

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-42-2538
Appellate Case No. 2014-000902

RECEIVED

AUG 08 2016

SC Court of Appeals

Gary G. Harris, Appellant,

v.

Tietex International, Ltd., Respondent.

**RESPONDENT'S RETURN IN OPPOSITION TO
APPELLANT'S PETITION FOR REHEARING**

Respondent Tietex International, Ltd. ("Tietex") submits its Opposition to Appellant Gary G. Harris' ("Harris") Petition for Rehearing. Nothing in Harris's Petition demonstrates how the Court "overlooked or misapprehended" any dispositive issues underlying the Court's decision to affirm summary judgment for Tietex on Harris's claims. Harris focuses on (1) irrelevant excerpts from the Court's Opinion that did not impact the holding, (2) a misstatement and misapplication of the burden of proof for the qualified privilege that attached to the allegedly defamatory statements, (3) his own unsupported and conclusory deposition testimony as the only "evidence" asserted to show actual malice, and (4) a regurgitation of the same arguments on the statute of limitations the Court properly rejected. Harris's Petition must be denied accordingly,

hopefully providing finality to the baseless claims Harris has forced Tietex to defend for the past eight years.

A. Harris's Petition Focuses on Dicta from the Court's Opinion that had no Bearing on the Court's Holding.

Harris spends the majority of his Petition (pages 1-4) attempting to identify allegedly defamatory statements within four documents in an effort to contradict the Court's comment regarding the vague and nonspecific nature of his allegations (*see* Slip Op. at 6 ("Initially we note Harris has not identified the specific defamatory statements on which he bases his defamation claim or claims. In his brief, Harris simply asserts the three internal memos contained 'malicious personal attacks outside any privilege impugning Harris's professional standards and abilities.'")). While the Court was correct in pointing this out—Harris's Petition is the first time he has isolated specific statements within the documents that are allegedly defamatory—Harris's attack on this comment in his Petition is irrelevant, as the Court's observation was merely dicta.

The Court made clear in Section III of the Opinion that the only issues it reached were the qualified privilege and the statute of limitations: "In light of our finding that the trial court properly granted summary judgment based on the qualified privilege and the statute of limitations, we decline to address the remaining issues on appeal." (Slip Op. at 8 (emphasis added)). Because the comment Harris attacks was dicta that had no bearing on the Court's holding, Harris's attempt to contradict the Court's statement is immaterial and provides no basis for a rehearing. Harris's Petition must be denied accordingly.

B. The Court Properly Applied the Law on Qualified Privilege, and Harris Has Offered Nothing to Impugn the Court's Holding.

As the Court recognized, "[t]his court has previously found the qualified privilege applies 'to situations in which an employee's job performance is properly evaluated.'"

(Slip Op. at 5 (quoting *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989))). Harris cannot dispute that the documents he cites as allegedly defamatory are all written communications about his job performance. Therefore, the qualified privilege applies, and the Court properly shifted the burden to Harris “to show actual malice or that the scope of the privilege has been exceeded.” (Slip Op. at 6 (quoting *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999))). Harris failed to meet this burden at every stage of the litigation, as demonstrated by his Petition.

In his Petition, Harris relies exclusively on his own unsupported and conclusory deposition testimony as somehow creating a triable issue of fact on whether there was actual malice to overcome the qualified privilege. In Harris’s own words, the only “evidence” he claims shows actual malice is his own “testimony . . . that the statements in the memoranda were fabricated or made up.” (Petition at 4.) Harris’s personal and subjective disagreement with the veracity of the purportedly defamatory statements is far from sufficient. If this were not the case, there could never be summary judgment on this issue. As the Court recognized, “if the plaintiff fails to present evidence of a genuine issue of fact as to actual malice and the qualified privilege is otherwise applicable, summary judgment may be granted.” (Slip Op. at 6.)

Harris did not point to anything beyond his own unsupported and conclusory statements that would even potentially show (1) that the allegedly defamatory statements were even false, (2) that Wade Wallace—his supervisor who made the statements—had any reason to believe the statements were false, or (3) that Wallace had any motivation to make false statements about him. Since Harris did not identify any documents,

witnesses, or other evidence to create a genuine issue of fact regarding actual malice, the Court properly concluded the summary judgment was appropriate on this issue. Thus, Harris's Petition should be denied.

C. The Court Properly Considered Each Allegedly Defamatory Statement as an Independent Claim and Found them All to be Barred by the Statute of Limitations.

Harris's argument in opposition to the statute of limitations is simple—he contends that any defamation claims he made against Tietex in his second action should not be barred by the statute of limitations because his filing of a different defamation claim in the first action should have tolled the limitations period.

The flaw in Harris's argument is similarly straightforward—he fails to recognize that claims based on different allegedly defamatory statements are different claims entirely. *See, e.g., George v. Fabri*, 345 S.C. 440, 456-61, 548 S.E.2d 868, 876-79 (2001) (analyzing defamation allegations separately in affirming grant of summary judgment); *McBride v. School Dist. of Greenville County*, 389 S.C. 546, 559-63, 698 S.E.2d 845, 851-54 (Ct. App. 2010) (analyzing alleged defamatory statements individually). This is particularly clear in light of the statute of limitations for defamation claims, which is based on “when the alleged defamatory statement is made.” (Slip Op. at 7.)

Harris's reference to Judge Addy's statements during the August 30, 2013 hearing is irrelevant. The Judge who subsequently issued the Order granting summary judgment on the statute of limitations issue was not Judge Addy, but Judge Cole. “An interlocutory denial of summary judgment is not a final order and is subject to change by the trial court.” *Abner v. Greenville County*, 327 S.C. 31, 40, 488 S.E.2d 314, 319 (1997). Judge Cole had discretion to consider and rule upon the motion before him. Judge Cole was not bound by Judge Addy's prior comments.

Harris has failed to demonstrate how the Court in any way “overlooked or misapprehended” the facts or law related to the statute of limitations holding, rendering improper any rehearing under Rule 221, SCACR. Harris’s Petition should be denied accordingly.

D. The Additional Bases for Affirming the Lower Court’s Decision Further Support the Denial of Harris’s Petition.

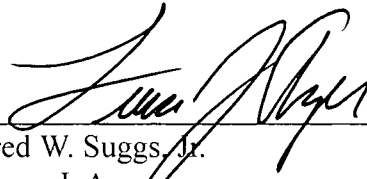
The Court of Appeals did not reach a number of issues on which the lower court based its summary judgment decision—(1) the allegedly defamatory statements were substantially true (R. pp. 15-19); (2) Harris’s claims were barred by the doctrine of collateral estoppel (R. pp. 21-23); or (3) Harris’s claims were at least partially barred by the doctrine of *res judicata* (R. p. 25). Even if the Court did reconsider this matter based on Harris’s Petition—though it should not, for the reasons set forth above—these additional issues would further warrant the affirmation of the lower court’s decision. The granting of Harris’s Petition is not supported by the notions of judicial economy, as the reconsideration of the existing decision would simply lead to the same result. Harris’s Petition should be denied for this reason as well.

E. Conclusion.

Like his claims in the underlying lawsuit, Harris’s Petition is nothing more than an attempt to gain a second bite at the apple. Harris has not pointed to anything that could even potentially justify rehearing of this matter. His Petition must be denied.

***** SIGNATURE ON FOLLOWING PAGE*****

Respectfully submitted,



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August 4, 2016

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PROOF OF SERVICE

I certify that I have served Respondent's Return in Opposition to Appellant's Petition for Rehearing on Appellant Gary G. Harris by sending to his attorneys of record a copy of the same via first class mail, properly addressed, postage prepaid at the following addresses: D. Alan Lazenby, Ginger D. Goforth, Lazenby Law Firm, Post Office Box 6099, Spartanburg, South Carolina 29304, and via electronic mail.

August 4, 2016



Lucas J. Asper

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August 4, 2016

The Hon. Jenny Abbott Kitchings
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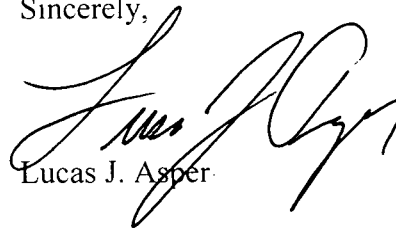
RE: **Gary G. Harris v. Tietex International, Ltd.**
C.A. No. 2011-CP-42-2538
Appellate Case No. 2014-000902

Dear Ms. Kitchings:

Please find enclosed the original and seven copies of the Respondent's Return in Opposition to Appellant's Petition for Rehearing on Appellant Gary G. Harris in the above-referenced matter. Please file the original and return the filed copy to us in the self-addressed, stamped envelope enclosed.

If you have any questions or concerns, please do not hesitate to contact our office. Thank you for your assistance with this matter.

Sincerely,



Lucas J. Asper

LJA:lah

Enclosures

cc: D. Alan Lazenby, Esq.
Ginger D. Goforth, Esq.

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