THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Carmen T. Mullens, Circuit Judge

Case No. 2020-CP-10-01315
Appeal No. 2023-000227

Caine Henry,

Appellant,

v.

Medical University of South Carolina,
Medical University of South Carolina
Department of Public Safety, and
Kevin Kerley,

Respondents.

INITIAL BRIEF OF RESPONDENTS

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Ph: (843) 577-4435 / Fax: (843) 722-1630

s/ Brian E. Johnson
Brian E. Johnson (SC #76103)
brian.johnson@hoodlaw.com
Lisa B. Bisso (SC #105258)
lisa.bisso@hoodlaw.com

Attorneys for the Defendants
Medical University of South Carolina, Medical University of South Carolina Department of Public Safety, and Kevin Kerley

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STATEMENT OF THE ISSUES ON APPEAL

The Respondents would restate the issues on appeal[1] as:

I. Did the Circuit Court properly grant summary judgment to the Defendants on the defamation claims where there is no evidence to create a jury issue or to reject the qualified privilege defense as shown by the evidence presented?

II. Did the Circuit Court properly grant summary judgment to the Defendants on the defamation claim despite the fact that there was a motion to compel information from a SLED investigation file still pending in Richland County?

The Respondents would state additional sustaining grounds:

III. Should the summary judgment be affirmed as the MUSC Department of Public Safety because it is not a separate governmental entity?

IV. Should the summary judgment be affirmed as to Kevin Kerley, the Chief of the MUSC Department of Public Safety, under the Tort Claims Act, § 15-78-70(a), because he is an employee of MUSC?

STATEMENT OF THE CASE

Plaintiff Caine Henry, a former employee of MUSC, filed a complaint on March 11, 2020, asserting causes of action for defamation, intentional infliction of emotional distress, civil conspiracy, and negligence arising from a wellness check conducted by the Charleston County Mental Health Mobile Crisis Unit (the Crisis Unit) and the North Charleston Police Department (NCPD) at the home of the Plaintiff on March 15, 2019. [ROA ___; Complaint.] The Plaintiff has not named either the County Crisis Unit or NCPD as defendants or asserted claims about their

[1] See discussion infra regarding the Plaintiff/Appellant's failure to present a concise and direct statement of issues as required by Rule 208, SCACR.

conduct of the wellness check; to the contrary, he has admitted that his actions in sending certain disturbing emails provided reasonable grounds for conducting the welfare check. Instead, the Plaintiff's claims rest on his allegation that MUSC, the MUSC Department of Public Safety, and Kevin Kerley, Chief of the MUSC Department of Public Safety (collectively "MUSC Defendants") conspired to make a false statement that he had threatened to kill any law enforcement that might come to his house which was made known to the NCPD and Crisis Unit representatives who conducted the wellness check.

The MUSC Defendants filed an answer and a motion to dismiss on April 10, 2020. [ROA ___, ___; Answer, Motion.] The Defendants filed an amended answer on April 23, 2020. [ROA ___; Amended Answer.] By their Answer, the Defendants assert general denials of the allegations, defenses under Tort Claims Act as well as other affirmative defenses. By their motion to dismiss, the Defendants argued that the allegedly defamatory statement was qualifiedly privileged; that the outrage cause of action was barred by § 15-78-30(f) of the Tort Claims which specifically excludes claims for intentional infliction of emotional harm; and that the conspiracy cause of action was barred by the intracorporate conspiracy doctrine. The motion to dismiss also asserted additional grounds for dismissal (1) as to the Medical University of South Carolina Department of Public Safety because it is not a separate distinct legal entity, and (2) as to the individual Defendant Kevin Kerley because, as an employee, he is immune from suit under §15-78-70(a) of the Tort Claims Act.

By order filed June 22, 2021, the Circuit Court denied the motion to dismiss, stating: "Procedurally this matter should be presented at a Motion for Summary Judgment." [ROA ___; Order.] After conducting discovery, the Defendants filed a motion for summary judgment on May 31, 2022. [ROA ___, ___; Motion and supporting memorandum and exhibits filed October 19,

2022.] The Plaintiff filed a response in opposition to the motion for summary judgment along with exhibits. [ROA ___; Response with attachments, filed October 25, 2022.] The Circuit Court granted summary judgment by order filed January 3, 2023. [ROA ___; Order.] Plaintiff filed a motion to reconsider on January 11, 2023, which was denied by at Form 4 order filed January 17, 2023. [ROA ___, ___; Motion, Form 4 order.] Plaintiff filed and served a notice of appeal on February 14, 2023. [ROA ___; Notice of Appeal.]

STATEMENT OF THE FACTS

In his complaint, the Plaintiff admitted that he sent an email to MUSC purporting to describe emotional distress he had suffered from the termination of his employment and criminal charges initiated by the MUSC Department of Public Safety. [ROA ___; Complaint ¶8.] He alleged that the emails prompted the Defendants to contact the Crisis Unit and the Defendant provided false defamatory information with a request for a wellness check. [ROA ___; Id. ¶9.] He also alleged that the Defendants had contacted the NCPD and falsely told them that the Plaintiff was armed and threatening to shoot anyone that came to the door. [ROA ___; Id. ¶ 10.] He alleged that the NCPD engaged in offensive maneuvers, which he refers to as "swatting," in the course of the wellness check. [ROA ___; Id. ¶ 11.] The complaint also includes various allegations about a conspiracy to rig his previous employment grievance proceedings and complaints about Chief Kerley refusing to conduct an internal investigation.

In attempting to state his claims, Plaintiff asserted that the Defendants conspired to defame him and intentionally inflicted emotional distress by making an allegedly false defamatory accusation and statement to the Crisis Unit and NCPD that Plaintiff had threatened to shoot anyone who came to his door. Plaintiff separately asserted a claim for negligence with allegations that

MUSC owed him a duty to exercise due care in review and response to the emails he sent and breached that duty by interpreting his emails as a threat to kill anyone that came to his door.

The evidence submitted on summary judgment establishes a much different story that the allegations of the complaint. In support of their motion for summary judgment, the Defendants submitted certain of the Plaintiff's discovery responses and a series of emails that the Plaintiff sent in March several days/weeks prior to the wellness check. [ROA ___-___; Exhibits to Defendants' memorandum in support of motion for summary judgment.] In opposing the summary judgment motion, the Plaintiff submitted a transcript of the audio from the body camera worn by a NCPD officer during the wellness check, and a transcript of a meeting Plaintiff had with Defendant Kerley several days/weeks after the wellness check. [ROA ___-___; Exhibits to Plaintiff's response.]

The emails, which Plaintiff admits to sending to MUSC officials/employees,[2] establish background crucial to a basic overview of the Plaintiff's protracted disputes with MUSC over a period of many years, and important context of what prompted the wellness check in March 2019. Contrary to the Plaintiff's inflammatory accusation in his complaint, this was not a swatting. It is undisputed, and the Plaintiff now admits, that the series of disturbing emails he sent provided a reasonable basis for concern to prompt a wellness check. Perhaps even more significantly, the wellness check was not a dangerous confrontation/interaction. To the contrary, the transcript of the recording from the body cam of a NCPD officer present at the wellness check indisputably establishes the calm and nonconfrontational manner in which the wellness check was conducted.

The pertinent series of emails began on March 3, 2019, when Plaintiff sent an email to SLED Special Agent Michael Prodan and MUSC General Counsel Annette Drachman, regarding

[2] Plaintiff admits the genuineness of the email correspondence. [ROA ___; Defendants' Ex. A -- Plaintiff's Response to Defendants' First Set of Requests for Admission. See also ROA ___; Complaint ¶ 8.]

his "Continued request for Grievance hearing and internal Police investigation Colcock Hall." In this email Plaintiff admitted that he had had "war-like, workplace-shooter thoughts." [ROA ___; Defendants' Ex. B.]

On March 11, 2019, Plaintiff sent an email titled "with a bullet" to the President of MUSC with copies to SLED Agent Prodan and MUSC General Counsel Drachman. In that email he discussed witnessing a shooting in his neighborhood with a thinly veiled threat that violence was an acceptable answer when pathways to justice are blocked. [ROA ___; Defendants' Ex. C.]

On the day of the wellness check, March 15, 2019, Plaintiff sent another email to SLED Agent Prodan as well as to the MUSC President and General Counsel titled "shooting Officer Register in the head." In this email, Plaintiff stated that he was scared and disturbed about his previous "intense daydreams about shooting Officer Register in the head" and intense thoughts of killing Sgt Register. His rambling grievances about the old larceny charge are peppered with mentions of work-place shootings, mass-shootings, school shootings, and suicide bombers. [ROA ___; Defendants' Ex. D.]

In an email Plaintiff sent to an attorney representing MUSC[3] on May 5, 2020, he affirmatively acknowledged that: "My email did justify a welfare check but it certainly did not deserve to put myself and others in unnecessary arms way." [ROA ___; Defendants' Ex. A.] In his response to Requests for Admission, Plaintiff formally admitted that the welfare check was conducted on Plaintiff on March 15, 2019 by the Charleston County Mental Health Mobile Crisis Unit and the North Charleston Police Department. Plaintiff further admitted that there were reasonable grounds for conducting the welfare check. [ROA ___-___; Defendants' Ex. A – Plaintiff's Response to Defendants' First Set of Requests for Admission.] Yet, even as the Plaintiff

[3] The email was addressed to the undersigned, Brian Johnson.

admitted that the wellness check was reasonable, the Plaintiff still alleged that the check was "armed and dangerous." However, contrary to the Plaintiff's accusation, the body camera recording of the wellness check indisputably establishes that Plaintiff's depiction of an armed and dangerous interaction is entirely unsubstantiated hyperbole. While the NCPD officers may have been armed as a matter of their basic on-duty uniform, there is no evidence that they ever drew their guns; rather, the evidence shows that the wellness check was conducted by the Crisis Unit peacefully and calmly.

As established by the body camera recording, the wellness check was conducted by the representatives from the Crisis Unit who were accompanied, as a matter of routine policy, by members of the NCPD. [ROA ___; MFSJ Plaintiff Exhibit A – p. 003, ll. 27-28.] The recording establishes, and Plaintiff now admits, that the wellness check request was made to the Crisis Unit by the SLED Agent – not by the MUSC Defendants. [ROA ___; Id. p. 002, ll. 12-15.] The recording also establishes that the NCPD who accompanied the Crisis Unit worker, had access to NCPD case notes, which contained a warning/caution that: "He's threatening to kill law enforcement or anyone that comes to his house." [ROA ___; Id. p. 002, ll. 26-27.] The note prompted the NCPD officer to wait for his partner before making contact with the Plaintiff. [ROA ___; Id. p. 002, l. 31.]

While the NCPD officers were cautious/on alert because of the case note warning/caution, the interaction with the Plaintiff was not confrontational and never escalated to an armed and dangerous point. From the outset, the Plaintiff was agreeable to answering their questions, and the NCPD and Crisis Unit staffers engaged in a calm and polite conversation with the Plaintiff to assess whether he was a threat to himself or others. [ROA ___; Id. p. 003, ll. 25-28.] During that conversation, the Plaintiff rattled on about his ongoing disputes with MUSC about certain old

charges and grievances about the termination of his employment. During the course of his conversation, he also told the NCPD officers and mental health workers that he has a history of mental illness and that he had had thoughts of killing a MUSC law enforcement officer[4], but he denied having any weapons. [ROA ___; Id. p. 022, ll. 18-20.] Eventually, the mental health staffers assessed that there was no imminent risk, and the wellness check was resolved without any conflict or trouble. [ROA ___; Id. p. 023, l. 32.]

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), S.C.R.C.P. The moving party need not support its motion with affidavits or other materials negating the opponent's claims; instead, the moving party can simply point to the absence of evidence to support the nonmoving party's claims. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Rule 56 requires that to withstand a summary judgment motion, the non-movant must present evidence sufficient to create a jury issue on each element essential to the claim on which that party will bear the burden of proof.

Generally, summary judgment is premature if discovery is not complete. However, even where discovery is not complete, the court may still grant summary judgment where the nonmoving party does not demonstrate that further discovery will likely uncover additional relevant evidence. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003).

[4] The Plaintiff also admitted in his conversation with Chief Kerley that Kerley: "I have an illness and suicide and homicidal thoughts are a part of depression." [ROA ___; Plaintiff Ex. C – p. 012.]

ARGUMENT

I. IDENTIFICATION OF THE ISSUES RAISED ON APPEAL

Rule 208(b)(1)(B) of our appellate rules, provide that an appellant's brief must contain: "A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Thus, as a threshold matter, it is proper and necessary to identify/clarify the issues that Plaintiff is raising in his appeal.

By its order, the Circuit Court grants summary judgment on all four claims: defamation; conspiracy; outrage; and negligence. Plaintiff's Statement of Issue does not specify his challenge to any particular claim. However, from his argument it appears that he in only challenging the grant of summary judgment on the defamation claim. Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant's arguments."); Greenville Bistro, LLC v. Greenville Cnty., 435 S.C. 146, 164, 866 S.E.2d 562, 171–575 (2021).

Since the Plaintiff's argument in his brief does not discuss any error about the dismissal of his claims for conspiracy, outrage/intentional infliction of emotion distress, or negligence, any issues as to those claims is not preserved. However, the Defendants maintain that the Circuit Court properly granted summary judgment on each and all of those claims for the reasons stated in the order. On the negligence claim, the Plaintiff presented no authority to support the proposition that the Defendants owed any legal duty of care to investigate his email "concerns," and even if there was some legal duty, the Plaintiff has not established any act or omission on the part of the

Defendants related to the welfare check conducted by the NCPD and the Charleston County Mental Health Mobile Crisis Unit. As a matter of law, the claim for intentional infliction of emotion distress is barred by the explicit terms of the Tort Claims Act, § 15-78-30(f) which provides that: "'Loss' … does not include the intentional infliction of emotional harm." Likewise, the civil conspiracy claim fails, as a matter of law, because Plaintiff has failed to allege and establish any alleged acts in furtherance of the alleged conspiracy on the part of the Defendants; and in any event, as cited by the Circuit Court, under the intracorporate conspiracy doctrine, "an agreement between or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy." Ziglar v. Abbasi, 582 U.S. 120, 153 (2017); see also Painter's Mill Grille, LLC v. Brown, 716 F.3d. 342, 353 (4th Cir. 2013) ("The intracorporate conspiracy doctrine recognizes that a corporation cannot conspire with its agents because the agents' acts are the corporation's own); McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 565, 626 S.E.2d 884, 887 (2006), overruled on other grounds by Paradis v. Charleston Cnty. Sch. Dist., 433 S.C. 562, 861 S.E.2d 774 (2021) ("A civil conspiracy cannot be found to exist when the acts alleged are those of employees or directors, in their official capacity, conspiring with the corporation.").

II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE DEFENDANTS ON THE DEFAMATION CLAIM.

The elements of defamation include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. McNeil v. S.C. Dep't of Corr., 404 S.C. 186, 195, 743 S.E.2d 843, 848 (Ct. App. 2013); *see also* Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006).

A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable. Murray v. Holnam, Inc., 344 S.C. 129, 141, 544 S.E.2d 743, 749 (Ct. App. 2001). "In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion." Id. (quoting Bell v. Bank of Abbeville, 208 S.C. 409, 38 S.E.2d 641, 643 (1946)).

The Defendants have denied that they made the statement found in the NCPD case notes, and in the alternative, asserted the privilege as an affirmative defense. As the Circuit Court correctly found, the Plaintiff has no evidence that any individual associated with the MUSC Defendants made the allegedly defamatory statement found in the NCPD case notes about the threat posed by the Plaintiff. After learning that it was SLED, not MUSC, that requested the wellness check, the Plaintiff has shifted his claims to accuse MUSC of conveying threats to SLED which were then relayed to NCPD. However, he has no evidence to support his speculation. In addition, even if it were assumed, for the sake of argument, that the Defendants had made any statement about Plaintiff making such threats of violence, any statements to SLED about the emails received or the conducting of a welfare check, such statements made in the context of a wellness check (reasonably prompted by the emails) are qualifiedly privileged.

Plaintiff argues on appeal that summary judgment was premature because he has a pending motion to compel SLED to produce information from its investigatory files. When a plaintiff

opposes summary judgment on the ground that discovery is not complete, the plaintiff must an affidavit that explains why not discovery is not complete and what the plaintiff expects to find that is relevant to proving his claims. Rule 56(f), SCRCP. However, the fact that a plaintiff has not completed discovery will not preclude summary judgment if the evidence sought could not create a genuine issue of material fact and/or the law provides dispositive grounds on the undisputed facts already proven. *See* Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54–55, 677 S.E.2d 32, 36 (Ct. App. 2009) (plaintiff failed to demonstrate further discovery would uncover additional relevant evidence or create a genuine issue of material fact).

The court filings show that the Plaintiff made a FOIA request and attempted to subpoena SLED investigatory records, but SLED objected to providing any information about an ongoing SLED threat assessment file. [ROA ___; Plaintiff Ex. D – Subpoena Objection, dated 11/19/21.] The Plaintiff first filed a motion to compel in Charleston County circuit Court which was denied. [ROA ___; Order, dated 10/27/21.] Nine months later, after the Defendants had moved for summary judgment, the Plaintiff refiled his motion to compel in Richland County on July 5, 2022. [2022CP4003387.] At the time the motion for summary judgment was heard, the Richland County motion was still pending.

Plaintiff argues that summary judgment is premature because there is reason to believe that SLED has information that would support his claims that MUSC made false accusations that he was threatening to shoot anyone who would come to his door. On this point, it seems necessary to apprise the exact nature of the Plaintiff's claims in this action to see that the evidence he seeks will not support his defamation claim. First, the Court should look beyond the Plaintiff's rambling complaints about decade long employment grievances and criminal charges which are not the subject of this current legal action. It also is important to ignore his inflammatory references to

the allegedly armed and dangerous tone of the wellness check because the body cam recording disproves his depiction of the interaction between Plaintiff and the NCPD/Crisis Unit and because he has not named NCPD or County Mental Health as defendants to assert any claims as to their actions in conducting the wellness check.

In any event, the body camera recording shows a calm, civilized conversation at the Plaintiff's doorway with no evidence of any conflict or danger. The NCPD officer waited for backup as a precaution, but there is no evidence that the NCPD officers ever drew their guns. The Crisis Unit representatives asked a series of questions to ascertain the Plaintiff's wellness, but they also indulged the Plaintiff's ramblings about his contentious 10-year history of complaints against MUSC for allegedly wrongfully denying him a grievance hearing[5] and allegedly making unsubstantiated criminal charges of larceny.

As the Plaintiff's claim has evolved during this litigation, such that it now appears to be one for defamation in regards to a notation in the NCPD case notes that cautioned that Plaintiff had threatened to shoot any law enforcement that would come to his door. The evidence indicates that SLED Agent Prodan, who had been copied on all those disturbing emails, requested the wellness check. There is no evidence to give any credence to the Plaintiff's conjecture that MUSC was somehow behind the statement found in the NCPD case notes. And, the case note about the threat was only discussed by those who needed the information to safely conduct the wellness check. Ultimately, the Circuit Court properly granted summary judgment to the MUSC Defendants.

[5] The transcript of the discussion with Chief Kerley indicates that the grievance proceeding was dismissed because the Plaintiff did not appear for the hearing. [ROA ___; Plaintiff Ex. C 006.]

ADDITIONAL SUSTAINING GROUNDS

III. THE CLAIMS AGAINST THE MUSC DEPARTMENT OF PUBLIC SAFETY AND ITS CHIEF KEVIN KERLEY CANNOT BE SUSTAINED UNDER THE TORT CLAIMS, §15-78-70.

The Tort Claims Act is the exclusive remedy for any tort committed by a government employee, and the proper party to a claim is the government entity: "[W]hen bringing an action against a governmental entity under the provisions of this chapter, [the plaintiff] shall name as a party defendant only the agency or political subdivision for which the employee was acting." S.C. Code §15-78-70; see also Faile v. S.C. Dep't of Juv. Just., 350 S.C. 315, 329–30, 566 S.E.2d 536, 543 (2002) ("only the entity employing the employee whose act gives rise to the claim may be sued.")

In their Motion to Dismiss, the Defendants sought dismissal of the Department of Public Safety on the ground that: "Plaintiff also names the Medical University of South Carolina Department of Public Safety; however, this is not a distinct entity and falls under Defendant Medical University of South Carolina. Thus, Defendant Medical University of South Carolina Department of Public Safety must be dismissed from the Complaint." [ROA ___; Motion, p. 1.] In their Motion to Dismiss, the Defendants also sought dismissal of Defendant Kevin Kerley, who is the Chief of the MUSC Department of Public Safety on the ground that as an employee of MUSC, he is immune of the provisions of §15-78-70. [ROA ___; Motion, p. 8.] The Defendants/Respondents submit that the grant for summary judgment to the MUSC Department of Public Safety and to Kevin Kerley, as Chief of the Department, should be affirmed on these additional sustaining grounds.

CONCLUSION

Wherefore, based on the foregoing, the Respondents respectfully submit that the Order granting summary judgment should be affirmed.

Respectfully submitted,

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Ph: (843) 577-4435 / Fax: (843) 722-1630

s/ Brian E. Johnson
Brian E. Johnson (SC #76103)
brian.johnson@hoodlaw.com
Lisa B. Bisso (SC #105258)
lisa.bisso@hoodlaw.com

Attorneys for the Defendants Medical University of South Carolina, Medical University of South Carolina Department of Public Safety, and Kevin Kerley

April 24, 2023

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Certificate of Service

The undersigned certifies that on this **24th** day of **April, 2023**, a copy of the Initial Brief and Designation of Matter to be Included in the Record on Appeal on behalf of Respondents Medical University of South Carolina, Medical University of South Carolina Department of Public Safety, and Kevin Kerley were served by mailing a copy of each, on the following at the address listed below:

Caine Henry
7882 Red Birch Circle
North Charleston, SC 29418

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Ph: (843) 577-4435 / Fax: (843) 722-1630

s/ Brian E. Johnson
Brian E. Johnson (SC #76103)
brian.johnson@hoodlaw.com
Lisa B. Bisso (SC #105258)
lisa.bisso@hoodlaw.com

Attorneys for the Respondents Medical University of South Carolina, Medical University of South Carolina Department of Public Safety, and Kevin Kerley

April 24, 2023