that one of the LSU police officers "pointed to" plaintiff.

Oubre further asserted that subsequent to Saxon's identification of her apparently as both a driver and a passenger in the dark SUV ostensibly used by the person retrieving the order placed by the Department of Geology, she was wrongfully arrested for felony theft by the LSU police officers.

The petition claimed that Saxon was "negligent in her duties and caused [Oubre's] wrongful detention and arrest." Oubre also averred that Saxon publicly defamed her, stating "defendants Saxon and Franklin Covey also accused [Oubre] of a crime, without any basis in evidence or facts. Defendant Saxon repeatedly told several versions of the events occurring on June 3, 2003, and was never able to identify [Oubre] until shown her picture and told to select [Oubre] as the person who drove the [SUV]."

Insofar as Franklin Covey's liability, Oubre's petition asserted that as Saxon's employer, the merchant is liable for its manager's actions. The petition also claimed that Oubre is entitled to damages from Franklin Covey for its failure

to adequately train Saxon in handling of merchandise, loss prevention, and identification of customers retrieving phone orders, as well as for defamation.

Franklin Covey and Saxon filed an exception objecting to the petition for failing to state a cause of action. The trial court granted the motion, but allowed Oubre to amend her petition.

Addressing her claims of having been publicly defamed by Saxon and Franklin Covey, Oubre's amended petition averred:

> Defendant Saxon was not in a position to observe any facial or distinct features of the alleged passenger in the dark SUV. Defendant Saxon originally testified that the weather was clear and sunny on the day in question when, in fact, it was raining and, at the salient period, was a thunderstorm. It was impossible for defendant Saxon to identify the passenger in the dark SUV as defendant Saxon's line of sight to the location of the vehicle precluded any view of the alleged passenger. Only after Saxon was shown plaintiff's picture in a lineup and advised which photograph to select, did she identify the plaintiff as the alleged passenger. Indeed, defendant Saxon could not and did not identify the plaintiff as the alleged passenger until that occurred.
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> However, after being shown the tainted lineup and essentially advised which photograph corresponded to the plaintiff, defendant Saxon stated to her co-workers, her supervisors, in a public hearing, and [to] attorneys for LSU and employees of LSU that plaintiff definitively was the passenger in the dark SUV. Defendant Saxon knew and should have known that the plaintiff was not, in fact, the passenger in the dark SUV. Indeed, defendant Saxon lacked any evidence supporting her suspicion and accusation that plaintiff was a criminal.

Oubre's amended allegations included the following assertions against Franklin Covey and Saxon insofar as their alleged acts of other negligence:

> At the time of the alleged instance of the merchandise retrieval, defendant Franklin Covey had a policy against releasing any merchandise purchased by phone order without obtaining a signature from the person retrieving it, identification produced from the person retrieving the merchandise, and obtaining a credit card imprint from the person retrieving it. Defendant Saxon, the store Manager, allegedly broke company policy on the day in question by releasing

> the merchandise without taking any steps to secure the identity of the person retrieving the merchandise, requiring production of the credit card, or reasonable efforts to preclude the theft of the goods and alleged unauthorized use of an access card.
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> * * *
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> However, defendant Franklin Covey failed to undertake any efforts to train defendant Saxon regarding its policy set forth above, failed to communicate said policy to defendant Saxon and failed to undertake any reasonable training or efforts to prevent the theft of goods and alleged unauthorized use of an access card.

Franklin Covey and Saxon re-urged their exception objecting to the failure of the petition to state a cause of action. The trial court again sustained the exception and dismissed Oubre's claims against these defendants. This appeal followed.

NO CAUSE OF ACTION

The peremptory exception raising the objection of no cause of action is a procedural device used to test the legal sufficiency of the petition. All well-pleaded allegations of fact in the petition must be accepted as true, and no reference can be made to extraneous supportive or controverting evidence. ***Pelts & Skins, L.L.C. v. Louisiana Dep't of Wildlife and Fisheries***, 05-0952, p. 8 (La. App. 1st Cir. 6/21/06), 938 So.2d 1047, 1052-53, ***writ denied***, 2006-1821 (La. 10/27/06), 939 So.2d 1281. The petition must set forth the material facts upon which a cause of action is based; the allegations must be ultimate facts; conclusions of law or fact and evidentiary facts will not be considered. ***Parish of Jefferson v. City of Kenner***, 95-266, p. 1 (La. App. 5th Cir. 10/31/95), 663 So.2d 880, 881. The court must then determine whether the law affords any relief to the claimant if those factual allegations are proven at trial. If the allegations of the

petition state a cause of action as to any part of the demand, the exception must be overruled.

A petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle her to relief. ***Pelts & Skins***, 05-0952 at p. 6, 938 So.2d at 1053. The question therefore is whether, in the light most favorable to plaintiff, with every doubt resolved in her favor, the petition states any valid cause of action for relief under any evidence admissible under the pleadings. ***Id.*** The burden of demonstrating that no cause of action has been stated rests on the exceptor. In reviewing a trial court's sustaining an exception of no cause of action, the reviewing court conducts a *de novo* review. ***Id.***

DEFAMATION

Defamation is an invasion of a person's interest in his reputation and good name. Ordinarily in a defamation suit, plaintiff must prove: defamatory words, publication, falsity, actual or implied malice, and resultant injury. ***Perere v. Louisiana Television Broadcasting Corp.***, 97-2873, p. 3 (La. App. 1st Cir. 11/6/98) 721 So.2d 1075, 1077. But a statement which imputes commission of crime to another is defamatory *per se* and as result, falsity and malice are presumed, but not eliminated, as requirements. Defendant then bears the burden of rebutting the presumption. ***Redmond v. McCool***, 582 So.2d 262, 265 (La. App. 1st Cir. 1991).

Statements are defamatory only if the words, taken in context, tend to injure the person's reputation, expose the person to public ridicule, deter others from associating or dealing with the person, or deprive the person of public confidence

in his or her occupation. ***Aranyosi v. Delchamps, Inc.***, 98-1325, p. 6 (La. App. 1st Cir. 6/25/99), 739 So.2d 911, 915, ***writ denied***, 99-2199 (La. 11/5/99), 750 So.2d 187. 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, without considering extrinsic facts or circumstances, are considered defamatory *per se*. ***Kennedy v. Sheriff of East Baton Rouge***, 05-1418, p. 5 (La. 7/10/06), 935 So.2d 669, 675.

Insofar as plaintiff's claims of defamation by Franklin Covey and Saxon, the trial court stated:

> [T]he petition alleges that Ms. Saxon, quote, identified the plaintiff as the alleged passenger, unquote. The plaintiff never states a crime that Ms. Saxon allegedly accused plaintiff of committing, merely places her in … the dark SUV.

We expressly note that, based on the allegations of Oubre's petition, the claims of defamation levied against Franklin Covey are solely attributable to Saxon's actions. Thus, Franklin Covey's liability for defamation is dependent on whether Oubre has stated sufficient facts to support a finding that Saxon publicly defamed her. ***See Kennedy***, 05-1418 at p. 16 n.12, 935 So.2d at 681 n.12.

The only statement contained in the petition directly setting forth any facts of defamatory words -- i.e., words that tend to injure Oubre's reputation, expose her to public ridicule, deter others from associating or dealing with her, or deprive her of public confidence in her occupation -- is her allegation "defendants Saxon and Franklin Covey also accused [Oubre] of a crime, without any basis in evidence or facts." While the amended petition includes a more-detailed articulation of Saxon's alleged lack of knowledge to support her identification of

Oubre as a person in the dark SUV, it fails to specify the crime that Saxon accused Oubre of having committed. The amended allegations claim only that Saxon "stated to her co-workers, her supervisor, in a public hearing, and [to] attorneys for LSU and employees of LSU that *plaintiff definitively was the passenger in the dark SUV*." (Emphasis added.) But a statement by Saxon that Oubre was the passenger in the dark SUV, standing alone, neither accuses Oubre of criminal conduct nor tends to injure her reputation, expose her to public ridicule, deter others from associating or dealing with her, or deprive her of public confidence in her occupation. And even when coupled with the assertion that Saxon "accused [Oubre] of a crime" in the context of the criminal investigation by the LSU police officers into the theft committed at Franklin Covey on June 3, 2003, a statement that Oubre "was a passenger in the dark SUV" does not suggest a particular crime that Oubre may have committed. Absent an allegation that Saxon indicated Oubre had reason to know the person who retrieved the merchandise from the store on June 3, 2003 had committed the theft or that Oubre was somehow involved in a scheme designed to accomplish the theft, Saxon's statement that Oubre "was a passenger in the dark SUV" fails to implicate Oubre as the perpetrator of any crime.

Mindful that a petition must set forth the material facts upon which a cause of action is based, that its allegations must be ultimate facts, and that its conclusions of law or fact are not before us in our review of the propriety of the trial court's action in sustaining an exception of no cause of action, we find Oubre's petition insufficient to state a cause of action in defamation because it does not articulate any defamatory words. At best, Oubre has asserted a

conclusory allegation without supporting facts that Saxon "accused [her] of a crime." Accordingly, we find no error in the trial court's conclusion that the petition failed to state a cause of action in defamation against Saxon and, therefore, against Franklin Covey.

INADEQUATE TRAINING/FAILURE TO IDENTIFY AND VERIFY

Oubre has asserted in her petition that Franklin Covey was liable to her and caused her wrongful arrest by the LSU police officers when the merchant failed to properly train Saxon on an appropriate procedure insofar as telephone orders. She also alleged Franklin Covey had a policy against releasing any merchandise purchased by telephone orders without properly identifying the person retrieving the merchandise and verifying the credit card securing the order, and that the store failed to properly train its employees in implementation of the policy or that Franklin Covey did not effectively communicate that policy to its employees. Additionally, she averred that Saxon was liable to her for allegedly failing to conform to that policy.

Whether a duty exists in a particular set of circumstances is a question of law for the court to decide. ***Junot v. Morgan***, 01-0237, p. 6 (La. App. 1st Cir. 2/20/02), 818 So.2d 152, 158. Oubre relies on ***Kennedy v. Sheriff of East Baton Rouge***, 04-0574, p. 11 (La. App. 1st Cir. 3/24/05), 899 So.2d 682, 689, ***writ granted***, 05-1418 (La. 1/13/06), 920 So.2d 217, ***rev'd***, 05-1418 (La. 7/10/06), 935 So.2d 669, to assert that Franklin Covey had a duty to train its employees in properly identifying a person who placed a telephone order and in verifying the credit card used to secure the transaction.

Kennedy involved a patron who was detained by sheriff's deputies after paying for his drive-though meal with a $100-dollar bill that the restaurant's employee suspected to be counterfeit and contacted police. Another panel of this court reversed the trial court's grant of a summary judgment of the patron's claims of defamation against the sheriff and the restaurant, reasoning that outstanding questions of fact precluded summary judgment and specifically noting, "There was no showing by either [the sheriff or the restaurant] that its employees were provided with instruction, training, or procedures to address suspicions of counterfeit money." Seizing upon this language, Oubre contends that Franklin Covey had a duty to train its employees in properly identifying a person who placed a telephone order and in verifying the credit card used to secure the transaction.

In its reversal of this court's decision in ***Kennedy***, the supreme court concluded that the failure of restaurant's employees to receive training in the detection of counterfeit currency or to investigate further before contacting police was insufficient to establish the requisite reckless disregard for the truth plaintiff had the burden of showing to support his motion for summary judgment. Neither the decision of the court of appeal nor that of the supreme court holds that a merchant has a duty to train its employees on an appropriate procedure insofar as telephone orders. Thus, we find Oubre's reliance on the court of appeal's ***Kennedy*** decision misplaced.

Moreover, if such a duty exists, as a matter of law, the failure of a merchant to train its employees in an appropriate procedure for handling the retrieval of orders placed on the telephone and secured with a credit card does not include the

risk that a non-customer sitting outside the store in the vehicle that transported the person picking up the order would be falsely accused by law enforcement of having committed felony theft. Likewise we find that any policy Franklin Covey may have set in place to identify those retrieving telephone orders and verify the credit card used to secure the transaction, and any failure of the merchant to communicate such a policy to its employees, did not create a duty owed to Oubre that included the risk that a person, who was not a customer but merely an alleged passenger in a vehicle located outside the store, would be falsely accused of having committed a theft by investigating police. And because any policy Franklin Covey established did not create a duty in favor of Oubre, Saxon's failure to conform to such a policy cannot, as a matter of law, be a basis for imposing liability against either the store manager or her employer. Accordingly, the trial court correctly granted the exception raising the objection of no cause of action and dismissing these additional claims of alleged negligence against Franklin Covey and Saxon.

DECREE

Because Oubre failed to state a cause of action for defamation or for other claims of negligence against defendants, Franklin Covey or Saxon, the trial court's judgment sustaining the exception and dismissing these defendants from Oubre's lawsuit is affirmed. Appeal costs are assessed against plaintiff, Roselyn Oubre.

AFFIRMED.