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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
CIRCUIT COURT

The Honorable G. D. Morgan, Jr., Circuit Court Judge
The Honorable Perry H. Gravely, Circuit Court Judge

Trial Court Case No. 2020-CP-23-01450
Appellant Case No. 2022-001432

Michael Gene Putnam.....Appellant,

vs.

Robert Henry PurkersonRespondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. The Circuit Court erred in granting Purkerson's motion for summary judgment when there is substantial evidence in the record of at least one defamatory statement and that it was published including the filing of the unredacted sex crime investigation report on the public index in violation of S.C. Code §63-7-940.
- II. The Circuit Court erred in granting summary judgment when Appellant's motion to amend his complaint had not yet been ruled on.

STATEMENT OF THE CASE

Appellant originally filed this action on June 21, 2019, in the Court of Common Pleas for Greenville County, South Carolina, against Wake Christian Academy, Dana Graves Cordell, Kellie O'Neal Auerweck, and Robin Cary Maples (collectively, the "Removing Defendants") alleging defamation and conspiracy to defame. On July 30, 2019, the Removing Defendants filed a timely notice of removal, removing the case to the Federal District Court on the basis of diversity jurisdiction. On August 26, 2019, Appellant filed an amended complaint naming Robert H. Purkerson as an additional defendant.

During the pendency of the case before the Federal District Court, there were numerous pre-trial motions by Removing Defendants for dismissal based on Rules 12(b)(6) and 12(b)(2), none of which were granted. Upon a determination that the case was "ripe" for review, it was submitted to the magistrate's judge for a recommendation to the Court. The essential conclusions of the magistrate's court for review by the Honorable Judge Timothy M. Cain was that Appellant could not establish sufficient contacts using South Carolina's Long-Arm statute over the North Carolina defendants. Ultimately, Judge Cain dismissed the case without prejudice on February 6, 2020 based on Appellant's lack of ability to overcome the objections based on diversity jurisdiction.

Appellant commenced the instant action *pro se* with the filing of Summons and Complaint on March 6, 2020 against various defendants including Respondent Robert Henry Purkerson ("Purkerson"). (R., p. 39). Appellant filed an Amended Complaint on April 6, 2020 asserting causes of action for defamation/libel per se and specifically alleging that Purkerson made false allegations

about Putnam regarding sex crime investigations related to the Child¹. (R., p. 77). Appellant filed a motion to amend his Amended Complaint on July 20, 2020 that has not yet been ruled on. (R., p. 109). The Defendants other than Purkerson have been dismissed and this appeal only relates to the case against Purkerson.

The Court denied Purkerson's initial Motion for Summary Judgment in an order dated June 25, 2020. (R., p. 1). After an order compelling Appellant to specifically respond to interrogatories requesting specifics of the alleged defamatory statements, Appellant produced 36 pages of text messages between himself and Nikkee Fleming, emails from Purkerson to third parties, and phone recordings of Purkerson². (R., p. 737-739).

Purkerson renewed his summary judgment motion and the Court heard Purkerson's Renewed Motion for Summary Judgment June 21, 2022. (R., p. 198). The Court granted Purkerson's Renewed Motion for Summary Judgment in an order dated July 8, 2022. (R., p. 13). Appellant filed a motion to reconsider July 25, 2022 and a Motion to Alter or Amend dated August 17, 2022 that was denied in a form 4 order dated September 8, 2022. (R., p. 16). Appellant filed a timely notice of appeal. (R., p. 486).

STATEMENT OF FACTS

This case involves allegations of defamation by Appellant against Purkerson. Appellant's ex-wife, Lyn Maples, is currently married to Robin Maples. One child was born of Appellant and Lyn Maples' marriage and this child is still a minor (the "Child"). For the relevant times involved in this case, Robin and Lyn Maples along with the Child lived in North Carolina and the Child

¹ Note that the index in the Record on Appeal incorrectly lists the date for the Amended Complaint as March 6, 2020.

² Note that only the relevant emails/texts of these 36 pages are included in the record.

attended Wake Christian Academy. Purkerson is Lyn Maples' father and the maternal Grandfather of the Child as well as Robin Maples father-in-law.

In or around October 2018, a report was filed with the Wake County, North Carolina Department of Social Services ("NCDSS") by a representative of Wake Christian Academy in Raleigh, North Carolina. As a result of that report, Greenville County, South Carolina DSS received a referral request from NCDSS requesting they conduct an investigation as to Appellant. Appellant has alleged that Purkerson made false and defamatory statements to individuals involved in this investigation relating to Appellant's conduct toward the Child that were determined to be unfounded. In addition, Appellant alleges that Purkerson have made other defamatory statements related to this incident to various other people. Specifically, Purkerson sent email dated 9/1/2015 to Jeffery Fleming stating Appellant was "a sick and desperate man" and a voice recording where Purkerson called Appellant "a low-life coward" and "lousy trash". (R., p. 737). In addition, Purkerson posted on the Public Index for this case an unredacted copy of the sex crime investigation report (the "Report") in violation of S.C. Code §63-7-940. (R., pp. 743-753). See Purkerson's Motion to Compel with exhibits filed December 22, 2021 with the unredacted Report. (R. p. 151).

The Greenville County Sheriff's office did not move forward with criminal charges against Appellant declaring the allegations unfounded. Appellant's relationship with his daughter and reputation in the community has been severely damaged by these false statements. In addition, the filing of the unredacted sex crime investigation report on the public index by Purkerson has damaged and continues to damage Appellant as it still available on the public index to this day.

STANDARD OF REVIEW

“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.*, 306 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. THE EVIDENCE APPELLANT SUBMITTED SUPPORTING HIS DEFAMATION CLAIM AGAINST PURKERSON IS SUFFICIENT TO SATISFY THE PUBLICATION AND OTHER REQUIREMENTS FOR DEFAMATION.

A. The defamatory statements do meet the publication requirements as defined by the courts.

The Court's Form 4 Order granting Purkerson's renewed motion for summary judgment concedes that "one of the emails and one of the voicemails produced by the Plaintiff in opposition to summary judgment contain statements made by [Purkerson] to third parties about the Plaintiff." (Form 4 Order dated 7/8/22). (R., p. 13). The Court grants the summary judgment motion because the statements "do not satisfy the publication element required for a defamation claim" because the people hearing the statements were "either a family member or unidentified." (Form 4 Order dated 7/8/22). (R., p. 13). The Court cites *Capps v. Watts*, 271 S.C. 276, 246 S.E.2d 606 (1978) for this proposition. (Form 4 Order dated 7/8/22). (R., p. 13).

The Court's full order dated August 17, 2022 restates this holding more fully stating that the "publication must be derogatory to more than a single individual or a very small group of persons, such as family members." (Order dated 8/17/22, p. 16), (R., p. 19). The Court goes on to state that the publication requirement was not met in this case because the communications were made only to the Appellant or to a family member, again citing *Capps*. (Order dated 8/17/22, p. 16). (R., p. 19).

Capps does not stand for the proposition that publication must be to more than a single individual, a small group or beyond family members and it was an error of law for the court to interpret it that way. *Id.* *Capps* is not a case on publication at all as the defamatory remark in *Capps* was published in a newspaper at the defendant's request. *Id.* The only mention of family in *Capps* is the Appellant's request that the defendant be responsible for his wife's doctor's bills

to get a prescription for her to handle the anxiety allegedly caused by the defamatory statements. *Id.* *Capps* is a case related to pleading special damages and whether the particular statement made was defamatory. *Id.* The Court found that the wife's doctor's bill was not a proper special damage, that general damages were presumed and that whether calling the defendant a "paranoid sonofabitch" is defamatory is a question for the jury under the circumstances. *Id.* The other two cases cited in the Court's Order make no reference to a publication needing to be more than one person, a small group of people or someone beyond the family and Appellant can find no case law with such a holding. See *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002); *Richardson v. State-Record Co.*, 330 S.C. 562, 499 S.E.2d 822 (Ct. App. 1998).

The only reference at all in the Court's August 17, 2022 Order related to the size of the group that hears the defamatory remark is an excerpt from the Restatement Second of Torts, §559. The excerpt states that a defamatory communication need not offend everyone or even a majority, but that it is enough that the communication would be derogatory in the view of a single individual or a very small group of persons. (Order dated 8/17/22, p. 15), (R., p.19). This states exactly the opposite of what the court found in holding that the defamatory communications did not meet the publication requirement because it was said to only one person, a small group or a family member. (Order dated 8/17/22, p. 16), (R., p. 19). It is entirely unclear where the court came to the belief that a defamatory communication must be made to more than one person, a small group and to non-family members. Because the court misapprehended the law on publication as explained above, this court should reverse the trial court on the issue of a lack of publication of the defamatory remarks and remand the case to the trial court.

B. The statements in the 9/1/15 email and 5/16/22 voicemail recording meet the standard of defamatory statements or the question is for a jury to decide.

As a threshold issue, the August 17, 2022 order does not hold that the voicemail statements where Purkerson said Appellant is “a low-life coward” and “lousy trash” are not defamatory. The court granted summary judgment on these statements based on lack of publication grounds. The court held that they were made to a family member or to an unidentified person and this did not meet the publication requirements. (Order dated 8/17/22, p. 16, R. p.19); (Form 4 Order dated 7/8/22, R., p. 13). Appellant contends that the court misapprehended the law on publication related to these statements as fully argued above.

With respect to the emails, the Form 4 order of the court dated July 8, 2022 makes no mention of the Respondent’s communications not being defamatory. (Form 4 Order dated 7/8/22). (R., p. 13). Only in the order drafted by Respondent’s counsel dated August 17, 2022 does any mention that the September 1, 2015 email statements are not defamatory. (R., p. 19). Arguably, there was no actual finding that the statements were not defamatory. If this Court finds that the lower court did find that the statements were not defamatory, Appellant shows that they in fact were defamatory or the question is one for a jury.

Appellant has produced an email dated September 1, 2015 and this has been acknowledged by the court (Order dated August 17, 2022, Form 4 Order dated 7/8/22, R. p. 13; email dated 9/1/2015, R. p.737). The September 1, 2015 email shows Purkerson writing to Jeff Fleming that Appellant “is a sick and desperate man...”. (email dated 9/1/2015, R. p. 737).

“A person makes a defamatory statement if the statement ‘tends to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him.’” *Fleming v. Rose*, 350 S.C. at 494, 567 S.E.2d at 860 (2002); (Order dated 8/17/22, p. 14, R. p.19). It cannot fairly be said that these statements do not tend to injure one’s reputation as to lower him in the estimation of the community or deter third persons

from associating or dealing with him. There is clear intent to harm someone's reputation when you call them "sick and desperate" and this phrase conveys a strong negative connotation.

The court considered Jeff Fleming's affidavit stating that he did not interpret the statement in the 9/1/15 email as defamatory. (Order dated 8/17/22, p. 16, R. p.19). There is no exception in the rule set forth in *Fleming v. Rose* if a recipient of the statement says they didn't take it in a defamatory way. To suggest that Jeff Fleming's interpretation of the statement is a relevant factor to consider shows the flawed analysis the court engaged in. The recipient of the statement does not decide whether it is defamatory. Under *Capps v. Watts*, "[I]t is for the jury to determine whether [the statements] were used in a libelous sense given the circumstances." *Capps at 610*.

For the reasons stated above, the statements made in the September 1, 2015 email are either defamatory as meeting the definition set forth in *Fleming v. Rose* or it is a jury question to decide if they are defamatory in light of the circumstances pursuant to *Capps v. Watts* . As a result, the court should reverse the trial court, reinstate the case and remand the case for trial.

C. The filing of the unredacted sex crime investigation report on the public index is a defamatory statement and gives rise to a separate cause of action under S.C. Code §63-7-940.

Title 63, Chapter 7 of the South Carolina Children's Act (the "Act"), establishes that a person is guilty of a crime, punishable by jail time and fines upon conviction of violating the Act. The Act, specifically S.C. Code §63-7-940(B), also permits any person aggrieved by unlawful dissemination of an unfounded case in violation of the Act has not only a constitutional right, but a South Carolina specific "statutory" right "to file a civil action against any parties breaching the rules related to protected information as defined by the Act." *See* S.C. Code §63-7-940(B).

Purkerson filed a Motion to Compel Discovery Responses against Appellant December 22, 2021. (R., p. 151). Included as attachments to this motion were and unredacted copy of the Greenville

County Sheriff's Department Incident Report and Supplemental Report (the "Report").³ Appellant was eventually able to obtain a court order to remove the attachments. Appellant filed an Affidavit in Opposition to Defendant Purkerson's Motion for Summary Judgment on June 17, 2022 referencing the fact that Purkerson and Maples had an unredacted copy of the Report and had disseminated it. (R., p. 359). Appellant was asking the court to seal the record or at least that portion of the file that had not been removed. (R., p. 359). Appellant then filed a formal Motion to Seal prior to the court ruling on Purkerson's summary judgment motion on July 7, 2022.

Purkerson's violation of S.C. Code §63-7-940(B) in filing an unredacted copy of the Report on the public index gives rise to not only the dissemination of defamatory statements, but a separate cause of action under S.C. Code §63-7-940(B). The court had received the Affidavit and was aware the issue at the time it was considering Purkerson's Motion for Summary Judgment. The court failed to address this issue or consider these issues in the August 17, 2022 order or the denial of Appellant's Motion to Reconsider. As stated above, the statements contained in the unredacted Report support Appellant's defamation claim as well as give rise to a separate cause of action under S.C. Code §63-7-940. As a result, this court should reverse the grant of summary judgment with respect to Purkerson on these grounds and remand the case to the trial court.

II. THE TRIAL COURT ERRED IN FAILING TO CONSIDER APPELLANT'S MOTION FOR LEAVE TO AMEND THE FIRST AMENDED COMPLAINT.

Plaintiff filed a Motion for Leave to Amend Plaintiff's First Amended Complaint on July 24, 2020. (R., p. 109). This motion has not been heard or ruled as of this date.

Rule 15(a) SCRPC provides that leave shall be freely given when justice so requires and does not prejudice any other party. This rule strongly favors amendments, and the court is

³ The reports do redact the minor child's name, but do not redact Appellant's name which is the critical name to be redacted. Other exhibits in the filing reveal the minor child's full name in further violation of S.C. Code §63-7-940.

encouraged to freely grant leave to amend. *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005).

Plaintiff filed his Motion for Leave to File Second Amended Complaint approximately two years prior summary judgment being granted. Discovery could not have been conducted or completed relating to the allegations in the Second Amended Complaint because the motion had not yet been ruled on. It is well settled law that summary judgment is premature when discovery is not yet complete. *Gary v. Askew*, 813 S.E.2d 717, 423 S.C. 47 (S.C. 2018) citing *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004) ("[S]ince it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues."); *Baird v. Charleston Cty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery."); *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) (holding summary judgment was premature where the plaintiff did not have an adequate opportunity to conduct discovery on the issue of medical causation).

In addition, it is an error of law for a court to fail to exercise its discretion and make a ruling on the motion to amend.

"In this case, the circuit court never considered Rule 15(a). While we have consistently held that a circuit court's ruling on a Rule 15 motion to amend is within its discretion, a court's failure to exercise its discretion is itself an abuse of discretion. *State v. Hawes*, 411 S.C. 188, 767 S.E.2d 707 (2015) (quoting *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997)."

Patton v. Miller, 804 S.E.2d 252, 420 S.C. 471 (S.C. 2017) granting summary judgment prior to considering a motion to amend is an error of law. Plaintiff also raised this issue again to the court in his March 2, 2022 Motion to Amend Pending Leave to Amend to which the court ignored. (R, p. 180).

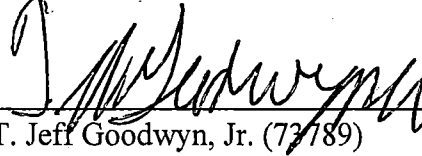
Because the court failed to rule on Appellant's motion to amend prior to granting summary judgment in favor of Purkerson, this court should reverse the trial court and remand the case for a ruling on this motion.

CONCLUSION

For the reasons set forth herein, the Appellant respectfully request that this Court reverse the granting of Purkerson's motion for summary judgment as there is evidence in the record supporting the existence of and the publication of at least one defamatory statement made by Purkerson. This includes the filing of the unredacted sex crime investigation report in violation of S.C. Code §63-7-940(B). In addition, it was an error of law to fail to rule on Appellant's motion to amend his complaint prior to granting summary judgment and a reversal and remand by this court is the appropriate remedy.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "T. Jeff Goodwyn, Jr.", is written over a horizontal line.

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Michael Gene Putnam.....Appellant,

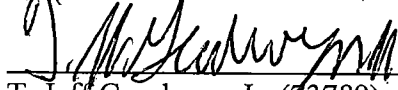
v.

Robert Henry Purkerson.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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