

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Appellate Case No.: 2024-001366

Anthony Wise, Petitioner,

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.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on June 20, 2024. (App. pp. 919-24). Counsel for Petitioner certifies that the Petition for Rehearing was made on June 27, 2024, and a new decision was substituted and refiled on July 17, 2024. (App. pp. 925-45). Counsel for Petitioner certifies that a second Petition for Rehearing was made on July 23, 2024, regarding a new issue raised by the Court of Appeals in its refiled decision and denied on August 13, 2024. (App. pp. 946-54).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in finding that Petitioner’s defamation by innuendo argument was unpreserved.
2. Whether the Circuit Court and Court of Appeals erred in finding that the defamatory statement that is the subject of this appeal was true and could not be defamatory by way of innuendo.
3. Whether the Court of Appeals erred in failing to find that there was sufficient evidence on a motion for summary judgment to support an inference that a false statement was made about Wise by an employee of West Fraser, Inc.

STATEMENT OF THE CASE

I. Procedural History.

This appeal arises from defamatory statements that were made about Petitioner Anthony Wise by Keith Nelson, an employee of Respondent West Fraser, Inc., which cascaded into a series of defamatory rumors that ran unabated through West Fraser’s work force.¹ These statements and rumors followed a workplace injury that involved Wise and falsely accused him of having a sexually transmitted infection. Wise filed a Complaint against West Fraser and others on March 7, 2019, in the Newberry County Court of Common Pleas, alleging a cause of action for defamation.

¹ West Fraser is a wood products company with more than 60 facilities in North America and Europe. *Company*, West Fraser, <https://www.westfraser.com/company>. West Fraser produces lumber, pulp, and woodchips, amongst other products. West Fraser maintains an operating lumber mill in Newberry.

(App. pp. 28-31). On June 3, 2019, West Fraser filed its Answer in which it (1) denied its safety director, Keith Nelson, published defamatory statements to other workers, (2) denied that the statements spread through its mill and damaged Wise's reputation, (3) denied that Nelson's statements were defamatory or capable of possessing a defamatory meaning, (4) raised the truth as an affirmative defense, and (5) raised the qualified privilege as an affirmative defense. (App. pp. 32-35).

After discovery, West Fraser filed a Motion for Summary Judgment on June 8, 2021, contending that any statements made by Nelson were true and that Nelson's statements were not defamatory *per se*. (App. pp. 36-57). The motion came up for hearing before the Circuit Court on August 11, 2021, with appearances by counsel for Wise and counsel for West Fraser. (App. pp. 122-52). At the hearing, counsel for both parties argued as to whether a jury could infer from the subsequent rumors and other facts that Nelson had indeed conveyed a defamatory meaning concerning Wise to others, literally or by innuendo or inference. (App. p. 126, line 17-p. 127, line 12, p. 132, lines 5-11). Following the hearing, on August 17, 2021, Wise filed a Motion to Amend Complaint to add a claim for breach of confidentiality. (App. pp. 84-88). Wise subsequently filed a supporting memorandum, which also contained arguments in opposition to West Fraser's Motion for Summary Judgment, on August 26, 2021. (App. pp. 96-100).

On August 27, 2021, the Circuit Court issued a Form 4 Order granting West Fraser's motion and requesting a proposed order from West Fraser. (App. pp. 4-6). Wise filed a Motion for Reconsideration on September 2, 2021. (App. pp. 101-02). On October 11, 2021, the Circuit Court issued a formal Order granting West Fraser's motion on the grounds that (1) there was not a jury issue as to whether Nelson's statements were true, (2) Nelson's statements could not be reasonably construed as defamatory by innuendo, (3) Nelson's statements to plant manager Dolan J. Russell

were qualifiedly privileged, and (4) Wise's Motion to Amend Complaint was futile and unfairly prejudicial to West Fraser. (App. pp. 7-24).

Wise filed a Memorandum in Support of his Motion for Reconsideration on October 14, 2021, arguing that (1) there was sufficient evidence in the record casting doubt on Nelson's testimony and creating a jury issue as to Nelson's credibility, (2) there was sufficient evidence to reasonably support an inference that Nelson told employees that Wise had a sexually transmitted infection, (3) in the alternative, Wise had adduced facts sufficient to create a jury issue as to whether Nelson's statements were defamatory by innuendo, (4) Nelson's statements were a separate defamatory republication of other defamatory statements, (5) any statements made by Nelson to non-essential employees of West Fraser were not qualifiedly privileged, and (6) the Order inappropriately weighed the merits of Wise's proposed amendment and did not conduct a thorough prejudice analysis. (App. pp. 103-21). In a November 23, 2021, Form 4 Order, the Circuit Court denied Wise's Motion for Reconsideration. (App. pp. 25-27). Wise timely filed his Notice of Appeal on December 15, 2021. (App. pp. 699-703).

On appeal, Wise again argued that there was sufficient evidence in the record from which the jury could infer that Nelson had made a defamatory statement in a literal sense despite contrary testimony from Nelson, or that in the alternative, even if the statement was not facially defamatory, a reasonable person could derive a defamatory implication from the statement that was made by Nelson. (App. pp. 831-40). Wise also argued that even if Nelson was repeating statements made by Wise's physician, the statements could still be actionable as defamatory republications, and that any statements made by Nelson to West Fraser's employees other than the plant manager would not be protected by a qualified privilege. (App. pp. 840-43). West Fraser argued that there was no dispute that Nelson's statement was facially and literally true, that the statement could not be

reasonably construed as defamatory by innuendo, and that Wise could not prove actual malice or special damages.² (App. pp. 890-95, 898-900).

In a June 20, 2024 unpublished per curiam Opinion, the Court of Appeals affirmed the Circuit Court. In doing so, the Court of Appeals determined that any defamatory statements made to West Fraser's human resources manager and Wise's supervisor by Nelson were not preserved for review, that a statement made by Nelson to one of Wise's coworkers was facially true, and that any statements made by Nelson to West Fraser's plant manager fell within the qualified privilege. (App. pp. 919-24). The Court of Appeals did not rule on whether the statement made by Nelson to the coworker could be reasonably construed as carrying a defamatory innuendo, nor did it give any weight or consideration to the fact that defamatory rumors concerning Wise's condition had begun at West Fraser's facility after Nelson's statement and before Wise returned to the plant, amongst other circumstantial evidence pointing to Nelson as the origin of the rumors.³

On June 27, 2024, Wise filed a Petition for Rehearing, arguing that the Court of Appeals' Opinion failed to consider his defamation by innuendo argument. (App. pp. 925-37). On July 17, 2024, the Court of Appeals withdrew its June 20, 2024 Opinion to substitute a revised Opinion. The refiled Opinion added a section concerning Wise's defamation by innuendo argument, finding that the argument had not been preserved. (App. p. 944). On July 23, 2024, Wise filed another Petition for Rehearing, asserting that counsel had preserved a defamation by innuendo argument

² Wise's claim is that Nelson made a statement accusing him of having a sexually transmitted infection, which would be slanderous per se and would relieve Wise of the burden of proving common law malice, and general damages would be presumed. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 465-66, 629 S.E.2d 653, 664 (2006). Either way, these issues are irrelevant to the reasoning of the Court of Appeals' decision.

³ It has never been contested that the statement made by Nelson to Wise's coworker would be protected by a qualified privilege.

at the summary judgment hearing by arguing that Nelson’s admitted statement could still be defamatory if it carried an inference that Wise had a sexually transmitted infection. (App. pp. 946-50). In an August 13, 2024 Order, the Court of Appeals denied the second Petition for Rehearing. (App. p. 953). Wise’s Petition for a Writ of Certiorari timely follows.⁴

II. Factual Background.

On November 7, 2017, Wise was working for West Fraser at its Newberry facility. After reporting to work, he began to check the fluids in a forklift he would be operating during his shift. (App. p. 254, lines 1-2). When he began to pull up on the hood of the forklift, he felt something “give”. (App. p. 254, lines 10-12). Wise was asked by a co-employee if he was ok, to which he responded that “something gave”, ostensibly indicating that he had suffered a sprain or some other manner of physical injury. (App. p. 254, lines 13-15). After indicating to his supervisor that he was experiencing pain in his groin, Wise went to a restroom and upon inspection discovered that his testicles were swollen and painful. (App. p. 254, line 19-p. 256, line 12).

Wise immediately notified West Fraser management that he needed to see a doctor. (App. p. 254, line 23-p. 255, line 8). Wise was given an icepack to place on his groin area. (App. p. 255, line 8-p. 258, line 13). During this time, according to Wise and Anthony Cannon’s deposition testimony, at least seven West Fraser employees were aware that Wise was experiencing significant pain in his groin area. (*Id.*; App. p. 440, lines 11-18).⁵ It was obvious that Wise was in pain in his groin area, and that he was very uncomfortable. (App. p. 467, lines 20-24).

⁴ In an August 21, 2024 Order for the Court, the Chief Deputy Clerk granted Wise’s request for an extension to serve and file the Petition for Writ of Certiorari until September 22, 2024.

⁵ Cannon is a forklift operator who works with Wise. (App. p. 437, lines 21-24).

Keith Nelson was West Fraser's Environmental Health and Safety Director in charge of overseeing any medical care employees would receive after they suffered a workplace injury. (App. p. 458, lines 4-6; p. 463, lines 16-20). Nelson took Wise to the emergency room at Newberry County Memorial Hospital ("NCMH"). (App. p. 264, lines 5-18). Wise's wife, Pauline Wise, arrived at the hospital sometime after Wise and Nelson. (App. p. 265, lines 21-23). While diagnosing Wise, the attending physician, Dr. Keith Leap, made comments implying that sexual promiscuity may have contributed to Wise's condition. (App. p. 279, line 19-p. 285, line 2). It is disputed whether this comment was made in the presence of Nelson, with Wise and his wife contending that Nelson was present. (App. p. 285, lines 3-23; App. p. 661, lines 3-13). This statement was false and untrue.

In his deposition, Nelson stated that after Dr. Leap left the room, he tracked the doctor down and requested an explanation as to what was really going on, to which Dr. Leap replied that Wise had an "infection" and would need a prescription.⁶ (App. p. 466, lines 6-17). Wise has confirmed that Nelson left the exam room as Dr. Leap did, and that he could see Nelson speaking to him in the hall but could not hear what they were discussing. (App. p. 303, lines 13-17). Nelson has claimed that he had no idea that anyone could infer any sexual innuendo from the fact that Wise had an infection, but this assertion is contradicted by the statement of West Fraser's human resources manager Melody Jepsen, which documents that Nelson returned to West Fraser from the hospital and informed her and others that Wise had a "long worded infection" that possibly originated from his sexual history, and that the doctor had asked him about his sex partners in front

⁶ A prescription for an antibiotic was provided to Nelson for Wise. (App. p. 463, lines 11-14; p. 496, lines 9-10).

of his wife. (App. p. 516, line 15-p. 517, line 6; App. p. 695). Nelson also asked Wise if he thought that his wife may have given him the infection. (App. p. 299, lines 3-6).

Wise left the hospital with his wife and did not return to work until the next Monday, six days later. (App. p. 299, line 12). Nelson, on the other hand, immediately returned to the Newberry mill. (App. p. 469, lines 11-12). Upon returning to the mill, Nelson saw George Wilson, Jr., a West Fraser employee and coworker of Wise. (App. p. 531, lines 11-15). Apparently, by this time word had spread to other employees, like Wilson, that Wise had suffered sudden pain and discomfort in his groin that morning, with the prevailing belief being that he had likely pulled a muscle while lifting something. (App. p. 543, lines 9-17; App. p. 438, lines 2-6; App. p. 658, lines 11-16). According to Wilson and Nelson, Wilson asked Nelson how Wise was doing, to which Nelson claims he merely replied that Wise had an “infection,” supposedly without further explanation. (App. p. 531, lines 15-17; App. p. 470, lines 9-12). Wilson, in turn, claims that he told several other employees only that Wise had an “infection”. (App. p. 531, line 24-p. 532, line 3).

Curiously, under oath Nelson and Wilson both testified as to the contents of this discussion in nearly identical terms, stating that Wilson asked Nelson how Wise was doing, to which the only reply Nelson gave was that Wise had an infection, after which the conversation immediately ceased. Even more curious, no follow up questions were asked by Wilson as to the nature of the infection, given the employees’ awareness of the location of Wise’s injury, nor were any questions as to the nature of the infection asked of Wilson when he reported Wise’s condition to his co-employees. Importantly, at this point, Nelson no longer believed that Wise’s condition was related

to the workplace incident; his belief was that Wise's infection arose from other circumstances.⁷ (App. p. 473, lines 1-11).

As previously noted, Nelson proceeded to the front office, where he informed Jepsen and others that the doctor had told him that Wise had an infection that was possibly sexual in origin, and that the doctor had inquired about multiple sexual partners. (App. p. 695). However, in his deposition, Nelson claimed that the conversation in the front office only took place with plant manager Dolan J. Russell behind closed doors. (App. p. 470, lines 13-25). Nelson testified that he told Russell about the doctor's diagnosis of an infection for which Wise was given a prescription, and he also testified that he informed Russell of the doctor's accusation that Wise had been with multiple sexual partners. (App. p. 470, lines 19-25).

However, Russell has denied that Nelson ever told him anything about Wise's condition being related to multiple sexual partners or a sexually transmitted disease. (App. p. 554, lines 6-16; p. 566, line 20-p. 567, line 4). According to Russell, the only way a rumor concerning Wise's condition could have made its way into the West Fraser workforce before Wise returned to work was from the aforementioned conversation between Nelson and Wilson, and he did not know exactly what Nelson had told Wilson. (App. p. 567, line 7-p. 568, line 11). Nelson also told Wise's supervisor, Mike Shealy, that Wise had an "infection" and would be missing time from work. (App. p. 630, lines 18-23). Shealy was only responsible for keeping up with Wise's time, a task which did not require knowledge of the specifics of Wise's condition. (App. p. 521, line 17-p. 522, line 5).

⁷ Nelson essentially states in his deposition that Wise's injury was a pre-existing infection that was not work related.

Unsurprisingly, in the coming days the rumor that Wise had been diagnosed with a sexually transmitted infection spread throughout West Fraser like wildfire. These rumors started well before Wise returned to work after recovering from his injury. (App. p. 542, line 23-p. 543, line 2). Upon returning to work six days later, Wise was humiliated and ridiculed by numerous West Fraser employees for having a sexually transmitted infection, despite that this was not in fact what he was suffering from. (App. p. 544, lines 7-15; App. p. 590, line 24-p. 592, line 8; App. p. 599, line 22-p. 601, line 8; App. p. 612, lines 16-24; App. p. 622, lines 9-21; App. p. 438, line 9-p. 439, line 22). No less than six West Fraser employees other than Wise have testified that they heard accusations in the workplace that Wise had a sexually transmitted infection. Somehow, in the days following Wise's departure from work, the discussion around West Fraser concerning Wise's condition transmuted from the belief that he had pulled a muscle into accusations that he had a sexually transmitted infection. And in that intervening period, only one person who was present at NCMH to hear the allegations of Dr. Leap had returned to the West Fraser mill: Keith Nelson.

Wise confronted several of his coworkers in an attempt to find out how the rumor had started. (App. p. 601, lines 9-19; App. p. 545, line 21-p. 546, line 4; App. p. 614, lines 4-14). Frustrated, Wise went to Russell to inform him of the rumors and mistreatment he was experiencing. (App. p. 557, line 5-p. 558, line 9). Notes from the meeting document that Wise informed Russell of the conversation between Nelson and Wilson, and that Nelson had told Wilson that Wise had a sexually transmitted infection after returning from NCMH. (App. p. 578). Russell promised Wise that he would investigate the situation and take corrective action. (App. p. 558, lines 10-15). Russell called West Fraser's regional manager and corporate human resources representative and was advised to investigate the situation. (App. p. 558, line 17-p. 559, line 1). Four days later, Russell had another meeting with Wise and told him that he had investigated the

incident and taken appropriate action. (App. p. 579). Russell had sent a letter to Nelson, reprimanding him and informing him that he had very serious concerns about his conduct. In particular, Russell was concerned that the disclosures made by Nelson to Wilson were the source of the rumors and could have been considered slanderous, and that his behavior had put West Fraser at risk. (App. pp. 581-82).

ARGUMENT

Pursuant to Rule 242, SCACR, Wise moves for a Writ of Certiorari and for this Court to review and reverse the Court of Appeals' Unpublished Opinion, *Wise v. Leap*, Appellate Case No. 2021-001463, of July 17, 2024. The Court of Appeals erroneously affirmed the Circuit Court's grant of summary judgment on the basis that (1) the defamatory statement at issue was facially true, (2) any statements made by Nelson to Dolan Russell, the plant manager, were protected by a qualified privilege, and (3) Wise's defamation by innuendo argument was unpreserved. For the first issue, the Court of Appeals and Circuit Court ignored or discounted evidence undermining the credibility of Nelson and Wilson as well as evidence which supports that the defamatory rumors could have originated from Nelson and Wilson's conversation. For the second, even if any conversations Nelson had with Russell were protected by the qualified privilege, this is irrelevant to Wise's claims because there is evidence that it was Nelson's conversation with Wilson, not Russell, that gave rise to the rumors in the West Fraser mill. For the third, Wise preserved his defamation by innuendo argument by raising it to the Circuit Court at the summary judgment hearing, after which it was ruled upon by the Circuit Court and raised again by Wise in his Motion for Reconsideration.

Under Rule 242(b), SCACR, a "writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." The

Rule states further that “the character of reasons” to be addressed when considering review includes when “there are novel questions of law.” The issue of whether a statement is defamatory by innuendo is not a novel issue under South Carolina law, but there is a dearth of modern case law explaining what is required to satisfy the elements of the claim. The most quoted passages in South Carolina decisions explaining defamation by innuendo rely on language from cases over 65 years old. South Carolina’s use of the terms “innuendo”, “inducement”, “colloquium”, and “averment” to describe the requirements of pleading and proof for statements carrying defamatory meanings that are not facially obvious is highly confusing, antiquated, and out of touch with the modern trend of framing such statements as defamatory by implication. This appeal offers the Court an opportunity to provide clarity to and revise the framework for private figure plaintiffs to prove a defamation by implication claim. The Court of Appeals’ analysis is fundamentally flawed, and the Court should review the issues and reverse.

I. Wise’s defamation by innuendo argument was raised to the Circuit Court by Wise and West Fraser at the summary judgment hearing, ruled upon by the Circuit Court in its October 11, 2021 Order granting summary judgment, and raised again by Wise in his subsequent Motion for Reconsideration.

After the Court’s June 20, 2024 Unpublished Opinion was filed, Wise petitioned the Court for rehearing on the basis that it wholly overlooked and did not address Wise’s argument that the statement made by Nelson to Wilson could reasonable be construed as defamatory by way of innuendo and implication. The refiled Opinion addresses this argument as follows:

After a scrupulous review of the record, we find this argument is not preserved for our review. Wise never raised an innuendo argument to the circuit court-he did not file any written arguments opposing summary judgment, nor did he make a defamation by innuendo argument at the summary judgment hearing before the circuit court.

Wise v. Leap, Op. No. 2024-UP-216 (S.C. Ct. App. refiled July 17, 2024). In short, the revised Opinion does not reach the merits of Wise’s argument because it finds that the issue is unpreserved.

Appellate courts are to be “mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner as if this is some sort of game of ‘gotcha’ elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue.” *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023) (citing *State v. Jones*, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021)). “One primary purpose of our issue preservation rules is to ‘give the trial court a fair opportunity to rule.’” *Id.* (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)). Additionally, issue preservation rules serve the purpose of ensuring that “both parties are aware of the nature of the [issue] such that they may present their best arguments addressing *that* [issue].” *Id.* So long as a party raises an issue with sufficient specificity to permit the opposing party and the trial court to meaningfully address that issue prior to ruling, the issue is preserved. *See S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007). “Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue.” *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011).

At the hearing on West Fraser’s Motion for Summary Judgment, the first argument that counsel for Wise advanced was that the statement made by Nelson to Wilson, that Wise had an “infection”, could be defamatory by way of implication or innuendo:

You know, I sat here listening to this, we obviously have different viewpoints of this case. Her thinking and the Defendant West Fraser’s thinking, well, you got to have a witness to say that so and so told me. But you don’t have to have that. All you have to do is have an inference that that is what they said.

(App. p. 132, lines 5-11). In other words, counsel for Wise was arguing that regardless of what Nelson later testified he had told Wilson, it could still be actionable if it could be reasonably inferred from the statement that it possessed a defamatory meaning. Counsel for West Fraser had just argued that Nelson only told Wilson that Wise had an “infection”, and that there was no innuendo or insinuation that the infection was sexual in origin. (App. p. 127, line 17-p. 128, line 12).

Now, under the South Carolina law, a statement that on its face is not defamatory, can become defamatory by insinuation or innuendo. But here there’s no evidence that there was any innuendo by the safety director, making the statements to George Wilson, to suggest that he was talking about anything sexual. And the best evidence of whether – and this is a question of law for the Court, is whether a statement can reasonably be construed as defamatory?

(App. p. 129, lines 15-24). While the specific word “innuendo” was not used in Wise’s argument at the hearing, it is sufficiently clear that Wise was arguing that one could reasonably infer from Nelson and Wilson’s testimony that even if Nelson only told Wilson that Wise had an “infection”, he was inferring that Wise had a sexually transmitted infection.

West Fraser responded to this argument at the hearing, arguing that there was no evidence that a reasonable person could have inferred from Nelson’s statement that he was accusing Wise of having a sexually transmitted infection. (App. p. 149, lines 11-14). The Circuit Court extensively addressed the argument and counterargument, stating in its Order that “Nelson’s statement cannot be construed as defamatory by innuendo” and that his statement was true based on its literal meaning and that “there is no evidence to establish the statements reasonably would be construed as defamatory.”⁸ (App. pp. 14-17). Therefore, the two overriding policy

⁸ The Circuit Court’s Order specifically provides that Wise’s counsel had contended “that Nelson’s statement to Wilson that Plaintiff had an infection and/or had an infection and had received a prescription would reasonably be understood as suggesting that Plaintiff had a *sexual* infection.” (App. p. 9).

considerations behind issue preservation have been satisfied, as both West Fraser and the Circuit Court had sufficient notice of the innuendo argument that they were able to present counterarguments and rule on it on West Fraser's Motion for Summary Judgment. The issue was raised by Wise again on his Motion for Reconsideration. (App. pp. 112-15). Therefore, a meaningful opportunity for appellate review was presented to the Court of Appeals and has been presented to this Court on the issue. Denying Wise's Petition for Rehearing on the basis that he did not sufficiently raise the issue at the Motion for Summary Judgment hearing is in error because it places form over substance. The denial does not serve either of the purposes of the issue preservation rules because the Circuit Court had a "fair opportunity to rule" on the innuendo argument, and West Fraser had the opportunity to present its counterargument, thus ensuring "meaningful appellate review." *Morales*, 439 S.C. at 609, 889 S.E.2d at 556.

II. The Circuit Court and Court of Appeals erred in finding that there was no evidence that Nelson's admitted statement could reasonably be construed as defamatory even if it was facially true.

The Courts' analysis of whether the statement that Wise had an infection and needed an antibiotic was defamatory is flawed and focuses on irrelevant facts in deciding whether the statement was defamatory by way of innuendo. The Circuit Court's Opinion found that the statement is not susceptible to a defamatory meaning based on the following grounds: (1) there is no direct evidence rebutting Nelson's testimony that he only stated that Wise had an "infection," (2) Wise discussed the sexually transmitted infection accusations with other West Fraser employees after he returned to work, (3) other employees were aware that Wise had suffered a groin injury before he and Nelson went to NCMH, (4) the warning letter only established that Nelson's actions were contrary to company policy, and (5) Wise's testimony concerning assumptions or stereotypes of black men and sexually transmitted infections is mere conjecture. The Court of Appeals solely focused on the fact

that Nelson’s statement (as claimed by Nelson) was facially true. Most of these points have no bearing on whether the statement that Wise had an infection and needed antibiotics (assuming for the sake of argument that this is indeed what was said) was defamatory by way of innuendo, and in the light most favorable to Wise, some of these points are extrinsic facts indicating that the statement could be reasonably construed as possessing a defamatory meaning. Since it is reasonable under the circumstances for the statement that Wise had an infection to possess multiple meanings, including a defamatory meaning, a jury should have been allowed to decide which view was more reasonable.

South Carolina clearly recognizes that a statement, while not defamatory on its face, may be defamatory by innuendo or implication.⁹ 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 convey 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

⁹ 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).

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.”).

To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain. Statements therefore may be either defamatory on their face, or defamatory by way of innuendo. Innuendo is extrinsic evidence used to prove a statement’s defamatory nature. It includes the aid of inducements, colloquialisms, and explanatory circumstances.

Fountain, 398 S.C. at 441-42, 730 S.E.2d at 309.

For example, the statement that “A had a baby” does not have a defamatory meaning obvious from the face of the statement, but it could be defamatory by way of innuendo where the extrinsic fact is that A is unmarried. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 509, 506 S.E.2d 497, 501 (1998). Thus, our courts have found that the statements such as “there was simply no family support to encourage her to continue her education” and “I don’t believe I ever called Don Capps a paranoid bastard. I called him a paranoid sonofabitch” are capable of defamatory meanings in light of the extrinsic facts. *See id.*; *Capps v. Watts*, 271 S.C. 276, 246 S.E.2d 606 (1978). It is for a court to decide whether a communication is reasonably capable of conveying a defamatory meaning. *Holtzscheiter*, 332 S.C. at 530, 506 S.E.2d at 512 (Toal, J. concurring). However, if reasonable minds might differ as to whether the statement is capable of a defamatory construction, then the issue must be submitted to the jury. *Id.* at 531, 506 S.E.2d at 513.

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'Neill'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.” Restatement (Second) of Torts § 563 cmt. e.

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 of Appeals’ Opinion are in error because they do not recognize the distinction between the words of the publication themselves and the defamatory implication of 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.¹⁰ Additionally, the Order and Opinion do not account for the extrinsic facts, the context under which the statement were made, and what was known to Wilson and Wise’s coworkers at the time of Nelson’s publication, and they do not explain how it would be unreasonable for the recipient to infer a defamatory meaning from the statement, even if it is facially true.¹¹

The Circuit Court’s reasoning, and the Court of Appeals’, is erroneous because statements that are defamatory by way of innuendo or implication may very well be true on their face while

¹⁰ It is undisputed that Wise in fact did not have a sexually transmitted infection.

¹¹ To the extent that the Opinion also finds that Nelson’s statements were true accounts of what was said by Dr. Leap, this finding is in error because “one who repeats a slanderous statement originally published by a third person is subject to liability to the person defamed as though he had himself originated the statement. This is true although the speaker accompanies the slander with a statement that it is rumor only, or designates the name of the author or the original publisher.” Restatement (Second) of Torts § 578 cmt. c. (Am. Law Inst. 1977).

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

Upon returning from his visit to Newberry County Memorial Hospital, Nelson at minimum 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. (App. p. 255, line 8-p. 258, line 13; App. p. 440, lines 11-18). Upon returning, Nelson undisputedly told Wilson at minimum that Wise had an "infection" and would need antibiotics. (App. p. 470, lines 9-12; App. p. 531, 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. (App. p. 530, line 24-p. 531, 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.

(App. p. 523) (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.¹² (App. p. 438, lines 2-6; App. p. 438, line 9-p. 439, line 22; App. p. 542, line 23-p. 543, line 2; App. p. 543 lines 9-17; App. p. 544, lines 7-15; App. p. 590, line 24-p. 592, line 8; App. p. 599, line 22-p. 601, line 8; App. p. 612, lines 16-24; App. p. 622, lines 9-21; App. p. 658, 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. (App. p. 567, line 21-p. 568, 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.¹³ It also creates reasonable doubt that Nelson had no intentions of conveying

¹² Jeremy Neal testified as follows

I heard he went to the hospital because he had pulled something, if I ain't mistaken. And I think I was off that day, I'm trying to remember. I think I was off – I was off that day. I had heard that he had went to the emergency room because he had pulled something. And I came back like a day or two later and heard that through the plant site they were saying that, you know, he had HIV.

(App. p. 543 lines 9-17).

¹³ 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. (App. p. 291, lines 4-14; App. p. 324, lines 15-23).

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 inference that a defamatory meaning was subsequently conveyed by Wilson to others at West Fraser. (App. p. 531, line 24-p. 532, 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. (App. p. 523).

The Court of Appeal’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 only 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.

III. In the alternative, even if the statement is not defamatory by innuendo, there is sufficient evidence in the record to create a genuine factual dispute as to whether

Nelson told Wilson that Wise had an “infection”, or whether he actually told Wilson that Wise had a sexually transmitted infection.

The evidence in the record gives rise to a reasonable inference that Nelson told Wilson that Wise had a sexually transmitted infection, despite Wilson’s and Nelson’s denials, and that this publication was subsequently spread throughout West Fraser. Nelson and Wilson have denied that any references to a *sexually transmitted* infection were made by Nelson, and that the communication consisted only of the message that Wise had an “infection.” (App. p. 531, lines 15-17; App. p. 470, lines 9-12). Despite this, there is sufficient circumstantial evidence to the contrary to give rise to the inference that Nelson’s and Wilson’s testimony is untrue, rendering summary judgment inappropriate.¹⁴

Prior to leaving West Fraser’s mill to travel to NCMH, a handful of employees were aware that Wise was suffering from a groin injury of some nature. (App. p. 254, line 19- p. 257, line 13; App. p. 438, lines 11-18). The testimony of several West Fraser employees indicates that the prevailing belief at the time was that Wise had pulled a muscle. (App. p. 543, lines 9-14; App. p. 438, lines 2-6). The only West Fraser employee to accompany Wise to NCMH was Nelson. (App. p. 264, lines 5-18). Upon arriving at NCMH, Nelson learned that Wise had an infection and would need treatment. (App. p. 279, line 19-p. 285, line 2; R. p. 466, lines 6-17). In the light most favorable to Wise, Nelson also overheard the defamatory allegation that Wise had multiple sexual partners and that the infection may have been sexually transmitted. Nelson then returned to West Fraser, while Wise went home and did not return to work in the next week. (App. p. 516, line 15-p. 517, line 6; App. p. 695; App. p. 311, lines 3-7).

¹⁴ It is undisputed that Wise did not in fact have a sexually transmitted infection.

Upon arriving back to West Fraser, Nelson claims to have only told Wilson that Wise had an “infection.” Nelson claims to have then entered the front office and only told plant manager Russell behind closed doors of the statements made by Dr. Leap. (App. p. 470, lines 13-25). Russell, on the other hand, denies that Nelson ever told him of a sexual component to the injury. (App. p. 554, lines 6-16; p. 566, line 20-p. 567, line 4). These claims are contradicted by the statement of Jepson, which provides that Nelson returned to the front office and related to Jepson and others that Wise had a “long worded infection” that possibly originated from his sexual history, and that the doctor had asked him about his sex partners in front of his wife.¹⁵ In accepting Nelson and Wilson’s testimony as true, and requiring Wise to rebut their testimony with direct evidence as to its falsity, while ignoring all of the circumstantial evidence favorable to Wise, the Circuit Court’s Order improperly weighed the evidence and usurped this role from the factfinder.

Before Wise could return to work, the consensus of the employees at West Fraser seems to have shifted from believing he had a pulled muscle to thinking that he had a sexually transmitted infection. This communication was repeated and spread throughout the West Fraser workforce at least four days before Wise ever returned to West Fraser. (App. p. 299, line 12). In the immediate aftermath of these incidents, Russell noted that Wise had learned that Nelson told Wilson that Wise had a sexually transmitted infection. (App. p. 578). Russell subsequently investigated and reprimanded Nelson, informing him that the rumors about Wise could be considered slanderous

¹⁵ Nelson’s deposition testimony is impeached by several other facts in the record. Nelson also denies having any idea that Wise’s infection could be construed as sexual in nature when he spoke to Wilson, yet Jepson’s statement indicates that Nelson clearly believed it could have been when he initially entered the front office and spoke to her. (App. p. 517, lines 2-6). The credibility of Nelson’s testimony that he only told Wilson that Wise had an “infection”, with no mention that it was sexually transmitted, must be weighed by a jury, and his testimony should not have been accepted by the Circuit Court and Court of Appeals as undisputed direct evidence on a motion for summary judgment.

by Wise and that their origin was Nelson. (App. pp. 581-82). Considering that Russell made this assertion immediately following his investigation, the most reasonable inference is that he made the assertion because he had learned that Nelson communicated untrue, defamatory information to Wilson. Otherwise, why would Russell believe that what Nelson had said could be considered by Wise as slanderous?

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. (App. p. 516, line 15-p. 517, 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. (App. p. 254, line 17-p. 262, 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. (App. p. 284, line 2-p. 286, line 10; App. p. 661, line 3-p. 664, line 4). Nelson even asked Wise if he had considered that his wife may have given him an infection. (App. p. 299, 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 on Wise’s body could have inferred a defamatory meaning from his statement is incredibly naïve, and 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, with the most likely explanation being that he knew that his statement to Wilson was likely to convey that Wise had in fact been diagnosed with a sexually transmitted infection, or 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. *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 defamatory rumors concerning Wise, regardless of whether his statement was defamatory on its face or by implication.

CONCLUSION

For these and all other reasons set forth to the Court of Appeals and Circuit Court, viewed in the light most favorable to Petitioner, the Petition for Writ of Certiorari should be granted, and the Court of Appeals’ decision affirming the Circuit Court’s grant of summary judgment to Respondent should be reversed.

[SIGNATURE PAGE TO FOLLOW]

September 19, 2024
Hampton, South Carolina

Respectfully submitted,

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