The State of South Carolina
In the Court of Appeals

Appeal from Florence County
Court of Common Pleas

D Craig Brown, Circuit Court Judge

Case No 2010 CP 21 131

Mark Fountain, Appellant,

v

First Reliance Bank, Thomas C Ewart, and Ernest Pennell, Defendants

Of whom First Reliance Bank and Thomas C Ewart are, Respondents

Appellant's Final Reply Brief

Robert N Hill
Law Offices of Robert Hill
P O Box 51
Newberry, SC 29108
803 405 1629

William P Hatfield
The Hyman Law Firm, LLP
P O Box 1770
Florence, SC 29503 1770
843 662 5000

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Argument

The Bank's brief dwells on evidence favorable only to it, offers its view of what is reasonable and plain, draws inferences in its favor, and dismisses Fountain's expert evidence as nonsensical [1] But this appeal is from a summary judgment order

To defeat summary judgment, Fountain need only muster a scintilla of evidence on issues where he carries the burden of proof [2] And he has no burden of proving the defamation's falsity, rather, the Bank must prove that the defamatory meaning is true [3] Conclusions and inferences from the evidence must also be construed most strongly in Fountain's favor, and when there is no dispute as to evidentiary facts but only has to the conclusions or inferences to be drawn from them summary judgment must be denied *Murray v Holnam, Inc*, 344 S C 129, 137 138, 542 S E 2d 743, 747 (Ct App 2001)

The summary judgment order must be reversed because there is

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[1]Fountain will refer to both the Bank and Ewart as the Bank

[2]*Hancock v Mid South Management Co*, 381 S C 326, 673 S E 2d 801 (2009)(scintilla standard applies where the plaintiff's burden of proof is by the preponderance of the evidence), *Parrish v Allison*, 376 S C 308, 320, 656 S E 2d 382, 388 (Ct App 2007)(defamation elements must be proved by the preponderance of the evidence)

[3]*Parrish*, 376 S C at 326, 656 S E 2d at 391 392 (truth is an affirmative defense if the statements are a matter of private concern)

at least a scintilla of evidence that Ewart needlessly or recklessly defamed Fountain as a manager

I The trial court applied the wrong standard in ruling that Ewart's statement is not defamatory as a matter of law

Ewart implied that Fountain was unfit to manage Pennell's store when he told Pennell, "If Mark [Fountain] was going to be managing the operation, we would not be making the loan "[4] To argue otherwise, the Bank criticizes *Adams v Daily Telegraph Printing Co*, 292 S C 273, 356 S E 2d 118 (Ct App 1986), and dismisses its standard as "only dicta " It then argues that the defamatory implication is not plain, that the statement does not implicate Fountain's character, and that the statement's other implications that are not at issue are true

This confuses the role of the trial judge and the jury, and ignores the test for whether one is defamed in their profession

A The *Adams* standard governs

Like Fountain, the plaintiff in *Adams* sued for a literally truthful statement's defamatory innuendo In resolving whether summary judgment was properly granted, this Court concluded that summary

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[4]This is Ewart's version of his statement Ewart Depo , p 6 ll 18 21, p 56 ll 13 19, R p 199, 237

judgment on a statement's meaning must be denied unless the trial judge can affirmatively say that the statement is incapable of a defamatory meaning If the language is capable of a defamatory meaning, it is up to the jury to decide if the statement had that defamatory meaning The Court applied this standard to reverse summary judgment because the statements made were "susceptible of the inference" of defamation *Id* at 279, 356 S E 2d at122

The Bank dismisses this as "only dicta addressing a one of a kind case in a very preliminary posture," and argues that *Adams* "admittedly and needlessly borrowed dated language from [a] 1940 decision " Respondent's Initial Brief at 14 and n 30 This is triply wrong

The procedural posture of the two cases is identical As here, the trial judge in *Adams* granted summary judgment because the statements were literally true As here, the plaintiff did not contest the statements' literal truthfulness but rather the innuendo This Court reversed the summary judgment order because the truthful statements' innuendo was susceptible of a defamatory inference *Id* at 278 279, 356 S E 2d at 121 122 That is precisely what Fountain asks here

The Bank is next wrong in dismissing the standard as dicta The standard that the Court applied in reviewing the summary judgment

order is an integral part of its holding that summary judgment was improperly granted *Id* at 279, 356 S E 2d at122 It seems axiomatic that part of a holding is the test applied to reach the holding

The Bank is lastly wrong because the *Adams* standard is not limited to that one case The Court instead looked to the 1940 decision to distinguish between the differing roles that a judge and a jury play in determining if a statement is defamatory The judge determines if the language is capable of the defamatory meaning ascribed to it If it is, the jury determines if the language had that meaning *Id* This standard is not unique the Court cited a similar "general rule" from a legal encyclopedia *Id*

The trial court in this case strayed from this governing *Adams* standard The summary judgment order must thus be reversed

B Ewart's implication that Fountain was unfit to manage Pennell's store is plain

The Bank tries to salvage the trial judge's failure to apply the *Adams* standard by arguing that the implication of Fountain's unfitness to manage Pennell's store is not "plain " It plucks this adjective out of *Tyler v Mack's Stores of South Carolina, Inc*, 275 S C 456, 272 S E 2d 633 (1980), and then dwells on the term's dictionary definitions The

Supreme Court, however, was not drafting a statute It was deciding the case before it, and its holding refutes the Bank's view

In *Tyler*, the Court held that a "defamation need not be accomplished in a direct manner" and allowed a claim to go forward where there were no statement or writing at all *Tyler,* 275 S C at 458, 272 S E 2d at 634 Rather, the alleged defamation was implied from the employee's discharge even though he could have been fired for a multitude of legitimate reasons

Here, Ewart told Pennell, "If Mark [Fountain] was going to be managing the operation, we would not be making the loan " The defamatory implication that Fountain was unfit to manage Pennell's store is at least as plain as the *Tyler* insinuation

C Ewart's implication that Fountain was unfit to manage Pennell's store is incompatible with Fountain's trade or profession

The Bank next wrongly contends that Ewart's statement is not defamatory per se because it does not implicate Fountain's character It is at most, the Bank argues, a "more general reflection" on his qualities Respondents' Initial Brief, p 17 In advocating this point, the Bank tries to factually distinguish various decisions without coming to grips with the South Carolina test

In South Carolina, the test for whether one is defamed in their trade or profession is whether the statement imputes "conduct or characteristics incompatible with a person's office, trade, or profession " *Capps v Watts*, 271 S C 276, 286, 246 S E 2d 606, 612 (1978) Here, Ewart went far beyond a general reflection Ewart implied to Pennell that Fountain was unfit to manage Pennell's store This imputes conduct or characteristics incompatible with Fountain's specific ability to do the job that Pennell hired him to do After all, Pennell, after hearing from Ewart, asked Fountain to tear up their management agreement Fountain Depo, p 128 l 5 p 129 l 3, R p 158 159

D A jury could find that the Bank failed to meet its burden of proving the truth of Ewart's implication that Fountain was unfit to manage Pennell's store

The Bank lastly argues that Ewart's statement is not defamatory because it and its reasonable implications are in fact true On this score, it bears the burden of proving that the defamatory implication of Ewart's statement is true and not just the statement's literal truthfulness [5] It has not met this burden

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[5] *See Richardson v State Record Co , Inc* , 330 S C 562, 566 567,499 S E 2d 822, 824 825 (Ct App 1998)(reversing summary judgment where the defendant failed to demonstrate the absence of a genuine issue of material fact over the truthful statements' allegedly false insinuation)

The Bank, for example, tellingly limits its arguments about truthfulness to the statement's literal truthfulness and implications about Fountain's creditworthiness or the Bank's lack of faith in Fountain This, however, is not the defamatory meaning that Fountain ascribes to Ewart's statement The defamatory meaning ascribed is the insinuation that Fountain was in fact unfit to manage Pennell's store Whether Fountain was in fact unfit to manage Pennell's store is an objective fact not a constitutionally protected opinion and is disputed [6]

The record reflects that Pennell thought that Fountain was fit enough to manage his store in that he hired Fountain to manage it even after Fountain told him about his credit problems from the Bojo Tim endeavor Pennell did not ask Fountain to tear their management agreement up until after hearing from Ewart Fountain Depo, p 68 ll 14 17, p 128 l 5 p 129 l 3, R p 151, 158 159

Ewart, in turn, testified that his concern about Fountain as a manager came from the BoJo Tim operation Ewart Depo, p 58 l 5 p 61 l 7, R p 238 241 Fountain testified, however, that he was not a day to day manager at BoJo Tim but was one of five LLC members who had

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[6]The Bank limits its claim of constitutional protection to its opinion on Fountain's creditworthiness Respondents' Initial Brief at 19 That is not the defamation at issue

others manage it for them Fountain Depo, p 24 l 15 p 25 l 7, R p 119 120 Ewart also never asked Bojo Tim to replace Fountain, and the other members of the LLC likewise never fired Fountain or took him off of the payroll A leading member of the LLC likewise never expressed disappointment in Fountain's role in the LLC Fountain Depo , p 74 ll 9 12, p 148 ll 8 13, R p 154, 168, Ewart Depo, p 30 ll 3 5, R p 219 There is also no evidence none that Fountain contributed to Bojo Tim's financial problems

Lastly, Fountain was a good enough manager to later be hired as Timmonsville's Town Administrator Fountain Depo, p 10 ll 17 19, p 36 ll 10 15, R p 114, 131

There is thus at least a scintilla of evidence from which a jury could find that Fountain would have made Pennell a fine store manager and that Ewart thus defamed him when Ewart insinuated otherwise

II A jury could find that the qualified privilege was abused

At the summary judgment hearing, Fountain recounted the record evidence that he relied on to show the qualified privilege's abuse Hearing Tr , p 12 l 5 p 21 l 23, R p 103 112 He then again cited some of this record evidence in his motion to reconsider Motion to Reconsider, pp 5 6, R p 56 57 While the Bank takes Fountain to task for saying

that the trial court "failed to address" this evidence, neither the summary judgment order nor the order on reconsideration cites this evidence or explains why it does not create a jury issue on the privilege's abuse The Bank is thus left offering explanations for the orders that may or may not reflect the trial court's actual reasoning

Part of the Bank's explanation is that Fountain's expert affidavit is nonsense Respondents' Initial Brief, p 10 While perhaps appropriate on an appeal from a jury verdict, dismissing evidence as nonsense is misplaced in an appeal from a summary judgment On an appeal from summary judgment, the conclusions and inferences from the evidence must be construed most strongly in Fountain's favor The Bank should have thus moved to strike the expert's affidavit if it did not want this Court to take the expert's opinions as true on appeal

This expert affidavit was introduced to show that Ewart's statement to Pennell about Fountain was reckless Other evidence of Ewart's abuse of privilege includes

> Ewart dragged Fountain into the conversation with Pennell even though Ewart knew that Fountain would not be on Pennell's proposed loan and would have no ownership interest in Pennell's

business Ewart Depo , p 38 ll 11 14, p 50 ll 5 12, R p 224, 233 [7]

- Ewart could not name any other commercial loan that had ever been denied solely because of the choice of management Ewart Depo , p 35 ll 17 21, p 37 ll 7 16, R p 222 223
- Ewart's view of Fountain came from the BoJo Tim operation in which Fountain was an owner who hired others as managers Ewart Depo, p 58 l 5 p 61 l 7, R p 238 241, Fountain Depo, p 24 l 15 p 25 l 7, R p 119 120
- Ewart's information about Fountain when he spoke to Pennell was five to six years old Ewart Depo , p 18 ll 3 13, p 43 ll 3 15, p 52 ll 1 6, R p 211, 226, 235
- Ewart's boss, the Bank's President and CEO, did not object to Fountain's management of Pennell's store even though he knew at least as much as Ewart about making commercial loans Ewart Depo, p 53 ll 8 25, R p 236, Fountain Depo, p 132 ll 2 24, p 134 l 23 p 135 l 5, R p 161, 163 164, Pennell Depo , p 47 ll 8 23, R p 181

In recounting this evidence, Fountain does not suggest that he is

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[7]The Bank devotes a good part of its brief to Fountain's lack of creditworthiness without explaining its relevance The Bank does not dispute that everyone knew that Fountain was not going to be obligated on Pennell's proposed loan

entitled to a summary judgment that the Bank abused its privilege The factual conclusions and inferences to be drawn from this evidence is very much in dispute, and the Bank does a good job in bringing out other facts and in drawing conclusions and inferences in its favor

But these factual controversies create a jury issue over whether the privilege was abused Whether privilege was abused is ordinarily one for the jury *Swinton Creek Nursery v Edisto Farm Credit, ACA,* 334 S C 469, 485, 514 S E 2d 126, 134 (1999) So too here

Conclusion

The summary judgment order must be reversed because at least a scintilla of evidence exists that Ewart needlessly or recklessly defamed Fountain in his trade or profession

Respectfully submitted,

Robert N Hill
Law Offices of Robert Hill
P O Box 51
Newberry, SC 29108
(803) 405 1629

William P Hatfield
The Hyman Law Firm, LLP
Post Office Box 1770
Florence, SC 29503 1770
(843) 662 5000

Attorneys for the Appellant
Mark Fountain