THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
MAR 26 2018
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

2017-UP-040 (S.C. Ct. App. filed January 25, 2017)
Appellate Case No. 2017-001160
Lower Court Case No. 2013-CP-40-1460

Jeffrey Kennedy....., Petitioner,

v.

Richland County School District Two, Eric Barnes and Chuck Earles.....Respondents.

REPLY BRIEF OF PETITIONER

Rachel G. Peavy, Esq. (SC Bar #69397)
T. Jeff Goodwyn, Jr., Esq. (SC Bar #73789)
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205
(803) 251-4517

Attorneys for Petitioner Jeffrey Kennedy

INDEX

TABLE OF AUTHORITIES

CASES

Rules

ARGUMENT IN REPLY

I. There Was At Least Some Evidence in The Record of Defamatory Communication.

The trial court correctly found that there was evidence in the record from which the jury could find that Respondents defamed Mr. Kennedy through words, conduct, or a combination of both. There was, of course, the evidence that a supposedly "confidential" e-mail, authored by Mr. Earles and received by Mr. Barnes, was printed out and left in the open in offices and vehicles for employees to read. However, there was also evidence that Respondents communicated to rank and file employees their belief that Mr. Kennedy was a thief. Kennedy's fellow security guard, John Reid, recounted the following:

> Q. When did you first find out that Jeffrey was being investigated for the theft?
> A. Well, I mean, after [Eric Barnes] asked me about it, [Kennedy] didn't come to the shift to take the supervisor's position. They moved him into the office, and all he could do was answer the telephone, wasn't to have any keys, wasn't to drive any vehicles.
> Q. **How did you find out that he wasn't supposed to have keys or drive vehicles.**
> A. **It was told to us. Because he came in on third shift and he would relieve us, and sometimes he would beat the shift supervisor to work himself . . .**
> Q. **Who told you he was not supposed to have keys?**
> A. **It was put out by Mr. Barnes.**
> Q. What did you think of that?
> A. Well you know, it's pretty obvious. I mean, a guy supposed to get promoted; and all of a sudden, they move. He didn't get promoted, and then he is brought into the office. All he can do is answer telephones. Evidently he was under suspicion for something.
> Q. Was it clear to you that he was under suspicion for the thousand dollar theft?
> A. That's when it started. So, I mean, put one and two together.
> Q. So you ended up getting the job that Jeffrey had been promoted to and that was revoked?
> A. Yes, sir.

Q. . . . Did Jeffrey's job overlap with what you thought your job was supposed to be as the second shift supervisor?
A. I didn't get the job until later on.

R. at p. 249, l. 14 – p. 251, l. 3.

Barry Mitchell, another shift security guard, also testified that Respondents let the staff security guards know that they considered Kennedy to be the thief:

Q. **Based on your personal knowledge, going back to those days and months around March 2011, personally was it obvious to you that Mr. Earles and Mr. Barnes thought that Jeffrey was not to be trusted?**
A. **Yes, ma'am. Once they promoted him to lieutenant and then demoted him to a desk job, it was rather obvious that he was under investigation for it.**
. . .
Q. **Where did you see this [Earles e-mail] before?**
A. **There is an office in the support service center where we have a file cabinet where we keep our time sheets . . . and it was laying on the desk.**
Q. **So that office is not a secure area?**
A. **No.**
Q. Staff goes in and out of there?
A. Yes, ma'am.
. . .
Q. **And so the letter says [Kennedy] is not to have keys?**
A. **Yes, ma'am.**
Q. **And you interpreting that how?**
A. **He was not to be trusted.**
Q. A security guard without keys really isn't a security guard?
. . .
A. Is worthless, for what we do. If you can't use keys, you can't work.

R. p. 229, l. 13 – p. 231, l. 1.

Furthermore, Mr. Kennedy himself testified that he heard that Respondents said he was a thief. R. p. 168, l. 5-23. Taken together, the testimony of Messrs. Reid, Mitchell and Kennedy is at least "some" evidence of defamation; and defamation can be established by either direct or circumstantial evidence, and proven through words, conduct, or a

combination of both in South Carolina. *See, e.g. Duckworth v. First Nat. Bank*, 176 S.E.2d 297, 254 S.C. 563 (1970); *Mains v. K-Mart Corp.*, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988). The Court of Appeals, having overlooked "any" evidence in the record to support the jury's verdict, instead improperly weighed the evidence. The testimony of Respondents (specifically, their denial that they left out the e-mail) was merely one piece of evidence; this was not the only evidence for the jury to consider in determining whether Respondents defamed Mr. Kennedy and neither the Court of Appeals or the trial court can decide credibility issues or resolve conflicts in the evidence. *See Bass v. SC DSS*, 414 S.C. 558, 780 S.E.2d 252 (2015). After all, if the Respondents were willing to verbally inform rank and file employees that Mr. Kennedy was not to have keys, there is a reasonable inference that they would do so in writing as well.

Furthermore, whether any privilege was exceeded or abused is properly for the jury. *See, e.g., Swinton Creek v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999) (whether privilege exceeded or abused is for the jury); *See also Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2011). Put another way, there was decidedly a controversy as to the facts in this case; any suggestion otherwise, based upon the voluminous evidence before the jury, is incorrect. The Court of Appeals improperly weighed the evidence in the case, and substituted its view of such evidence for the jury's view. *See Brown v. Dick Smith Nissan*, 414 S.C. 101, 777 S.E.2d 208 (2015) (reversing Court of Appeals and reinstating damages award). For all the reasons stated in the Brief of Petitioner, this Court should reverse the Court of Appeals and affirm the rulings of the trial court.

A. This is Not a Wrongful Discharge Case

Respondents argue that affirming the jury's verdict, and the rulings of the trial court, will "eviscerate" at-will employment in South Carolina. Resp. Br. at p. 8, fn. 1. This is a red herring and the Court should ignore this attempt to "muddy the waters." This case went to the jury on the sole cause of action for defamation; it was never a wrongful discharge case and the Respondents never requested a charge on wrongful termination. R. pp. 1043-1065 (Appendix to Record). Furthermore, the case of *Taghivand v. Rite Aid Corp.*, 768 S.E.2d 385, 411 S.C. 240 (2015), cited by Respondents, is inapposite. In *Taghivand*, the Court considered a certified question from the district court: whether an at-will employee may maintain a cause of action in tort for wrongful termination under the parameters of the public policy exception? The Court held that an at-will store manager, who was terminated for reporting, in good faith, alleged shoplifting by a customer, could not state a claim for wrongful termination under the public policy exception. The Court declined to expand the public policy exception and noted that it had invoked the exception in only two instances: where an employer requires an employee to break the law, or when the termination itself is illegal.

Here, Mr. Kennedy sought damages related to Respondents conveying to his co-workers and others that he was a thief and could not be trusted, with keys or otherwise. There was no claim for wrongful termination; this Court should reject any attempt to inject the issue of at-will employment into a defamation action such as this. In South Carolina, an adverse employment decision can be the basis for a defamation claim. *See Pridgen, supra; See also Constant v. Spartanburg Steel,* 316 S.C. 86, 447 S.E.2d 194 (1994). The

Court should adhere to this precedent and reject Respondents' attempt to misdirect the Court's review.

II. *Harris v. TieTex* and *Williams v. Lancaster School District* Are Distinguishable From This Case In Significant Ways.

Respondents rely upon *Harris v. TieTex*, 417 S.C. 533, 790 S.E.2d 411 (Ct. App. 2016), for their argument that while abuse of a qualified privilege is generally an issue for the jury to decide, where there is an absence of a controversy as to the facts, it becomes a matter of law for the court. In *TieTex*, the Plaintiff admitted he had no evidence that his employer, TieTex, shared internal, performance-related memos with anyone other than the individuals to whom they were addressed. The Court determined the memos were qualifiedly privileged.

The trial court subsequently granted the employer's motion for summary judgment, holding that the plaintiff failed to show actual malice or that the scope of the privilege had been exceeded, as required under *Swinton Creek Nursery*. Specifically, the trial court noted that, while the issue of whether a qualified privilege has been abused is generally for the jury, in the absence of a controversy as to the facts, it is for the court to determine. 790 S.E.2d at 416. Since the plaintiff failed to present any evidence of either malicious intent or that the internal memos were shared with any non-supervisory employees, summary judgment was proper.

Mr. Kennedy's case stands in direct contrast; here, there was evidence that the Respondents communicated their belief to rank and file employees that Mr. Kennedy was a thief and could not be trusted. Furthermore, there was evidence of a motive to harm Mr. Kennedy because Respondents were angry he was not fired or charged with a crime by the Sheriff's Department. Further evidence of malice could be found in the lack of meaningful

investigation into the alleged theft, as reflected in the record below. Taken together, the voluminous record in Mr. Kennedy's case puts it apart from the bare allegations advanced by the plaintiff in *TieTex*.

Respondents' reliance on *Williams v. Lancaster County School District*, 369 S.C. 293, 631 S.E.2d 286 (Ct. App. 2006) is similarly misplaced. In *Williams,* a husband and wife who were both high school teachers brought an action for slander against the school principal. They alleged that during meetings the principal had with the husband, the wife, and a school secretary, the principal accused the husband of committing adultery with the secretary, and that thereafter rumors of adultery immediately spread throughout the school community.

The trial court granted summary judgment, holding that the record was devoid of any evidence of any publication of a slanderous statement by the principal. The Court of Appeals affirmed, noting that several employees, and possibly parents and students, were in the immediate area after the husband and school secretary were discovered locked in a bathroom together. Additionally, the deposition testimony confirmed that rumors had been circulating for some time prior to the bathroom incident about a possible romantic relationship between the two. *Id.* at 292-293.

Unlike the situation in *Williams v. Lancaster County*, here the evidence was that there were no negative rumors circulating, or innuendo surrounding, Mr. Kennedy reputation as of March 2011 — rather, the testimony was that he was a valued part of the security division who had just been recommended for a promotion and was introduced as a new supervisor at the lieutenant's meeting. There was evidence that Kennedy had a good reputation until Earles and Barnes decided to label him as untrustworthy and unfit for his

profession, and disseminate that information to his fellow employees by their words and conduct. There was also sufficient evidence for the jury to decide that Earles and Barnes left the "confidential" memo out for all to see in the office and the vehicles – despite their denials - given that they were the author and recipient respectively and clearly had opportunity and motive. That is, the jury resolved this dispute in the evidence against the Respondents.

The trial court carefully considered these exact same arguments of the Respondents – both at the directed verdict stage and at the JNOV stage – and properly found that there was sufficient evidence for the jury to consider whether the qualified privilege was exceeded and whether they acted with actual malice. *See* R. p. 575, l. 22 – p. 586, l. 5; R. p. 599, l. 24 – p. 601, l. 5; R. at pp. 908-913; R. p. 915, l. 22 – p. 919, l.13; R. p. 923, l. 22 – p. 927; l. 13; p. 922, l. 24 – p. 928, l. 10; R. p. 929, l. 11 - p. 945, l. 7; R. pp. 48-74 (Def. Post-Trial Motion)

Accordingly, the denial of the directed verdict motion and the denial of the JNOV was proper. Mr. Kennedy requests that the Court reverse the opinion of the Court of Appeals and affirm the holding of the trial court for the reasons stated herein, or for any other reason found in the record pursuant to Rule 220, SCACR. *See, e.g.*, cases cited herein; *See also Constant v. Spartanburg Steel, supra,*; *Mains v. KMART*, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988); *Lynch v. Toys R Us*, 375 S.C. 604, 654 S.E.2d 541 (Ct. App. 2007); *McBride v. School Dist. of Greenville*, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010).

III. By Way of Special Interrogatory, the Jury Specifically Found the Respondents Acted with Actual Malice and *Bell II* is Unpersuasive

The Court of Appeals did not directly address whether evidence of actual malice existed as an alternative ground to reverse in its unpublished opinion. However, the Court of Appeals relied upon *Swinton*, which specifically provides that "where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." 334 S.C. at 484. The task of the appellate court is to "determine whether a verdict for the party [opposing the motions for directed verdict and JNOV] would be **reasonably possible** under the facts as **liberally construed** in his favor. If the evidence is susceptible **to more than one reasonable inference**, the case should be submitted to the jury." *Erickson v. Jones St. Publishers*, 368 S.C. 444, 629 S.E.2d 653 (2006) (emphasis added).

"Common law actual malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, meaning with conscious indifference toward the plaintiff's rights." *Murray v. Holnam*, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) "Malice may be proved by direct or circumstantial evidence . . . Whether malice is the incentive for a publication is ordinarily for the jury to decide. Proof that statements were published in an improper and unjustified manner is sufficient evidence to submit the issue of actual malice to a jury." Id. at 750-751. The trial court properly charged the jury, without objection, as to the law of defamation, qualified privilege and malice. R. at pp. 978-988 (jury charge); *See also* R. p. 992, p. 1055 (Respondents' counsel noting no objections to the charge).

The jury could have reasonably concluded that the Respondents acted with actual malice and left the memo sitting out, and told Mr. Kennedy's co-workers he was not to have keys, in order to punish him and ruin his reputation - because they were angry that he wasn't charged with the theft by the Sheriff's Department or fired by Richland Two. The jury heard the following testimony from Earles and Barnes: that they thought Jeffrey Kennedy stole the money; that they had no idea who had keys to what buildings; and that they didn't bother to interview other individuals who were in the AD building on the night in question. Earles testified explicitly that he formed his opinion that Kennedy was a thief based on a "very limited set of facts" and that he was still comfortable with that opinion. R. p. 569, l. 9-25.

The jury heard testimony that Appellants knew that the security division was a "rumor mill" and had a rumor problem, but that Appellants did nothing to ensure that the memo be kept confidential. R. p. 311, l. 10- p. 312, l. 4; R. p. 426, l. 9 – p. 428, l. 2. The jury also heard testimony that the Respondents did not even speak with the shift supervisor, Lt. Gerome Young, who was on duty on the night in question. The jury heard testimony that others had "access and opportunity," but only Mr. Kennedy was targeted.

A plain reading of the transcript shows that the jury could reasonably have found Messrs. Earles and Barnes to be callous, careless, and recklessly deficient in their handling of this matter. The juxtaposition between the way in which Assistant Principal Childers discretely handled the situation with the custodian and the public humiliation of Mr. Kennedy could not have been more clear. R. pp. 707-708, R p. 736, R. p. 755-756. After all, Richland Two's own HR head, Roosevelt Garrick, admitted that dissemination of sensitive information concerning Mr. Kennedy did not reflect the "culture of excellence"

that Richland Two strives for, and that it did not reflect "best practices" in the industry. R. pp. 849-851.

In *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2011), the defendants were supervisors who were tasked with investigating alleged infractions at the prison where the plaintiff also worked. The Court of Appeals held that the denial of defendants' motions for directed verdict and JNOV as to immunity under the Tort Claims Act was proper. The Court of Appeals held that because the plaintiff alleged personal motives and bias on the part of the defendants, "there was at least circumstantial evidence that the defendants acted outside the scope of their employment and with the intent to harm the plaintiff . . . [and] [t]he jury could infer from . . . the nature of their actions that they intended to harm [the plaintiff]." 705 S.E.2d at 64.

Accordingly, under *Pridgen*, the personal motives and bias of the Respondents would be relevant evidence to support a finding of malice. After all, at trial the jury observed Mr. Barnes become quite agitated on the witness stand, stating that he was "very frustrated" and simply could not believe that Mr. Kennedy was not fired, and characterizing Richland Two, his voice dripping with sarcasm at trial, as a "beautiful place to work." R. p. 328, l. 21-23; R. p. 366, l. 9 – p. 367, l. 21; R. p. 847, l. 19-24.

Bell v. Bank of Abbeville ("*Bell II*"), 211 S.C. 167, 44 S.E.2d 328 (1947) is not persuasive. In *Bell II*, the evidence was that the only people involved in the alleged defamatory communication were directors of the bank. There was no evidence that anyone outside that scope was exposed to the potentially defamatory communication and all communications were made privately and secretly. As such, the Supreme Court found

there was only one reasonable inference and there was no evidence of ill will (i.e. "malice") sufficient to support the jury's verdict.

Here, there is evidence that non-supervisory Richland Two employees[1] were informed by Respondents, either through words or conduct or a combination of both, that Mr. Kennedy could not be trusted and was considered a thief by Respondents. There was evidence that despite others having "access and opportunity" to the cash, and despite the Sheriff's Department declining to charge anyone, and despite the District deciding not to fire Mr. Kennedy, Respondents' sole focus was on Mr. Kennedy and their "investigation" could be deemed sloppy at best. Furthermore, because the credibility of these witnesses was for the jury to determine, the jury was free to judge the actions of Respondents – and their general demeanor – as it saw fit.

CONCLUSION

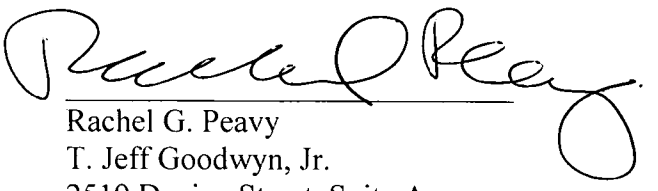
Because there was evidence in the record that the Respondents defamed Mr. Kennedy – and did so with malicious intent – the Court should reverse the decision of the Court of Appeals and reinstate the jury verdict. The Court of Appeals went beyond its scope of review and substituted its view of the evidence for that of the trial judge and jury.

In their brief, the Respondents request that, if the Court finds error, the case be remanded to the Court of Appeals for consideration of the remaining issues on appeal. In response, the Petitioner prays that this Court elect to review those additional issues, find

[1] There is no evidence in the record that at the time Eric Barnes spoke to John Reid, Mr. Reid had obtained the position of a supervisor (which had previously been offered to Mr. Kennedy). In fact, Mr. Reid specifically testified that he didn't receive the promotion until "later on."

them without merit, and affirm the decisions of the trial court pursuant to Rule 220(b), SCACR. *See Miller v. Ferrellgas*, 392 S.C. 295, 709 S.E.2d 616 (2011).

GOODWYN LAW FIRM, LLC



Rachel G. Peavy
T. Jeff Goodwyn, Jr.
2519 Devine Street, Suite A
Columbia, SC 29205
(803) 251-4517
Attorneys for Petitioner Jeffrey Kennedy

Dated: March 26, 2018

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
MAR 26 2018
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

2017-UP-040 (S.C. Ct. App. Filed January 25, 2017)
Appellate Case No. 2017-001160
Lower Court Case No. 2013-CP-40-1460

Jeffrey Kennedy.....Petitioner,

v.

Richland County School District Two, Eric Barnes and Chuck Earles..... Respondents.

PROOF OF SERVICE

I certify that I have served the **Reply Brief of Petitioner**, by depositing a copy of same in the United States Mail, postage prepaid, on **March 26, 2018**, addressed to counsel for Respondents, Thomas K. Barlow, Esquire and Kathryn Long Mahoney, Esquire, at the Law Firm of Halligan, Mahoney & Williams, PA to P.O. Box 11367, Columbia, SC 29211 and by filing the original and fifteen (15) copies of same, via hand delivery, to the South Carolina Supreme Court, 1231 Gervais Street, Columbia, South Carolina.

Thomas J. Goodwyn, Jr., Esquire
Rachel G. Peavy
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205

March 26th, 2018