

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

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APR 14 2015

SC Court of Appeals

Case No. 2011-CP-42-04385

Appellate Case No. 2014-002260

Nellie Josephine Brown,..... Respondent

v.

Delilah Goode,..... Appellant

INITIAL BRIEF OF APPELLANT



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STATEMENT OF ISSUES ON APPEAL

This appeal arises from the Circuit Court's affirmance of the jury verdict in the Magistrates Court, awarding judgment of \$7500 against appellant Delilah Goode for alleged slander. The issues on appeal are as follows:

1. DID THE TRIAL COURT ERR IN NOT DIRECTING A VERDICT IN FAVOR OF APPELLANT?
2. DID THE TRIAL COURT ERR IN NOT DISMISSING THE ACTION DUE TO FAILURE TO JOIN A NECESSARY PARTY?

STATEMENT OF THE CASE

On May 27, 2008 plaintiff-respondent Nellie Josephine Brown ("plaintiff") brought this action in the Magistrates Court. The Complaint purported to allege common law defamations actions -- for libel per se, slander per se, libel and slander -- against defendant-appellant Delilah Goode. In essence plaintiff claimed that Ms. Goode had falsely accused plaintiff of cheating on an exam while both were graduate students at Converse College. Plaintiff did not join Converse College as a party even though the real culprit was the College and its "Honor Code," as well as plaintiff's own actions. Ms. Goode answered the Complaint, alleging that the action was frivolous because, among other grounds, there was no publication as required to prove defamation under South Carolina law.

On May 17, 2011, the case was tried before a jury in the Magistrates Court. Following presentation of evidence, the Magistrates Court denied Ms. Goode's motions for a directed verdict and for dismissal due to failure to join Converse College, and the jury awarded appellee \$7500. Ms. Goode appealed, and the Court of Common Pleas affirmed the Magistrates Court verdict on September 16, 2014. Ms. Goode timely appealed to this Court.

STATEMENT OF FACTS AND PROCEEDINGS

At the time of the underlying incident, plaintiff and Ms. Goode were both students in the masters degree program at Converse College. TR 20. Converse College had in place a mandatory Honors Code, whereby graduate students were required to directly confront fellow students whom they believed were cheating, and the accused student was then required to "present his or her case to the [Honors] committee by him or herself." TR 45, 46, 84-85.

At trial, plaintiff presented the testimony of two witnesses, herself and Dr. Joseph Harris, the professor who taught the class where the alleged cheating occurred. Dr. Harris testified that on the day in question, after he told his students they had done a good job on a particular test, Ms. Goode announced in class that the average was high because there was "rampant" cheating. TR 68. However, Ms. Goode did not identify any student who had cheated. TR 66, 68. Approximately two weeks later, Dr. Harris observed after class that the plaintiff was upset.

Plaintiff approached Dr. Harris and stated, “Delilah Brown accused me of cheating.” TR 69. There was another student with plaintiff, Ms. Rush, who purportedly also stated, “She accused me of it, too.” TR 69-70. However, Dr. Harris testified he identified Ms. Goode as making the accusation only because the plaintiff and Ms. Rush had identified Ms. Goode. TR 71. Dr. Harris also admitted that he had never heard Ms. Goode accuse plaintiff of cheating, and that he also had never seen a statement written by Ms. Goode accusing anyone of cheating. TR 80. Dr. Harris confirmed that Ms. Goode spoke directly to plaintiff. *Id.* Even though Dr. Harris asked Ms. Goode to “name names,” Ms. Goode would not. *Id.* Ms. Goode was instructed by Dean Faulkenberry that she should conduct herself pursuant to the Honor Code, by talking to the student directly, and then the student was required to report to Dean Faulkenberry. TR 81. Instead, however, after Ms. Goode spoke to plaintiff she (plaintiff) went to Dr. Harris, and plaintiff told Dr. Harris that Ms. Goode had accused her of cheating. TR 81. Dr. Harris also testified that before plaintiff informed her of the cheating accusations, Dr. Harris had never heard Ms. Goode say anything about the fact that she thought either Ms. Brown or Ms. Rush were cheating. TR 82.

Dr. Harris further testified that there was no need for Converse College to hold a hearing, as it could have ended the process simply by speaking to Dr. Harris, but Converse College wanted to hold the hearing. TR 83. Ms. Goode did

not request the hearing. In fact, if Converse College had just ended the process after checking with Dr. Harris, no one would have known Ms. Goode accused either plaintiff of Ms. Rush of cheating. TR 84. However, Converse College insisted on having the hearing, informed Ms. Goode that she must attend and testify, and that if she did not testify Converse College would actually take disciplinary action against Ms. Goode. TR 84-85.

Dr. Harris confirmed that Ms. Goode had no choice, but was forced by Converse College to participate at the hearing, and that Ms. Goode testified as truthfully as possible, including that she had been accused of saying things she had not said. TR 85. On recross, Dr. Harris reiterated that at no point in the process did Dean Faulkenberry identify which students had been accused of cheating. Rather, Dr. Harris learned of their identity only from the accused students themselves – plaintiff and Ms. Rush. TR 87-89.

Plaintiff's testimony also confirmed that Ms. Goode acted pursuant to the honor code and that there was no third party publication. Specifically, plaintiff testified:

Ms. Goode approached me with a recorder in her hand and accused me of cheating on the test, and told me that I needed to report to Dean Faulkenberry's office. She said – her exact statement was that she had observed me cheating and that I was to report to the dean's office the next morning, . . .TR 25.

Plaintiff also admitted on cross-examination that no one other than herself (plaintiff) heard Ms. Goode accuse plaintiff of cheating. TR 35-36. No evidence was presented at trial that Ms. Goode communicated plaintiff's name to anyone other than plaintiff.

At the close of plaintiff's case-in-chief, defendant orally moved for a directed verdict on all counts of the complaint. TR 90-91. The court granted the directed verdict on libel, but denied it as to slander. TR 96. The slander claim went to the jury, which returned a verdict for plaintiff in the amount of \$7500. By Order dated September 16, 2014, the Court of Common Pleas affirmed the Magistrates Court.

ARGUMENT

I. PLAINTIFF'S SLANDER CLAIM FAILS AS A MATTER OF LAW.

A. Standard of Review

The standard of review as regards the refusal to grant a directed verdict is well established:

In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt. The trial court can only be reversed by this Court when there is not evidence to support the ruling below.

Strange v. South Carolina Dep't of Hwys. & Pub. Transp., 314 S.C. 427, 429, 445 S.E.2d 439, 440 (1994) (citations omitted). In this case, there is no evidence to support the jury's verdict because there was no publication to a third person, as further discussed below.

B. Because There Was No Evidence That Appellant Published The Alleged Slanderous Statement, The Slander Claim Fails As A Matter Of Law

The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). Defamatory communications take two forms: libel and slander. Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct. *Id.*

In order to prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Erickson v. Jones St. Publr., LLC*, 368 S.C. 444, 464-465, 629 S.E.2d 653, 664 (2006); *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002); *Holtzscheiter*, 332 S.C. at 506, 506 S.E.2d at 508 (Toal, J., concurring).

In this case plaintiff did not prove any communication to a third-party, and as result her defamation claim fails as a matter of law. *See id.* The Court in its

decision below focused on the humiliation that plaintiff experienced from being false accused, and relied primarily on *Lynch v. Toys R Us Delaware*, 375 S.C. 604, 654 S.E.2d 541 (App. 2007), to uphold the jury verdict. Order, pp. 3-4. As an initial matter, the Court of Appeals decision in *Lynch v. Toys R Us Delaware*, has no precedential value because that opinion was vacated by the South Carolina Supreme Court. *See Lynch v. Toys "R" Us-Delaware, Inc.*, 384 S.C. 511, 682 S.E.2d 824 (2009). Even more importantly, nowhere in its decision does the Court find that Ms. Goode published to a third party. See Order, pp. 1-4. For good reason: there was no evidence introduced at trial – as opposed to speculation and conjecture – that any such publication occurred. “Verdicts cannot rest upon guess or conjecture.” *Delk v. Liggett & Myers Tobacco Co.*, 180 S.C. 436, 443, 186 S.E. 383, 386 (S.C. 1936) (emphasis added).

At trial there was no proof presented, either by document or testimony, that Ms. Goode ever disclosed to a third party that plaintiff had cheated. Plaintiff herself admitted that no one other than herself (plaintiff) heard Ms. Goode accuse plaintiff of cheating. TR 35-36. Plaintiff’s only other witness, Dr. Harris, testified without contradiction that he only learned plaintiff had been accused of cheating because plaintiff told him this herself. TR 87-89. Unless plaintiff is to be excused from proving the element of publication, the jury verdict for defamation cannot be

sustained on the records before this Court. *See Delk v. Liggett & Myers Tobacco Co.*, 180 S.C. at 443, 186 S.E. at 386.

II. CONVERSE COLLEGE, AS THE ENTITY THAT COMPELLED MS. GOODE TO ACCUSE PLAINTIFF OF CHEATING, WAS A NECESSARY AND INDISPENSABLE PARTY TO THIS ACTION

Based on plaintiff's own evidence, Converse College and its Honor Code, required Ms. Goode to confront and identify plaintiff as having cheated, and it was Converse College, not Ms. Goode, that caused plaintiff to be identified and subjected to a hearing. TR 83-85. South Carolina Rule of Civil Procedure 12(b)(7), like Rule 12(b)(7) of the Federal Rules of Civil Procedure allows a court to dismiss an action for failure to join a party in accordance with Rule 19. *See, e.g., Register v. Cameron & Barkley Co.*, 467 F.Supp.2d 519 (D.S.C. 2006); 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1359 (3d ed. 2004) ("Rule 12(b)(7) permits a motion to dismiss when there is an absent person without whom complete relief cannot be granted.").

Under SCRCPP 19(a)(2), disposition of this action in the absence of Converse College impaired or impeded its ability to protect their interests. Notably, Converse College, not Ms. Goode, was shown to be the operative cause of plaintiff's injury. Moreover, there were serious accusations of false claims levied against the College by one its own professors, Dr. Harris, and the College had no

opportunity to defend itself. As a result of this evidence, not only has the reputation of Converse College been irreparably damaged, but its Honor Code was shown to be a defective instrument of slander. Accordingly, the action should have been dismissed for the failure to join Converse College, and the trial court erred in failing to do so. *See* SCRCF 12(b)(7) and 19(a)(2).

CONCLUSION

The Court should reverse the Order of the Court of Common Pleas affirming the judgment of the Magistrates Court, vacate the judgment, and dismiss appellee's action with prejudice.

Respectfully submitted, this 9th day of April, 2015.

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NELLIE JOSEPHINE BROWN,

RESPONDENT,

V.

DELILAH GOODE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the initial brief of the appellant and designation of matter in the above-referenced case has been served on Charles J. Hodge, Esq., P.O. Box 2765, Spartanburg, SC 29304, this the 10th day of April, 2015.

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April 10, 2015

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SC Court of Appeals

RE: Nellie Brown v. Delilah Goode
Appellate Case No. 2014-002260

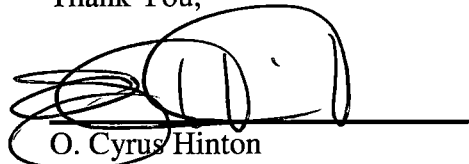
Dear Ms. Kitchings:

Enclosed please find the initial brief of the appellant in the above referenced case. This matter was originally appealed from the magistrate court to circuit court.

Please notify my office of any impending court dates. Should you have any further question regarding the above referenced matter do not hesitate to contact me.

O. CYRUS HINTON, P.A.

Thank You,



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