

RECEIVED

Mar 15 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Walton J. McLeod, Circuit Court Judge

Appellate Case No. 2023-000051
Case No. 2021-CP-22-00806

Thomas M. Reown, Individually and as Parent
and Natural Guardian of K.R., a Minor aged 11 years..... Appellant,

v.

Lieutenant Joshua Smith and The Salvation Army
of the Carolinas..... Respondents,

INITIAL BRIEF OF RESPONDENT

Wesley T. Moran
SC Bar No. 012797
E-Mail: wes.moran@nelsonmullins.com
3751 Robert M. Grissom Parkway / Suite 300
Post Office Pox 3939 (29578-3939)
Myrtle Beach, SC 29577-6412
(843) 448-3500
G. Mark Phillips
SC Bar No. 007945
E-Mail: mark.phillips@nelsonmullins.com
151 Meeting Street, Suite 600
Charleston, SC 29401
(843) 853-5200
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 1

STANDARD OF REVIEW 3

FACTUAL BACKGROUND..... 4

ARGUMENT 5

CONCLUSION..... 7

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bell v. Bank of Abbeville</i> , 208 S.C. 490, 38 S.E.2d 641 (1946)	6
<i>Brinkley v. S.C. Dep't of Corr.</i> , 386 S.C. 182, 687 S.E.2d 54 (Ct. App. 2009)	4
<i>Burke v. AnMed Health</i> , 393 S.C. 48, 710 S.E.2d 84 (Ct. App. 2011).....	4
<i>Davis v. Niederhof</i> , 246 S.C. 192, 143 S.E.2d 367 (1965)	2
<i>Harvey v. Strickland</i> , 350 S.C. 303, 566 S.E.2d 529 (2002)	3
<i>Holtzscheiter v. Thomson Newspapers</i> 306 S.C. 297, 411 S.E.2d 664 (1998)	5
<i>Holtzscheiter v. Thomson Newspapers, Inc.</i> , 332 S.C. 502, 506 S.E.2d 497 (1998)	5, 6
<i>Law v. S.C. Dep't of Corr.</i> , 368 S.C. 424, 629 S.E.2d 642 (2006)	3
<i>Mills v. S.C. State Ports Auth.</i> , 435 S.C. 213, 865 S.E.2d 910 (Ct. App. 2021).....	4
<i>Murray v. Holnam, Inc.</i> , 344 S.C. 129, 542 S.E.2d 743 (S.C. Ct. App. 2001).....	2, 6
<i>Proctor v. Dep't of Health & Envtl. Control</i> , 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006).....	3
<i>Sabb v. S.C. State Univ.</i> , 350 S.C. 416, 567 S.E.2d 231 (2002)	3
<i>Swinton Creek Nursery v. Edisto Farm Credit, ACA</i> , 334 S.C. 469, 514 S.E.2d 126 (1999)	1
<i>Woodward v. South Carolina Farm Bureau Ins. Co.</i> , 277 S.C. 29, 282 S.E.2d 599 (1981)	6

STATEMENT OF ISSUES ON APPEAL

1. This Court should affirm the trial Court decision directing a verdict in favor of the Respondents on its Motion for a Directed Verdict.

2. This Court should affirm the trial Court decision denying Appellants' Motion for Reconsideration and for a New Trial.

STATEMENT OF THE CASE

This case arises out of events that took place on July 9, 2021 when Respondent, Lt. Joshua Smith, reported a suspected theft involving Appellants to the Georgetown County Sheriff's department.

The trial of this matter took place on October 10 and 11, 2022 and involved a single claim—defamation—based Lt. Smith's statement to the police that Appellants were stealing furniture from a Salvation Army Store located in Litchfield Beach, South Carolina. However, “[i]n a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege.” *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). “Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused.” *Id.*

After considering all of the evidence at the summary judgment stage, the trial Court found that Lt. Smith and The Salvation Army had a qualified privilege to report the suspected theft to the Georgetown County Sheriff's Office. (Transcript pp. 27:9-28:4, 29:13-30:3; R. ___); *see also Swinton*, 334 S.C. at 484, 514 S.E.2d at 134 (holding that the question whether an occasion gives rise to a qualified or condition privilege is one of law for the court). Therefore, the only issue at trial was whether Lt. Smith and The Salvation Army abused their qualified privilege.

Abuse of a qualified privilege may be shown by communication that exceeds what the occasion demands. *Davis v. Niederhof*, 246 S.C. 192, 199-200, 143 S.E.2d 367, 371 (1965). In addition, the privilege may also be overcome by a showing of common law malice on the part of the alleged defamer. *Murray v. Holnam, Inc.*, 344 S.C. 129, 142, 542 S.E.2d 743, 750 (Ct. App. 2001).

On October 11, 2022, after nearly two days of testimony, this Court correctly granted a directed verdict in favor of Respondents at the close of Appellants' case because Appellants failed to put forth any evidence that (1) Lt. Smith's communication to the Georgetown County Sheriff's Office "exceeded the scope of what the occasion demanded" or (2) that Lt. Smith acted with actual malice when reporting the suspected theft to the Georgetown County Sheriff's Office. (Transcript pp. 201:1-203:11; R. __; Form 4 Order dated October 12, 2022; R. __). In reaching this decision, the trial Court considered all of the evidence including the testimony of fact witness Janet Reown, fact witness and Salvation Army employee Tamika Smalls, both plaintiffs, and Defendant Lt. Smith. (Transcript pp. 74:11-96:24, 97:21-104:19, 107:16-148:14, 149:19-177:6, 177:15-189:13; R. __). The Court also considered two recorded calls between Lt. Smith and the Georgetown County Sheriff's dispatcher where in the first call Lt. Smith reported the suspected theft to the police and where in the second call (three minutes after the first) Lt. Smith informed the police that he had made a mistake and that no theft had occurred. (Transcript pp. 117:7-25, 141:6-143:3; Exhibit P2 of Transcript, Exhibit P4 of Transcript R. __).

Following the trial court's grant of Directed Verdict, Appellants filed a Motion for Reconsideration and for a New Trial raising two arguments as to why the trial court erred in granting a directed verdict in favor of defendants: (1) because Lt. Smith's statement to police were defamatory *per se*, Plaintiff's claim that actual malice is presumed; and (2) the Court overlooked evidence that Lt. Smith acted with actual malice because he could have called the Salvation Army

store manager to confirm Plaintiffs were actually stealing furniture before calling the police. The trial Court found both arguments unavailing and denied Appellants' motion. This Appeal followed. The only argument that Appellants raise on appeal is that Lt. Smith's statement was defamatory *per se* and therefore malice is implied.¹ As set forth herein, this argument is without merit and the trial Court's grant of Directed Verdict and denial of Appellants' Motion for Reconsideration and for a New Trial should be upheld.

STANDARD OF REVIEW

In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion when either the evidence yields more than one inference or its inference is in doubt. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). However, this rule does not authorize submission of speculative, theoretical, or hypothetical views to the jury. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 292–93, 628 S.E.2d 496, 503 (Ct. App. 2006). In essence, the court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his or her favor. *Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002).

“When considering the trial court's ruling on motions for a new trial, this court ‘employ[s] a highly deferential standard of review.’” *Mills v. S.C. State Ports Auth.*, 435 S.C. 213, 227, 865

¹ Appellants also claim that “it is certainly a jury question as to whether the speaker of the defamatory words acted negligently or recklessly is one for the jury.” (Initial Br. of Appellants p. 10). The context for this statement is unclear, but nonetheless, Appellants are wrong. When the facts of the case are undisputed, as they are here, whether a qualified privilege is abused is one for the Court and not the jury. *See infra* p. 7. Also, the appropriate inquiry is not whether the speaker was negligent or reckless in making the statement. The appropriate inquiry is whether the communication made by the speaker exceeded what the occasion demanded or whether the speaker acted with actual malice. *See supra* p. 3. Here Appellants failed to present any evidence of both and therefore, the trial Court correctly granted directed verdict in favor of Respondents.

S.E.2d 910, 917 (Ct. App. 2021) (quoting *Burke v. AnMed Health*, 393 S.C. 48, 57, 710 S.E.2d 84, 89 (Ct. App. 2011). “The trial court’s ‘decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.’” *Id.* (quoting *Brinkley v. S.C. Dep’t of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009).

FACTUAL BACKGROUND

The facts of this case are undisputed, and the issues on appeal are purely legal. (Transcript p. 23:2-5; R. ____). However, a brief recitation of the facts giving rise to this case may provide some helpful context.

On July 9, 2021, Respondent Lt. Joshua Smith witnessed—from the security camera on his phone—Appellants loading furniture into the back of their pickup truck from the Salvation Army Store in Litchfield Beach, South Carolina after store hours. Lt. Smith did not notice any store personnel with Appellants. Given these facts and the fact that this store has a history of thefts, Lt. Smith proceeded to sound the alarm on the security camera using his phone. Both Appellants heard the alarm and looked up at the security camera but proceeded to keep loading the furniture. Lt. Smith then spoke into his phone so that his voice would be projected through the microphone on the security camera and instructed Appellants to stop loading the furniture. Both Appellants claim that they could not make out what Lt. Smith was saying, however, Appellant K.R. looked up at the security camera when Lt. Smith spoke. The Appellants then finished loading the furniture into their truck. It was only at this point that Lt. Smith called the Georgetown County Sheriff’s department and reported the suspected theft. After ending the call with the Georgetown County Sheriff’s department, Lt. Smith called the store manager Tamika Smalls, who informed Lt. Smith that the furniture Appellants were loading had been paid for and was not stolen. Lt. Smith then immediately called the Sheriff’s department back to inform them he had made a mistake and that no theft had occurred. A total of three minutes elapsed between Lt. Smith’s two calls to the

Sheriff's department. However, during that time, Appellants were pulled over by the police and questioned about the furniture. The stop lasted no more than seven minutes. Appellants were never arrested, never put in the police car, never touched by the police officers, were able to walk around freely during the entirety of the stop, and were able to use their phones.

ARGUMENT

Appellants' sole ground for appeal is that Lt. Smith's statement to the Georgetown County Sheriff's department that Appellants were stealing furniture was defamatory *per se*. (Initial Br. of Appellants p. 9). Appellants therefore argue that malice is implied and they were not required to put forth evidence of actual malice to prevail on their defamation claim. (*Id.*) In support of their argument, Appellants rely entirely on *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998).² (*Id.*) However, their reliance on *Holtzscheiter* is misplaced and Appellants' argument is incorrect.

Holtzscheiter was not a case where the defamatory statement was made with a qualified privilege, as it was in this case. Cases subsequent to *Holtzscheiter* make clear that where the defamatory statement was made pursuant to a qualified privilege, actual malice is not presumed, but must be proven by the plaintiff.

If a defamation is actionable *per se*, then under common law principles the law presumes the defendant acted with common law malice and that the plaintiff suffered general damages. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998). If a defamation is not actionable *per se*, then at common law the plaintiff must plead and prove common law actual malice and special damages. *Id.* Slander is actionable *per se* if it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession. *Id.*

² Appellants actually cite *Holtzscheiter v. Thomson Newspapers* 306 S.C. 297, 411 S.E.2d 664 (1998), which is a mixture of the citations of the 1991 *Holtzscheiter* opinion (*Holtzscheiter v. Thomson Newspapers* 306 S.C. 297, 411 S.E.2d 664 (1991)) and the 1998 *Holtzscheiter* opinion (*Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998)). However, it appears Appellants rely on the 1998 *Holtzscheiter* opinion because the quote they include on page nine of their Initial Brief is from the 1998 opinion. Ultimately, it does not matter which *Holtzscheiter* opinion they cite as both are equally inapplicable to the scenario presented in this case.

However, even if the slander is actionable per se, if the communication is privileged, the plaintiff must prove actual malice. *Bell v. Bank of Abbeville*, 208 S.C. 490, 38 S.E.2d 641 (1946) (finding that a privileged communication is exception to rule that malice will be presumed where offending statement is actionable per se).

Murray v. Holnam, Inc., 344 S.C. 129, 142, 542 S.E.2d 743, 750 (S.C. Ct. App. 2001) (citing *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998)) (emphasis added).³

Here, the Court found that Lt. Smith’s statement to the police was privileged. (Transcript pp. 27:9-28:4, 29:13-30:3, 201:4-11; R. ____). Appellants do not dispute this, and even concede that Lt. Smith “possessed a qualified privilege to report his conclusions that a theft (sic) was underway” to law enforcement. (Motion for Reconsideration and for a New Trial p. 3; R. ____). As such, actual malice is not presumed in this case. Rather, Appellants had the burden of proving Lt. Smith acted with actual malice when he reported the theft to the Georgetown County Sheriff’s department. Additionally, both parties stated numerous times on the record that the facts of the case were not in dispute. (Transcript p. 23:2-5; R. ____). Therefore, the issue of whether Lt. Smith abused the privilege by acting with actual malice was one for the court to decide; not the jury. *See Woodward v. South Carolina Farm Bureau Ins. Co.*, 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981) (emphasis added) (“While abuse of the conditional privilege is ordinarily an issue reserved for the jury, in the absence of a controversy as to the facts, as here, it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.”).

³ *See also, Bell v. Bank of Abbeville*, 208 S.C. 490, 494–95, 38 S.E.2d 641, 643 (1946) (“Ordinarily, proof of a defamatory publication, charging another with the commission of a crime, makes out a prima facie case of malice in the author. But a privileged communication is an exception to the rule. In such case the presumption of malice is rebutted. The effect is to cast upon the plaintiff the necessity of showing malice in fact—that is, that the defendant was actuated by ill will in what he did and said, with the design to causelessly and wantonly injure the plaintiff.”).

Here, the trial court correctly ruled that Appellants had the burden of proving Respondents acted with actual malice in order to show that the qualified privilege was abused. After considering all of the evidence presented at trial, the trial court correctly found that Appellants failed to put forth any evidence of actual malice.⁴ Therefore, the trial court's grant of directed verdict in favor of Respondents and denial of Appellants' Motion for Reconsideration and for a New Trial should be affirmed.

CONCLUSION

For the reasons stated, the Respondents respectfully request this Court affirm the Circuit Court's decision to grant a Directed Verdict in favor of Respondents and deny Appellants Motion for Reconsideration and for a New Trial.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/Wesley T. Moran
Wesley T. Moran
SC Bar No. 012797
E-Mail: wes.moran@nelsonmullins.com
3751 Robert M. Grissom Parkway / Suite 300
Post Office Pox 3939 (29578-3939)
Myrtle Beach, SC 29577-6412
(843) 448-3500
G. Mark Phillips
SC Bar No. 007945
E-Mail: mark.phillips@nelsonmullins.com
151 Meeting Street, Suite 600
Charleston, SC 29401
(843) 853-5200

Attorneys for Respondents

March 15, 2023

⁴ Appellants have challenged this ruling or otherwise claimed on Appeal that they did put forth evidence of actual malice.