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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

G.D. Morgan, Jr., Circuit Court Judge

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Appellate Case No.: 2016-002525

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Anthony Wise, ..... Appellant,

v.

Kenneth E. Leap, Newberry Hospital, LLC d/b/a Newberry County Memorial Hospital, and West Fraser, Inc., Defendants,

Of Whom, West Fraser, Inc. is ..... Respondent.

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# PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant moves the Court for Rehearing and/or to Alter its Unpublished Opinion number 2024-UP-216 of June 20, 2024, which affirms the Circuit Court's grant of summary judgment to Respondent, West Fraser, Inc.

Respectfully, the Court's Opinion wholly overlooks and does not address Appellant's argument that a statement made by West Fraser's safety director, Keith Nelson, to Anthony Wise's coworker, George Wilson, was defamatory by way of innuendo and implication, and solely focuses on Respondent's argument, and the Circuit Court's reasoning in its Order, that the words of Nelson's statement were facially true.[1] The Circuit Court's reasoning, and the Opinion's, is erroneous because statements that are defamatory by way of innuendo or implication may very well be true on their face while implying a defamatory, false meaning through the omission or juxtaposition of facts. Since there is evidence in the record creating a genuine dispute as to whether Nelson conveyed a statement to Wilson that could reasonably be interpreted by the recipient as having a defamatory meaning under the circumstances, it was error for the Circuit Court to grant West Fraser's Motion for

[1] In analyzing whether the statement was defamatory by innuendo, the Circuit Court was further in error in that it only viewed testimony in favor of West Fraser indicating that Wise had confronted numerous coworkers concerning the rumors, while ignoring conflicting testimony proving that other employees had spread the rumor, as well as part of the warning letter sent to Nelson, which documents that the information communicated to Wilson by Nelson was the same information that was repeated throughout West Fraser, i.e., that Wise had a sexually transmitted infection. (R. pp. 13-16, 519). The Order even goes as far as to recognize that one coworker had inferred from the injury that Wise had a sexually transmitted infection before he even went to the hospital but then fails to consider this extrinsic evidence as proof that Wilson could have reasonably interpreted Nelson's statement to mean that Wise had a sexually transmitted infection. (R. p. 9).

Summary Judgment solely on the basis of whether Nelson's statement as described by him was facially true.

South Carolina clearly recognizes that a statement, while not defamatory on its face, may be defamatory by innuendo or implication.[2] A defamatory inference may even be derived from a factually true, seemingly innocent statement. *Jones v. Garner*, 250 S.C. 479, 484, 158 S.E.2d 909, 912 (1968) (stating that if words are susceptible to two *meanings*, one defamatory and the other innocent, the issue of whether they were defamatory must be left to the jury); *McBride v. Merrell Dow and Pharms. Inc.*, 717 F.2d 1460 (D.D.C. 1983) (stating that a facially true statement could have a defamatory meaning); Restatement (Second) of Torts § 563 cmt. d (Am. L. Inst. 1977) ("[W]ords which alone are innocent may in their context clearly be capable of a defamatory meaning and may be so understood."). Statements which are technically true on their face, but which by innuendo or implication covey an untrue and defamatory meaning, may constitute defamation. 50 Am. Jur. 2d *Libel and Slander* § 161; *see Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1108 n.13 (Fla. 2008) ("'[I]n a defamation by implication claim, the "matter charged as defamatory" is not the literally true statement, but the false impression given by the juxtaposition or omission of facts. Accordingly, truth remains an available defense to defendants who can prove the *defamatory implication* is true.").

[2] While South Carolina recognizes that a statement may be defamatory by innuendo, the modern trend is to recognize the principle as defamation by implication. *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012); *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827-29 (Iowa 2007).

After considering the extrinsic circumstances, if the words used are themselves capable of conveying a defamatory meaning within the context in which they are spoken, a circuit court cannot on summary judgment find otherwise simply because the words themselves can be construed as facially true or non-defamatory:

> The District argues that because the statements in Stevens' email could be read as non-defamatory, the trial court should have declared them so and granted JNOV to the District. The District is in essence trying to resurrect the ancient doctrine of *mitior sensus* ("gentler sense"), which held that if words may be construed as either defamatory or not, the court must give them the non-defamatory meaning as a matter of law. *Wardlaw v. Peck*, 282 S.C. 199, 203, 318 S.E.2d 270, 273 (Ct. App. 1984) (discussing doctrine). English courts cast the doctrine off by the early 18th century, and we inherited that common law by the reception statute. *Id.* We have since directly rejected the doctrine, most famously in Judge O'Neall's decision in *Davis v. Johnston*, 18 S.C.L. 579, 579-80 (1832), and most recently in Judge Bell's comprehensive opinion in *Wardlaw*, both of which we reaffirm today. *See generally* Eldredge, The Law of Defamation § 24 at 161 (criticizing the doctrine as "peculiar" and one that would allow defamers to destroy another's reputation and escape liability by phrasing the defamatory statement in such a way that it can also be interpreted as an innocent comment).

*Cruce v. Berkeley Cnty. Sch. Dist.*, 442 S.C. 1, 16, 896 S.E.2d 765, 773 (2024).

Even if the defamatory meaning is not intended, if the defamatory implication is a reasonable construction of the statement's language, given the extrinsic circumstances and context, then the statement can be defamatory. Restatement (Second) of Torts § 563 cmt. c. "The meaning of a communication is that which the recipient correctly, or *mistakenly but reasonably*, understands that it was intended to express." Restatement (Second) of Torts § 563 (emphasis added). Therefore, a statement may have a defamatory and false *meaning* even if the words of the communication itself are facially true.

> The usual test applied to determine the meaning of a defamatory utterance is whether it was reasonably understood by the recipient of the communication to have been intended in the defamatory sense . . . . When one uses language, *one is held to the construction placed on it by those who hear or read, if that construction is a reasonable one.*

F. Harper, et al., *The Law of Torts* § 5.4 (1986) (emphasis added).

"In determining the meaning of a communication, account is to be taken of *all the circumstances* under which it is made so far as they were known to the recipient." *Id.* at § 563 cmt. e (emphasis added); *Parrish v. Allison*, 376 S.C. 308, 321, 656 S.E.2d 382, 389 (Ct. App. 2007) ("[T]he trial court may consider not only the statement on its face, but also evidence of any extrinsic facts and circumstances."). "[T]he decisive question is what the person or persons to whom the communication was published reasonably understood as the meaning intended to be expressed.

Unless the question of what the recipient understood is free from reasonable doubt, *it is for the jury* to determine the meaning and construction of the alleged defamatory language." *Id.* (citing Restatement (Second) of Torts § 614(2) (Am. L. Inst. 1977)) (emphasis added). The Circuit Court's Order granting summary judgment and the Court's Opinion are in error because they do not recognize the distinction between the words of the publication themselves and the defamatory meaning that can implied by those words, and they do not recognize evidence in the record demonstrating that Wilson, and other coworkers of Wise, understood the meaning of Nelson's statement to be that Wise had a sexually transmitted infection.[3] Additionally, the Order and Opinion do not account for the extrinsic facts, the context

[3] It is undisputed that Wise in fact did not have a sexually transmitted infection.

under which the statements were made, and what was known to Wilson and Wise's coworkers at the time of Nelson's publication.

To recap, Nelson, upon returning from his visit to Newberry County Memorial Hospital, informed Wilson that Wise had "an infection" and needed antibiotics. Before he left to go the hospital, multiple employees, including Nelson, were aware that Wise had a painful injury to his groin. (R. p. 254, line 8-p. 257, line 13; R. p. 439, lines 11-18). Upon returning, Nelson undisputedly told Wilson at minimum that Wise had an "infection" and would need antibiotics. (R. p. 466, lines 9-12; R. p. 527, lines 15-17). In the light most favorable to Wise, Wilson had previously been made aware of the nature of Wise's injury, and Nelson would have been aware that Wise's coworkers were aware of the location of the injury. (R. p. 526, line 24-p. 527, line 7).

The warning letter from plant manager Dolan J. Russell to Nelson documents that the statement to Wilson was the source of the subsequent rumors amongst the West Fraser workforce:

> You escorted Mr. Wise to the physician. Upon return to the Newberry mill, *you discussed the medical condition and diagnosis that the physician made regarding Mr. Wise with another hourly employee. In turn, this information has been communicated throughout the mill . . . .* Verbally disclosing medical information about an employee can be considered by the employee as slanderous. As a representative of West Fraser, your disclosure of this information has put the Company at risk.

(R. p. 519) (emphasis added). The rumor being passed between employees of West Fraser, which began before Wise returned to work six days later, was not that Wise had an "infection" but that Wise had a sexually transmitted infection, whereas initially the prevailing belief was that Wise had strained a groin muscle. (R. p. 437,

lines 2-6; R. p. 437, line 9-p. 438, line 22; R. p. 538, line 23-p. 539, line 2; R. p. 539 lines 9-14; R. p. 540, lines 7-15; R. p. 586, line 24-p. 588, line 8; R. p. 595, line 22-p. 597, line 8; R. p. 608, lines 16-24; R. p. 618, lines 9-21; R. p. 654, lines 11-16). Plant manager Russell testified that the only way this rumor concerning Wise's condition could have made its way to West Fraser before Wise returned to work was from the conversation between Nelson and Wilson. (R. p. 563, line 21-p. 564, line 11). Thus, in the light most favorable to Wise, the warning letter recognizes not only that the statement was susceptible to a defamatory meaning, but that the sexually transmitted infection rumor was attributable to the statement of Nelson, which was subsequently republished in some form by Wilson.

When taking into account all of the circumstances, the juxtaposition of Nelson's statement with the fact that it was known to the West Fraser workforce that Wise had suffered a groin injury, in conjunction with the fact that Nelson had overheard statements at the hospital implicating that Wise had contracted a venereal disease, creates an inference that Nelson conveyed and Wilson reasonably understood the *meaning* of Nelson's statement to be that Wise had a sexually transmitted infection.[4] It also creates reasonable doubt that Nelson had no intentions of conveying that Wise had a sexually transmitted infection. When viewed in the light most favorable to Wise, the evidence, including the warning letter and testimony regarding the nature of the rumors spread amongst the West Fraser employees, also creates a reasonable

[4] The fact that Wilson then conveyed this information to the workforce at West Fraser, which subsequently framed the infection as being sexually transmitted, serves as further proof that Wilson understood the statement as conveying that Wise had a sexually transmitted infection. (R. p. 290, lines 4-14; R. p. 323, lines 15-23).

inference that a defamatory meaning was subsequently conveyed by Wilson to others at West Fraser. (R. p. 527, line 24-p. 528, line 3). Again, by West Fraser's own admission, "the information" "communicated throughout the mill", which was that Wise had a sexually transmitted infection, was the "information" that Nelson discussed with Wilson. (R. p. 519).

The Court's Opinion never contemplates in the light most favorable to Wise any meaning that could have reasonably been inferred by Wilson or Wise's coworkers from Nelson's statements given the circumstances, or the warning letter's documentation that Wilson subsequently conveyed the rumor to others; it does not engage in any analysis of whether the statement was defamatory by implication; it does not contemplate the warning letter's admission that the rumor's source was Nelson. By taking at face value Nelson and Wilson's testimony and confining its holding to the literal construction of Nelson's admitted statement, the Opinion weighs the evidence in favor of West Fraser and does not resolve inferences in Wise's favor. Clearly, there is sufficient evidence to create a genuine dispute as to whether Nelson conveyed a statement capable of implying a defamatory meaning to Wilson, which is an issue that must be resolved by a jury. *See Parrish*, 376 S.C. at 323, 656 S.E.2d at 390 ("The resolution of conflicting meanings is reserved for the jury."). But even if the Opinion had considered the defamatory implications of Nelson's statement, which it did not, it would still be in error because it does not take into account certain credibility issues with Nelson's testimony.

In his deposition, Nelson was adamant that he never even "remotely considered" that someone could infer that Wise had a sexually transmitted infection from his statement to Wilson:

> Q. - did it occur to you that that information would lead someone to conclude that Hop had contracted a sexually transmitted disease?
>
> A. No, no. I would – if I even remotely remotely considered that, I would have never said anything except to Mr. Russell.
>
> Q. Sitting here –
>
> A. I mean, just like I said, throughout the years you just – you know, I've mentioned several employees, you know, sprain, you know, have negative X-rays so – so I considered all that just routine stuff, you know. Yeah, you got a prescription because of an infection, that's like routine stuff. I – I never put that together like that.
>
> Q. You never put the sexual component with the infection?
>
> A. Absolutely not.

(R. p. 512, line 15-p. 513, line 6). However, Nelson was fully aware that others knew before leaving West Fraser about the nature of Wise's injury and that he was experiencing extreme pain in groin area. (R. p. 253, line 17-p. 261, line 1). Additionally, testimonial evidence in the record indicates that Nelson was in the room with Wise when his doctor informed him that he believed he may have contracted the condition by having extra-marital affairs, and that Nelson had a follow-up private conversation with the doctor. (R. p. 283, line 2-p. 285, line 10; R. p. 657, line 3-p. 660, line 4). Nelson even asked Wise if he had considered that his wife may have given him an infection. (R. p. 298, lines 1-6).

At best, Nelson's assertion that he never imagined a West Fraser employee who was aware of Wise's condition and its location could have inferred a defamatory meaning from his statement is incredibly naïve; the more reasonable inference to be taken from his testimony is that Nelson is being untruthful. This begs the question of why Nelson would take such a position in the first place, and the most likely explanation is that (1) he knew that his statement to Wilson was likely to convey that Wise had in fact been diagnosed with a sexually transmitted infection, or (2) he directly made such an accusation.

While Nelson's intent is not dispositive of whether his statement was capable of possessing a defamatory and false meaning, this evidence clearly creates a dispute for the factfinder as to whether his testimony concerning the defamatory statement is credible, and it should have been a factor considered by the Court in its Opinion.[5] *See* Restatement (Second) of Torts § 563 cmt. c ("If the defamatory meaning is not intended, it must be a reasonable construction of the language."); *see also* Restatement (Second) of Torts § 580B cmt. b (stating that under the common law position, which is the law of South Carolina regarding private figure defamation, liability will be imposed despite the lack of intent on the part of the defendant). Within the entire context of the extrinsic circumstances, which were known to Nelson, this evidence creates a genuine dispute as to whether Nelson was the source of

[5] Instead, this evidence would be relevant to the common law malice element of Wise's defamation claim. In this case, there is a presumption that Nelson acted with common law malice. Regardless, the issue of common law malice is not before the Court on appeal.

defamatory rumors concerning Wise, regardless of whether his statement was defamatory on its face or by implication.

Lastly, the Opinion is in error in that it affirms the Circuit Court's decision to deny Wise's Motion to Amend for being untimely. The proposed amendment, which sought to add a cause of action for breach of confidentiality, was based on the same factual allegations of the original Complaint and evidence that was in West Fraser's possession for the entirety of litigation. The Opinion's holding is based on a conclusory assumption that West Fraser would have been prejudiced by the amendment; neither the Opinion nor the Circuit Court's Order conducts a prejudice analysis based on the allegations of the original Complaint and the facts.

The Opinion relies on *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 236, 754 S.E.2d 714, 719 (Ct. App. 2014), which cites *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986) for the proposition that prejudice results when a proposed amendment is offered shortly before or during trial and raises a new legal theory that would require gathering and analysis of facts *not already considered by opposition*. "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Tanner v. Florence Cnty. Treasurer*, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999). Rule 15 states that leave to amend the pleadings "shall be freely given". Rule 15(a), SCRCP. The burden is on the party opposing amendment to prove it would be prejudiced by an amendment. *Harvey v. Strickland*, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002).

The genesis of the proposed amendment's new legal theory is that Nelson made an unauthorized disclosure of Wise's diagnosis and treatment, as reported by Wise's physician, to an hourly employee, Wilson. This fact was clearly alleged in the Complaint and is the same fact that is central to Wise's defamation claim. (R. p. 29). The Circuit Court's Order goes so far as to recognize this, but then diverges into the merits of Wise's defamation claim. (R. p. 21). The Circuit Court's Order, and the Opinion, do not adequately explain how West Fraser would have been prevented from defending the merits of the new breach of confidentiality theory when it is undisputed that the new theory is solely based on evidence that had been in West Fraser's possession since the inception of the litigation and was factually pled in Wise's Complaint.

Because the factual allegations of the Complaint were sufficient to support the proposed cause of action, and the details of Nelson's statement to Wilson were thoroughly examined by counsel during Nelson's deposition, and could have been addressed at trial, there could have been no prejudice to West Fraser in the amendment. This Court has found no prejudice in such an amendment, even after a trial has commenced, under similar circumstances. *See Armstrong v. Collins*, 366 S.C. 204, 231, 621 S.E.2d 368, 381-82 (Ct. App. 2005) (finding no prejudice when plaintiff moved to amend complaint to add new theory of liability after close of plaintiff's case when the new cause of action was based entirely on facts pled in the original complaint and the issue was addressed at the trial). Because the Circuit Court's Order did not engage in a meaningful prejudice analysis or explain how West Fraser

would be prejudiced, the Order constitutes an abuse of discretion and should be reversed. *See Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017) (finding that when a circuit court does not explain why a defendant would be prejudiced by an amendment that it constitutes an abuse of discretion).

For the foregoing reasons, the Appellant requests that the Court rehear and alter its Unpublished Opinion and reverse the Circuit Court's Order granting summary judgment to Respondent.

Respectfully submitted,

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June 27, 2024
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**PROOF OF SERVICE**

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The undersigned certifies that a copy of the foregoing **Appellant's Petition for Rehearing** has been served upon the following counsel of record by emailing a copy of the same this 27th day of June 2024.

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