

INITIAL BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2015-000163

Antonia Graves,

Appellant,

v.

Dillon County Board of Education,
Dillon County School District Four,
Richard Schafer, James McRae,
Ray Rogers, Arthur McMillan,
Amanda Hayes, and Claretha Whitfield,

Respondent.

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STATEMENT OF ISSUES OF APPEAL

1. Did the Court err in holding that the Appellant could not establish that the Defendants Defamed Her?
2. Did the Court err in holding the District and County Board are entitled to Summary judgment on Tortuous Interference with Contractual Relations?
3. Did the Court err in holding that the Appellant fail to establish each element of a triable civil conspiracy claim?

STATEMENT OF THE CASE

This case arises out of Plaintiff's service as a member of the Defendant Board of Education, her separation from that board, and her interactions with the Defendants arising out of the same. This case was filed on June 10, 2013. In the amended complaint filed on July 9, 2013, Plaintiff alleged defamation against all Defendants¹, interference with contract, and invasion of privacy against the Defendant Board and Defendant School District, and civil conspiracy against the individual defendants.

The Defendants moved for summary judgment on August 1, 2014. In the Court of Common Pleas, the Honorable Paul M. Burch presiding, heard that motion on September 3, 2014.

Supplemental briefs on that motion were filed by the Plaintiff and the Defendants in October 2014. The Court granted summary judgment on January 6, 2015.

The Plaintiff filed an appeal to the Appellate Court on January 26, 2015.

¹Dillon County Board of Education, Dillon County School District Four, Richard Schafer, James McRae, Ray Rogers, Arthur McMillan, Amanda Hayes, and Clareth Whitfield are collectively referred to as the "Defendants" herein; CareSouth Carolina, Inc. has been released.

ARGUMENTS

I. Plaintiff established a triable defamation claim against Defendants McRae, Hayes, Whitfield, the Defendant Board, and the Defendant District to surpass summary judgment.

Actionable defamation requires: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) actionability of the statement. *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 474, 710 S.E.2d 67, 74 (2011). “The publication of a statement is defamatory if it tends to harm the reputation of another as to lower [her] in the estimation of the community or to deter third persons from associating or dealing with [her].” *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). The South Carolina Supreme Court has held that an actionable defamatory insinuation may be made by action or conduct, not just by words. *Tyler v. Macks Stores of South Carolina*, 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980). Defamation can be actionable even when it is indirect. *See, Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (1987); *see also Tyler*, 275 S.C. at 458, 272 S.E.2d 633, 634 (1980) (citing, *Timmons v. News and Press, Inc.*, 232 S.C. 639, 644, 103 S.E.2d 277, 280 (1958)). Furthermore, where a statement accuses a plaintiff of unfitness in her profession or commission of criminal conduct it is *per se* actionable. *See, Parish v. Allison*, 376 S.C. 308, 656, S.E.2d 382 (Ct. App. 2007); *Norton v. Great Atl. & Pac. Tea Co.*, 184 S.C. 525, 193 S.E. 1236 (1937); *Roswell v. Johnson*, 170 S.C. 205, 170 S.E.2d 151 (1933); *Woodward v. South Carolina Farm Bureau Ins. Co.*, 277 S.C. 29, 282 S.E.2d 599 (1981). Malice and damages are presumed in the case of

per se defamation. See, *Manley v. Manley*, 291 S.C. 325, 353, S.E.2d 312 (Ct. App. 1987); and, *Holtzschierter v. Thompson Newspapers, Inc.*, 332 S.C. 502, 511 n. 5, 506 S.E.2d 497, 502 n. 5 (1998) (*Holtzsheiter II*).

A. Plaintiff produced sufficient evidence of unprivileged *per se* defamation by Defendant Hayes to overcome summary judgment.

Plaintiff provided private counseling services for witness, Linda Pinkney's daughter. (Exhibit 9 to Plaintiff's Memoranda in Opposition to Summary Judgment; Deposition of Linda Pinkney at pp. 13:19-14:11). Plaintiff referred Pinkney to Defendant Hayes², to receive accommodation for what the Plaintiff felt might be Asperger's Syndrome *Id.* at p. 19:15-22. At their meeting, Defendant Hayes inquired into whether or not plaintiff had a license for counseling and stated that Plaintiff could not make the diagnosis³ about which Pinkney and Hayes discussed relative to Pinkney's daughter. *Id.* at pp. 27:14-28:13. Pinkney testified, that based on Defendant Hayes' words, she felt like Defendant Hayes had stated that Plaintiff did not have a license to practice counseling and that she should no longer take her daughter to Plaintiff for treatment. *Id.* at pp. 40:14-41:11; 46:12-22. Compellingly, Pinkney testified that Defendant Hayes focused the majority of their meeting on Plaintiff; rather than, her daughter which should have been the subject. *Id.* at pp. 42:11-13; 47:24-48:7; 51:4-13; 54:11-55:2 (testifying that approximately 8 minutes of the 15 minute meeting were focused on Plaintiff not the

²The Defendant District's Director of the Office for Exceptional Children.

³While the fact that Plaintiff could not make such a diagnosis is a true statement, it was a moot point as Plaintiff had not made such a diagnosis; rather, plaintiff directed client to seek such a diagnosis. Plaintiff contends that in the context of questioning Plaintiff's licensure the same constitutes a defamatory insinuation.

Subject of the meeting, see specifically, Ex. 9: 54:11-19). Plaintiff has a master's degree in social work and is a licensed independent social worker for clinical practice clinical counselor. (Exhibit 1 to Plaintiff's Memoranda in Opposition to Summary judgment; Deposition of Plaintiff-Nov. 11, 2013: pp. 24:7-25:16).

It is unlawful to practice clinical counseling as a social worker without a license.

S.C. Code Ann. §40-63-30. Specifically Ms. Pinkney testified:

Q: Did Ms. Hayes say anything in response to that when you said you were taking your daughter to see Ms. Graves for counseling?

A: She asked me, did Toni Graves have a license hanging on her wall. And I looked at her and I remember just saying to myself, why is she asking me that, you know. I said, yes, she does. And when the Asperger's came up, she said that Ms. Graves is not licensed to diagnose her with that.

(Ex. 9; p. 27:14-22). Questioning Plaintiff's licensure, in the manner Defendant Hayes did, was a legally cognizable *per se* defamatory insinuation. *Tyler v. Macks Stores of South Carolina*, 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980); and, *Parish v. Allison*, 376 S.C. 308, 656, S.E.2d 382 (Ct. App. 2007). Plaintiff respectfully asserts that the Court's holding to the contrary was error. (Order pp. 6-8).

Lastly, with respect to defendant Hayes, the Court found that the Defamation at issue was privileged. (Order, P. 8). However, Ms. Pinkney testified that Defendant Hayes spent the majority of their meeting discussing Plaintiff and not Pinkney's daughter. (Ex. 9; p. 54:11-19). Privilege is an affirmative defense, which Defendant Hayes must prove. *Gathers v. Harris Teeter Supermarket, Inc.*, 282, S.C. 220, 317 S.E.2d 748 (Ct. App. 1984); *Smith v. Dunlop Tire & Rubber Co.*, 186 S.C. 456, 196 S.E. 174 (1938).

Furthermore, a qualified privilege is subject to being “abused.” See *McBride v. Sch. Dist. Of Greenville Cty.*, 389 S.C. 546, 562, 698 S.E.2d 845, 853 (Ct. App. 2010). “In general, the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court. However, the question whether the privilege has been abused is one for the jury.” *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (citing, 50 Am. Jur. 2d Libel and Slander § 276 (1995)). The sheer length of time that Defendant Hayes spent discussing the Plaintiff, when she should have been discussing Ms. Pinkney’s child, gives rise to a factual basis for a jury to find that any privilege at hand has been abused. Plaintiff respectfully requests that the order for summary judgment for Defendant Hayes as to defamation be reversed, and that the claim be tried before a jury.

B. Plaintiff produced sufficient evidence of defamation by Defendant Whitfield to surpass summary judgment.

Defendant Whitfield admitted to publishing statements that the Plaintiff had defrauded the government. (Ex.; Dep. Whitfield: pp. 45:13-46:4). Such a statement is defamatory *per se* as it accuses the Plaintiff of commission of a crime. *Parish v. Allison*, 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007). The Court found that this statement was barred by the affirmative defense of truth. (Order p. 12). However, the Defendant bears the burden of establishing truth as an affirmative defense. *Id.* 376 S.C. at 320. The Court’s inference that because Plaintiff received an overpayment of unemployment benefits Defendant Whitfield’s statement was substantially true, is an inference drawn in favor of Ms. Whitfield, a moving party on her own affirmative defense. *See, Bayle v.*

SCDOT, 542 S.E.2d 736 (Ct. App. 2001) (“[E]ven when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied”). Plaintiff respectfully requests that the Court reverse its holding that Plaintiff had not proffered triable defamation against Defendant Whitfield and allow that claim to proceed to trial.

C. Plaintiff produced sufficient evidence of Defamation by Defendant McRae to surpass summary judgment.

Plaintiff also testified that Defendant McRae informed a member of the community that “[she] was crazy, a trouble maker and that [her] husband was about to have [her] committed.” (Exhibit Six; Deposition of Plaintiff-1/16/14: p: 123:5-9). The Court first found that this statement was hearsay and thus could not support a defamation claim. However, defamatory statements, such as this, are not offered for the truth of the matter asserted and are not hearsay. *Goodwin v. Kennedy*, 347 S.C. 30, 47-48, 552 S.E.2d 319, 328 (S.C. Ct. App. 2001). (“We agree with the circuit court that the testimony was not offered for the truth of the matter asserted, but to show the effect on the students to support Goodwin’s claim of reputational damages”). Next, the Court, without a basis in South Carolina law, held that the statements by Defendant McRae at issue were mere opinion or name-calling. However, our Court has addressed the “mere words of abuse and scurrility” argument at issue as follows:

“We agree with the defendant that the words “paranoid sonofabitch” Are words of abuse and scurrility and that such words, on their face, are Not, as a general rule, considered defamatory, [internal citation omitted]. Nevertheless, when viewed in light of the extrinsic facts which have been Pled (the inducement), we conclude that the defendant’s remarks are Susceptible of a libelous construction.”

Capps v. Watts, 271 S.C. 276, 281-282, 246 S.E.2d 606, 609 (S.C. 1978). Likewise, here the accusation the Plaintiff was a “crazy, troublemaker, who was going to be committed to an insane asylum by her husband” is reasonable susceptible to a libelous construction. Moreover, a reasonable jury could find that such words were malicious and cause her damages. *See, Tyler*, 275 S.C. at 458, 272 S.E.2d 633, 634 (1980) (“To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain”). Based on the above, the Plaintiff respectfully requests that the Court reverse its holding that the Plaintiff has not submitted actionable defamation with respect to Defendant McRae.

D. The Defendant Board and Defendant District Can Be Held Liable for The Defamation at Issue.

A principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority. Anderson, Ralph King, Jr. Request to Charge Civil §14-14 (2d ed. 2009); citing, *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986); *Murray v. Holnam, Inc.*, 344 S.C. 129, 542, S.E.2d 743 (Ct. App. 2001); Restatement (Second) of Agency §247 (1965) (master is subject to liability for defamatory statements made by servant acting within scope of his employment, or, as to those hearing or reading the statement, within his apparent authority); 50 Am. Jur. 2d Libel and Slander §240 (1995) (defamatory communications made by agent do not bind principal as a publication unless agent, in making communications, was acting within scope of his agency or employment)

Here, the Defendant Board may be held liable for the statements of Defendant McRae to whom it is principal, and the Defendant District may be held liable for the statements for Defendant Hayes and Defendant Whitfield to whom it is principal. The Court made no holding to the contrary, and if Plaintiff's defamation claims against Defendants McRae, Hayes, and/or Whitfield are restored so to should her claims against their respective principals be restored.

II. The Court made a reversible fact determination, regarding the credibility of witness Dr. Alice Grice, to substantiate summary judgment as to Plaintiff's tortious interference with contract claim; that determination is reserved for the jury.

Witness credibility is a fact issue for the jury. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (1996). Dr. Alice Grice, formerly a high level employee of the Defendant District, testified to a quid pro quo whereby the Plaintiff was terminated by former Defendant CareSouth Carolina, Inc. in exchange for the Defendant District permitting CareSouth to hold a dental program at its schools. Dr. Grice testified:

Q. Okay. So I want to make sure I understand. The quid pro quo we're talking about here was, the schools were going to allow CareSouth Carolina to come into the schools with some type of dental program in Lake View. And in return, what was CareSouth Carolina going to do as to Toni Graves?

A. Terminate her. In fact, I want to say that they had already terminated her, but not sure about that. I'm not sure about that.

Q. Okay.

A. But the plan was for them to get rid of Toni Graves, and that was the payback for CareSouth to be able to provide dental services to the students there in Dillon.

The Court held that Dr. Grice's testimony was purely speculative. However, her testimony directly references the quid pro quo at issue. In deciding to reject Dr. Grice's testimony in favor of others, Plaintiff respectfully contends that the Court drew an

impermissible inference in favor of the moving party and made credibility determination reserved for the jury. (Order, pp. 15-17); *See also, Bayle*, 542 S.E.2d 736 (Ct. App. 2001); and *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (1996).

III. Plaintiff submitted sufficient evidence of triable civil conspiracy.

The Court held that Plaintiff failed to establish each element of an actionable civil conspiracy. (Order, pp. 18-21). A valid civil conspiracy claim requires: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) which causes special damages. *LaMotte v. Punchline of Columbia, Inc.*, 296 S.S. 66, 370 S.E.2d 711 (1988). To establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise.” *Pridgen v. Ward*, 391, S.C. 238, 246, 705 S.E.2d 58. 63 (S.C. Ct. App. 2010) citing, *Cowburn v. Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (S.C. Ct. App. 2005). “Conspiracy may be inferred from the nature of the acts committed, the relationship of the parties, the interests of the alleged conspirators, and other relevant circumstances.” *Moore v. Weinberg*, 373 S.C. 209, 228, 644 S.E.2d 740, 750 (Ct. App. 2007). “Because civil conspiracy is ‘by its very nature covert and clandestine,’ it is usually not provable by direct evidence.” *Id.* (quoting, *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987).

“Moreover, the field of admissibility of evidence is broadened in proof of conspiracy.”

Island Car Wash, Inc., 292 S.C. at 601; citing *Hall v. Walter*, 226 S.C. 430, 85 S.E. (2d) 729 (1955).

“In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a part may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. “ *Pridgen v. Ward*, 391 S.C. 238, 246, 705 S.E.2d 58, 63 (S.C. Ct. App. 2010) *citing*, *Cowburn v. Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (S.C. App. 2005). However, the gravamen of a civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se. *See Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986).

The third element of a proper civil conspiracy requires the plaintiff to show special damages and that those damages must not provide a double recovery. *Hackworth*, 682 S.E.2d 871 at 875; see also *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000); *Anthony v. Ward*, 336 Fed. Appx. 311, 318, C.A.4 (S.C.), (2009). A civil conspiracy claim can be shown where a plaintiff pleads that she has been maliciously blacklisted. *See, Austin, v. Torrington Co.*, 810 F.2d 416 (4th Cir. 1987). Furthermore, the costs of prosecuting an action are a cognizable special damage under South Carolina Law. *Benedict College v. Nat’l Credit Sys., Inc.*, 400 S.C. 538, 735 S.E.2d 518, 523 (2012). Plaintiff must show acts in furtherance of the conspiracy alleged, by the conspirators, to establish the first to elements of her civil conspiracy claim. *Hackworth v. Greywood at Hammett, L.L.C.*, 358 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009).

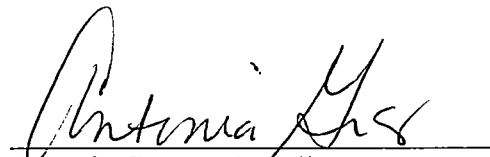
Plaintiff contends that she brought sufficient evidence before the Court, by way of

her Memorandum in Opposition to Summary Judgment and supporting exhibits, of concerted action by the Individual Defendants to harm her. Such conduct is sufficient for a jury to infer that the individually named defendants conspired to harm her. See, *Pridgen v. Ward*, 391 S.C. 238, 246, 705 S.E.2d 58, 63 (S.C. Ct. App. 2010) (“In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a part may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise”). Furthermore, Plaintiff’s primary damages are distinct in substance and form from the other damages sought from the Defendant’s in her complaint; thus there can be no double recovery, and the elements of special damages is satisfied. *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000); See Also, *Anthony v. Ward*, 336 Fed. Appx. 311, 318, C.A.4 (S.C.) (2009) (unpublished) (interpreting South Carolina civil conspiracy law and recognizing: “The case law makes clear that the concern is with the plaintiff receiving a double recovery”). Because Plaintiff has established the elements of a triable civil conspiracy, she respectfully asserts that the Court’s holding on this claim was error.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the circuit court and allow (1) Defamation Claim against Defendants; (2) her tortious interference with contract claim; and (3) her civil conspiracy claim to proceed to trial.

Respectfully submitted,

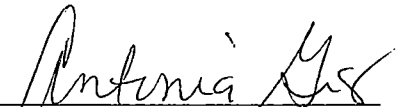
A handwritten signature in cursive script, appearing to read "Antonia Graves", is written over a horizontal line.

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**PROOF OF SERVICE
INITIAL BRIEF**

I certify that I have served the Initial Brief on Dillon District Four, et al, by depositing a copy of it in the United States Mail, postage prepaid, on July 31, 2015 addressed to the attorney on record, Laura Hart and Andrea White, Post Office Box 1486, Columbia, South Carolina 29202 and by fax to (803) 790-0605.

August 4, 2015



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