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S.C. Supreme Court

STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM THE COURT OF COMMON PLEAS
RICHLAND COUNTY

Robert E. Hood, Circuit Judge, Fifth Judicial Circuit

Appellate Case No. 2013-002802

Anonymous Surgeon ..... *Appellant,*

~ *vs.* ~

Matthew T. Siedhoff, M.D. ..... *Respondent.*

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant commenced this case for libel *per se* against Respondent in the Court of Common Pleas on June 13, 2012. It was removed to federal court, but subsequently remanded by agreement on October 25, 2012.

The Complaint was amended to add a claim for civil conspiracy on October 30, 2012. On April 13, 2013, the civil conspiracy claim was dismissed. On June 25, 2013, Appellant died unexpectedly. On November 12, 2013, summary judgment was entered in favor of the Respondent on grounds that claims for libel and slander do not survive a person's death.

This appeal was taken to the Court of Appeals on December 20, 2013. The case was transferred to this Court on February 20, 2014, because Appellant asks the Court to reverse Supreme Court precedent, which is beyond the jurisdiction of the Court of Appeals.

FACTS

This is a case of libel *per se* arising between two surgeons within the context of a confidential peer review activity. Respondent reviewed 10 of Appellant's surgical cases and prepared a written report. (Am. Compl. 1) Appellant claims that Respondent exceeded the scope of any privilege, and that his written report is libelous *per se*, (Am.

Compl. ¶¶13-15) which Respondent denies. (Ans. ¶¶16) Respondent also claims various privileges and immunities, none of which are presently at issue before the Court. (Ans. ¶¶ 22, 24, 26, 28, 30)

Appellant commenced the present case on June 13, 2012. (Summons, Compl.) However, Appellant died unexpectedly on June 25, 2013 at age 56. (Death Cert.) On November 12, 2013, summary judgment was entered in favor of the Respondent on grounds that claims for libel and slander do not survive a person's death. (Order of November 12, 2013)

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP, when reviewing a grant of summary judgment. *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011).

ARGUMENT

I. A CLAIM FOR LIBEL THAT ACCRUES DURING THE LIFE OF A PLAINTIFF SURVIVES THE PLAINTIFF'S DEATH UNDER THE PLAIN TEXT OF THE SOUTH CAROLINA SURVIVAL OF RIGHTS OF ACTION STATUTE.

This appeal presents a pure question of law. The facts underlying the question presented are straightforward and not in dispute. Additionally, this appeal does not ask the Court to correct any errors of law by the trial court. The trial court felt constrained by

precedent, *Carver v. Morrow*, 213 S.C. 199, 48 S.E.2d 814 (1948) and its progeny to rule in favor of the Defendant-Respondent. Appellant does, however, ask the Court to correct a fundamental error of law committed by the *Carver* Court and to overrule that decision.

Appellant attacks *Carver* and all cases following it as fundamentally flawed because the *Carver* Court created judicial exceptions to a *very* clear statute, essentially re-legislating plain, unambiguous blackletter law, invading the province of the Legislative Branch, and reviving archaic common law in derogation of a remedial statute.

a. The Survival of Rights of Action Statute is Plain and Unambiguous, and any Extra-legislative Exceptions Thereto are Unlawful and Clearly Erroneous.

Because the South Carolina Survival of Rights of Action Statute (Statute) is plain and unambiguous in declaring that any and all injuries to the person survive, "any law or rule to the contrary notwithstanding," all South Carolina authorities purporting to except libel and slander are contrary to clear legislative intent, and should be overturned.

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and *any and all injuries to the person or to personal property* shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, *any law or rule to the contrary notwithstanding.*

S.C. CODE ANN. § 15-5-90 (Supp. 2013) emphasis supplied. Because the Statute is patently clear, the courts need not apply rules of construction, but may only enforce its terms as written.

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and

> the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Additionally, the Statute is remedial in nature, and must therefore be liberally construed to effectuate its purpose. "A statute remedial in nature should be liberally construed in order to accomplish the object sought." *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008) *quoting Inabinet v. Royal Exchange Assur. of London*, 165 S.C. 33, 36, 162 S.E. 599, 600 (1932).

The Survival Statute was initially enacted in 1892, stating as follows:

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate shall survive both to and against the personal or real representative (as the case may be) of deceased persons and the legal representatives of insolvent persons, and defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

1892 S.C. Acts 15. Personal injuries were not addressed. The prevailing view was found in the common law, as expressed in *Perry v. Atlantic Coast Life Ins. Co.,* 166 S.C. 270, 164 S.E. 753 (1932): "In *Miller v. Newell*, [20 S.C. 123, 47 Am. Rep. 833 (1883)], it was held that a cause of action for slander is, until reduced to judgment, a tort of a strictly personal character, and therefore not assignable." 166 S.C. 272, 164 S.E. 754.

The Statute remained unchanged until 1905, when it was amended to insert the words, "and any and all injuries to the person or to personal property . . . ." 1905 S.C. Acts 471 (initially codified at S.C. CIVIL CODE § 2859 (1905), presently codified at S.C. CODE ANN. § 15-5-90 (Supp. 2012)). The text of the Statute remains undisturbed since 1905.

The 1905 amendment would certainly seem to supersede *Perry*. Despite that clear and unambiguous legislative pronouncement, this Court later carved out an exception to the statute in *Carver v. Morrow*, 213 S.C. 199, 48 S.E.2d 814 (1948), exempting claims for defamation from survivability, relying on *Perry* at 213 S.C 203, 48 S.E.2d at 816, and judicially reinstating legislatively superseded common law. This was simply wrong.

Carver was a libel case arising from the publication of a defamatory will. While the Court ultimately ruled that one's estate cannot be held liable for an act not completed during his lifetime, but consummated after his death, 213 S.C. at 205, 48 S.E.2d at 817, it first stated that "It is a rule of the common law, which has long been followed in this State unless changed by statute, that a personal action *ex delicto* dies with the person." 213 S.C. at 202, 48 S.E.2d at 816. The Court rationalized this ruling by reasoning, "It will be noted that the General Assembly was careful in not including actions for injury to character." 213 S.C. at 203, 48 S.E.2d at 816.

This makes no sense. The Legislature did not enumerate which injuries would survive. If it did, the canon of construction, "*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*" – to express or include one thing implies the exclusion of another, or of the alternative, might apply. But it does not. The words "any" and "all" are unambiguous, susceptible of only one meaning. The Statute is a remedial broom with a very broad sweep.

The Statute is remedial and entitled to broad application, the *Carver* Court sidestepped its inclusive nature. The notion that "the General Assembly was careful in not including actions for injury to character," is simply not evinced in the text of the Statute.

"[T]he Survival Statute must be liberally construed . . . ." *Brewer v. Graydon*, 233 S.C. 124, 127, 103 S.E.2d 767,769 (1958). "While the [Survival] act is remedial, and a liberal construction should be given to its provisions we must resort, in arriving at the intent of the Legislature, to the actual words used in the statute, and the court should not place such judicial construction upon the language used as to effectuate its own conception of right rather than the intent of the Legislature." *Claussen v. Brothers*, 148 S.C. 1, 145 S.E. 539 (S.C. 1928).

But most troublesome is that the Court affirmatively abrogated the statute by imposing common law in its place. *Carver* resurrects a deservedly dead letter of the common law in derogation of the Statute. The 1905 Act was an enlightened departure from an otherwise inexplicably persistent medieval jurisprudence having justly earned its proper legislative execution and burial.[1]

The *Carver* Court exceeded the scope of its authority in creating an exception to an otherwise clear statute. "[I]t is not the province of this Court to perform legislative functions." *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 117, 580 S.E.2d 100, 108 (2003) *quoting Spoone v. Newsome Chevrolet Buick,* 306 S.C. 438, 412 S.E.2d 434 (Ct. App.1991). Yet that is exactly what happened. "When the legislature has struck a balance by enacting a statutory rule, the courts have no prerogative to annul the legislative choice

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[1] In a 2012 survey of laws published by the Arent Fox law firm on damage laws of the fifty states, D.C, and Puerto Rico, it appears that only 16 jurisdictions prohibit survival of defamation claims, and the other 35 allow them, based on their survival statutes. *See* ARENT FOX LLP SURVEY OF DAMAGE LAWS OF THE 50 STATES INCLUDING THE DISTRICT OF COLUMBIA AND PUERTO RICO, Elliott M. Kroll and James M. Westerlind, 2012, at *http://www.arentfox.com/sites/default/files/Downloads/practicesindustries/practices/AF-Survey-of-Damage-Laws.pdf.*

by applying 'chancellor's foot' notions of equity in its place." *Id.*

Though recognized in a number of subsequent cases, *Carver* is not without valid criticism, most notably by Judge Blatt:

> Why an action for a nervous breakdown caused by the publication of a false story is non-survivable, while an action for emotional upset caused by an auto-train collision does survive, is not readily apparent from the language of § 15-5-90, which expressly provides for survivability of "causes of action for . . . all injuries to the person . . . any law or rule to the contrary notwithstanding."

Schneider v. Allstate, 487 F.Supp. 239, 244 (D.S.C. 1980) *quoting Burt v. Abel*, 466 F.Supp. 1234, 1239 (D.S.C. 1979). In fact, this Court has also recognized the dichotomy between the clear text of the Survival Statute and its judicially created exceptions:

> Despite the clear language of the statute, this Court has created certain exceptions to the survivability statute . . . As noted above, the statute's language is broad and ostensibly appears to include almost every conceivable cause of action. Causes of action relating to "any and all injuries to the person or to personal property" survive to the personal representative of the deceased. S.C.Code Ann. § 15-5-90 (1996). Despite this broad language, South Carolina case law has continued to recognize a common law exception regarding causes of action for fraud or deceit.

Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002). Perhaps the Court has never been asked to question the vitality and lawfulness of the exceptions recited in *Ferguson*, specifically that for defamation.[2] However, that is the purpose of this appeal.

Carver should be overruled as incorrectly decided. "[S]tare decisis is not an inexorable command: There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right . . . There should be no blind adherence

[2] South Carolina appellate courts do not apply the plain error rule. *State v. Beekman*, 746 S.E.2d 483 (S.C. Ct. App. 2013).

to a precedent which, if it is wrong, should be corrected at the first practical moment." *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012) (internal citations ommitted). "Therefore, '[s]tare decisis should be used to foster stability and certainty in the law, but not to perpetuate error.'" *Id.*, 396 S.C. at 655, 723 S.E.2d at 203.

It also appears that *Carver* is the only decision of precedential weight in South Carolina jurisprudence to have actually enforced a defamation exception to the Survival Statute. Every decision in which it is cited merely mentions it in passing during the course of construing other exceptions. Thus, *Carver* is a "single-precedent case," *McLeod*, 396 S.C. at 655, 723 S.E.2d 203, which makes it more vulnerable to attack. "[S]tare decisis is far more a respect for a body of decisions as opposed to a single case standing alone." *Id.*, 396 S.C. at 654, 723 S.E.2d 203.

b. Defaming a Person's fitness to Practice her Profession Injures a Tangible Property Interest that Survives to her Estate and her Personal Representative.

Because the libel uttered by the Respondent presumptively damaged and interfered with the Appellant's property right in her trade and profession, it survives under the plain text of the Statute.

There is no question that the Statute will preserve any and all personal property rights or interests of a decedent. Because the right to practice one's trade or profession is tangible property, claims of damage to it are accordingly preserved by the Statute.

(1) Appellant's Chose in Action Survives to her Estate.

Initially, it merits discussion that the Appellant commenced her action for libel prior to her death. The question might be different had the claim merely accrued without

commencement during her life, but here, an assignable chose in action was perfected and survives.

> A "chose in action" has been variously defined as (1) "A proprietary right *in personam*, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort"; (2) "The right to bring an action to recover a debt, money, or thing"; and (3) "Personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit." BLACK'S LAW DICTIONARY 275 (9th ed. 2009). "South Carolina jurisprudence has long recognized that a chose in action can be validly assigned in either law or equity." *Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007). "In South Carolina a chose or thing in action is statutorily included in one's personal property and is assignable." *Id.*

Narruhn v. Alea London Ltd., 404 S.C. 337, 349, 745 S.E.2d 90, 96 (2013) n.3. It defies argument that the Appellant did not, in fact possess, perfect and pursue a choate, vested "proprietary right in personam, such as . . . a claim for damages in tort," and "The right to bring an action to recover . . . money . . . " and as such it "is statutorily included in [her] personal property and is assignable."

Of course, Respondent will argue that a libel claim, until reduced to judgment, is one *ex delicto* that dies with the Appellant, perpetuating the fallacy of *Perry*. But the very recent *Narruhn* decision offers reasoning superior to that of the anachronistic authorities supporting the defamation exception to the Statute, and resolution of the instant case could turn on this point alone, obviously in favor of the Appellant.

"Generally, any cause of action which could have been brought by the deceased in his lifetime survives to his representative." *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563 564 S.E.2d 94, 97 (2002) citing *Layne v. International Bhd. of Elec. Workers*, 271 S.C. 346, 247 S.E.2d 346 (1978). Appellant was entitled to commence

her action for libel during her life, which she did. Thus under this rule, it inures and assigns to her estate.

(2) Appellant's Claim of Injury to her Property Interest in the Practice of her Trade and Profession Survives to her Estate.

(i) Appellant's Professional Reputation Constitutes a Valuable Property Right.

Because Appellant possessed a licensed property right in the practice of her profession–the practice of medicine and surgery–which included her medical staff privileges at Palmetto Baptist Hospital, which are rights *ex contractu*, her chose in action for injury to those rights survives to her estate and her representative under the plain text of the Statute.

"It cannot be doubted that a man's trade or profession is his property." *Byrne's Adminstrs. v. Stewart's Adminstrs.*, 3 S.C. Eq. (3 Des. Eq.) 466, (1812). "[T]here is no reasonable doubt that the rights of those who have been duly licensed to practice medicine or other professions are property rights of value which are entitled to protection; and that the right of a person to practice his profession for which he has prepared himself is property of the very highest quality." *Dantzler v. Callison*, 230 S.C. 75, 94 S.E.2d 177 (1956)(internal citations omitted).

A common idiom describes property as a "bundle of sticks" – a collection of individual rights which, in certain combinations, constitute property. *See* BENJAMIN N. CARDOZO, PARADOXES OF LEGAL SCIENCE 129 (1928) (reprint 2000).

Justice Cardozo further instructs timely change in the letter of the law law to reflect societal values and spirit, and to abandon blind judicial conformity: "The bundle

of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time." *Id.*

To that end, Courts already grant formal recognition to the property interest a duly licensed physician and surgeon has earned and owns in her credentials and her reputation for her fitness to practice her profession, which enables her to contractually engage a publicly licensed hospital for medical staff privileges.[3] It is now time to recognize the juridically palpable nature of injury to it.

The proprietary nature of one's professional *persona* is further borne out by the statutory due process requirements imposed upon hospital peer review committees under South Carolina law at S.C. CODE ANN. § 40-71-10 (1976) (committee member is immune from monetary liability if he acts without malice, has made reasonable effort to obtain the facts, and acts in belief that action taken is warranted by facts known), and under the federal Health Care Quality Improvement Act of 1986 at 42 U.S.C. § 11112(a)(2012), which is substantially similar to the state law, but adds an adequate notice and hearing requirement. Likewise, the Court is undoubtedly familiar with the substantive and procedural due process requirements that attach to professional licensure and disciplinary actions. Thus, although no physician has an absolute right to practice medicine or obtain medical staff privileges at a hospital, once obtained, neither may be arbitrarily taken or

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[3] Most jurisdictions view medical staff bylaws as an enforceable contract between the hospital and members of the medical staff. *See, e.g., Virmani v. Presbyterian Health Svcs. Corp.*, 488 S.E.2d 284 (N.C. Ct. App. 1997) (mere enactment of bylaws pursuant to statute cannot itself constitute consideration for formation of a contract; but when hospital offers privilege to practice medicine and offer is accepted by the physician, physician receives benefit of ability to treat patients in hospital and hospital receives benefit of providing care to physician's patients; each confers a benefit on the other which constitutes sufficient legal consideration for performance of the agreement.)

encumbered without due process, a *cardinal* hallmark of a property right.

(ii) The Libel Perpetrated by the Respondent Presumptively Harmed Appellant's Property and Contractual Rights Inherent in the Practice of her Profession and her Reputation for Fitness to Practice.

Because a libelous utterance disparaging one's fitness to practice her profession is presumed as a matter of law to inflict pecuniary damage upon her property interest in her chosen profession, her damage claim survives to her estate.

In this case, the Respondent's written libel directly interfered with Appellant's valuable contractual rights in her medical staff privileges, and her property rights inherent in her licensure as a physician and surgeon, and damage is presumed.

In order to prove defamation, the complaining party must show: (1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm. *Fleming v. Rose*, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000). "Libel is actionable *per se* if it involves 'written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous . . . .'" *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998). "Essentially, all libel is actionable *per se.*" *Id.* "If the statement is actionable *per se*, then the defendant 'is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages.'" *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006), *Goodwin v. Kennedy*, 347 S.C. 30, 552 S.E.2d 319 (Ct. App.

2001). If a defamation is actionable *per se,* then under common law principles the law presumes the defendant acted with common law malice and that the plaintiff suffered general damages. *Fleming v. Rose*, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000) *citing Holtzscheiter v. Thomson Newspapers, Inc.,* 332 S.C. 502, 506 S.E.2d 497 (1998). "Malice in law, or legal malice, is a presumption of law and dispenses with the proof of malice when words which raise such presumption are shown to have been uttered. This form of malice is not necessarily inconsistent with an honest or even laudable purpose and does not imply ill will, personal malice, hatred, or a purpose to injure." *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001)(citations omitted).

"A wide variety of imputations may interefere with one's conduct of a business, trade, profession or office. Charges of incompetence, venality, or dishonesty are all injurious to reputation in one's calling." F.P. HUBBARD & R.L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 493 (3rd ed. 2004) *citing Moshtaghi v. The Citadel*, 314 S.C. 316, 443 S.E.2d 915, (Ct. App. 1994).

The professors properly recognize and explain that this particular species of libel or slander directly interferes with one's tangible property interests. And, because this is one of the four categories of defamation that presumes damage and excuses a plaintiff from proving special economic harm, *Id.* at 488-493 and citations therein, the Appellant in the present case owned an assignable chose in action for Respondent's interference with the conduct of her business and profession that survives her death as an assignable property right. This is a right that is clearly protected under the plain text of the Survival Statute.

The most correct result in this case would be abolition of the defamation exception altogether. However, if the Court is truly wedded to the Survival Statute exceptions, and believes that creating those exceptions was within the province of the Judiciary, then the Court should create an exception to the slander exception: Where a claim for libel or slander alleges damage *per se*, or a claim *per quod* states economic harm beyond mere hurt feelings or words of scurrility[4], the defamation exception is inapplicable, as the plaintiff seeks recovery of damage to a tangible property right.

CONCLUSION

Carver must be overruled. There are two paths to that inescapable conclusion:

(1) The Survival Statute is unambiguous and clear, and all vestiges of common law exceptions to it violate its plain language; or

(2) There is an exception to the current slander and libel exception for defamation that harms a person's business, trade or profession, because in reality it injures a property interest, which survives under the prevailing construction of the Statute.

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[4] *E.g.*, *Capps v. Watts*, 271 S.C. 276, 246 S.E.2d 606 (1978).

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CERTIFICATE OF SERVICE

The Initial Brief and Designation of Matter for the Record in this case was served upon the Respondent by first class mail this date, addressed to counsel at their address below.

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