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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
CIRCUIT COURT

Brian M. Gibbons, Circuit Court Judge

Case No. 2022-CP-20-00104
Appellate Case No.: 2023-001451

Bertha Goins,.....Respondent,

v.

Jenkinsville Water Co., Inc.,.....Appellant.

APPELLANT’S RESPONSE TO RESPONDENT’S MOTION TO STRIKE

In response to Respondent’s request to exclude certain evidence, Appellant shows that the items designated by Appellant were produced in discovery, referenced or cited in Appellant’s brief in opposition to summary judgment or submitted to the court and as a result, are properly included in the record on appeal.


The original deposition transcripts of Greg Ginyard, Bertha Goins and Clemart Camack were filed with the court and were part of the court’s file when the motion for summary judgment was heard and decided upon. While only excerpts of the transcripts were cited in the parties’ briefs, the entire transcripts were in the court’s possession. As a result, they are properly included in the designation even though the entirety of the transcripts were not cited in the briefs.

All of the Fairfield County Council Meeting minutes designated were cited to in Appellant's Memorandum in Opposition to Summary Judgment factual background with the bates label numbers listed. (See Memorandum in Opposition of Summary Judgment of Appellant attached as Exhibit 1). In addition, all of the news articles designated were cited in Appellant's Memorandum in Opposition to Summary Judgment with the bates label numbers listed. The State and National awards were also cited to in Appellant's Memorandum in Opposition to Summary Judgment factual background.

This case was dismissed at summary judgment prior to a trial. As result, there is no trial transcript and there are no trial exhibits. Appellant contends that the record consists of the discovery that had been exchanged by the parties and certainly the items specifically referred to in the briefs arguing summary judgment. It would be improper to exclude items specifically referred to in the briefs. For these reasons, Appellant respectfully requests that the motion to strike be denied.

Respectfully submitted,

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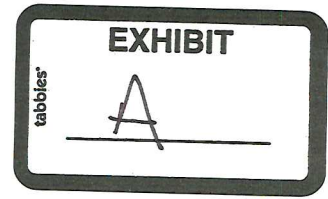
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April 5, 2024



STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD)

Jenkinsville Water Co., Inc.,) Civil Action No. 2022-CP-20-00104
)
)
Plaintiff,)

vs.) **PLAINTIFF’S MEMORANDUM IN**
) **SUPPORT OF SUMMARY**
) **JUDGEMENT AND IN OPPOSITION**
) **OF DEFEDANT’S MOTION FOR**
) **SUMMARY JUDGMENT**

Bertha Goins,)
)
)
Defendants.)

The Plaintiff hereby submits this Memorandum in Support of its Summary Judgment Motion and in Opposition to Defendant’s Motion for Summary Judgment.

Undisputed Factual Background

Defendant is a former board member of Jenkinsville Water Co. (“JWC”) and lost her board seat in 2015. After losing her board seat, Ms. Goins has been a vocal critic of JWC and has openly supported consolidating JWC with the water systems of Winnsboro and Mid-County going so far as to write letters to the paper to that effect.

JWC won the award for the best tasting water in the state by the South Carolina Rural Water association in both 2017 and 2019. JWC won the second place award (tie) for the best tasting water in the United States by the National Rural Water association in 2019. The President of JWC was given public recognition by State Senator Mike Fanning in a letter dated January 6, 2020 and as announced at the company’s annual meeting on January 8, 2020 for winning the best tasting water in the state two out of the past three years.

In the years leading up to the filing of this compliant March 4, 2020, Defendant engaged in a public campaign of maliciously attacking JWC by stating that the water produced by JWC is

substandard, that there is sediment in the water, that there is a causal connection between her husband's medical conditions and the water he drinks that is provided by JWC, there is criminal activity going on at JWC, that JWC hasn't issued boil water notices in the past 20 years, that JWC doesn't bill for water at time, and that the age of JWC's pipes are causing a degradation in the quality of the water it provides. These above-referenced statements were made to news reporters with Defendant's knowledge that the statement would be published in the newspaper, broadcast on television and online and were also made publicly at Fairfield County Council meetings with Defendant's knowledge that these statements would be publicly heard and incorporated into the minutes of the publicly available county council meetings, recorded and reported in newspapers by reporters. The statements were not made in the discharge of a public duty, but were made with actual malice and/or implied malice and with a reckless disregard for truth of the accusations made, without proof of these accusations, and with the intent to harm the reputation of JWC. The above-referenced statements were also made to private individuals.

Defendant Bertha Goins has said that JWC's water is substandard multiple times as shown in the below referenced news articles, news videos and county council meeting minutes. Ms. Goins has publicly said that that there is sediment in the water multiple times as shown in the below referenced news articles, news videos and county council meeting minutes. Ms. Goins stated that there is a causal connection between her husband's medical conditions and the water he drinks that is provided by JWC at the April 8, 2019 Fairfield County Council Meeting and as published by the Voice on April 9, 2019. Ms. Goins has stated that the age of JWC's pipes are causing a degradation in the quality of the water it provides orally at unknown times and as shown in the below referenced news articles, news videos and county council meeting minutes. See the attached newspaper articles bates numbered 00800-00849, council meeting minutes and videos.

At the October 14, 2019 Fairfield County Council meeting, Ms. Goins made statements implying there was criminal activity at JWC that should require jail time, that JWC has not issued a boil water advisory in the past 20 years, that thousands of people were drinking contaminated water from JWC, and that JWC was providing water without metering or billing for it.

ARTICLES & MEDIA SOURCES:

DATE	SOURCE	BATES NUMBER(S)
	Associated Press	00818
4/8/19	News & Observer (Charlotte)	00819-00821
4/9/19	106.3 The Word	00827
4/9/19	SC Now	00828
4/9/19	The Independent Voice	00829-00831 & 00845-00849
3/8/20	The State	00848-00849
4/9/19	The State	00835-00838
	The State	00816-00817

FAIRFIELD COUNTY COUNCIL BOARD MEETINGS:

DATE	BATES NUMBERED PAGES
4/8/19	00092-00093
4/22/19	00127
10/14/19	00246-00249
1/13/20	00343-00344

Plaintiff brought a defamation action against Ms. Goins after asking Ms. Goins for months to stop telling such lies. Ms. Goins responded by bringing causes of action against Plaintiff for breach of contract, breach of implied warranty, FOIA violation, UTPA claim, outrage, and abuse of process all based on occasional pipe breaks and detections of impurities in the water that every water company has. Plaintiff moves for summary judgment on each of Defendant's claims and for partial summary judgment on its defamation claim on liability. This memorandum also serves a response brief to Defendant's motions for summary judgment on each of these claims.

Legal Standard

“Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” *Baughman v. Am. Tel. & Tel. Co.*, S.C. 101, 115,410 S.E.2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the non-moving party’s case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent’s claim. *Id.* Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial. *Id.*; Rule 56(e) SCRPC.

“In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.” *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” *Lanham v. Blue Cross & Blue Shield of S.C.*, 349 S.C. 356, 362, 563 S.E.2d 331,333 (2002). Moreover, because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006).

Argument

I. There is no genuine issue of material fact that Defendant has defamed Plaintiff.

The elements of defamation are as follows: (1) It had a defamatory meaning; (2) it was published with actual or implied malice; (3) it was false; (4) it was published by the defendant; (5) it concerned the Plaintiff; (6) it resulted in legally presumed damages or in special damages to plaintiff. Smith v. Bradstreet, 63 S.C. 525, 41 S.E. 763 (1902).

Organizations like corporations, associations, and partnerships can sue for defamation that affects their businesses or other organization interests. (South Carolina Law of Torts, Third ed.). With respect to the following defamatory statements, the record is clear that the statements were defamatory in meaning, made by Defendant and Defendant admits that they are not true:

At the October 19, 2019 Fairfield Council meeting, the minutes of the meeting indicate that Ms. Goins stated that she was “complaining about the operation of the company, investigations and house arrest. She suggested that maybe some jail time is needed now.” (See Bates Label JWC 00247). This language strongly implies that there is criminal activity going on at JWC which is actionable under South Carolina defamation law and implies malice by law and is slander per se. Defamation need not be accomplished in a direct, open or positive manner, insinuation can be defamatory. (see Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987); Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980)). Ms. Goins unequivocally testified that she knew of no criminal activity at JWC at the time she made those statements (Depo. Bertha Goins, P. 193, ll. 17-20).

At the October 19, 2019 Fairfield Council meeting, the minutes of the meeting indicate that Ms. Goins stated that “In 20 years, there has not been one boil water advisory.” (See Bates Label JWC 00247). This statement impugns JWC’s fitness in its business and is slander per se. Ms.

Goins concedes that she has done no investigation as to whether there in fact had been no boil water notices in the past 20 years at the time she made those statements and made no investigation as to the truth of that statement. Ms. Goins agrees that investigating the truth of the existence of boil water advisories may have been the prudent thing to do. Ms. Goins also remembers JWC discussing issuing boil water advisories when she was a member of the JWC board from 2012-2015. (Depo. of Bertha Goins, p. 39, l. 11 – p. 46, l. 4). The evidence in the case shows that there have in fact been many boil water advisories over the past 20 years including these dates: 7/6/12; 7/31/18 for Ms. Goins street; 1/16/17; 6/30/17; 7/10/17; 1/18/17; 2/22/17; 4/12/17; 4/10/17.

At the October 19, 2019 Fairfield Council meeting, the minutes of the meeting indicate that Ms. Goins stated that “Water is being sold without a meter with thousands of gallons going against accountability and transparency.” (See Bates Label JWC 00247). This statement impugns JWC’s fitness in its business and is slander per se. Ms. Goins testified that she was referring to a water truck getting water from a JWC hydrant and thought the truck owner was not paying for the water. Ms. Goins testified that when she made those remarks, she had no knowledge “[w]hether they were charged, not charged, I don’t know. Didn’t ask. Didn’t follow up on it”. (Depo. of Bertha Goins, p. 125, l.11 - p. 128, ll. 7). The only evidence in the record on this issue is that these trucks are metered and are billed. (Depo. of Greg Ginyard dated 12/15/21, p. 196, l. 14 – p. 197, l. 7).

Defendant is reported by multiple newspaper articles that she believes the age of the pipes in the JWC water system is causing the water quality to suffer. (See bates labels Goins 00818-0850). This statement impugns JWC’s fitness in its business and is slander per se. Ms. Goins testimony however is that she has no information and has no way of knowing as to whether the JWC pipes have degraded over time. (Depo. of Bertha Goins, P. 83, l. 16 – P. 84, l. 2). The only

evidence in the record is that JWC's pipes are PVC that do not degrade over time. (Depo. of Greg Ginyard dated 12/15/21, p. 79, l. 13 – p. 80, l. 19).

These undisputed facts surrounding these statements meets all of the elements of defamation and this court should grant partial summary judgment for Plaintiff on liability for its defamation claim.

In addition to the defamatory statements outlined above, there are at least two other defamatory statements that Defendant has made where there will be some dispute as to whether the statement was actually made or not. This includes the statements that Defendant 4/9/19 and in October 2019 claiming that the water JWC provides caused her husband's cancer (Newspaper article dated April 9, 2019 bates labeled Goins 829 and Depo. of Clemart Camack, p. 141, ll. 6 – p. 142, p. 19). It also includes the statement that a bottle of dirty water she held up at the October 19, 2019 Fairfield County Council meeting was actually from her home. (Depo. of Clemak, p. 19, l. 7 – p. 31, l. 12). For the above reasons, the court should deny Defendant's motion for summary judgment.

B. Defendant was not acting within her official duties as a member of the Fairfield County Council at the time she made the defamatory statements.

Section 15-78-60 of the Tort Claims Act reads as follows:

§15-78-60. Exceptions to waiver of immunity (17) employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude;

At the time Defendant was making the defamatory comments at Fairfield County Council meetings, she was not speaking as part of her official duties for the county, but giving her personal thoughts on JWC to the general public. The statements were made during a time during the County Council meeting where the Council members can say whatever they want to but have no obligation

to say anything. Anyone can speak at the County Council meetings at the appropriate time. The fact that Ms. Goins was a Council Member does not make what she was saying connected to her job in any way. Ms. Goins was making similar statements about JWC prior to becoming a County Council member and continued after she lost her re-election bid for the County Council. Speaking to the general public at a County Council meeting does not make these statements a party of her official duties as contemplated by the Tort Claims Act. She is simply stating her personal thoughts during her time at the meeting. As a result, the tort claims act does not apply to these statements.

If the tort claims act does apply, pursuant to §15-78-60, if a jury determines that Ms. Goins was acting with actual malice, she will be determined to have been acting outside her scope of employment and not subject to the tort claims act. Kennedy v. Richland Cnty. Sch. Dist. Two, 428 S.C. 98, 833 S.E.2d 414 (S.C. App. 2019). As a result, there is a question of fact for the jury as to whether these statements were made within her official duties and whether they were made with malice even if they are held to be within official duties. As a result, this court should deny Defendants motion for summary judgment.

C. No privilege applies to false statements made in an open session to the public. If a privilege does exist, it is a question of fact as to whether the privilege has been exceeded.

A privilege generally arises when defamatory comments are conveyed to supervisors or other coworkers that need to know possible harmful information for the organization to respond properly. Supervisory staff should be the only ones to be protected by the privilege. In this case, a closed-door session with other council members about these issue should be afforded the qualified privilege. Speaking to the general public as Ms. Goins did in this case does not receive the qualified privilege under the law. Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986) (generally on qualified privilege).

Even if a qualified privilege is afforded these comments, “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.” Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (S.C. 1999) (emphasis added). “The question whether the privilege had been abused is one for the jury. Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused. Id at 134. In addition, there is ample evidence in the record that these statements were made with actual malice. As a result, Defendant’s motion for summary judgment should be denied.

II. Plaintiff has no standing to bring her FOIA claim, has not alleged or proven a proper FOIA claim, and has not brought her FOIA claim within the applicable statute of limitations. Defendant failed to request the necessary hearings for FOIA claims. Even if there is an appropriate FOIA claim alleged, there are questions of fact related to whether JWC is a governmental entity subject to FOIA and whether there are any applicable FOIA requests brought by Defendant.

A. Plaintiff has no standing to bring her FOIA claim and the statute of limitations has run on any such claim as well as there being no evidence in the record to support a finding that no proper response was provided by JWC.

The Freedom of Information Act reads in relevant part as follows:

§ 30-4-100. Injunctive relief; costs and attorney's fees.

(A) A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases **if the application is made no later than one year after the date of the alleged violation** or one year after a public vote in public session, whichever comes later. Upon the filing of the request for declaratory judgment or injunctive relief related to

provisions of this chapter, **the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties. If the hearing court is unable to make a final ruling at the initial hearing, the court shall establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing.** The court may extend this time period upon a showing of good cause. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists. (emphasis added).

As a threshold matter, Defendant has not properly plead nor proved a FOIA violation. Defendant seeks injunctive relief in its Counterclaim, but makes no reference to a FOIA violation within a year of filing her Counterclaim on April 6, 2020. (See Counterclaim, ¶¶61-66). In responses to Requests to Produce, Defendant references a 2011 Attorney General's opinion, discovery response issues, and generally years-old FOIA requests that have allegedly not been responded to. (See Defendants Responses to Request to Produce, ¶18). There is no reference to any FOIA request that has not been responded to that was served by April 6, 2019, one year prior to the FOIA claim being filed. *Id.* In addition, Defendant's testimony is that she has never filed any FOIA requests upon JWC. (Depo. of Bertha Goins, p. 162, l. 11 – p. 163, l. 14).

These facts give rise to two arguments why Defendants FOIA cause of action must fail as a matter of law. First, Plaintiff contends that a citizen bringing a FOIA claim pursuant to §30-4-10 et. seq. must file such a claim based on the alleged failure of the public entity's response to her own FOIA request, not the request of others. Ms. Goins has no standing to bring a FOIA claim for JWC's alleged failure to respond to someone else's FOIA request and this cause of action should be dismissed as a matter of law.

Second, even if Ms. Goins can bring a FOIA claim for someone else's unresponded FOIA request to JWC, there is no evidence in the record that any other party served a FOIA request within a year of the filing of the Counterclaim and that it went unresponded to. As stated above, there is no evidence or reference in the Counterclaim or Defendant's discovery responses of any

FOIA request served by anyone within one year of the date of filing the Counterclaim. In addition, there is no testimony or other evidence in the record that the party that did file the FOIA request within that year did not receive a proper response. As a result, Defendant's FOIA request should be dismissed for both not being filed within the Statute of Limitations and for there being no evidence in the record that a proper response was not received to a FOIA request.

B. Defendant has failed to diligently pursue her FOIA claim by failing to request the necessary 10 day hearing, the six month final hearing, and has failed to move to extend the 6 month final hearing deadline to have the FOIA issue resolved.

Defendant has sought declaratory and injunctive relief in her Counterclaim (see Counterclaim, ¶ 64). §30-4-100 requires, "the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties. If the hearing court is unable to make a final ruling at the initial hearing, the court shall establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing." The court neither scheduled nor the Defendant sought either hearing. §30-4-100 goes on to state, "The court may extend this time period upon a showing of good cause." Defendant did not seek an extension of this six-month deadline and no good cause was shown for an extension. It has now been two weeks short of three full years since Defendant sought relief for a FOIA violation. If Defendant had a legitimate FOIA violation claim, she had a right to a 10 day hearing and a final hearing within six months of filing.

Plaintiff contends that Defendant does not actually want a response to any FOIA request since she has never served one on JWC. Her goal is to drag the litigation out and incur as much in attorney's fees as possible to use this as settlement leverage against JWC. If Defendant had a legitimate FOIA request and honestly wanted documents, she had a right to a 10-day hearing where the issue could have been finally resolved for an inexpensive amount. In addition, Plaintiff has a

right to get the FOIA issue resolved either within 10 days or at most six months. Plaintiff has been prejudiced by not having this FOIA claim resolved in the timely fashion set forth in the Freedom of Information Act. Defendant has been incurring additional attorney's fees during this delay that should not have been incurred and Plaintiff has been unable to conclusively resolve this issue due to Defendant's inaction. It can fairly be said that Defendant has failed to diligently pursue her claim. By failing to seek a 10-day hearing, a six-month final hearing, and without seeking an extension of the six-month deadline to have a final hearing, Defendant's FOIA claim should be dismissed with prejudice.

C. If the Court does not dismiss Defendant's FOIA claims for the reasons above, there is a genuine issue of material fact as to whether JWC is subject to FOIA.

Jenkinsville Water Company is a South Carolina private non-profit corporation. It has no affiliation with the Town of Jenkinsville or any other governmental entity. All of the revenue generated by JWC stays in JWC and none is shared with any governmental entity. The Freedom of Information Act defines a public body as follows:

§ 30-4-20. Definitions.

(a) "Public body" means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.

There is no mention in this definition that private non-profit water companies are considered public bodies. Most companies serve the public, but they are not public bodies under the Freedom

of Information Act unless some other provision applies. Defendant has pointed to a 2011 Attorney General's opinion that JWC is a public body for FOIA purposes. First, JWC would point out that this opinion is just that, an opinion. It is not controlling. Second and most importantly, much has changed since the 2011 AG's opinion 12 years ago. The AG's opinion was based on financial information about JWC at that time. Since then, JWC has paid off its state loans and other loans which significantly alters the analysis as to whether it receives public funds.

In addition, JWC was not prosecuted for an alleged failure to respond to a FOIA request in 2012, after this AG's opinion was issued. This means that a solicitor declined to prosecute the board member for an alleged FOIA violation giving JWC a good faith basis to believe that it was not a public body under FOIA. For these reasons, there is a genuine issue of material fact as to whether JWC is a public body as defined by the Freedom of Information Act and Defendant's motion for summary judgment on this issue should be denied.

III. Defendant's claims for Breach of Contract, should be dismissed as a matter of law as there is no evidence of a contract. Defendant has no damages associated with a breach of contract claim and her claim should be dismissed.

Defendant alleges she had a continuing contract with JWC where JWC agreed to provide safe, sanitary and reasonably priced water to Defendant. (Counterclaim, ¶56). A contract is an agreement between two or more parties, the preliminary step in the making of which is an offer by one and acceptance by the other in which the minds of the parties meet and concur in understanding the terms. A contract is the meeting of the minds of at least two parties. It involves an offer and acceptance and it must bind both parties. The essentials of a contract are:

- (1) a person or entity able to contract;
- (2) a person or entity able to be contracted with;
- (3) a thing to be contracted for;
- (4) good and sufficient consideration;

- (5) clear and explicit words to express the contract; and
- (6) the assent of both the contracting parties.

Judge Anderson's Request to Charge, §19-3.

An essential element of a breach of contract claim is clear and explicit words to express the contract. Defendant has no copy of any written contract with JWC. (Depo. of Bertha Goins, p. 165, ll. 3-25). No oral contact to this effect has been alleged.

Defendant does not allege that occasional breaks in the water line that are timely repaired constitute a breach of any contract she may have. (Depo. of Bertha Goins, p. 166, l. 10 – p. 168, l. 21). Ms. Goins points to no term of any written or oral contract that has been breached. There is no contact as alleged in Defendant's Counterclaim and there is no evidence that any terms were breached. All water systems have occasional pipe breaks and findings of impurities. DHEC regulates water systems, sets standards, and has the authority to require changes or corrections in the manner in which a water company operates. There is no private cause of action Defendant points to for occasional discoloration and findings of impurities. Because no contract exists, Plaintiff's motion for Summary Judgment should be granted and Defendant's motion for Summary Judgment should be denied.

If the Court finds that there is a contract, Defendant's contract claim should be dismissed as Defendant has no evidence any valid damages. Defendant's only damages include stress, attorney's fees and costs, none of which are recoverable under South Carolina law for a breach of contract claim. (Depo. of Bertha Goins, p. 171, l. 11 – p. 172, l. 12). Stress for dealing with a broken water line for a few days is not a proper category of damages. Attorney's fees and costs and not recoverable absent a statute allowing them or a contractual provision allowing them. Defendant has not shown that either of these exist. Ms. Goins also testified that she always buys bottled water because she doesn't like the taste of the water. (Depo. of Bertha Goins, p. 90, ll. 7-

11). As a result, there can be no claim for any expense to buy bottled water. For these reasons, Defendant has no valid damages and Plaintiff's motion for summary judgment should be granted.

III. Defendant's claims for Breach implied warranty for fitness for a particular purpose should be dismissed as the water is conclusively safe as DHEC insures that it is.

§36-2-315 sets for the requirements of an implied warranty and state as follows:

§36-2-315. Implied warranty: Fitness for particular purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section (Section 36-2-316) an implied warranty that the goods shall be fit for such purpose.

Warranty theory does not require a fool-proof product; reasonable safety is all that merchantability requires. (See Soaper v. Hope Indus., 306 S.C. 531, 424 S.E.2d 493 (1992); Southeastern PVC Pipe Mfg. Co. v. Rothrock Constr. Co., 280 S.C. 498, 313 S.E.2d 50 (1984).

In the context of water companies providing water to many members of the community, the water company is regulated by DHEC who ensures that the product, water, is reasonably safe. If a water company is not producing reasonably safe water, it has the authority to order that corrective action be taken and, in extreme cases, will assume control over the company to make the water safe. The fact that JWC has never lost control over producing the water means that DHEC believes it is producing a reasonable safe product. As a result, Defendant's claim for a breach of an implied warranty for fitness for a particular purpose must fail and Plaintiff's motion for summary judgment should be granted.

If the Court finds that there is valid claim for breach of warranty, this claim should be dismissed as Defendant has no evidence any valid damages. Defendant's only damages include stress, lack of bringing awareness to the people, attorney's fees and costs, none of which are recoverable under South Carolina law. (Depo. of Bertha Goins, p. 172, l. 13 – p. 175, l. 12). Stress

for dealing with water that is discolored for a few days is not a proper category of damages. Feeling like a company has not brought enough awareness to a problem is not a proper category of damages. Attorney's fees and costs are not recoverable absent a statute allowing them or a contractual provision allowing them. Defendant has not shown that either of these exist. As a result, Defendant has no valid damages and Plaintiff's motion for summary judgment should be granted.

IV. Defendant's claim for abuse of process should be dismissed as a matter of law.

The essential elements of abuse of process are (1) an ulterior purpose, (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, but they use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." (see *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206 (1967)).

Plaintiff has brought a defamation action against Defendant in an effort to recover for the reputational damage it has sustained from Defendant's admitted lies about JWC. There is nothing in the record to suggest that JWC has an ulterior motive. From before this suit, JWC sent multiple letters to Defendant's attorney asking her to stop telling these lies and to publicly repudiate them. Defendant defiantly said she would continue saying them claiming she was simply expressing concern for her water quality. As can be seen from the nature of the statement Ms. Goins admittedly made, these are not expressions of concern for the quality of the water JWC delivered. They were malicious attacks against JWC to try to earn public disdain for JWC hoping that the member of JWC would vote to consolidate with the neighboring water companies.

There is no evidence of an ulterior motive and Plaintiff has every right to bring an action for these types of defamatory comments. As a result, Defendant's abuse of process claim should be dismissed.

V. Defendant's claims for violations of the unfair trade practices act should be dismissed as there is no evidence in the record to support such a claim.

The South Carolina Unfair Trade Practices Act ("UTPA") requires damages to have been sustained to bring an action. The relevant portion of the UTPA reads as follows:

§ 39-5-140. Actions for damages.

(a) **Any person who suffers any ascertainable loss of money or property, real or personal**, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by Section 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages. If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs. (emphasis added).

Even if she can show a violation of the UTPA, the Defendant in this case has not been able to show that she was damaged in any monetary fashion. While the UTPA allows for an award of attorney's fees, attorney's fees for this suit are not considered damages for the basis for bringing the suit. Defendant claims she has stress and wants people to be better notified and for better communication. Defendant has not articulated or otherwise shown how she has been damaged by any alleged unfair trade practices. (Depo. of Bertha Goins, p. 171, l. 11 – p. 176, l. 13). As a result, Plaintiff's motion for summary judgment should be granted and Defendant's motion for summary should be denied.

With respect to the merits of Defendant UPTA claim the UTPA states in relevant part as follows:

§ 39-5-20. Unfair methods of competition and unfair or deceptive acts or practices

unlawful; application of federal act.

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

Defendant claims that JWC has deceived the public and regulators as to its standing as a public utility in order to avoid appropriate oversight of its activities. This appears to be another way to allege a violation of FOIA which is argued above. JWC is properly registered as a South Carolina non-profit corporation with no affiliation to any city, town, or county. This structure is and has always been entirely proper in South Carolina and is for a number of other South Carolina water companies. Because of no affiliation with a political entity, JWC has been able to keep its rates as some of the lowest, if not the lowest in the state. There is no evidence that DHEC regulates JWC any differently than it regulates every other water company in the state and there is no evidence in the record that JWC is not receiving the appropriate oversight from regulators.

Defendant claims that JWC has intentionally deceived the public and its customers as to the quality and safety of the water it provides. As stated above, JWC is regulated by DHEC just as every other water company in the state. DHEC issues water quality reports every year that are available to the public. There is no evidence that JWC has tried to hide any report DHEC requires regarding the safety of its water. In addition, there is no evidence at any time leading up to this litigation that JWC has not been in good standing with DHEC. JWC has award winning water and this claim is nothing more than an attempt to pressure JWC into dismissing its claims for fear of baseless accusations that DHEC records refute. For the above reasons, Plaintiff's motion for summary judgment should be granted and Defendants motion for summary judgment should be denied.

VI. Defendant's claims for outrage and harassment should be dismissed as there is no evidence to support such a claim.

To recover for outrage, a plaintiff must show: (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain to substantially certain that such distress would result from his conduct; (2) the conduct was so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community'; (3) the actions of the defendant caused the plaintiff's emotion distress; and (4) the emotion distress suffered by the plaintiff was 'severe' so that 'no reasonable man could be expected to endure it'. Ford v. Hudson, 276 S.C. 157, 276 S.E.2d 776 (1981).

When Defendant was asked how she has been harmed by what she claims JWC has done, she states that "it's nothing outrageous." (Depo. of Bertha Goins, p. 175, l. 11). JWC is a water company dealing with what every other water company deals with – broken pipes and the occasional finding of impurities in the water. It cannot fairly be said that these acts are meant to intentionally cause emotional distress on anyone or that Ms. Goins, as frustrated as she claims to have been, believes that no one should expected to endure it.

If Ms. Goins is referring to JWC asking her to stop telling lies about the company, JWC would argue that it was Ms. Goins that has been intentionally hurting it and that she brought this case on herself. JWC has presented evidence through Ms. Goins own testimony that she admits to lying about facts that can only be deemed to be harmful to JWC. Accusing JWC of intentionally trying to harm he is the pot calling the kettle black. The evidence in this case does not rise to the level required to go to a jury and Plaintiff's motion for summary judgment should be granted and Defendants motion for summary judgment should be denied.

Conclusion

For the reasons outlined above, Plaintiff respectfully request this Court grant its motions for summary judgment with respect to each of Defendant's cause of action, grant partial summary judgment in Plaintiff's favor on liability for its defamation claim and deny Defendant's motions for summary judgment.

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Attorney for Plaintiff

Columbia, South Carolina
March 22, 2023

RECEIVED

Apr 05 2024

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
CIRCUIT COURT

Brian M. Gibbons, Circuit Court Judge

Case No. 2022-CP-20-00104
Appellate Case No.: 2023-001451

Bertha Goins,.....Respondent,

v.

Jenkinsville Water Co., Inc.,.....Appellant.

PROOF OF SERVICE

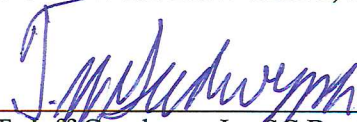
I certify that I have served a copy of **Appellant’s Response to Respondent’s Motion to Strike**, upon; Austin T. Reed, Esquire; Daniel C. Plyler, Esquire; Sydney J. Douglas, Esquire and H. Thomas Morgan, Jr., Esquire, Attorneys for Respondent, at the address(es) below by E-mailing a copy of same, on April 5, 2024.

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April 5, 2024

VIA E-FILING – Ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
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RECEIVED

Apr 05 2024

SC Court of Appeals

RE: ***Bertha Goins v. Jenkinsville Water Company, Inc.***
Civil Action No.: 2022-CP-20-00104
Appellate Case No.: 2023-001451
Our File No.: 3550-0001

Dear Ms. Kitchings:

Enclosed for filing, please find the original and one copy of Appellant's Response to Respondent's Motion to Strike, along with a Proof of Service, in regards to the above referenced matter. Please file the original and return a filed copy of same to me via email.

As evidenced in the Proof of Service, I have served all interested parties, with a copy.

Thank you for your attention to this matter and should you have any questions, please do not hesitate to contact me.

Sincerely,



T. Jeff Goodwyn, Jr.

TJG:cnc

Enclosures

cc: Austin T. Reed, Esquire
Daniel C. Plyler, Esquire
Sydney J. Douglas, Esquire
H. Thomas Morgan, Jr., Esquire
(all via email)