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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr., Circuit Judge

Case No. 2020-CP-26-05790

Appellate Case No. 2023-01499

Major Jason J. MacDonald,

Appellant,

-vs-

Horry County School District, Dr. Rick Maxey, in his individual and official capacities, Michael McCracken, in his individual and official capacities, Brandon Todd, in his individual and official capacities, and Mary Anderson, in her individual and official capacities,

Respondents.

REPLY BRIEF OF APPELLANT

April 4, 2024

Jack E. Cohoon (S.C. Bar No. 74776)
Lydia Robins Hendrix (SC Bar No. 106334)
BURNETTE SHUTT & McDANIEL, P.A.
Post Office Box 1929
Columbia, SC 29202
T: 803.904.7914
F: 803-904-7910
JCohoon@BurnetteShutt.law
LHendrix@BurnetteShutt.law

ATTORNEYS FOR APPELLANT

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INTRODUCTION

Appellant Major Jason MacDonald ("Major MacDonald") comes before this Court to ask that it find that the trial court erred when it granted summary judgment on Major MacDonald's claims for defamation and intentional interference with prospective contract. In response to Major MacDonald's Initial Brief, Respondent Horry County Schools ("HCS") argues that there is no defamatory meaning of its conduct in investigating, suspending, and terminating Major MacDonald. HCS also argues that the trial court applied the proper negligence standard in evaluating Major MacDonald's claim of intentional interference with prospective contract. Neither is the case.

Contrary to HCS's argument, Major MacDonald has presented sufficient evidence for a reasonable jury to find that HCS's conduct in investigating, suspending, and terminating him defamed him, greatly harming his reputation in his community. Additionally, Major MacDonald presented sufficient evidence for a reasonable jury to find that HCS intentionally interfered with his prospective contract with Florence County School District Two, and the trial court erred in applying a negligence standard when it granted HCS's motion for summary judgment.

Appellant submits this Reply Brief to concisely address the arguments made in Respondent's Initial Brief, but otherwise rely on the detailed arguments set forth in his Initial Brief.

ARGUMENT

I. Respondent errs in its contention that HCS's manner of suspension, investigation, and termination is not capable of a defamatory meaning.

Respondent concedes that actions or conduct can create a defamatory insinuation but errs in its argument that HCS's conduct with respect to Major MacDonald is not defamatory. (Resp. Br., p. 9-10.)

HCS's reliance on *Phelan v. May Dep't Stores Co.*, a Massachusetts case, fails. In *Phelan*, the security guard accompanied the plaintiff around the office without any other conduct that would provide a more specific, defamatory meaning to an observer, such as "chasing, grabbing, restraining, or searching." *Phelan v. May Dep't Stores Co.*, 443 Mass. 52, 58, 819 N.E.2d 550, 555 (2004).

Instead, Major MacDonald's case is more similar to *Tyler v. Macks Stores of South Carolina Inc.*, 275 S.C. 456, 272 S.E.2d 633 (1980). Unlike in *Phelan*, in this case there were other circumstances surrounding the extended suspension and termination that created a defamatory meaning, similar to that in *Tyler*. There, the former employee's colleagues were aware that the employer had conducted a polygraph test just prior to the termination, which "gave fellow employees and others the feeling and belief that [the plaintiff] had been discharged for some wrongful activity." *Tyler*, 275 S.C. at 458, 272 S.E.2d at 634. Here, similar to *Tyler*, HCS employees conducted questioning with students regarding the allegations of sexual misconduct, and Sgt. Jones indicated to students that they may need to speak to law enforcement. (R.p.__; Exhibit 3 to Exhibit E to Mem. in. Opp. to Summ. J.). After making it clear that HCS was investigating Major MacDonald for sexual misconduct, HCS then put Major MacDonald on an absence that extended beyond that school year. (R.p.__; Exhibit 8 to Exhibit C to

Mem. in. Opp. to Summ. J.) This action—and the obvious absence of Major MacDonald—in the context of the school community's knowledge that there were allegations of a sexual nature and an investigation that communicated the false and defamatory message that Major MacDonald had engaged in serious wrongdoing with students.

Additionally, the *Phelan* court explained that the employee's own perception of the situation was insufficient evidence that the conduct created a defamatory message. By contrast, here, Major MacDonald has presented evidence that members of the community perceived the extended suspension as evidence of serious wrongdoing. (R.pp.__; Exhibit A to Mem. in. Supp. of Summ. J., pp. 108-109). Major MacDonald presented evidence that members of the Myrtle Beach *and* Conway communities believed that Major MacDonald had engaged in misconduct. (R.p.__; Exhibit A to Mem. in. Supp. of Summ. J., 110-111). Accordingly, Major MacDonald has presented evidence outside of his own perceptions that HCS's conduct was defamatory and a reasonable construction of HCS's conduct.

Respondent's reliance on *King v. Charleston County School District* is also misplaced, as the plaintiff in *King* relied solely on the statement of the school psychologist as the basis for her defamation claim. 664 F.Supp. 2d 571, 586 (2009). By contrast, here, Major MacDonald does not point solely to Sgt. Jones's communications as the published statement, but rather the context in which HCS's conduct conveyed a defamatory message. (App. Br., p. 18.) Instead, Major MacDonald has identified the publication to third parties as the communication to the school community HCS created

by leaving Major MacDonald on an obvious extended absence of twenty months immediately after the sexual misconduct investigation. (App. Br., p. 20.)

HCS further errs in its reliance on *Drakeford v. Dixie Home Stores* to support the argument that the false statement at issue is not defamatory. In *Drakeford*, the court explained that it *is* proper for a plaintiff to cite "innuendo to allege the meaning claimed to have been intended and conveyed." *Drakeford v. Dixie Home Stores*, 233 S.C. 519, 520, 105 S.E.2d 711, 713 (1958). The court further explained that a plaintiff *may* cite innuendo "when the intent may be mistaken or where it cannot be collected from the defamatory matter itself." *Id.* (citing 33 Am. Jur., Libel and Slander, para. 241, at pp. 220-21). Consequently, *Drakeford* does not stand for the proposition that insinuation or innuendo have no place in a defamation claim, but rather that there can be no defamatory meaning where the language at issue cannot "be fairly or reasonably construed to have the meaning attributed to it by the appellant." *Id.* at 526, 105 S.E.2d at 715. Consequently, *Drakeford* supports Major MacDonald's position, as he has presented evidence that the communication to the community had the defamatory meaning he has attributed to it. (R.p.__; Exhibit A to Mem. in. Supp. of Summ. J., 110-111).

II. HCS has failed to preserve the argument of truth as a defense and asserts the defense against a statement not at issue.

First, HCS failed to raise truth as a defense at the trial level, and it may not now assert the defense for the first time at the appellate level. *Knight v. Waggoner*, 359 S.C. 492, 496, 597 S.E.2d 894, 835 (Ct. App. 2004) (explaining that an issue is not preserved for review where a party raises the argument for the first time on appeal); (R.p.__; Mem. in. Supp. of Summ. J., pp. 17-18).

Second, even if HCS *had* preserved truth as a defense, it does not assert truth of the statement at issue. (Resp. Br., p. 10.) Major MacDonald does not assert that HCS falsely published a statement that he was on administrative leave; he asserts that HCS communicated the false message that he had engaged in serious misconduct of a sexual nature to the school community through its conduct related to his investigation, suspension, and eventual termination. (App. Br., pp. 19-20.)

III. Qualified privilege does not attach to HCS's publication because it failed to preserve the argument at the trial level and HCS's communication exceeded any privilege.

First, HCS failed to preserve any argument that the publication was privileged, as it failed to raise the argument at the trial level. *Knight*, 359 S.C. at 496, 597 S.E.2d at 835; (R.pp.__; Mem. in. Supp. of Summ. J., pp. 16-17).

Second, HCS's argument that its communication regarding Major MacDonald's employment was privileged fails for two reasons. First, the communication at issue is not that of employer-employee limited by a bona fide inquiry into alleged misconduct nor part of a performance evaluation, as HCS alleges. (Resp. Br., pp. 13-14.) Instead, Major MacDonald has complained of HCS's communication to the *community*. (App. Br., pp. 20-21.) Moreover, as Major MacDonald has illustrated, any "bona fide" inquiry lasted only from November 29 to December 4, 2018—a mere *six* days. (App. Br., 7-8.) To that end, HCS's reliance on *Wright*, *Bell*, and *Conwell* are inapposite, as the communication at issue was not that of employer-employee; that of a performance evaluation; part of a *bona fide* inquiry into misconduct; or that of a "proper" evaluation. *See Wright v. Sparrow*, 298 S.C. 469, 381 S.E.2d 503, 506-07 (Ct. App. 1989); *Bell v. Bank of Abbeville*, 211 S.C. 167, 172, 44 S.E.2d 328, 329 (1947); *Conwell v. Spur Oil Co.*, 240 S.C. 170, 179, 542 S.E.2d 270, 274 (Ct. App. 1962). Again, a mere *six* days out of the

twenty-month suspension were spent on investigation, and the communication at issue is not that of HCS to Major MacDonald or limited to internal HCS communications.

Second, HCS exceeded the scope of any qualified privilege that was available. Qualified privilege is established only through "good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only." *Prentiss v. Nationwide Mut. Ins. Co.*, 256 S.C. 141, 147, 181 S.E.2d 325, 327 (1971). HCS has not articulated any required element of qualified privilege in its brief. (Resp. Br., pp. 13-14.)

Regardless, as Major MacDonald has explained, HCS's communication to the school community in leaving him in administrative limbo for twenty months while not taking a single step towards the truth or falsity of the allegations is hardly a "good faith" investigation, and the communication cannot be characterized as limited in scope to the requirement of the occasion. (App. Br., p. 22.) Therefore, HCS cannot assert qualified privilege as to the publication.

IV. Respondent has conceded any argument regarding fault of the publisher or damages.

HCS's brief is silent as to both Major MacDonald's damages and the fault of the publisher, and, thus, concedes that HCS is at fault for the publication of the defamatory statement that Major MacDonald engaged in serious misconduct to the school community and that he can establish both general damages and special harm from the publication. (App. Br., p. 25.)

V. HCS has failed to establish that duty is relevant to Major MacDonald's claim of intentional interference with prospective contractual relations.

HCS fails to establish that duty is a proper consideration in a court's analysis of intentional interference with prospective contractual relations, as it fails to cite any authority to demonstrate a connection between duty and the claim at issue. (Resp. Br., p. 16). Not *only* can duty be isolated from the intentional tort of intentional interference with prospective contractual relations, but also the Court of Appeals has expressly indicated that the "cause of action for intentional interference with contractual relations *does not require a duty analysis*." *Gecy v. S.C. Bank & Trust*, 422 S.C. 509, 521, 812 S.E.2d 750, 756 (Ct. App. 2018) (emphasis added). Accordingly, the trial judge erred in applying a duty analysis to Major MacDonald's claim of intentional interference with prospective contractual relations.

VI. HCS has failed to establish that there is no genuine dispute of material fact that Major MacDonald had a prospective contract with Florence School District Two.

HCS fails in its contention that Major MacDonald did not have a prospective contract with Florence School District Two ("FSCD2"), as it has cherry picked evidence in its favor. (Resp. Br., p. 17.) Viewed in the light most favorable to Major MacDonald, there is sufficient evidence for a reasonable jury to find that the agreement for FCSD2 to hire Major MacDonald was a close certainty. (App. Br., p. 26-28.) The principal of Hannah-Pamplico had recommended that FCSD2 hire Major MacDonald, and the *only* outstanding step was a neutral reference from HCS. (R.p.__; Exhibit J to Mem. in. Opp. of Summ. J., pp. 18-19). HCS's speculation that "it is just as likely, therefore, that the allegations made by the students were the reason Appellant did not the job" is demonstrably false, as FSCD2 Superintendent Dr. Vincent testified that had he gotten a

neutral reference, he would have moved forward with the principal's recommendation to hire Major MacDonald. (R.p.__; Exhibit J to Mem. in. Opp. of Summ. J., p. 19; (R.pp.__; Exhibit 1 to Exhibit I to Mem. in. Opp. to Summ. J.). Accordingly, Major MacDonald can establish a genuine dispute of material fact on the issue of prospective contract.

VII. HCS has failed to establish the absence of a genuine dispute of material fact that HCS engaged in an intentional act of interference.

HCS's argument that Major MacDonald failed to allege an act or omission fails, as Major MacDonald has established that HCS, by and through Superintendent Maxey, knew that interference was substantially certain as a result of turning away Dr. Vincent when he requested a neutral reference. (App Br., pp. 30-31.)

Contrary to HCS's argument, intent does not require a "positive, affirmative act." (Resp. Br., p. 18.) Instead, intent requires voluntariness and substantial certainty of the consequences. *Snakenberg v. Hartford Casualty Ins. Co.*, 299 S.C. 164, 173, 383 S.E.2d 2, 7 (Ct. App. 1989); *see also* Restatement (Second) of Torts § 766B cmt. d (Am. Law Inst. 1979) ("The intent required for this Section is that defined in § 8A."); Restatement (Second) of Torts § 8A (Am. Law Inst. 1979). Here, there is sufficient evidence to show that Dr. Maxey voluntarily elected not to respond to Dr. Vincent's request for a reference, as the Superintendent's office directed Dr. Vincent away from Dr. Maxey, and Dr. Maxey failed to respond to repeated requests for a recommendation, which was a standard practice among superintendents. (App. Br., pp. 30-31.)

Viewed in the light most favorable to Major MacDonald, there is sufficient evidence for a reasonable jury to find that Dr. Maxey's repeated ignoring of Dr. Vincent's request, paired with Dr. Maxey's assistant actively turning Dr. Vincent *away*

from the Superintendent's office, constitute intentional acts substantially certain to result in an interference with the prospective FCSD2 contract. (*Id.*)

Furthermore, HCS's discussion of acts and omission in the negligence context is misplaced. (Resp. Br., p. 18.) As established, Major MacDonald has brought a claim for *intentional* interference with prospective contract, and a negligence standard has no bearing on the claim. (App. Br., pp. 29.)

The irrelevance of a negligence standard notwithstanding, the fact that statutory immunity *exists* supports the argument that a reasonable and prudent person *would* provide a neutral reference for disclosure of Major MacDonald's prior employment, pay level, and wage history. *See* The South Carolina Law of Torts § 2.A.2.b (2023). The safety net provided to an employer cuts against any argument that failure to respond was protective, as HCS was already protected from liability through the S.C. Code § 41-1-65(B).

Additionally, in light of the statutory immunity, a reasonable prudent person *would* provide a neutral reference to an employee where there was no finding of wrongdoing and where the *only way* that any future employer could confirm that employee's JROTC certification was through communication with the former employer. (App. Br., pp. 30-31.)

VIII. HCS failed to preserve its argument on improper purpose or methods.

HCS raises the argument that it did not utilize an improper purpose or method for the first time on appeal. At the trial level, HCS's sole arguments were that HCS "had no legal obligation to respond" and that "not responding to a request for a reference is equivalent to an intentional interference with a prospective contract." (R.pp.__; Mem. in.

Supp. of Summ. J., p. 16). Therefore, HCS has not preserved the argument that protection of one's legal rights is a proper purpose. (Resp. Br., p. 19.)

IX. HCS has conceded any argument on established standard of trade or profession and injury to Major MacDonald.

Not only has HCS failed to preserve its argument that Dr. Maxey utilized proper purposes or methods in refusing to provide Major MacDonald a reference, but also it failed to address Major MacDonald's argument that HCS violated an established standard of a trade or profession by refusing to confirm the employment of a JROTC instructor for another superintendent in its brief. Consequently, HCS has waived argument on this point.

Additionally, HCS failed to address injury to Major MacDonald, and it has therefore conceded that HCS's intentional interference with the prospective FCSD2 contract resulted in injury to Major MacDonald.

CONCLUSION

Major MacDonald has presented sufficient evidence for a reasonable jury to find that HCS's manner of investigating, suspending, and terminating him communicated the false, defamatory message to the Myrtle Beach and Conway communities that Major MacDonald had engaged in serious misconduct and was unfit for his profession. He has also presented sufficient evidence for a reasonable jury to find that HCS interfered with his prospective contract with FCSD2. As a result, HCS inflicted devastating injury on Major MacDonald's career, reputation, and mental health. Because HCS has failed to establish that there is no genuine dispute of material fact on Major MacDonald's defamation and intentional interference with prospective contract claims, this Court should reverse the trial court's grant of summary judgment on each.

Respectfully submitted,

s/Lydia Robins Hendrix
Jack E. Cohoon (S.C. Bar No. 74776)
Lydia Robins Hendrix (SC Bar No. 106334)
BURNETTE SHUTT & McDANIEL, P.A.
Post Office Box 1929
Columbia, SC 29202
T: 803.904.7914
F: 803-904-7910
JCohoon@BurnetteShutt.law
LHendrix@BurnetteShutt.law

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PROOF OF SERVICE

I certify that the **REPLY BRIEF OF APPELLANT** was served on the following counsel of record for Respondents on April 4, 2024, via electronic mail under Paragraph (d)(1) of Order re: Methods of Electronic Filing and serve under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447.

Samuel F. Arthur, III (SC Bar No. 13618)
Email: sfa@aikenbridges.com

Joseph P. McLean (SC Bar No. 11839)
Email: jpm@aikenbridges.com

s/ Lydia Robins Hendrix
Lydia Robins Hendrix (SC Bar No. 106334)
Counsel for Appellant

Traci B. Wolfe

From: Traci B. Wolfe
Sent: Thursday, April 4, 2024 11:47 AM
To: Buddy Arthur; jpm@aikenbridges.com
Cc: Jack Cohoon; Lydia Robins Hendrix
Subject: MacDonald v. Horry County School District, et al.
Attachments: Reply Brief of Appellant.pdf; 2024-04-04-Proof of Service.pdf

Dear Counsel,

Please find attached, for service upon you, the Reply Brief of Appellant for the above-referenced matter. The Proof of Service has also been attached, reflecting service of same upon all counsel of record.

Thank you,
Traci Wolfe, PP