NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2005 CA 1637

MARENA MONTELEONE DONALDSON

VERSUS

VIRGIL ALLEN, CLARENCE ZAHN, SR., LIONEL BRIDGES, AND THE TANGIPAHOA PARISH SCHOOL BOARD

Judgment rendered OCT 2 6 2006

J.D.

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Appealed from the
21st Judicial District Court
in and for the Parish of Tangipahoa, Louisiana
Trial Court No. 9603003
Honorable Jefferson D. Hughes, III, Judge

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BEFORE: KUHN, GUIDRY, AND PETTIGREW, JJ.

Guidry, J., concurs in the result.
KUHN, J. CONCURS

PETTIGREW, J.

In this action, plaintiff seeks damages, in addition to lost wages and injunctive relief, as a result of alleged sexual harassment, retaliation, and discharge. At the conclusion of a bench trial, the court concluded that one of the defendants had orchestrated and perpetuated a pattern of intentional infliction of emotional distress toward plaintiff and awarded damages. From this judgment, said defendant has appealed. We hereby reverse.

FACTS

On September 27, 1996, petitioner, Marena Monteleone Donaldson ("Ms. Monteleone") filed a "Petition for Damages, Lost Wages and Injunctive Relief for Sexual Harassment, Failure to Protect Employees from Sexual Harassment, Creation and Maintenance of a Work Environment Hostile to Female Employees, Retaliatory Transfer and Discharge of an Employee for Complaining of Sexual Harassment, Defamation of Character, and Intentional Infliction of Emotional Distress" in the 21st Judicial District Court, Parish of Tangipahoa. Named as defendants therein were Virgil Allen, individually, and in his capacity as Superintendent of the Tangipahoa School Board ("School Board"); Clarence Zahn, Sr., individually, and in his capacity as Principal of Champ Cooper Junior High School; Lionel Bridges, individually, and in his capacity as an employee of the School Board; Catherine Arnold, individually, and in her capacity as an employee of the School Board; and the School Board.

According to the allegations set forth in the petition, sexually suggestive remarks and gestures were directed towards Ms. Monteleone by Mr. Bridges, the custodian of Champ Cooper School, beginning on September 30, 1995. In an effort to stop this harassment, Ms. Monteleone alleged that she reported this matter to Mr. Allen and Mr. Zahn.

Ms. Monteleone also alleged that Mr. Zahn began harassing her as early as October 11, 1995. Due to her complaints regarding Mr. Bridges, coupled with her choice to ignore Mr. Zahn's previous sexually suggestive remarks and invitations to accompany him to a gambling casino, Mr. Zahn allegedly responded with indifference towards her and

failed to take corrective action to prevent further harassment by Mr. Bridges. In addition, Ms. Monteleone alleged that thereafter Mr. Zahn began to intentionally harass and embarrass her; and with the assistance of the school's secretary, Ms. Arnold, spoke ill of Ms. Monteleone over the school intercom on at least one occasion, gave her undeserved and unfavorable evaluations, and was instrumental in ultimately convincing the School Board not to renew Ms. Monteleone's employment contract.

Ms. Monteleone subsequently filed an amending and supplemental petition on January 9, 1997, wherein she added her minor son, James Michael Scott Devlin, and then-husband, Eric Christopher Donaldson, as additional petitioners in this matter. Through this addition to her petition, Ms. Monteleone clarified her earlier allegations and deleted the allegations she had made previously against Ms. Arnold. Ms. Monteleone also dismissed Ms. Arnold as a defendant in this matter.

On March 17, 1997, an answer was filed on behalf of defendants, Mr. Allen, Mr. Zahn, and the School Board, denying the allegations set forth in the original and supplemental petitions. Additionally, and by way of further answering, said defendants affirmatively alleged that any threatening or harassing gestures made by Mr. Bridges towards Ms. Monteleone were neither permitted nor allowed by either the School Board or Mr. Allen and Mr. Zahn. In addition, it is further alleged that said defendants "took quick and swift action" in response to Ms. Monteleone's complaints.

On September 10, 1998, Mr. Allen and Mr. Zahn filed a peremptory exception raising the objection of no right of action. Later, by virtue of a consent judgment, the parties stipulated to the granting of the exception with respect to any cause of action asserted against Mr. Allen and Mr. Zahn, personally, as employers of Ms. Monteleone, pursuant to Title VII of the Civil rights Act of 1964.

On May 18, 1999, Ms. Monteleone moved for the appointment of a curator ad hoc to receive service of process on behalf of the absentee defendant, Mr. Bridges. Following service of process upon the curator ad hoc, Ms. Monteleone moved for entry of a preliminary default judgment against Mr. Bridges on June 29, 1999. The default judgment was confirmed on July 16, 1999, and following a hearing, the trial court found

Mr. Bridges "to be guilty of fault and liable to" Ms. Monteleone for an undetermined amount of damages for sexual harassment and intentional infliction of emotional distress and mental anguish. A judgment to this effect was later signed by the trial court on February 18, 2000.[1] That judgment is not the subject of this appeal.

On August 30, 2000, the School Board moved for summary judgment on all remaining claims put forth by Ms. Monteleone on the grounds that said claims were prescribed, that Ms. Monteleone had failed to exhaust her administrative remedies and procedural prerequisites pursuant to Title VII of the Civil Rights Act of 1964 or any other federal statute, and that Ms. Monteleone's claims did not rise to the level of "hostile environment," "sexual harassment" or "unlawful retaliation," thereby precluding her recovery of damages in this matter. Following a hearing on said motion on October 10, 2000, the trial court took the matter under advisement. On November 15, 2000, the court issued its opinion that denied the exception raising the objection of prescription, but granted summary judgment and held that Ms. Monteleone was not entitled to pursue a claim for punitive damages.

This matter ultimately proceeded to a bench trial on October 20 and 21, 2004. On December 28, 2004, the trial court rendered its opinion wherein it referenced the previously rendered default judgment against Mr. Bridges, and opined that Ms. Monteleone was entitled to damages of $10,000.00 against Mr. Bridges. The trial court further found that Mr. Zahn "orchestrated and perpetuated a pattern of intentional infliction of emotional distress" toward Ms. Monteleone and awarded damages of $20,000.00 against Mr. Zahn individually. A judgment reflecting the award of $20,000.00 against Mr. Zahn individually was signed by the trial court on January 28, 2005. There was no judgment rendered for the award of $10,000.00 against Mr. Bridges.

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[1] The record reflects that a Curator's Return and Affidavit was filed into the record on February 23, 2000, by Peyton P. Murphy, the attorney appointed to represent the absent defendant, Mr. Bridges. The return reflects that although Mr. Murphy was appointed to represent Mr. Bridges on May 25, 1999, he did not attempt to locate a telephone number for defendant Bridges until late January 2000. After publishing an advertisement seeking knowledge of the defendant's whereabouts in February 2000, the return indicates that Mr. Bridges contacted Mr. Murphy, albeit after confirmation by Ms. Monteleone of the default judgment.

On February 4, 2005, Mr. Zahn moved for a new trial. Following a hearing, the trial court, on April 4, 2005, issued a judgment denying the motion for new trial. Mr. Zahn thereafter perfected the instant appeal from the judgment of January 28, 2005, and the denial of his Motion for a New Trial on April 4, 2005.

ISSUES

In connection with his appeal in this matter, Mr. Zahn presents the following issues for consideration by this court:

1. Whether Plaintiff's allegations rise to the level of conduct required for claims of Intentional Infliction of Emotional Distress.

2. Whether Plaintiff proved her emotional distress was "severe," and intentionally caused by Defendant/Appellant Zahn as required under law.

3. Whether Plaintiff's claims are prescribed.

4. Whether the award of $20,000.00 is excessive.

STANDARD OF REVIEW

The Louisiana Constitution of 1974 provides that the appellate jurisdiction of the courts of appeal extends to both law and facts. La. Const. art. V, § 10(B). A court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that is manifestly erroneous or clearly wrong. See **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882, n. 2 (La. 1993). The two-part test for appellate review of a factual finding is: 1) whether there is a reasonable factual basis in the record for the finding of the trial court, and 2) whether the record further establishes that the finding is not manifestly erroneous. **Stobart**, 617 So.2d at 882. This test dictates that a reviewing court must do more than simply review the record for some evidence that supports or controverts the trial court's finding. The reviewing court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous. **Id.**

Nevertheless, 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. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, inferences of fact should not be disturbed upon review

where conflict exists in the testimony. However, where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story, the court of appeal may find manifest error or clear wrongness even in a finding purportedly based on a credibility determination. **Id.**

ANALYSIS

The primary issue presented by this appeal is whether the trial court erred in finding that Mr. Zahn's actions with respect to Ms. Monteleone were sufficient to constitute the tort of intentional infliction of emotional distress.

Intentional Infliction of Emotional Distress

As our Louisiana Supreme Court noted in its opinion in **Nicholas v. Allstate Insurance Company**, 99-2522, p. 5 (La. 8/31/00), 765 So.2d 1017, 1021, the tort of intentional infliction of emotional distress was previously recognized by that court in **White v. Monsanto**, 585 So.2d 1205 (La. 1991), as emanating from the provisions of La. Civ. Code art. 2315 and illuminated by the restrictions and guidelines set forth in the American Institute's Restatement (Second) of Torts § 46. The court in **Nicholas** observed that Comment D of Restatement (Second) of Torts § 46 provides:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that this conduct has been characterized by "malice" or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and leave him to exclaim, "Outrageous!"

Nicholas, 99-2522 at 5, 765 So.2d at 1022.

The court in **Nicholas** continued to quote from its earlier opinion in **White** and stated:

> [I]n order to recover for intentional infliction of emotional distress, a plaintiff must establish (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional

> distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct.

Nicholas, 99-2522, at 6, 765 So.2d at 1022 (quoting **White v. Monsanto**, 585 So.2d at 1209).

Upon application of this standard in **White**, the court found no showing of extreme and outrageous conduct where it was shown that a supervisor directed profanity at White and other workers who were sitting idle in the workplace. Despite the fact that the supervisor threatened them with dismissal, referring to them and castigating them with base and vulgar four-letter words during a one-minute tirade, the court found that such conduct did not constitute the tort of intentional infliction of emotional distress. The court opined that to rise to the level of being tortious,

> The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Persons must necessarily be expected to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.

White, 585 So.2d at 1209

The court in **White** further acknowledged that while disciplinary action and conflict capable of causing some degree of mental anguish were foreseeable in today's workplace environment, such incidents were not ordinarily actionable. The distress suffered must be such that no reasonable person could be expected to endure it. **White**, 585 So.2d at 1210. Recognition of a cause of action for intentional infliction of emotional distress in a workplace environment has usually been limited to cases involving a pattern of deliberate, repeated harassment over a period of time. **Id.**

In its opinion in **Bustamento v. Tucker**, 607 So.2d 532 (La. 1992), the court clarified its earlier holding in **White**, and noted that conduct which, viewed as an isolated incident, would not be outrageous or would not be likely to cause serious damage, can become such when repeated over a period of time. The court further noted that this has been characterized as a sliding scale approach under which even relatively "mild" harassment may become tortious if continued over a substantial time period. **Bustamento**, 607 So.2d at 538 (citing Montgomery, <u>Sexual Harassment in the</u>

Workplace: A Practitioner's Guide to Tort Actions, 10 Golden Gate U. L. Rev. 879, 890 (1980)).

While a defendant's knowledge that a plaintiff would be particularly susceptible to emotional distress is a factor to be considered, the mere fact that the defendant knew that the plaintiff would regard the conduct as insulting, or would have his feelings hurt is not enough. Unless the defendant had knowledge of the plaintiff's particular susceptibility to emotional distress, the defendant's conduct should be judged in the light of the effect such conduct would ordinarily have on a person of ordinary sensibilities. **White**, 585 So.2d at 1210.

The court concluded that,

> Liability can arise only where the actor desires to inflict severe emotional distress or where he knows that such distress is certain or substantially certain to result from his conduct. The conduct must be intended or calculated to cause severe emotional distress and not just some lesser degree of fright, humiliation, embarrassment, worry or the like.

White, 585 So.2d at 1210 (citation omitted).

Later in **Nicholas**, the court noted that despite having been singled out from his peers for corrective review by his supervisor, the supervisor's conduct, while seemingly arbitrary and without compassion, did not rise "to the high threshold of extreme and outrageous conduct." **Nicholas**, 99-2522 at 17-18, 765 So.2d at 1028. While conceding that Nicholas "genuinely felt humiliated, anxious, confused, upset and worried" as a result of the employee review process utilized by his employer, the court declined to say that Nicholas's emotional distress was more than a reasonable employee might be expected to endure in the workplace. **Nicholas**, 99-2522, at 20, 765 So.2d at 1030.

Merits of the Instant Case

Upon application of the foregoing precepts of law to the facts of the instant case, we find that Ms. Monteleone failed to establish her right to recover from the defendants for an intentional tort.

Following a thorough review of the record in this matter, we note that many of the allegations of sexual harassment put forth by Ms. Monteleone involve acts allegedly

perpetrated against her by Mr. Bridges, the custodian at Champ Cooper School. These acts are not an issue in the instant appeal.

In her trial testimony, Ms. Monteleone stated that she began teaching seventh and eighth grades at Champ Cooper School during the 1994-1995 school term. Ms. Monteleone admitted that for most of her first year, she had no problems with either Mr. Bridges or Mr. Zahn. Although she was bothered when Mr. Zahn referred to her as "Baby," Ms. Monteleone stated that she simply disregarded such comments. Later, Mr. Zahn's comments became more personal. In recounting an incident that allegedly took place at the end of April 1995, Ms. Monteleone claimed that she approached Mr. Zahn and applied for a position teaching summer school. According to Ms. Monteleone, Mr. Zahn allegedly told her that with a body like hers, he did not know why she would teach summer school, when she could make considerably more money working in a casino.

Ms. Monteleone also related an incident that she claimed occurred at a teachers' luncheon, held at a restaurant in Madisonville at the end of May 1995. According to Ms. Monteleone, Mr. Zahn asked her six times at the luncheon to accompany him to a casino; and when she refused, Mr. Zahn requested that she give him her telephone number. Ms. Monteleone testified that she sought refuge in the women's restroom until Mr. Zahn left. Ms. Monteleone stated that she did not teach summer school that summer and had no contact with Mr. Zahn during that time.

Upon returning to Champ Cooper School in the fall of 1995, Ms. Monteleone claimed that she did not believe the school's administration supported her with respect to discipline. Whenever she would have a discipline problem in her classroom, there would be no consequences from the administration. In another incident, Ms. Monteleone claimed that while in line with her class at the cafeteria, Mr. Zahn began "screaming" at her about an unnamed incident. In Ms. Monteleone's opinion, such incidents undermined her authority and made it very difficult to teach and maintain classroom discipline without administrative support. Ms. Monteleone further testified that during this time, she was subjected to sexually suggestive remarks and gestures directed towards her by the school custodian, Mr. Bridges.

Following a meeting held between teachers at the school and the superintendent, Mr. Allen, wherein she expressed some unrelated concerns, Ms. Monteleone claimed that the school's assistant principal advised her that, unlike other teachers at the school, she would have to request permission for time off directly from Mr. Zahn. Ms. Monteleone stated that Mr. Zahn also confirmed that she would need to ask him directly if she wanted to request days off.

Ms. Monteleone further alleges that in the spring of 1996, Mr. Zahn made a comment about her use of blood pressure medication and inquired as to whether she knew that it affected a person's sex drive. In another incident, Mr. Zahn apparently drew Ms. Monteleone's name to attend a charity gala. Ms. Monteleone testified that the school's intercom was thereafter left "on" inadvertently, and Mr. Zahn was heard to remark to a secretary, "Can you believe she –she won" – "Can you believe she won that after all that shit she started up," or something to that effect. According to Ms. Monteleone, Mr. Zahn subsequently apologized for his remark, and then allegedly attacked her verbally, advising that he would be watching her work performance; and because he considered her to be a "troublemaker," he would find a way to "get rid of" her.

Later, Ms. Monteleone testified that she received an unfavorable work evaluation and contended that after issuing contracts to other teachers at the school, Mr. Zahn purposely and inexplicably "withheld" the teaching contracts for Ms. Monteleone and a fellow teacher with respect to the upcoming school year. This allegation was refuted by testimony from Joseph Bosch, Personnel Director for the School Board. Mr. Bosch confirmed that at the beginning of May 1996, Ms. Monteleone requested in writing a transfer to a lower grade level at another school. The proposed transfer of Ms. Monteleone to Hammond Westside School was subsequently approved by Mr. Zahn on May 6, 1996. Despite the fact that Ms. Monteleone was approved for a transfer to a school she had requested, Ms. Monteleone voluntarily chose to resign from her teaching position with the School Board.

Based upon the foregoing, it is apparent that Ms. Monteleone may have been subjected to inappropriate comments or unjustified criticism of her teaching abilities by Mr. Zahn; however, the trial court clearly erred in finding that such conduct rose to the high threshold of extreme and outrageous conduct. Moreover, the evidence fails to show that Mr. Zahn knew that severe emotional distress would be substantially certain to result from his conduct. While medical depositions introduced into the record establish that Ms. Monteleone's problems with anxiety and depression pre-dated her employment with the School Board, there is no evidence to suggest that Mr. Zahn was ever aware of this fact. Accordingly, we cannot say that Ms. Monteleone's emotional distress was more than a reasonable employee might be expected to endure in the workplace.

DECREE

For the foregoing reasons, the January 28, 2005 judgment of the trial court is reversed and set aside with respect to the claims asserted against Clarence Zahn, Sr. by the petitioners herein, and judgment is rendered in favor of said defendant dismissing petitioners' suit at their costs.

REVERSED AND RENDERED.