

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

---

Case No. 2011-CP-42-4538  
Appellate Case No. 2014-000902

---

Tietex International Ltd, ..... Respondent,

v.

Gary G. Harris, ..... Appellant,

---

**INITIAL BRIEF OF APPELLANT**

---

D. Alan Lazenby, Esq.  
Ginger D. Goforth, Esq.  
**LAZENBY LAW FIRM, LLC**  
PO Box 6099  
Spartanburg, SC 29304  
Phone: (864) 804-5050  
Fax: (864) 804-5051

**ATTORNEYS FOR APPELLANT**

**RECEIVED**

SEP 08 2014

**SC Court of Appeals**

---

**TABLE OF CONTENTS**

---

Table of Authorities ..... ii

Statement of Issues on Appeal ..... 1

Statement of the Case ..... 1

Facts ..... 3

Arguments

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S  
DEFAMATION CAUSE OF ACTION BASED ON THE DOCTRINE OF  
COLLATERAL ESTOPPEL..... 6

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S  
DEFAMATION CAUSE OF ACTION BASED ON THE STATUTE OF  
LIMITATIONS AND RES JUDICATA.....11

III. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S  
DEFAMATION CAUSE OF ACTION BECAUSE APPELLANT  
ESTABLISHED GENUINE ISSUES OF MATERIAL FACT FOR  
TRIAL..... 13

Conclusion ..... 16

---

**TABLE OF AUTHORITIES**

---

**CASES**

Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 543 (1991) ..... 10

Carolina Renewal, Inc. v. South Carolina Dep't of Transp., 385 S.C. 550, 684 S.E.2d 779, 782 (Ct. App. 2009) ..... 6

Dunlap v. Travelers Ins. Co., 223 S.C. 150, 74 S.E.2d 828 (1953) ..... 7

Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004) ..... 13

Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000) ..... 15

Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009) ..... 8

Hancock v. Mid-South Management Co., 381 S.C. 326, 673 S.E.2d 801, 803 (2009) ..... 11

Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004) .... 13

Hawkins v. PepsiCo, 203 F.3d 274 (4<sup>th</sup> Cir. 2000) ..... 8

Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277, 285 (4<sup>th</sup> Cir. 2004) ..... 8

Holtzscheiter v. Thompson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998) ..... 14

Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770, 774 (1997) ..... 7

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... 8

McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998) ..... 13

Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) ..... 14

Plum Creek Development Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999) ..... 13

Robinson v. Fred Store, Inc., 2013 WL 4505406 (August 22, 2013) ..... 9

<u>Robinson</u> , 2013 WL 4505406 at *6, citing <u>Hawkins v. PepsiCo</u> , 203 F.3d 274, 279 (4 <sup>th</sup> Cir. 2000) .....	10
<u>Scott v. McCain</u> , 272 S.C. 198, 250 S.E.2d 118 (1978) .....	13
<u>St. Mary's Honor Ctr. v. Hicks</u> , 509 U.S. 502, 506 (1993) .....	9
<u>Warch v. Ohio Casualty Ins. Co.</u> , 435 F.3d 510 (4 <sup>th</sup> Cir. 2006) .....	8
<u>Watts v. Metro Security Agency</u> , 346 S.C. 235, 550 S.E.2d 869, 871 (Ct. App. 2001) .....	11

## STATUTES

29 U.S.C. § 621. et seq. ....	2
28 U.S.C. § 1367(d) .....	3
29 U.S.C. § 623(a) .....	8
28 U.S.C. § 1367(a) .....	12

## **STATEMENT OF ISSUES ON APPEAL**

- I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S DEFAMATION CAUSE OF ACTION BASED ON THE DOCTRINE OF COLLATERAL ESTOPPEL.
- II. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S DEFAMATION CAUSE OF ACTION BASED ON THE STATUTE OF LIMITATIONS AND RES JUDICATA.
- III. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S DEFAMATION CAUSE OF ACTION BECAUSE APPELLANT ESTABLISHED GENUINE ISSUES OF MATERIAL FACT FOR TRIAL.

## **STATEMENT OF THE CASE**

On October 21, 2011, Gary G. Harris ("Harris or "Appellant") filed the pro se Complaint in this action, alleging various claims arising from the termination of his employment with Tietex International, Ltd. ("Tietex" or "Respondent"). (October 21, 2011 Complaint). Attorney D. Alan Lazenby filed a Notice of Appearance on behalf of Harris on March 8, 2012. (March 8, 2012 Notice of Appearance). On April 6, 2012, Harris moved to amend his complaint. (April 6, 2012 Motion to Amend Complaint). Tietex opposed this motion. This motion was granted, and Harris filed his Amended Complaint on September 5, 2012, raising claims for breach of contract, breach of contract accompanied by a fraudulent act, defamation, and intentional infliction of emotional distress. (September 5, 2012 Amended Complaint). Tietex timely answered.

On or about May 1, 2013, Tietex moved for Summary Judgment. (May 1, 2013 Motion for Summary Judgment). Tietex based this motion in large part on the Report and Recommendation of the United States Magistrate and the Opinion and Order of the United States District Court in C.A. No. 7:08-CV-03020-JMC, a prior federal case brought by Harris, pro se, alleging violations of the Age Discrimination in Employment

Act ("ADEA"), 29 U.S.C. § 621. et seq. (July 29, 2010 Report and Recommendation of the Honorable Kevin F. McDonald) (October 28, 2010 Order of the Honorable J. Michelle Childs). Tietex moved on the following grounds: (1) collateral estoppel, (2) res judicata, (3) statute of limitations, and (4) generally, that no genuine issue of material fact existed as to any of Harris's claims.

The Honorable Frank Addy, Circuit Court Judge, heard arguments on this motion on August 30, 2013. (August 30, 2013 Transcript of Summary Judgment Motion Hearing). On September 23, 2013, Judge Addy issued his Order Denying Defendant's Motion for Summary Judgment. This Order was filed on October 17, 2013. (October 17, 2013 Order Denying Defendant's Motion for Summary Judgment). Judge Addy denied the Motion for Summary Judgment based on the ground that none of Harris's claims were barred by the doctrine of collateral estoppel. Judge Addy determined that all of Harris's claims should go forward to trial.

On January 27, 2014, Tietex filed a Renewed Motion for Summary Judgment. (January 27, 2014 Renewed Motion for Summary Judgment). Tietex acknowledged that its first motion was based on collateral estoppels. This time, Tietex moved on the following grounds: (1) statute of limitations, (2) res judicata, and (3) generally, that no genuine issue of material fact existed as to any of Harris's claims. This motion was argued before the Honorable J. Derham Cole on February 6, 2014. (February 6, 2014 Transcript of Renewed Summary Judgment Motion Hearing). At the hearing, Harris withdrew all claims but his cause of action for defamation. On February 18, 2014, Attorneys Alan Lazenby and Ginger Goforth were relieved as counsel, and Judge Cole granted Tietex's Renewed Motion for Summary Judgment. (February 18, 2014 Form 4 Order granting Motion to be Relieved and granting Renewed Motion for Summary

Judgment)(March 20, 2014 Order Granting Defendant's Renewed Motion for Summary Judgment).

Harris timely filed this Notice of Appeal on April 15, 2014.

### **FACTS/PROCEDURAL HISTORY**

This action has a convoluted history, compounded in no small part by Tietex's constant efforts to delay and obstruct Harris's prosecution of his claims. The details provide necessary and important background for the Court.

Harris initially brought an action in the Court of Common Pleas for Spartanburg County on August 15, 2008, C.A. No.: 2008-CP-42-4316, alleging claims against Tietex for violation of the ADEA, as well as state law claims for breach of contract, breach of contract accompanied by a fraudulent act, and defamation. (Complaint, August 15, 2008). Tietex removed the case to the United States District Court for the District of South Carolina, Spartanburg Division, on the basis of federal question jurisdiction over the ADEA claim. The District Court granted summary judgment as to Harris's ADEA claim, declined to exercise supplemental jurisdiction over the pendent state law claims, and dismissed them without prejudice. Harris's state law claims were protected by the tolling provision of 28 U.S.C. § 1367(d).

Harris timely filed the present action, pro se, in state court, asserting his state law claims over which the District Court had declined jurisdiction. He thereafter retained counsel, who moved on April 6, 2012 to amend the complaint. Tietex objected to the amendment. The motion was ultimately granted. Harris filed an amended complaint

on September 5, 2012. Harris has since that time fought an uphill battle to conduct discovery in order to pursue his claims.<sup>1</sup>

In December of 2012, Harris sought to depose Tietex witness and employee Wade Wallace ("Wallace"). Harris had successfully worked for Tietex for 13 years, and by 2007 was a Senior Chemist and Technical Manager. Wallace became Harris's immediate supervisor for the six month period prior to his termination. Wallace was a crucial witness, and Harris's claims were directly related to his conduct. Nonetheless, on January 11, 2013, Tietex filed a motion for a protective order to prevent the examination of Wallace. (January 11, 2013 Motion for Protective Order). In the interim, Tietex filed its first Motion for Summary Judgment, before Harris had even been able to take the first deposition in this case.

The Motion for Protective Order was later denied, and Wade Wallace was finally deposed on June 12, 2013.<sup>2</sup> Wallace had given prior sworn testimony in a number of forums, and more than one day was required for his deposition to fully explore the numerous inconsistencies in his testimony. Tietex refused to make Wallace available for a second day, and on June 17, 2013, filed a Motion for Protective Order Prohibiting or Limiting any Further Deposition of Wallace. Harris ultimately successfully obtained additional time by court order to complete the deposition. (June 17, 2013 Motion for Protective Order) (Order Allowing Further Deposition of Wade Wallace).

---

<sup>1</sup> By April of 2009, Harris's attorney original attorney, Richard Stewart, had conducted no discovery. Stewart shortly thereafter informed Harris that he was going into another area of law practice, and notified Harris that he was turning his case over to his partner, Jason Kellett. Kellett was disbarred two months later. Harris proceeded pro se until he retained new counsel, Candy Kern-Fuller, who was required file a motion in order to be allowed the right to depose witnesses. Harris was limited to three depositions. (December 1, 2009 Order on Motion for Extension of Time for Discovery).

<sup>2</sup> Wallace was deposed on the record for 6.3 hours on June 12, 2013.

On June 28, 2013, Harris noticed the depositions of Tietex witnesses George Henderson, Patricia Guzman, and Timothy Isbell. On July 2, 2013, in direct response to these subpoenas, Tietex filed a Motion to Stay Pending Ruling on Tietex's Motion for Summary Judgment, effectively cutting off any further discovery for Harris. (July 2, 2013 Motion to Stay). On July 25, 2013, Tietex filed an additional Motion for Protective Order to block the proposed depositions of Tietex's Owner, Martin Wildeman and President, Reed Cunningham. (July 25, 2013 Motion for Protective Order).

At this point in the litigation, Harris, despite his best efforts, had been allowed to depose a single witness. The Motion for Summary Judgment was heard on August 20, 2013. Contrary to Tietex's assertions, the Motion for Summary Judgment was denied on the grounds that collateral estoppel did not establish certain facts for the record. It was not denied on the basis that discovery was not complete. Still, Tietex had made – and continued to make - every effort to block Harris's access to evidence.

For example, Harris requested a site visit to photograph the conditions of his working environment at Tietex on November 18, 2013, months before trial. Tietex refused the request, and, again, Harris was required to file a formal motion to obtain access to evidence to which he was absolutely entitled. (December 27, 2013 Motion to Compel Entry Upon and Inspection of Premises). Tietex vigorously resisted this motion, which the trial court ultimately granted on January 10, 2014. (January 10, 2014 Form 4 Order).

Tietex makes much of the two witness depositions that Harris cancelled prior to trial. However, at that point, and after years of incessant and unnecessary wrangling with Tietex over basic discovery issues, Harris had to make difficult decisions concerning his case in order to continue to fund the litigation. Nonetheless, Harris has

raised genuine issues of material fact, as noted below, that preclude summary judgment in this action.

## ARGUMENTS

### I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S DEFAMATION CAUSE OF ACTION BASED ON THE DOCTRINE OF COLLATERAL ESTOPPEL.

Collateral estoppel does not bar Harris's pursuit of his state law claims in state court. Collateral estoppel, or issue preclusion, is an equitable doctrine that generally bars the relitigation of issues actually and necessarily determined in an earlier proceeding by a valid and final judgment, and then, only if the determination was essential to the judgment. The party asserting collateral estoppel bears the burden of proving that (1) the issue was actually litigated in the prior action, (2) the issue was directly determined in the prior action, and (3) the issue was necessary to support the prior judgment. Carolina Renewal, Inc. v. South Carolina Dep't of Transp., 385 S.C. 550, 684 S.E.2d 779, 782 (Ct. App. 2009).

The Court of Appeals has warned that collateral estoppel should not be rigidly applied. Even if all of the elements are met, courts may refuse to apply it when "unfairness or injustice results or public policy requires it." Carolina Renewal, 684 S.E.2d at 782. Among these exceptions is the situation where the burden of proof on the cause of action litigated in the first suit differs significantly from the burden in the second suit. RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982).

The Supreme Court has further emphasized that all of the facts necessary to prove the material elements of the second suit must have been the same ones decided in the first suit for collateral estoppel to bar a second suit based upon different causes of action. Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770, 774 (1997), citing

Dunlap v. Travelers Ins. Co., 223 S.C. 150, 74 S.E.2d 828 (1953). The inquiry must focus on the points actually litigated and determined in the prior action, not what might have been litigated and determined. Id. at 831. The Court has cautioned that collateral estoppel does not apply to speculative comparisons of factual issues not directly determined in a final decision. Jones, 483 S.E.2d at 774, Dunlap 74 S.E.2d at 828.

The only issue decided by the District Court was that Harris failed to prove age-based discrimination under the ADEA. The District Court, adopting the Magistrate's Report and Recommendation stated: "The Magistrate Judge determined that Defendant articulated deficiencies in Plaintiff's performance in memoranda dated March 5, June 18, and July 17, 2007, and found that Plaintiff did not establish a prima facie case of age discrimination under the ADEA because he failed to provide evidence that established that he was meeting his employer's legitimate expectations at the time of the adverse action." (District Court Order, October 28, 2010, p. 3).

The trial court made the untenable and unsupported finding that the District Court made the following findings of "fact": (1) that Harris's job performance did not meet Tietex's expectations; (2) that Tietex had a legitimate reason to discharge Harris; and (3) that Harris cannot establish that the reason given was pretext.

None of the three purported "fact findings" was actually determined by the District Court under the same standard of proof in play on Harris's state law claims. Further, these "facts" were neither necessary to support the District Court's judgment, nor essential to the resolution of the ADEA claim.

To prove an ADEA claim, Harris was required to show that, but for his age, his employment would not have been terminated. Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009). The United States Supreme Court has placed the burden of persuasion

squarely on an ADEA plaintiff. As such, Harris was required to prove by a preponderance of evidence that age, and age alone, was the reason he was terminated. 29 U.S.C. § 623(a). To allege a *prima facie* case under the ADEA, a plaintiff must show that (1) he is a member of a protected class, (2) he suffered an adverse employment action, (3) he was performing his job duties at a level that met his employer's legitimate expectations at the time of the adverse employment action, and (4) the position remained open or was filled by similarly qualified applicant outside the protected class. Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277, 285 (4<sup>th</sup> Cir. 2004). Once this is done – the Fourth Circuit, at least – the burden shifts to the employer to proffer a nondiscriminatory reason for the adverse action.

The District Court found that Harris did not prove that he was performing his job duties at a level that met Tietex's stated expectations. The perception of the employer is critical in deciding issues under the ADEA, and the District Court clearly evaluated the evidence from Tietex's subjective point of view. Hawkins v. PepsiCo, 203 F.3d 274 (4<sup>th</sup> Cir. 2000). This is not equivalent to a finding that Tietex's proffered reasons for firing Harris were true and taken as fact.

Absent direct evidence of intentional discrimination, the Fourth Circuit Court of Appeals analyzes ADEA claims under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Warch v. Ohio Casualty Ins. Co., 435 F.3d 510 (4<sup>th</sup> Cir. 2006). The burden shifting analysis should only be undertaken where the plaintiff meets the *prima facie* case.<sup>3</sup> The District Court, despite finding that Harris did

---

<sup>3</sup> The Supreme Court has held that the ADEA does not authorize "mixed-motive" discrimination claims. If a plaintiff cannot establish "but for" causation, the burden does not shift to the employer to show that it would have taken action regardless of age, even when the plaintiff may have adduced some evidence that age was a contributing

not meet his prima facie case, applied this analysis anyway. Accordingly, any "facts" alleged by Tietex and accepted by the trial court to be determined in the burden shifting analysis were therefore unnecessary to the District Court judgment, and not binding on him in this action.

The relative burdens of production and persuasion involved in the McDonnell Douglas analysis have been recently clarified. In Robinson v. Fred Store, Inc., 2013 WL 4505406 (August 22, 2013), the Court held that where a plaintiff established a prima facie case of discrimination, the burden shifts to the employer to proffer a legitimate, nondiscriminatory reason for the dismissal. The burden then shifts back to the employee to prove that the reason is pretextual. Significantly, the employer does not have to **prove** a nondiscriminatory reason; it simply needs to offer one into evidence.<sup>4</sup> It is a burden of production, not persuasion. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993). The Court also recognized that "it is not necessary for a court to 'decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the [the defendant's decision].'" Robinson, 2013 WL 4505406 at \*6, citing Hawkins v. PepsiCo, 203 F.3d 274, 279 (4<sup>th</sup> Cir. 2000).

---

factor in his termination. Gross, 557 U.S. at 175-180. However, there is some question whether the Fourth Circuit has adopted this approach. See Miller v. HSBC Fin. Corp., No. 08-1942, 2009 WL 3233490 (D.S.C. 2009)(finding that in the absence of further direction from the Supreme Court, the district court judge would follow Fourth Circuit precedent, which applies the McDonnell Douglas framework to ADEA claims). Therefore, Harris addresses the District Court's application of the framework.

<sup>4</sup> "Proffer" means to offer or tender, as, the production of a document and offer of the same in evidence. "Proof", on the other hand, is defined as the effect of evidence; the establishment of a fact by evidence. To "prove" is to establish or make certain. Black's Law Dictionary (6<sup>th</sup> Ed. 1990).

In other words, Tietex did not have to prove a legitimate, nondiscriminatory reason to prevail on the ADEA claim. It only needed to satisfy the burden of production by proffering one. The burden, this time of proof, then shifted to Harris to prove the articulated reason was false. Therefore, even if the District Court "found" that Tietex had a legitimate, nondiscriminatory reason for discharging Harris, that finding was not essential to Harris's claim

The District Court found that Harris did not meet the burden of proving that, but for his age, he would not have been terminated. That is the only factual inquiry necessary with respect to the ADEA claim, and the only finding of fact binding on Harris in the present action. Therefore, he could assert age as the factual basis of any of his claims in this action, and he did not do so.

Even assuming the "facts" asserted by Tietex and adopted by the trial court were binding on this litigation, they do not bar Harris's state law defamation claim. Tietex could still be liable for defamation, even if it had a legitimate reason to fire Harris.

Finally, that Tietex asked the Court to decide the case by way of summary judgment militates in favor of declining to apply collateral estoppel. Summary judgment should be cautiously invoked so that it will not improperly deprive a party of a trial of disputed issues. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 543 (1991). Tietex had the burden of proving all of the elements of collateral estoppels, and the trial court erred in finding that it had done so. The "facts" Tietex raised and the trial court adopted were not essential to proving Harris's claim; rather, they were simply proffers of evidence that Harris did not **disprove** under the burden shifting framework applicable to his ADEA claim. In resisting Tietex's summary judgment motion on the issue of collateral estoppel, Harris only needed to submit a

scintilla of evidence. See Hancock v. Mid-South Management Co., 381 S.C. 326, 673 S.E.2d 801, 803 (2009). He more than satisfied that burden.

**II. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S DEFAMATION CAUSE OF ACTION BASED ON THE STATUTE OF LIMITATIONS AND RES JUDICATA.**

Harris stated a cause of action for defamation. Tietex twisted Harris's deposition testimony to create "additional" defamation claims that it asserted were not "raised" in the federal action. Specifically, it points to his deposition testimony concerning three instances of defamatory conduct on the part of Tietex that all occurred in 2007, within the six months prior to his discharge. Tietex posits that because these specific evidentiary facts supporting the properly pleaded defamation claim were not set forth in the original complaint, then Harris is time barred from relying on those facts to support his defamation claim.

This position, adopted by the trial court, has no merit.

Harris properly stated a cause of action for defamation in his original action. (August 15, 2008 Complaint, ¶¶ 39-46). South Carolina requires notice pleading. The purpose of a pleading is to provide "fair notice to the opponent and the court." Watts v. Metro Security Agency, 346 S.C. 235, 550 S.E.2d 869, 871 (Ct. App. 2001). Under Rule 8, SCRCF, a pleading must contain "ultimate facts" rather than "evidentiary facts" in order to state a cause of action. Such facts fall "somewhere between the verbosity of evidentiary facts and the sparsity of legal conclusions." Id. (citations omitted). Harris's cause of action for defamation, filed on August 15, 2008, met this standard by alleging that Tietex issued false statements about him containing a defamatory meaning, that these statements concerned his competence and acumen in his profession, that the

statements were published to third parties with actual malice and/or reckless disregard of the truth, and that he suffered specific legal and special damages. Rule 8 requires no more. Harris was not obliged - as the trial court apparently found - to specify in his complaint each piece of evidence supporting his defamation claim. Harris's original pleading was more than sufficient to put Tietex on notice of his defamation claim.

Tietex removed the original state court action on August 29, 2008 based on the federal question jurisdiction conferred by Harris's ADEA claim. The District Court had supplemental jurisdiction over the state law claims, pursuant to 28 U.S.C. § 1367(a), if it chose to exercise that jurisdiction. Upon granting summary judgment on the ADEA claim, it decided not to exercise that jurisdiction, and dismissed the state law claims without prejudice.

The statute of limitations for these pendent state law claims was tolled while the federal case was pending, and for an 30 additional days after dismissal. 28 U.S.C. § 1367(d). Harris's federal case was finally disposed of no earlier than July 26, 2011, when the Fourth Circuit Court of Appeals denied his Motion for Rehearing. The mandate was returned on August 3, 2011. On October 21, 2011, Harris filed his pro se complaint in state court, timely raising the state law claims preserved under the tolling provision. Harris's court-permitted amendment to his complaint, filed on September 5, 2012, did nothing to affect the validity or timeliness of his state law claims. Further, amendment of a complaint after the statute of limitations has run is allowable where new or additional allegations do not change the nature of the cause of action, but amplify and make more definite and certain the original general allegations. Scott v. McCain, 272 S.C. 198, 250 S.E.2d 118 (1978).

In like manner, res judicata does not operate to bar Harris's cause of action for defamation. To invoke res judicata, a defendant must prove (1) identity of the parties, (2) identity of the subject matter, and (3) adjudication of the issue in the former suit. Plum Creek Development Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). Harris properly raised his defamation claim, and the District Court declined to exercise supplemental jurisdiction over it. There was no adjudication of any of the state law claims. The trial court therefore erred in finding that Harris's defamation claim was barred by res judicata.

**III. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S DEFAMATION CAUSE OF ACTION BECAUSE APPELLANT ESTABLISHED GENUINE ISSUES OF MATERIAL FACT FOR TRIAL.**

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences that can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). Summary judgment should not be granted, even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusions to be drawn from those facts. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001).

Summary judgment should have been denied based solely on Tietex's concerted and deliberate efforts to thwart discovery.<sup>5</sup> Nonetheless, viewing the record in the light most favorable to Harris, he established at least some evidence to create a genuine issue of fact as to his defamation claim. See Hancock v. Mid-South Management Co., 381 S.C. 326, 673 S.E.2d 801 (2009) (holding that in cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment).

Harris's defamation claim is supported by evidence of record. The tort of defamation allows a plaintiff to recover for injury to his reputation as a result of the defendant's communication to others of a false message about him. The elements include (1) a false and defamatory statement concerning another, (2) an unprivileged communication to a third party, (3) fault on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Holtzscheiter v. Thompson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998). The defamatory material relied upon by Harris was actionable per se because (1) it was written and (2) it charged Harris with unfitness in his profession. Therefore, he was not required to plead or prove special damages to recover. Id. at 502. The court has held that "a communication is defamatory if it tends

---

<sup>5</sup> Tietex intentionally parried every effort by Harris to conduct meaningful discovery in this case. It repeatedly refused to voluntarily produce witnesses for depositions, requiring motions and arguments at every turn. Tietex objected to the bulk of Harris's discovery requests, claiming in its responses that it should not have to answer because (in its estimation) the claims were foreclosed by collateral estoppel. Harris was required to obtain court order after court order to require appearances and obtain discovery. These purposeful actions by a well-funded corporate defendant ate away at Harris's resources, which effectively deprived him of a fair opportunity to conduct discovery on the state law claims left untouched by the District Court.

to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000).

In Murray v. Holnam, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001), the court held that an employer could be liable to a former employee for an allegedly defamatory statement made by the employee's supervisor (in this instance, that the employee had misappropriated company property). This is so even if the employer did not direct the supervisor to make the statement. The court further held that defamation need not be direct; a mere insinuation is actionable as a positive assertion if it is false and malicious, and its meaning is plain.

Communications between officers and employees can be qualifiedly privileged if made in good faith and in the usual course of business. However, it is the jury's province to decide if the publication at issue went beyond what the occasion required and was unnecessarily defamatory. Murray, 542 S.E.2d at 749.

The record contains at least three memoranda constituting malicious personal attacks outside any privilege and impugning Harris's professional standards and abilities. (Wallace Memoranda dated March 5, 2007; June 18, 2007; and July 18, 2007). Further, Harris has explicitly testified concerning the lack of veracity in the contents of these memos. He gave unequivocal testimony that Wallace fabricated reports about him, lied about conversations that he purportedly had with him, (Deposition of Gary Harris, March 14, 2013, pp. 27-30, 32, 41-42, 52-54, 56, 61-62, 71-72, 86-87, 130). Harris has also testified to the abusive, bullying behavior that he endured from Wallace. (Deposition of Gary Harris, March 14, 2013, pp. 145-147, 152-156). Harris's testimony creates fact issues, and certainly provides the required scintilla,

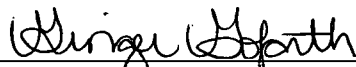
to preclude summary judgment. To find otherwise was error on the part of the trial court in making what should be a jury determination.

The trial court appears to have relied heavily on what Tietex urged to be "conclusively determined facts" from the District Court order. These "facts" cited by Tietex – as argued more fully above - are **not** conclusive, were **not** necessary to the District Court's ADEA ruling, and **cannot** be bootstrapped to form the basis of a finding against Harris on the merits of his defamation claim.

The trial court erred in ignoring the genuine issues of material fact plainly present in the extensive record in this case. That the trial court's order contains upwards of ten pages of "facts," carefully chosen and construed against Harris, should alone require reversal of the summary judgment order in this action.

#### **CONCLUSION**

For the reasons set forth herein, Harris submits that the trial court erred in granting summary judgment in favor of Tietex, and that he is entitled to a trial on his state law defamation claim.



---

D. Alan Lazenby, Esq.  
Ginger D. Goforth, Esq.

**LAZENBY LAW FIRM, LLC**  
340 E. Main St, Suite 240 (29302)  
Post Office Box 6099  
Spartanburg, SC 29304  
Phone: (864) 804-5050  
Fax: (864) 804-5051  
Email: [alan@lazenbylawfirm.com](mailto:alan@lazenbylawfirm.com)  
Email: [ginger@lazenbylawfirm.com](mailto:ginger@lazenbylawfirm.com)

September 5, 2014

**ATTORNEYS FOR APPELLANT**