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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

Gary G. Harris, Appellant,

v.

Tietex International Ltd., Respondent.

FINAL REPLY BRIEF OF APPELLANT

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REPLY ARGUMENTS

I. COLLATERAL ESTOPPEL DOES NOT BAR APPELLANT'S DEFAMATION CLAIM.

The most important question in this appeal is whether Harris's defamation claim is barred by the doctrine of collateral estoppel. Judge Addy evaluated the record and found as a matter of law that it did not. Judge Cole revisited this issue, and erred in applying the collateral estoppel standard.

Tietex bears the burden of proving that (1) the state law issues surrounding Harris's defamation claim were actually litigated in the federal action, (2) the facts underlying the state law defamation claim were directly determined in the federal action, and (3) a determination of facts underlying the state law defamation claim was necessary to support the judgment in the federal action. See, e.g., Carolina Renewal, Inc. v. South Carolina Dep't of Transp., 385 S.C. 550, 684 S.E.2d 779, 782 (Ct. App. 2009).

None of this happened.

Tietex mischaracterizes Harris's collateral estoppel argument as "improperly narrow." Tietex should be well aware that, as a matter of public policy and judicial restraint, collateral estoppel should **never** be strictly applied. In fact, even if a party meets each element of a collateral estoppel defense, the court should reject its application when, in its estimation, the results are unfair, unjust, or go against public policy. Id. at 782. When seeking to bar a different cause of action than the one(s) litigated in the prior suit, the party seeking to use collateral estoppel must show that the facts necessary to prove that cause of action were decided and determined in the prior

suit. 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).

Despite Tietex's dogged insistence otherwise, the facts underlying Harris's defamation claim were not determined in the federal action.

The District Court decided a single issue: that Harris failed to prove age-based discrimination under the ADEA. More specifically, the District Court found that Harris did not establish a prima facie case of age discrimination "because he failed to provide evidence that established that he was meeting his employer's legitimate expectations at the time of the adverse action." (R. p. 37).

From this finding, the trial court extrapolated that the District Court found: (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. The District Court made no such findings, and they were not necessary to the District Court judgment.

Harris bore the burden of persuasion in the District Court. He was required to prove by a preponderance of the evidence that, **but for his age**, his employment would not have been terminated. This was the only issue before the District Court: Did Harris establish age as the "but for" reason for his termination? The District Court found that he did not meet this burden. This is not, however, a finding that Tietex's proffered reasons for firing Harris were found to be true or established as "facts."

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 (4th Cir. 2006). This analysis only comes into operation if the plaintiff meets the prima facie case. The District Court, upon finding

that Harris had not met his prima facie case, had made all of the findings necessary to dismiss his ADEA claim. No further discussion by the District Court of any part of the record was necessary to this determination. Only facts necessary to determination of the action (i.e., the disposition of the ADEA claim) are subject to collateral estoppel. Therefore, no other "facts" discussed in the District Court's narrative were necessary to the ADEA decision, nor binding in this action alleging a state law defamation claim.

Tietex was not required to – and did not - prove a legitimate, nondiscriminatory reason for firing Harris in order to prevail on the ADEA claim. It only needed to satisfy its burden of production by proffering one. Once it did so, Harris had to prove that the articulated reason was false. Thus, no alleged "finding" that Tietex had a legitimate, nondiscriminatory reason for discharging Harris was 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. He cannot assert age as the factual basis of any of his claims in this action, and he has not.

Further, the record is clear, and Tietex does not presume to argue, that the District Court made any finding whatsoever with respect to the state law defamation claim. There is nothing in the District Court's opinion to suggest that any finding with regard to the ADEA claim had any bearing on the defamation claim. Tietex could absolutely defame Harris, even if it did not discriminate against him.

II. APPELLANT'S DEFAMATION CLAIM IS NOT BARRED BY THE STATUTE OF LIMITATIONS OR RES JUDICATA.

Harris properly stated a cause of action for defamation. (R. p. 61, ¶¶ 39-46). 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, SCRCP, a pleading must contain "ultimate facts" rather than "evidentiary facts" in order to state a cause of action. Harris's initial defamation pleading alleged 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. Harris satisfied the requirements of Rule 8. He was not required to describe each alleged occurrence if defamation in detail, or point to each piece of supporting evidence. Tietex was on notice of Harris's defamation claim as of August 15, 2008.

When Tietex removed the original state court action on August 29, 2008, the statute of limitations for the pendent state law claims, including the defamation claim, was tolled during the pendency of the federal action, and for an 30 additional days after its dismissal. 28 U.S.C. § 1367(d). The earliest date that could qualify as "dismissal" from federal court is July 26, 2011. Therefore, the statute of limitations did not begin to run again until, at the earliest, August 25, 2011. Harris filed his pro se complaint in state court on October 11, 2011, timely raising the state law claim – including the defamation claim - preserved under the tolling provision.

Assuming out of an abundance of caution that Harris's defamation claim arose as early as January 2007, the statute of limitations had run for no more than 20 months

when it was tolled by removal. Harris brought the state court action barely six weeks after the statute of limitations resumed its operation. His pleadings, and the defamation claim he raised, were not time-barred. Later amendments to the complaint, permitted by the trial court upon Harris's timely motions, did not change the nature of the defamation claim in any way. See,e.g., Scott v. McCain, 272 S.C. 198, 250 S.E.2d 118 (1978).

Likewise, Harris's cause of action for defamation is not barred by res judicata because the issue was not adjudicated by the District Court. Plum Creek Development Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). The District Court expressly declined to exercise supplemental jurisdiction over any state law claims.

III. APPELLANT MADE A CLEAR RECORD OF GENUINE ISSUES OF MATERIAL FACT FOR TRIAL, WHICH PRECLUDES SUMMARY JUDGMENT ON HIS DEFAMATION CLAIM.

It is surprising, and quite telling, that Tietex spends nearly fourteen pages of its brief setting forth its detailed exposition of the "facts," while arguing that there is no issue of material fact in this case.

When all reasonable inferences and conclusions are drawn from facts of this case in favor of Harris, as they must be, summary judgment is patently not appropriate. See, e.g., McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998).

Harris has established at least, and arguably more than, the mere scintilla of evidence supporting his claim that is required to defeat summary judgment. 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 was required to present evidence on each of the following elements: (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 it was written, it charged Harris with unfitness in his profession. Therefore, he was not required to plead or prove special damages to recover. Id. at 502; Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000).

An employer can be liable to a former employee for defamation by a supervisor, even if the employer did not direct the supervisor to make the statement or condone the statement. Murray v. Holnam, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001). Communications between officers and employees can be qualifiedly privileged if made in good faith and in the usual course of business. However, whether the publication went beyond what the occasion required and/or was unnecessarily defamatory is a question for the jury to decide. Id. at 749.

Tietex supervisor Wade Wallace issued at least three memoranda that attacked the character and professional fitness and ability of Gary Harris. (R. p. 753; R. p. 754; and R. p. 756). There is at least a scintilla of evidence in the record that the information contained in these memos is false, and was based on ulterior motives. (R. pp. 693-699, 700, 706-707, 708-710, 712, 714-715, 716-717, 718-719, 739, 741-743, 744-748).

To the extent that the trial court granted summary judgment to Tietex based on the District Court order, this is plain error. The District Court ruled on Harris's ADEA claim and expressly declined to rule on any state law claim. To use the District Court order to determine the state law claims anyway deprives Harris of his day in court.

Tietex makes much of the length of the proceedings in this case. However, it is Tietex that caused the vast majority of delays by removing the case to federal court and tolling the state law claims, resisting discovery efforts at every turn, and otherwise engaging in obstructive and abusive litigation tactics.

CONCLUSION

Gary Harris is not looking for a "second bite" at the apple. He only wants the first bite; the opportunity to try his defamation claim against Tietex before a jury of his peers. This is a right to which he is entitled. Because the trial court order improperly deprived Harris of this right, Harris respectfully requests that the Court of Appeals reverse this ruling and permit him to proceed to trial on his state law defamation claim.

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December 16, 2014

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned, hereby certify the Final Reply Brief of Appellant in the above referenced matter was mailed, postage prepaid, to Respondent's Attorney, Fred Suggs, by sending to Ogletree Deakins Nash Smoak & Stewart PC, PO Box 2757, Greenville, SC 29602, on December 16, 2014.

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