11/28/01 “See News Release93 for any concurrences and/or dissents.”

SUPREME COURT OF LOUISIANA

No. 00-C-1394 c/w 00-C-1423

DONNA LABOVE, ET VIR.

Versus

ROY RAFERTY, JR., ET AL.

KNOLL, Justice, concurring, in part, and dissenting, in part.

I am in agreement with the majority's determination that LaBove's age discrimination claim must fall because the evidence failed to preponderate that age discrimination was the motivation for CSB's actions. However, I disagree with the reversal of the jury verdict that found for LaBove on her claim against CSB for the intentional infliction of emotional distress. I find the record evidence fully supports the jury verdict on this issue. CSB could have simply terminated LaBove without subjecting LaBove, a bank vice-president, to menial tasks, and embarrassing and humiliating events. I find it particularly egregious on CSB’s part that while it required LaBove to perform duties beneath the rank of a bank vice-president, it never lowered her titled position.

The majority opinion today does grave injustice to our manifest error doctrine so well established in our uniqueness as a civil law state and our review of fact.[1] We are not following the very jurisprudence we made in cautioning the appellate courts to affirm a trial court’s ***findings of fact*** unless such factual determinations are manifestly erroneous or clearly wrong. Ambrose v New Orleans Police Dep't Ambulance Serv., 93-3099, 93-3010, 93-3112 (La. 7/5/94), 639 So. 2d 216; Stobart v State of Louisiana,

---

[1] The term “manifest error” first appeared in Louisiana jurisprudence in Moore v. Angioletto, 12 Mart (o.s.) 532, 533 (La. 1823). See also GEORGE W. PUGH, THE MANIFEST ERROR RULE, 21 La. Law Rev. 740 (1961). See also WILLIAM E. CRAWFORD, SHOULD LOUISIANA RETAIN CIVIL APPELLATE REVIEW OF FACTS?, 35 La. B. J. 244 (1987).

through Dep't of Transp. & Dev., 617 So. 2d 880 (La. 1993); Housleyv. Cerise, 579 So. 2d 973 (La. 1991); Sister v. Liberty Mutual Ins. Co., 558 So. 2d 1106 (La. 1990). In the present case, a jury of twelve members rendered a verdict for the plaintiff on this purely factual issue; the trial judge denied defendant's motion for judgment notwithstanding the verdict and a three-member panel of the court of appeal affirmed the jury verdict. It behooves us now to remind ourselves of the roots of manifest error review so that we might respect the role of our three-tiered court system[2] which forms the basis for this standard of review and that there is a need for us to temper our tendency to substitute our opinion for those of the fact-finders. Without such a perspective, the trial court's quintessential fact-finding role will be compromised.

The evidence presented in this case supports that the issue of intentional inflection of emotional distress presented a close case. A trier of fact virtually cannot commit manifest error in circumstances where the evidence supports a close issue, i.e., when the evidence can reasonably support the verdict or judgment either way. Under these circumstances the trier of fact makes the decision which should be affirmed by the upper courts. A reversal of a close decision is not correcting a manifest error, but is upending the doctrine of manifest error.

In Syndics of Brooks, 3 Mart. (o.s.) 9 (La. 1813), this Court recognized that manifest error review was necessitated because of the inherent weaknesses in the jury trial, "if it must depend on the caprice, ignorance, or information of a jury." Id. at 13. However, as well stated in Trinble's Syndics, 3 Mart. (o.s.) 394 (La. 1814), this Court astutely observed that "we must presume that [the jury] weighed and discussed [the

---

[2] Louisiana's three-tiered court system allocates the fact finding function to the trial courts. Virgil v. American Guarantee and Liability Ins. Co., 507 So. 2d 825 (La. 1987). Due to that allocation and the trial court's opportunity to evaluate live witnesses or to evaluate a mixture of deposition and live testimony, great deference is accorded to the trial court's factual findings. Id." Sistler v. Liberty Mut. Ins. Co., 558 So. 2d 1106, 1111 (La. 1990).

case] as they ought to have done; . . . this verdict . . . ought not to be disturbed. Trinble's Syndics, 3 Mart. (o.s.)" at 396. Consequently, in Walton v. Grant, 2 Mart. (n.s.) 494 (La. 1824), we stated:

> The question is one of fact alone and the rule established in this court is, that *the decision in the inferior tribunal always governs here, unless it clearly appears to be erroneous.*

Walton, 2 Mart. (n.s.) at 494. (emphasis added).

What we said permeates the jurisprudence of this Court to this day and serves as the bedrock upon which our manifest error doctrine is firmly planted. Notwithstanding this well established doctrine acknowledged by the majority, the commencement of the majority opinion states that the evidence and testimony has been viewed "in a light most favorable to plaintiff." Labove, slip op. at 1. In this case, the jury neither acted capriciously or ignorantly, nor was it misinformed.[3] With total disregard to the reasonableness of the jury's verdict, the majority re-weighs the evidence and substitutes its opinion for that of the jury even though this case is highly fact intensive and presented a close issue.

As observed in Nicholas v. Allstate, 99-2522 (La. 8/31/00), 765 So. 2d 1017, those facts which constitute outrageous conduct are based upon the perceptions of the "average member of the community." Nicholas, 765 So. 2d at 1022. CSB argues that the facts of this case are no more than petty incidents which occurred over more than two years that would not cause an average member of the community to exclaim

[3] It is on this fact that Nicholas v. Allstate, 99-2522 (La. 8/31/00), 765 So. 2d 1017, a cased that I authored, is clearly distinguishable. In Nicholas, the trial judge's failure to properly instruct the jury on the essence of the tort of intentional infliction of emotional distress interdicted the jury's decision. In the present case, the record shows that unlike Nicholas, the trial judge properly instructed the jury. Thus, the jury decision in the present case was fully informed and based upon close examination of the demeanor and credibility of the various witnesses.

"outrageous!" A recitation of record evidence shows clearly that the jury did not commit manifest error.

The record shows that in the early days of Raftery's presidency, he let it be known to Fruge that he did not like LaBove and that he wanted to replace her with someone else who could perform her marketing and advertising duties. Although he admitted this to Fruge, he also testified that the bank "couldn't stand any more bad publicity." Despite promoting LaBove to vice-president, the record shows that Raftery contemporaneously realigned the chain of command, making LaBove, a superior bank officer, report to persons of lesser rank, and assumed her marketing and advertising duties.

During LaBove's annual evaluation in early 1994, Raftery told her that he had taken her personal diary, read it, and threw it away. In the course of this evaluation, LaBove stated that Raftery referred derogatorily to Cameron Parish residents as "gee-gees" and explained that he utilized pictorial advertisement in the local newspapers because the local residents were too dumb to read. LaBove, the only bank officer from Cameron Parish, detailed that these comments personally offended her; she said that these comments reduced her to tears and nauseated her. Shortly after, when Raftery reaffirmed that LaBove was to report to junior corporate personnel, Wicke, the head cashier, and Landry, the assistant cashier, LaBove testified that her telephone calls to Raftery to discuss this corporate anomaly went unreturned.

Sandra DeShields, a fellow employee of LaBove, described Landry as a very loud, aggressive, ornery type. She stated that Landry boasted that she was LaBove's boss and that, like it or not, LaBove had to do whatever she said. According to DeShields, Landry quickly had LaBove performing tasks that would not have been

expected of a bank vice-president. She further testified that this treatment adversely affected LaBove.

One of the tasks assigned to LaBove was that of ordering and filling supply orders for the bank branches. Even though LaBove had difficulty lifting the boxes, DeShields was told by Paula Pool and Landry that she was not to provide assistance. DeShields described this treatment as belittling to LaBove and that the performance of these menial tasks caused LaBove to often cry.

Tina Savoie, a co-worker who was employed at CSB before Raftery's presidency and who became re-employed after his presidency, graphically contrasted LaBove's tasks during these periods. Whereas LaBove was a major player in the bank's day-to-day operations during Savoie's first period of employment, she found in her second period of employment that LaBove's duties had significantly diminished. She further explained that Landry constantly watched everything that LaBove did. Like DeShields, Savoie was told by Wicke and Landry that she was not to associate with LaBove because she was a bad influence. In essence, she testified that she found LaBove's treatment degrading.

Like Savoie, Belinda Miltenburger was employed at various times at CSB. She mirrored Savoie's observation of LaBove's duties at the bank. She stated that she was embarrassed for LaBove and felt that her treatment was degrading. She, too, was told by Landry not to assist LaBove with the supply orders.

The record further shows that the lessening of LaBove's duties and prominence was noticeable to Jennifer Bercier, a bank stockholder and a person in Cameron whose banking needs LaBove serviced. Ms. Bercier was so moved that she wrote a letter of concern to CSB. After some delay, Raftery assured Bercier that LaBove was still a vice-president and that he was not attempting to get rid of her.

In a January 17, 1996 meeting, LaBove's supervisors told her that she was no longer allowed to perform public relations or outside meeting work because of financial constraints and the need to standardize managerial functions. In a memorandum issued that same day, LaBove's authority to approve NSF checks, service charges and check approvals was removed. The memo stated, "so these functions have been reassigned and are gone forever from your job description . . . whether those things were or were not stressful to you." (P-21). At that same time, Pool informed LaBove that if she was unable to work as a teller, a job that LaBove had informed her supervisors in writing caused her stress, CSB would be forced to hire someone else and re-evaluate whether LaBove would still be considered a full-time employee.

At approximately this same time, Raftery had the locks to the Cameron bank changed because he thought that LaBove was stealing bank property. Although LaBove had traditionally opened the bank and made the morning coffee for staff, she was not provided with a new key. Raftery had learned that Landry saw LaBove moving boxes from the bank. Both Landry and Raftery testified that they did not speak to LaBove about her (LaBove's) suspected nefarious activity. In actuality, the evidence shows that the boxes LaBove removed contained Chamber of Commerce material that she was returning to the community organization. Had either Raftery or Landry spoken to her about this activity, not only would they have learned the nature of her actions, but would also have learned that Wicke, the branch manager, held the bank door open for her and further helped her carry the boxes to her automobile.

Finally, after a string of reprimands (LaBove's transference of $50 between her brother's bank accounts, the fur festival poster incident mentioned in the majority

opinion, her balancing of the checkbook for the Cameron Chamber of Commerce), LaBove chose to stop coming to work at CSB.

After examining this evidence, taking into mind the work place setting of this conduct and CSB's asserted perspective that its actions resulted in a series of petty incidents, I find that the jury was presented with two permissible views of the evidence. In its instructions to the jury, the trial court stated that CSB could only be liable if it was guilty of "atrocious conduct which exceeds all bounds usually tolerated by a decent society; . . . so outrageous in character and extreme in degree as to go beyond all possible bounds of decency." The trial court further tempered the jury determination by further instructing them that "mere insults, indignities, threats, annoyances" were insufficient and that "disciplinary action and conflict in a pressure packed workplace environment, although calculated to cause some degree of mental anguish is not ordinarily actionable." Speaking as "average member[s] of the community" who were well instructed by the trial court, I find that the jury determination that CSB's conduct was outrageous is a finding that can be well supported by the record.

As an additional criterion for recovery, it was necessary for LaBove to establish by a preponderance of the evidence that CSB's conduct produced severe emotional distress. It was well established that CSB's handling of LaBove caused her to cry and become nauseated at her evaluation, and that employees found her crying several times at the bank. The evidence also shows that Sandra DeShields found LaBove shaking and non-responsive at her teller window and that she had to be taken to her physician for treatment. Moreover, all of the expert medical testimony showed that LaBove was suffering from severe depression in the months leading to her removal from CSB.

Accordingly, I find that the jury did not abuse its discretion in finding that the evidence preponderated that the emotional stress that LaBove suffered was severe.

The final criterion that LaBove had to prove was that CSB desired to inflict severe emotional distress or that it was at least substantially certain that such would follow from its conduct. As sketched below, I find no manifest error in the jury's determination of this issue.

The oral statements that Fruge attributed to Raftery about his desire to remove LaBove indicate an animus from the upper level of CSB management as to the treatment she received. That this hostile treatment came from above was affirmed in the comments that Wicke made to Burl LaBove when he complained about the treatment his wife was receiving. Moreover, the oral reprimands that LaBove publicly received from a lower ranking bank official are highly indicative of an attack directed to LaBove and fully show the outrageous treatment that CSB leveled against LaBove, a bank vice-president. Furthermore, the gradual stripping of LaBove's functions which she had mastered through the years and the replacement of those duties with menial tasks usually performed by younger, less experienced employees, highlight the desire of CSB's upper management to inflict severe emotional distress or at least shows that severe emotional distress was substantially certain to follow from its conduct. When I view CSB's actions within the context of Louisiana's well accepted at-will employment doctrine, I find that CSB's demeaning treatment of LaBove is further exacerbated because it is clear that her employment could simply have been discontinued.

It is well accepted that whether an injured person's medical condition was caused by tortious conduct is a question of fact which should not be reversed on appellate review absent manifest error. Housely v. Cerise, 579 So. 2d at 973, 979;

Mart v. Hill, 505 So. 2d 1120, 1127-28 (La. 1987). Both Dr. Aretta J. Rathmell and Dr. David Post, a psychiatrist and psychologist, respectively, who appeared on LaBove's behalf, testified that job stress, more likely than not, caused LaBove's depression. In addition, Dr. Sheldon Hersh, defendant's medical expert, admitted that work related stress was a significant causative factor in LaBove's depression.

Throughout the course of the trial, the issues of LaBove's use of diet pills and the temporal onset of her hypertensive condition were debated. Dr. Hersh, a "medical detective" who testified on behalf of CSB, advanced the point that his interpretation of LaBove's medical history as recorded in the notes of doctors and nurses showed that LaBove had taken diet pills for two years.[4] He opined that it was common pharmaceutical knowledge that diet pills can cause high blood pressure, depression, and emotional instability. LaBove's treating family physician, Dr. Richard Sanders, testified that he had prescribed diet pills for LaBove for a total of six weeks during the ten years that he had treated her. Ultimately, I note, however, that even Dr. Hersh admitted that LaBove was still depressed when he saw her in 1998, approximately three years after LaBove had taken diet pills.

Dr. Hersh also attempted to suggest that his reading of the medical records indicated to him that LaBove suffered from high blood pressure before the period of her emotional turmoil at CSB. To rebut this contention, LaBove presented Dr. Sanders's, the physician who had treated her through the years, who unequivocally stated that LaBove did not suffer from a pre-existing high blood pressure condition.

A reviewing court must constantly be mindful that "if the trial court or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal

---

[4] It is unclear in the record what specific medical evidence Dr. Hersh relied upon to reach this conclusion. One possible explanation was a notation in Dr. Carlos Choucino's medical charts that LaBove had taken diet pills approximately two years before when Dr. Sanders treated her.

may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Stobart v. State of Louisiana, through Dep't of Transp. & Dev., 617 So. 2d 880, 882-83. Consequently, when there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. Id. Applying the well accepted jurisprudential framework that I have outlined regarding appellate review through the years, I believe the appellate court correctly determined that the jury was not manifestly erroneous in its determination that CSB's actions caused LaBove's medical condition.

Today a majority of this Court ignores the findings of a jury composed of average members of the Cameron community, substitutes its appreciation of the facts, and strips LaBove of a judgment which I find is fully supported by a reasonable reading of the record. For these reasons, I respectfully dissent from that portion of the majority opinion which denies LaBove recovery from CSB for the intentional infliction of emotional distress.