NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0150

DEBRA AND CHARLES GOULAS

VERSUS

BATON ROUGE AIR CONDITIONING AND HEATING, INC.,
SUNBELT AIR CONDITIONING SUPPLY OF BATON ROUGE, INC.,
JESSE TOUCHET, DANNY FREDERICK, AND DIANE JONES

Judgment Rendered: SEP 1 4 2011

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 593,085, DIVISION "24"

THE HONORABLE R. MICHAEL CALDWELL, JUDGE

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Nicole Dufrene Streva
Morgan City, Louisiana

Attorney for Plaintiffs/Appellants
Debra and Charles Goulas

Barry J. Salinger
Chaz H.Roberts
Lafayette, Louisiana

Attorneys for Defendants/Appellees
Baton Rouge Air Conditioning and
Heating, Inc., Sunbelt Air
Conditioning Supply of Baton Rouge,
Inc., Jesse Touchet, Danny Frederick,
and Diane Jones

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., dissents with reasons.

McDONALD, J.

This is the appeal from a judgment granting an exception of prescription. The plaintiffs, Debra and Charles Goulas, filed suit against Baton Rouge Air Conditioning and Heating (Baton Rouge Air Conditioning), Sunbelt Air Conditioning Supply of Baton Rouge (Sunbelt), Jessie Touchet, Danny Frederick and Diane Jones. Mrs. Goulas had worked as a bookkeeper for Sunbelt. Mr. Touchet was the majority owner of Sunbelt and sole owner of Baton Rouge Air Conditioning, Mr. Frederick was the manager of Sunbelt and Ms. Jones was the accounting supervisor for Sunbelt.

Mrs. Goulas was accused of stealing over $500.00 (felony theft) from Sunbelt between February 29, 2008 and April 17, 2008. After a trial on the matter, she was found not guilty. Mrs. Goulas filed suit for damages against the defendants on July 30, 2010, asserting that the defendants caused physical and mental harm to her and Mr. Goulas, intentionally and negligently inflicted emotional distress upon them, and that the accusations against Mrs. Goulas were founded in malice to damage her person and reputation. Mr. and Mrs. Goulas sought damages for medical expenses, physical and mental pain and suffering, loss of wages and benefits, damage to earning capacity and employability, loss of enjoyment of life, and loss of consortium. They further sought statutory penalties and attorney fees.

The defendants filed exceptions of no cause of action, vagueness, and prescription. In their exception of prescription the defendants asserted that the petition claimed that intentional and negligent inflictions arose out of actions that occurred between February and April of 2008, however, the suit was not filed until July 2010. The defendants asserted that because more than one year elapsed between the events giving rise to the plaintiffs' claims and the institution of the

lawsuit, all claims were prescribed and should be dismissed with prejudice. Defendants also filed an exception of insufficiency of service.

On October 25, 2010, the case was heard. The defendants withdrew their exception of insufficiency of service at the hearing. The trial court signed the judgment on November 16, 2010, and sustained the defendants' exception of vagueness, sustained the defendants' exception of no cause of action against Baton Rouge Air Conditioning, sustained the defendants' exception of no cause of action against Charles Goulas, and sustained the defendants' exception of prescription. All of Mr. and Mrs. Goulas' claims were dismissed with prejudice. In his reasons for the ruling, the district judge said he would normally give the plaintiffs additional time to amend their pleadings in order to state a cause of action, but the ruling granting the exception of prescription made this moot.

Mr. and Mrs. Goulas appealed the judgment dismissing their claims. In their only assignment of error, they assert that the trial court erred in ruling that the defamation claim was prescribed. Since they did not appeal the rulings on the granting of the exception of no cause of action as to Baton Rouge Air Conditioning and Mr. Goulas, these rulings are final. Thus, the only claim before us it that of Mrs. Goulas for defamation.

When evidence is introduced at the hearing on a peremptory exception of prescription, the trial court's findings of fact are reviewed under the manifest error-clearly wrong standard of review. If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **In re Succession of Landrum**, 2007-1144 (La. App. 1 Cir. 3/26/08), 985 So.2d 778, 780, writ denied, 2008-0896 (La. 6/20/08), 983 So.2d 1277.

Generally, the party raising the peremptory exception, urging prescription, bears the burden of proof. This is the rule unless prescription is evident from the face of the pleadings, in which case the plaintiff bears the burden of showing the action has not prescribed. **Spott v. Otis Elevator Co.**, 601 So.2d 1355, 1361 (La. 1992).

The petition, filed on July 30, 2010, states that the defendants publicly accused Mrs. Goulas of felony theft during the time period of February 29, 2008 through April 17, 2008. The defendants' exception of prescription noted that more than one year elapsed between the events occurring in February and April of 2008 and the filing of the petition on July 30, 2010. The Goulas filed an opposition to the exception of prescription, asserting that Mrs. Goulas was unable to bring her defamation action against the defendants until the criminal proceeding was resolved on March 29, 2010, and asserting that prescription did not begin to run until Mr. Frederick and Ms. Jones testified at trial and publicly accused Ms. Goulas of committing theft.

Louisiana case law recognizes a qualified privilege that provides parties to pending litigation protection from being sued for defamatory statements made during judicial proceedings. It necessarily follows that, during this time, the one-year period that applies to the filing of a defamation action is suspended. But this suspension of prescription applies only to allegedly defamatory statements made by *parties to a lawsuit.* **Killian v. Irving**, 2009-0827 (La. App. 1 Cir. 4/1/10), 2010 WL 1253378, p. 2 (unpublished) (emphasis added). Since Mr. Frederick and Ms. Jones were not parties to the criminal prosecution against Mrs. Goulas, the basis for suspension is inapplicable.

The petition does not allege any defamatory statements being made during the trial and the allegations of those made in 2008 are clearly prescribed on the

face of the petition. Since there has been no suspension of the 2008 alleged defamatory statements, the exception of prescription was properly granted.

The issue of whether the plaintiffs could have cured the defect by amending the petition is not before us, as the granting of the exception of no cause of action and the failure to allow an amendment to the petition were not appealed.

Thus, the trial court judgment is affirmed. Costs are assessed against Mrs. Goulas.

AFFIRMED.

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HUGHES, J., dissenting.

I respectfully dissent because I believe we should remand with instructions to the trial court to allow amendment under LSA-C.C.P. art. 934, which provides that "[w]hen the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court".

In this case, the plaintiffs' action for defamation was found to be prescribed because the petition alleged the defendants defamed Ms. Goulas between February 29, 2008 and April 17, 2008 and that the petition filed on July 30, 2010 was too late. However, in the plaintiffs' opposition to the defendants' exceptions, the plaintiffs asserted that two of the defendants testified as to the defamatory facts at the March 29, 2010 criminal trial. See Record, page 40. Therefore, the plaintiffs may be able to amend their petition to so state, such that the action in defamation is not prescribed on its face, at least as to any defamatory statements made on March 29, 2010.

Further, the plaintiffs may also be able to amend to state a cause of action for malicious prosecution. In the plaintiffs' opposition to the defendants' exceptions, it is maintained that the defendants wrongly accused Ms. Goulas of theft, but did not make a police complaint until the day after she was able to obtain unemployment compensation (through a ruling that she had good cause to voluntarily terminate her employment), intimating that the criminal charges were maliciously brought because of the unemployment compensation issue. See Record, pages 39, 45-48. See also Jackson v. Young, 2010-1832, pp. 14-15 (La. App. 1 Cir. 6/17/11) (unpublished), 2011 WL 2448070.