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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Carmen Mullens, Circuit Court Judge

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

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Caine Henry,

Appellant,

v.

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

Respondents.

_____

APPELLANTS' INITIAL REPLY BRIEF

_____

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Cases

Introduction

The Appellant finds the Respondent's various references to case history in their Initial Brief embellished and irrelevant to the current proceeding before this court. If the court wants to consider a brief history of the matters before the welfare check the Appellant will address the history during oral arguments if requested.

The two main issues before this Honorable Court are:

1. WHETHER THE CIRCUIT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT BECAUSE IT WAS PREMATURE DUE TO APPELLANT NOT HAVING A FULL AND FAIR OPPORTUNITY TO COMPLETE DISCOVERY

2. WHETHER THE CIRCUIT COURT ERRED IN CONCLUDING THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT

Reply to Respondent's Statement of the Case

The appellant finds the Respondent's Statement of the Case to be fractionally factual. The Respondents omit the Appellant's discovery subpoena requests dates and the subsequent Motions to Compel (discovery) dates in their version of Statement of the Case. The Appellant's appeal very much centers around the outstanding subpoenas and the subsequent Motions to Compel, one of which is still pending a hearing. [R. p. 61, 65, 128, 133]

Reply to Respondent's Statement of Facts

It should be clear to this Honorable Court that the Respondents have inflated facts to take the focus off of the main issue of the appeal: Full and Fair Discovery. Appellant could address their assessment of the tone of the welfare check but it is not relevant at this point. Many of their facts seem to argue the merits of the case rather than address the issues at hand. Yes, Appellant wants

to address and engage these ill placed arguments in the fact section of their brief but that is something that should happen during a proper trial when a jury can weigh the competing facts with evidence. There is also a heavy number of sinister interruptions of the emails leading up to the welfare check. This too is irrelevant but will be addressed when jurors are available to read this evidence as they see fit.

It's almost as if the Respondents are trying to try this case in the fact section. The Appeals Court is here to address potential lower court errors and the procedural aspects of this case and not to read distracting, exaggerated, and/or disputed facts regarding the Respondent's interpretation of a welfare check that only one party experienced firsthand.

The relevant facts involving the lower courts error are simple.

1. There were two subpoenas that were not complied with by the Respondent's listed witness: SLED. [R. p. 128, 133]
2. There was a pending discovery Motion to Compel before the MFSJ hearing. [R. p. 65]
3. The Appellant has an established history throughout this lawsuit and even before the lawsuit of attempting to secure and examine this crucial evidence from the Respondent's listed witness: SLED. [R. p. 128, 133, 216 #10]
4. SLED was one of two parties involved in the initiation of the welfare check. [R. p. 186 #15 & #16]
5. One of those two parties maliciously indicated to the North Charleston Police Department that: I would shoot anyone that came to my house. [R. p. 74 lines12-27]

MUSC, the other party involved in the initiation of the welfare check, has provided zero records of any communication with SLED despite admitting there were indeed communications. MUSC

Public Safety does record phone calls, just not the ones involved in this case. MUSC Public Safety stores email communications, just not the ones involved in this case. Despite Respondent's disputed disturbing initial brief analysis of Appellant's email writings there are no incident reports. Respondent's defense strategy appears to be: to provide "no evidence" as stated 7 times in their brief.

This Court should take notice of the fact that no tangible evidence has been produced by the Respondents regarding this matter. It is absurd to believe there were no recorded phone calls, no emails, no incident reports and no documents of any kind regarding the events leading up to and surrounding the welfare check. Thus, the Appellant is only left with the possibility of discovery from the Respondent's listed witness SLED. SLED has information related and relevant to this case. For some reason SLED has not released, it even in a limited manner. However, since Appellant's Notice of Appeal SLED has now agreed to release some information mid-May 2023.

Reply Argument

I. IDENTIFICATION OF THE ISSUES RAISED ON APPEAL

It is *reasonably clear* from the Appellant's arguments that the aspects of outstanding discovery impact every single cause of action here: defamation; conspiracy; outrage; and negligence. It would have been unduly burdensome for the Court here to read a 60-page initial brief addressing each cause of action as it relates to outstanding discovery. The brief would have been cyclical and tediously repetitive, saying the same thing over and over again to address each cause of action as it relates to the unfinished business of outstanding discovery. Without this withheld discovery evidence, it is impossible to fully and fairly address each cause of action adequately to

defend against a motion for summary judgement. The outstanding discovery affects everything here as discussed at the hearing. [R. p. 83, 84 lines 8-3]

It is clear from the North Charleston Police Department's (NCPD) body cam footage and the corresponding transcripts that defamation did in fact occur by either SLED or MUSC. [R. p. 74-76] Which then raises the question, does "qualified privileged" protect the defamer? The defamation statement "that (Appellant) would shoot anyone on scene" elevates the question for the jury to answer regarding the issue of intentional malice unlocking qualified privilege.

The Appellant correctly identified the two main issues of outstanding discovery affecting all causes of action and material issues that are preventing this lawsuit from moving forward to a jury for its judgment.

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

MUSC Public Safety routinely records their Public Safety phone calls and stores their emails. Yet despite an early FIOA request and later litigation discovery they provided "no evidence" to the Appellant. MUSC used the phrase "no evidence" seven times in their brief. The Appellant and this Court might speculate that "no evidence" is not just a phrase used here but rather an effective defense legal strategy for them. Again, MUSC records Public Safety calls just not the one involved in this matter, thus "no evidence". MUSC stores Public Safety emails just not the one involved here, thus "no evidence". It is probably illegal but it is a very effective strategy here to provide: "no evidence". However, SLED also records calls and stores email, thus the Appellant's subpoenas and two Motions to Compel regarding SLED. SLED holds critical evidence here that MUSC had "no evidence" for. In the event that SLED finally releases this evidence the Appellant can amend the complaint or even dismiss the case entirely based on what the outstanding

evidence suggests.

The Respondent's possible "no evidence" defense strategy was effective in the erroneous granting of Summary Judgement not only on the defamation claim but all claims. The Court here should be able to see the essential importance of the pending discovery evidence and why the Respondents have overly focused on the Appellant having "no evidence".

The Respondents under this section go on several distracting tangents. However, the following detour does actually address the procedural issue this Honorable Court is faced with: "(plaintiff failed to demonstrate further discovery would uncover additional relevant evidence or create a genuine issue of material fact)." The Appellant did in fact demonstrate further discovery would uncover relevant evidence. Appellant again cites his Initial Brief and MFSJ Brief/Affidavit:

> "[Appellant] believes that information contained in this phone call and other information in SLED's possession are likely relevant to [Appellant's] claims and or the defenses in this case and at least are discoverable. [Appellant's] case revolves around the communications between SLED and MUSC" [R. p. 190].

In South Carolina, summary judgment should not be granted until the non-moving party has had a full and fair opportunity to complete discovery. *See* *BPS, Inc. v. Worthy,* 362 S.C. 319, 329-330, 608 S.E.2d 155 (Ct. App. 2005). Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. AT & T,* 306 S.C. 101, 410 S.E.2d 537 (1991).The Lower court erred in granting MFSJ with pending imminent outstanding discovery still on the table. The judge does not address the pending discovery in her MFSJ Order. The judge issuing a continuance allowing for full and fair discovery would have correctly allowed justice to ensue, one way or the other. [R. p. 70, 285]

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 Respondents may be right here that the Appellants claims related to the Tort Claims Act may not be sustainable here. But again, without the pending discovery evidence from SLED it is impossible to evaluate the true merits here. Again, an amended complaint may be warranted but with the barrier or defense strategy of "no evidence" it's impossible to evaluate if proper justice has taken place, at this time.

Appellant was awaiting a discovery Motion to Compel hearing in Richland County as the MFSJ hearing took place. The Appellant is still awaiting a hearing as of present day. The Lower court erred in granting MFSJ instead of allowing for full and fair discovery to take place.

Conclusion

Relevant discovery evidence is certain here. In fact, since the filing of this appeal SLED has agreed to comply with a FOIA requests by mid-May 2023. Please remand back to the lower court for a MFSJ continuance for the outstanding discovery.

Respectfully submitted,

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May 1, 2023