

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

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JAN 21 2015

S.C. Supreme Court

Case No. 2012-CP-40-4129
Appellate Case No. 2013-002802

Aaron Kozloski, as Personal Representative of Anonymous SurgeonAppellant,

v.

Matthew T. Siedhoff, M.D.Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Should this Court overrule long-standing precedent that libel and slander actions do not survive the death of a party?

- II. Should this Court create an exemption for Appellant to the long-standing defamation exception where Appellant attempts to characterize damage to reputation as damage to a property interest where the decedent did not lose her medical license or hospital privileges?

STATEMENT OF THE CASE

On June 13, 2012, Anonymous Surgeon (“Anonymous”) filed the instant action in the Court of Common Pleas, alleging a sole cause of action for libel per se. [Complaint.] On October 30, 2012, Anonymous filed an Amended Complaint, which added a second cause of action for civil conspiracy. [Amended Complaint.] Respondent filed a motion to dismiss both causes of action. [Motion to Dismiss.] On April 30, 2013, the trial court partially granted Respondent’s Motion to Dismiss and dismissed the civil conspiracy claim, leaving the libel claim as the sole cause of action. [Order Partially Granting Motion to Dismiss.]

The parties were beginning to engage in written discovery when Anonymous unexpectedly died on June 25, 2013. [Death Certificate.] Following Anonymous’s death, Respondent filed a motion for summary judgment on September 16, 2013 because Anonymous’s claim did not survive her death under South Carolina’s survival statute. [Motion for Summary Judgment.] On November 12, 2013, the trial court granted summary judgment in Respondent’s favor. [Order Granting Motion for Summary Judgment.]

On December 20, 2013, counsel for Anonymous filed a Notice of Appeal and a Motion to Certify in the South Carolina Court of Appeals, asking this Court to review the case and to allow him to argue against precedent. Appellant does not challenge the lower court’s application of the law. Instead, he asks this Court to overrule the existing law. On February 6, 2014, this Court granted the motion to certify and agreed to review the case.

On July 30, 2014, Respondent filed a motion to dismiss the appeal based on Anonymous’s counsel’s failure to substitute the personal representative of Anonymous’s

estate as the appealing party. Thereafter, counsel for Anonymous, Aaron Kozloski, opened the estate as the personal representative and filed a cross motion to substitute himself as the appealing party. On November 20, 2014, this Court granted Appellant's motion.

STATEMENT OF THE FACTS

Anonymous was a surgeon at Palmetto Health Baptist Hospital ("Hospital"). [Amended Complaint at ¶ 1.] Respondent is a surgeon at UNC Healthcare in Chapel Hill, North Carolina. [*Id.* at ¶ 2.] In 2011, he was hired by the Hospital to participate in an external case review of a set of Anonymous's surgeries as part of an "Ongoing Professional Practice Evaluation." [*Id.* at ¶ 4.] In 2012, Respondent wrote a written report of his opinions regarding Plaintiff's cases he reviewed. Anonymous alleged that Respondent "published" his report only to "the Baptist Quality Assurance Department." [*Id.* at ¶ 9.] Anonymous alleged that the report contained "false and libelous statements" about Anonymous.¹ [*Id.* at ¶ 13.]

¹ Should this Court overrule the defamation exception to the Survival Statute and remand this action, Respondent will seek immunity under both the state and federal peer review statutes, which serve to protect doctors who in turn protect the public by participating in peer reviews. *See* S.C. Code Ann. § 40-71-10(B) and 42 U.S.C. § 11111. Respondent was hired by the Hospital to perform an external peer review of Anonymous's cases. Pursuant to that agreement, he reviewed the information provided to him and gave a report of his findings and opinions. Respondent's actions fall squarely within the protected actions contemplated by these statutes, and he is therefore immune from liability for the alleged defamation.

ARGUMENT

A. The defamation exception to the Survival Statute is a firmly-established judicially-created rule.

South Carolina's Survival Statute, S.C. Code Ann. § 15-5-90 (Supp. 2013), governs which causes of action survive a party's death and states the following:

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.

Id.

This Court has carved out three specific exceptions to the Survival Statute, thus completely removing certain causes of action from the statute's applicability. "The only exceptions to the survival of causes of action are malicious prosecution, *Brown v. Bailey*, 215 S.C. 175, 54 S.E.2d 769 (1949); libel and slander, *Carver v. Morrow*, 213 S.C. 199, 48 S.E.2d 814 (1948); and fraud and deceit, *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117 (1941)." *Belcher v. S.C. Bd. of Corr.*, 460 F. Supp. 805, 807-08 (D.S.C. 1978).

This Court first established the defamation exception to the Survival Statute in 1948 in *Carver v. Morrow*, 213 S.C. 199. In that case, the plaintiff claimed that the testator's will contained defamatory language about the plaintiff. The Court was asked to decide whether this action could be maintained against the testator's estate. In deciding that it could not, the Court noted the common law rule, "which has long been followed in this State unless changed by statute, that a personal action ex delicto dies with the person." *Id.* at 202. The Court went on to say that an "action for libel is one ex delicto,

and is a personal action. It is clear, therefore, that an ordinary cause of action for libel or slander dies with the person.” *Id.* at 203 (citing *Perry v. Atlantic Coast Life Ins. Co.*, 166 S.C. 270, 164 S.E. 753 (1932)).

Since *Carver*, South Carolina courts have reaffirmed and cited to the defamation exception to the Survival Statute on numerous occasions. See *Brewer v. Graydon*, 233 S.C. 124, 103 S.E.2d 767 (1958); *Belcher v. S.C. Bd. of Corr.*, 460 F.Supp. 805 (1978); *Schneider v. Allstate Ins. Co.*, 487 F.Supp. 239, 245 (D.S.C. 1980); *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002).

The *Carver* case involved the death of the defendant, but the rule applies with equal force in the event of the plaintiff’s death. In *Belcher v. South Carolina Board of Corrections*, the plaintiff was the widow of an inmate who died in a prison fire. 460 F.Supp. 805 (1978). The defendant moved to dismiss the claims, arguing the claim did not survive the plaintiff’s death. The Court denied the motion, specifically holding that South Carolina law recognized only three exceptions under its survival statute, and the plaintiff’s claim did “not come within one of the exceptions” (malicious prosecution, libel/slander, and fraud/deceit). *Id.* at 808. Therefore, the exceptions to the Survival Statute apply to the death of the plaintiff or the defendant.

The rule in many states is that a cause of action based on libel or slander does not survive the death of either the alleged wrongdoer or the person injured. Accordingly, South Carolina’s rule is consistent with the common law and many other states’ survival statutes. See *Sylvester v. City of New York*, 385 F. Supp. 2d 431, 439 (S.D.N.Y. 2005) (New York); *Ruffin-Steinbeck v. dePasse*, 82 F.Supp.2d 723 (E.D. Mich. 2000) (Michigan applying Mississippi law); *Mitchell v. Random House, Inc.*, 703 F. Supp.

1250, 1255 n. 4 (S.D. Miss. 1988) aff'd, 865 F.2d 664 (5th Cir. 1989) (Mississippi); *Loeb v. Globe Newspaper Co.*, 489 F. Supp. 481 (D. Mass. 1980) (Massachusetts); *Insull v. New York World-Telegram Corp.*, 172 F.Supp. 615 (N.D. Ill. 1959) (Illinois); *Faith v. Carpenter*, 33 Ga. 79 (1861); *Swift Specific Co. v. Davis*, 76 Ga. 787 (1886) (Georgia); *Johnson v. Haldeman*, 102 Ky. 163, 43 S.W. 226 (1897) (Kentucky); *Cummings v. Bird*, 115 Mass. 346 (1874) (Massachusetts); *Catchings v. Hartman*, 178 Miss. 672, 174 So. 553 (1937) (Mississippi); *Johnston v. Savings Trust Co.*, 66 S.W.2d 113 (1933) (Missouri); *Hyde v. Nelson*, 287 Mo. 130, 229 S.W. 200 (1921) (Missouri); *Alpaugh v. Conkling*, 88 N.J.L. 64, 95 A. 618 (1915) (New Jersey); *Alles v. Interstate Power Co.*, 176 Okla. 252, 55 P.2d 751 (1936) (Oklahoma); *Drake v. Park Newspapers of Northeastern Oklahoma, Inc.*, 683 P.2d 1347 (1984) (Oklahoma); *Benton v. Knoxville News-Sentinel Co.*, 174 Tenn. 658, 130 S.W.2d 105 (1939) (Tennessee).

Appellant argues that South Carolina's Survival Statute exceptions are judicially-created and, therefore, invalid. However, the Supreme Court first noted the defamation exception in 1948. *See Carver*, 213 S.C. at 202. If the legislature disagreed with the Court's interpretation of the statute or exceptions thereto, it was free to pass a revised version of the statute to specifically incorporate actions for defamation. Instead, no action has been taken by the legislature on this issue in 67 years.

Appellant also argues that the exceptions noted in *Carver* are in conflict with the language of the Survival Statute, which allows "any and all injuries to the person or to personal property" to survive the death of a party. S.C. Code Ann. § 15-5-90 (Supp. 2013). The Supreme Court in Mississippi had occasion to review the same apparent conflict. The Mississippi survival statute allowed for "any personal action" to survive the

death of a party, while the state common law had an exception for slander or libel. *Catchings v. Hartman*, 178 Miss. 672, 174 So. 553 (1937). The court held that “personal action” must be “strictly construed” and “interpreted according to its strictly technical meaning.” *Id.* (citing *McNeely v. City of Natchez*, 148 Miss. 268, 274, 114 So. 484, 487 (1927)). The court used a narrow definition for a personal action which included only actions “brought for the recovery of personal property, for the enforcement of some contract or to recover damages for its breach, or for the recovery of damages for the commission of an injury to the person or property.” *Id.* (internal quotation marks omitted.) Under this definition, defamation did not fit the definition of a personal action and was not in conflict with the statute. *Id.* Applying the same definition of “personal action” to the South Carolina statute allows the Survival Statute and the common law exception to exist in harmony.

The policy reason behind not including defamation in the personal actions protected by the Survival Statute lies in the purpose of a defamation claim. “One of the purposes behind the imposition of liability for publication of defamatory statements is to enable the person defamed to restore his reputation by forcing his accuser into open court to prove the truth of his accusations.” *Menefee v. Columbia Broad. Sys., Inc.*, 458 Pa. 46, 51, 329 A.2d 216, 219 (1974). Defamation claims are for injuries to character and exist to provide redress to damage done to one’s reputation. “Defamatory communications violate one’s right to a good reputation and give rise to a cause of action to recover damages because of the violation. **Once a person is dead, there is no extant reputation to injure or for the law to protect.**” *Johnson v. KTBS, Inc.*, 889 So. 2d 329, 332 (La. App. 2 Cir. 2004), writ denied, 2004-3192 (La. 2005), 896 So. 2d 68. (emphasis added).

“At common law, such actions always abated at death, because, as one analyst has explained:

. . . justice does not require a windfall to the plaintiff's heirs by way of compensation for an injury to him when they have suffered none of their own, together with the contention that since one party is dead and the other necessarily not disinterested the truth will be difficult to ascertain in court.”

Menefee at 51-52.

There are also logistical hurdles to litigating a defamation case once the plaintiff has passed away. Reputation is uniquely personal, and it is much more difficult to evaluate such alleged personal damage to someone who is dead. In this case, Anonymous died before discovery began. Her deposition was never taken. These obstacles prejudice Respondent and make it much more difficult for him to defend himself. Anonymous Surgeon's death was unexpected, but her estate should not be able to benefit from the alleged damage to her professional reputation. The South Carolina Supreme Court precedent providing for an exception to the Survival Statute for defamation actions should be upheld.

B. The defamation exception to the Survival Statute cannot be avoided by re-characterizing the damages from the alleged defamation.

The exception to the Survival Statute for defamation actions is a blanket exception. No South Carolina court has found any exceptions to the exception by carving out certain categories of damages or types of defamation from the rule. However, Appellant attempts to create exceptions for claims brought before death and for damages to contractual rights, neither of which can be supported.

First, Appellant argues that because this action was brought before Anonymous's death, the pending action is a “chose in action” and should survive to her estate. App. Br.

at p. 9 (citing *Narruhn v. Alea London, Ltd.*, 404 S.C. 337, 349, 745 S.E.2d 90, 96 (2013)). Appellant does not offer any reasoning as to why this action qualifies as a chose in action. Appellant simply refers to the definition of that term which includes the right to bring an action to recover money. Appellant is correct that during her life, Anonymous had the right to bring a defamation action and potentially recover a money judgment. The Survival Statute defamation exception, however, serves to limit that right following her death. None of the reasoning in *Narruhn* nor Appellant's discussion of it gives a reason or basis for the Court to overrule the defamation exception to the Survival Statute.

Whether a defamation claim was filed before a litigant's death or arose after the death is a distinction which has not been addressed by South Carolina appellate courts, but a circuit court order granting summary judgment is on point. In *Morris v. Town of Moncks Corner*, the plaintiff sued the mayor for defamation, and the mayor died while the case was pending. No. 90-CP-08-1498, 1992 WL 354206 (S.C. Comm. Pl. Jan. 13, 1992). The plaintiff in *Morris* tried to avoid the defamation exception by distinguishing *Carver v. Morrow* because he brought his claim before the defendant died.² The court found that “[n]othing in *Carver* suggests that an action that was pending when the defendant died would survive his death.” *Id.*

Next, in order to classify this defamation claim as something other than injury to reputation, Appellant argues that Anonymous suffered injury to her contractual rights. Injuries to personal property survive death under the survival statute, so Appellant argues that defamation related to a medical peer review is an injury to property. What Appellant

² As discussed in Section A, *Belcher* makes it clear that the Survival Statute exceptions apply to either the death of the plaintiff or the defendant. *Belcher v. South Carolina*

has tried to disguise as a “property interest” is really just damages, which flow from the alleged defamation. Recoverable damages in a defamation action focus on the injury to a person’s reputation as a result of false communication by the defendant. *Castine v. Castine*, 403 S.C. 259, 265, 743 S.E.2d 93 (Ct. App. 2013). Damage is not an independent cause of action separate from the defamation.

Appellant attempts to use Anonymous’s status as a licensed physician to elevate the value of her reputation to a property right.³ However, the contractual rights Anonymous had to her medical staff privileges at Palmetto Baptist Hospital, if any, have never been litigated. Other than some initial written discovery, Anonymous died before discovery began. These alleged damages were never even suffered by Anonymous because, as is stated in the Amended Complaint, she kept her medical privileges with Palmetto Baptist. [Amended Complaint at ¶ 10.] No adverse action was taken against her, and she continued in her job as before.

Contrary to Appellant’s assertion that statutory peer review protections evidence a legally established “property right” in Anonymous’s staff privileges, the peer review statutes Appellant cites serve as protections for the hospitals and doctors performing the peer reviews. In order to encourage candor in hospital peer review procedures, such proceedings are highly protected by both common law and statute. South Carolina and federal statutes protect those participating in hospital peer reviews and provide immunity from civil actions, such as this one, stemming from their involvement.

Board of Corrections, 460 F.Supp. 805, 808 (1978). The same logic applies to a case in which the plaintiff dies after bringing a claim.

³ The peer review performed by Respondent was done at the request of Baptist Hospital, not the medical license board, and was wholly unrelated to Anonymous’s medical license.

In South Carolina, “[h]ospital medical staff on a committee conducting peer reviews of patient medical and health records are protected from tort liability for their work if they ‘act[] without malice, [make] a reasonable effort to obtain facts relating to the matter under consideration, and act[] in the belief that the action [they take] is warranted by the facts known to [them].’” *Prince v. Beaufort Mem’l Hosp.*, 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011) (*citing* S.C. Code Ann. § 40-71-10(B)). Additionally, the federal Healthcare Quality Improvement Act provides civil immunity for peer review participants, including “any person under a contract or other formal agreement with the [professional review] body.” 42 U.S.C. § 11111. Even if this Court overrules the defamation exception and allows Anonymous’s estate to pursue this claim, the peer review statutes provide Respondent with immunity.

Appellant argues that an exception to the survival statute should exist for the reputational property right allegedly owned by doctors. Doctors, however, are just one of many categories of licensed professionals in South Carolina. Based on Appellant’s argument, all licensed professionals hold a property right in their ability to practice that profession. Appellant has not articulated whether certain types of licenses must be protected or whether every licensed real estate agent, nail technician, and electrician also has a property interest in their professional reputation.

Appellant then takes the property interest argument one step further. Appellant argues that because the allegedly defamatory statements written by Respondent related to Anonymous’s profession, damage to her alleged property interest in her medical profession is presumed. Specifically, Appellant states that “because this is one of the four categories of defamation that presumes damages and excuses plaintiff from proving

special economic harm, 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." App. Br. at 13 (internal citations omitted).

This argument represents another departure from established defamation law in South Carolina. The allegedly defamatory statements Appellant complains of were written and, if found to be defamatory, would constitute libel. However, the categories referenced by Appellant apply only to slander. "In contrast to libel, slander is actionable *per se* only if it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; (5) unfitness in one's business or profession." *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 511, 506 S.E.2d 497, 502 (1998) (citing *Lesesne v. Willingham*, 83 F.Supp. 918, 921 (E.D.S.C. 1949) and *Galloway v. Cox*, 172 S.C. 101, 172 S.E. 761 (1934)). "[T]hese four categories are sometimes used in discussing libel as well, but this usage does not appear useful or necessary." F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 529 (4th ed. 2011). Appellant is overstating his position in order to create some perceived exception. In the end, the cause of action is for defamation, which alleges injury to one's reputation and which cannot continue after death of a party.

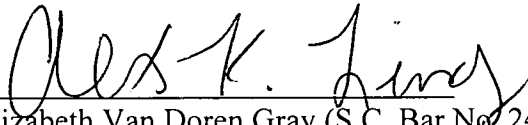
Even if the alleged defamation at issue in this case was held to be actionable *per se* libel, the presumed general damages would not be damage to Anonymous's assignable property interest in her medical license, as Appellant argues. Instead, the presumed damages would be injury to Anonymous's reputation as a surgeon. Anonymous did not

have a property interest in her reputation, and Appellant cannot claim that she did to circumvent the Survival Statute defamation exception.

CONCLUSION

The trial court was correct in finding that Anonymous's action against Respondent fails as a matter of law because after Anonymous unfortunately passed away, pursuant to South Carolina law, her defamation claim did not survive her death. Appellant wishes to continue the case on behalf of Anonymous's estate, which would require this Court to overturn its long-standing prohibition against the survival of defamation claims. Appellant has presented insufficient reasons as to why the alleged damage to Anonymous's personal reputation can be litigated after her death. Accordingly, this Court should uphold the defamation exception to the South Carolina Survival Statute and affirm the order of the trial court granting summary judgment in favor of Respondent.

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January 21, 2015

THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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Robert E. Hood, Circuit Court Judge

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Aaron Kozloski, as Personal Representative of Anonymous Surgeon Appellant,

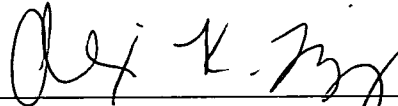
v.

Matthew T. Siedhoff, M.D. Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief by depositing a copy of it in the United States Mail, postage prepaid, on January 21, 2015, addressed to the attorney of record as addressed below:

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