

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

RECEIVED

AUG 26 2016

SC Court of Appeals

Case No. 2016-000982

Jacqueline BuieAppellant,

v.

Walmart Stores East, LP.....Respondent.

INITIAL BRIEF OF RESPONDENT



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STATEMENT OF ISSUE ON APPEAL

- I. Did the trial court properly grant summary judgment on Appellant's cause of action for slander where the material facts were not in dispute and there was no evidence from which a reasonable jury could find in favor of Appellant?

STATEMENT OF THE CASE

This case arises out of an alleged incident that occurred on November 2, 2012 at the Walmart located at 230 North Beltline Drive, Florence, South Carolina, in which Appellant Jacqueline Buie (hereinafter "Buie") was ultimately requested to leave her shift at the store where she was working as an associate. Buie filed her Complaint on September 8, 2014 in the Florence County Court of Common Pleas, in which she alleged causes of action against Appellant Wal-Mart, East, L.P. (hereinafter "Walmart") for: (1) slander *per se*/libel *per se* and (2) assault. Plaintiff then filed an Amended Summons and Complaint, the sole change being to designate the proper Defendant.

Following the completion of written discovery and deposition of Buie, Walmart filed a Motion for Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure as to all of Buie's causes of action. Additionally, Buie's counsel filed a Motion to Withdraw. A hearing was held before the trial court on September 28, 2015 on Walmart's Motion for Summary Judgment as well as Buie's counsel's Motion to Withdraw. During the parties' arguments to the Court, Buie's counsel explicitly abandoned Buie's claim of libel *per se* while maintaining the remaining causes of action. *See* Order dated Nov. 11, 2015, pg. 6. Thereafter, on November 11, 2015, the Court issued an Order granting summary judgment in favor of Walmart on all of Buie's causes of action and also granted her counsel's Motion to Withdraw. *See* Order dated Nov. 11, 2015. As to Walmart's Motion for Summary Judgment, the Court found that Buie failed to establish that any genuine issue of material fact existed as to her claim of slander because Buie admitted to initially refusing to leave the store when requested, causing her manager to call to law enforcement. Furthermore, as an independent, sustaining ground, the Court found that any communication by Walmart to law enforcement was subject to

a conditional privilege. Additionally, the Court found Buie failed to establish that any genuine issue of material fact existed as to her claim of assault because the claim was barred by the exclusivity provision of the South Carolina Workers' Compensation Act. *See* Order dated Nov. 11, 2015.

Buie, representing herself following the withdrawal of her counsel, filed a Motion to Alter, Amend, and Reconsider Judgment (hereinafter "Buie's Motion to Reconsider") on December 8, 2015. A hearing was held before the Court on April 14, 2016 on Buie's Motion to Reconsider and the Court issued its Order denying same on May 20, 2016. *See* Order, dated May 20, 2016. Buie then filed the instant appeal, arguing only that the Court erred in granting summary judgment as to the slander cause of action,¹ thereby abandoning any argument pertaining to her cause of action for assault.

¹ While Buie's brief refers to her cause of action for defamation, Buie abandoned any claim of libel during her argument before the trial court, as explicitly noted in the trial court's Order. *See* Order, dated Nov. 11, 2015.

STATEMENT OF FACTS

Buie began working for Walmart as a full-time, overnight stocker in 2008. Pl.'s Dep. 8:22-9:9. In 2009, she also became a bus driver for the local school district and, as a result, began working part-time at Walmart. Pl.'s Dep. 9:10-21. During the relevant time frame of 2012, Buie was working as an overnight stocker at the Walmart located at 230 North Beltline Drive, Florence, South Carolina, every Friday and Saturday night from 10:00 p.m. until 7:00 a.m. for a total of sixteen (16) hours per week. Pl.'s Dep. 10:1-13.

The incident that is the subject of the underlying action occurred on November 2, 2012. Buie arrived at work at 10:15 p.m. that evening, and when she first entered the building, she was called to the office by manager Kathy Roller. Pl.'s Dep. 14:24-15:1, 16:7-9. Roller explained that six associates² called out for their assigned shifts and, therefore, Roller needed Buie to work quickly because she needed assistance in other areas. Pl.'s Dep. 16:7-16. Buie understood Roller to mean that if Buie finished her work early, she was to work on the assignments of the associates who did not report for work that night. Pl.'s Dep. 18:12-23.

Buie then began her shift stocking diapers in the Infants Department. Pl.'s Dep. 19:1-5. Another associate, Carthenia Smith, was on her way to clock-out and stopped to chat with Buie. Pl.'s Dep. 16:12-14, 19:18-21, 21:11-21. During this time, Roller walked by and yelled "go back to work" in a rude voice. Pl.'s Dep. 19:4-14. Buie testified that she and Smith "looked at each other and started smiling and laughed" and Buie "continued to stock." Pl.'s Dep. 15: 7-22. The two did not respond to Roller. Pl.'s Dep. 19:11-17; 20:13-15. A few minutes later, assistant manager Amber Barnhill came to the area and told Buie that Roller wanted to see Buie in the office. Pl.'s Dep. 20:16-21. Buie was frustrated at being called to the office and told Barnhill

² Walmart refers to its employees as "associates."

that with all of the stopping and starting work, she (Buie) may as well clock out and go home. Pl.'s Dep. 24:5-10, 34:4-17.

When Buie and Barnhill arrived at the office, Roller and Barnhill told Buie that she needed to go to work and to stop talking. Pl.'s Dep. 20:23-24; 21:5-7. Buie was directed to sit down but "chose to stand." Pl.'s Dep. 20:24-25. Barnhill accused Buie of insulting her, and Roller told Buie that Buie was not working as she should have been. Pl.'s Dep. 35:9-15. Buie testified that they "got in a confrontation, sort of a misunderstanding." Pl.'s Dep. 22:15-19. Buie asked to speak with the store manager who was not working that evening. Pl.'s Dep. 24:22-25. Roller, who was in charge of the store that night, told Buie that she would not call the store manager, who lived in North Carolina and was presumably at home in the late evening. Pl.'s Dep. 24:24-25; 25:1-5.

Buie ignored Roller and Barnhill and walked out of the office to the break room and called a Human Resources telephone number at Walmart's corporate offices, which was listed on the wall in the break room. Pl.'s Dep. 25:12-18, 26:9-15. Buie left a voice message indicating that she had "two managers assaulting me, talking to me like a dog, accusing me of not working and I was very well working." Pl.'s Dep. 25:21-25, 26:1-2. After Buie left the voice message, Roller told her to go back to the office, but Buie refused. Pl.'s Dep. 52:14-25. Rather, Buie disregarded Roller's instruction and returned to the Infants Department where she continued stocking diapers. Pl.'s Dep. 26:18-19.

Thereafter, Roller came to the Infants Department and told Buie that since she had indicated that she wanted to go home, she should clock out and go home. Pl.'s Dep. 27:17-22. Buie testified that Roller attempted to move the pallet of merchandise but, Buie continued to take diapers off of the pallet and stock them. Pl.'s Dep. 26:24-25, 27:1-12. Buie then went and

retrieved more freight and began stocking it. Pl.'s Dep. 29:1-6. Buie continued to work and "thought everything was fine" when Roller walked toward her with two police officers. Pl.'s Dep. 29:7-12.

Buie asked the officers if there was a problem and the officers requested to speak with her, to which Buie responded, "[a]bout what?" Pl.'s Dep. 29:13-18. Buie followed Roller and the officers to the back of the store upon the officers' request. *Id.* Once in the back of the store, Buie asked why she was there. Pl.'s Dep. 30:8-11. One of the officers responded that Roller had called because she wanted Buie to go home. Pl.'s Dep. 30:10-14. Buie asked "for what reason?" Pl.'s Dep. 30:14. Buie then informed the officer that Roller told her she may as well go home as she had previously said she was going to clock out and go home. Pl.'s Dep. 30:14-18. Buie further explained that Roller was using Buie's words against her because Buie had not done anything wrong. *Id.* The officers responded, "[M]a'am, you don't want to get in trouble for insubordination, why don't you go home and come back in the morning." Pl.'s Dep. 31:23-24, 32:1. Following the officer's statement, Roller offered to pay Buie for the entire shift. Pl.'s Dep. 32:1. Buie again stated that she had not done anything wrong and the officers told her to leave. Pl.'s Dep. 32:2-8. The officers then began walking out into the store with Buie but, Buie recalled that she did not have her keys. Pl.'s Dep. 32:11-13, 40:22-25, 41:1-4. She told the officers she needed to get her keys and the officers told her that they would wait for her. Pl.'s Dep. 40:1-3. Buie then retrieved her keys and exited the store through another door at approximately midnight. Pl.'s Dep. 40:15-17, 43:12-14. Walmart paid Buie for the entire shift. Pl.'s Dep. 41:3-10.

STANDARD OF REVIEW

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *Melton v. Medtronic, Inc.*, 389 S.C. 641, 650, 698 S.E.2d 886, 891 (Ct. App. 2010) (quoting *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003)). “An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRPC.” *Id.* (quoting *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009)). “Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Id.* (quoting *Bovain*, 383 S.C. at 105, 678 S.E.2d at 424). “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Id.* at 650-51 (quoting *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009)).

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF WALMART AS BUIE PRESENTED NO GENUINE ISSUE OF MATERIAL FACT AS TO HER CLAIM OF SLANDER.

Buie avers that the trial court erred in granting summary judgment because Walmart defamed her by calling the police and having her escorted out of the store. App.'s Br. p. 5. She is incorrect. Buie presented no genuine issue of material fact as to her claim of slander; therefore, the trial court properly granted summary judgment to Walmart and this Honorable Court should affirm the trial court's ruling.

“A person makes a defamatory statement if the statement ‘tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.’” *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012) (quoting *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002)). “The tort of defamation therefore permits ‘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.’” *Id.* (quoting *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006)). “We therefore require a plaintiff to prove the following four elements to state a claim for defamation: ‘(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.’” *Id.* (quoting *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664). Slander is spoken defamation, and libel is written defamation. *Holtzscheiter v. Thomson Newspapers*, 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998).

Here, Buie alleges a cause of action of slander *per se*. Pl. Am. Compl. ¶ 1. To establish slander that is actionable *per se*, a plaintiff must show that the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: "(1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." *Holtzscheiter*, 332 S.C. at 511, 506 S.E.2d at 502.

a. Defamatory Insinuation

Buie asserts that there are genuine issues of material fact as to whether Walmart created a defamatory insinuation on the date of the alleged incident. App. Br. p. 5. She is incorrect.

South Carolina courts recognize that a defamatory insinuation may be made by actions or conduct as well as by word. *Tyler v. Macks Stores of S.C., Inc.*, 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980). Thus, defamation need not be accomplished in a direct manner. However, a mere insinuation is as actionable as a positive assertion only "*if it is false and malicious and the meaning is plain.*" *Id.* (quoting *Timmons v. News and Press, Inc.*, 232 S.C. 639, 644, 103 S.E.2d 277, 280 (1958)) (emphasis added).

In the present case, Buie testified that on the day following the alleged incident, co-workers asked her what she had stolen and why she had been arrested. Tr. of R., p. 17:20-18:2; 18:11-16. She bases her entire contention that Walmart's action of calling law enforcement to the store was defamatory on these questions by her co-workers. *Id.* However, Buie fails to set forth any evidence to show that Walmart acted in a false and malicious manner or that the plain meaning of Walmart's call to the police was that Buie had stolen. Law enforcement may be called for any number of reasons, including the reason for the call in this instance—Buie's admitted refusal to leave the store when instructed. Moreover, Buie acknowledged that (1) the

police officers requested she leave the store to avoid getting in trouble for insubordination, (2) Roller agreed to pay her for the entire shift, and (3) she returned to work the next day.

By Buie's own admissions, she was frustrated that she was called to the office for talking. The assistant manager, Amber Barnhill, reported Buie's conduct to the manager in charge, Kathy Roller. As Roller attempted to counsel Buie about talking to other associates during a shift, Buie refused to sit down and then left the office during the discussion. Buie called Walmart's corporate offices from the break room, leaving a voice message of complaint. Thereafter, Roller instructed Buie to go back into the office but, Buie ignored the instruction only to return to the department where she was previously working. Roller then called the police to assist her in having Buie leave the premises, which she was legally entitled to do. During her deposition, Buie admitted that Roller directed her to clock out and go home and that she refused to do so. Following the incident, Buie sent an email to Walmart's Human Resources Department, in which she once again admitted that she refused to go home as directed.

In an attempt to establish a genuine issue of material fact, Buie references deposition testimony given in response to questioning by her own counsel, in which Buie testified that she never told Roller she wanted to go home. App. Br. p. 4. However, to the extent that Buie's testimony in response to questioning by her own counsel contradicts her earlier testimony, the testimony is insufficient to create a genuine issue of fact. Buie acknowledged both in her deposition testimony and in an email she sent to Walmart's Human Resources Department only days after the incident that Roller told her to clock out and go home and that she instead went back to work. Furthermore, whether Buie told Roller she did not want to clock out and go home is not a material fact. Simply put, Buie admits there was a confrontation at the store between

Buie and her manager, and Buie refused her manager's request to leave the store following the confrontation. Consequently, Buie's manager was forced to call law enforcement.

Accordingly, Buie fails to establish that any genuine issue of material fact existed as to whether Walmart made a false and malicious insinuation, which had a plain meaning suggesting that Buie stole merchandise from the store. As Walmart's action in calling law enforcement for the sole purpose of having Buie leave as previously directed by her manager does not give rise to a claim of slander, that action cannot support a claim of slander *per se*. For the foregoing reasons, this Court should affirm the trial court's grant of summary judgment in favor of Walmart.³

b. Conditional Privilege

Buie fails to establish that any genuine issue of material fact exists as to the privileged nature of the subject store's communications to law enforcement. Thus, this Court must affirm summary judgment in favor of Walmart.

As a threshold matter, Buie only alleges in the instant appeal that Walmart created an indirect defamatory insinuation, rather than any direct defamatory statement; therefore, her argument related to privileged communications is irrelevant. Notwithstanding, in a defamation action, the defendant "may assert the affirmative defense of conditional or qualified privilege." *Castine v. Castine*, 403 S.C. 259, 267, 743 S.E.2d 93, 97 (Ct. App. 2013) (quoting *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999)). The elements of a conditionally privileged communication are: (1) good faith; (2) an interest to be upheld; (3) a statement limited in scope to this purpose; (4) a proper occasion; (5) publication

³ Notably, even assuming Buie could overcome the hurdles of establishing the publication of a false and defamatory statement through the fault of Walmart and without privilege, she cannot establish that she suffered harm to her reputation and, thus, the claim fails as a matter of law on this independent, sustaining ground. *See* Rule 220(c), SCAR.

in a proper manner to proper parties. *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987). “Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused.” *Castine*, 403 S.C. at 267, 743 S.E.2d at 97 (quoting *Swinton Creek*, 334 S.C. at 484, 514 S.E.2d at 134). “Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded.” *Swinton Creek*, 334 S.C. at 484, 514 S.E.2d at 134. “In general, the question [of] whether an occasion gives rise to a qualified or conditional privilege is one of law for the court.” *Id.* at 485, 514 S.E.2d at 134. “However, the question [of] whether the privilege has been abused is one for the jury.” *Id.* In the absence of a controversy as to the facts, it is for the court to say in a given instance whether or not the privilege has been abused or exceeded. *Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981).

Here, there is no evidence that Walmart’s managers acted in anything other than good faith. They had an interest in ensuring that Buie followed the instructions she was given and that there would be no further altercations or insubordination. There is no evidence that Walmart made any statement to the police other than a request to respond to the store; thus, the call to the police was limited in scope to its purpose and made in a proper manner to the proper parties. Buie fails to present any genuine issue of material fact as to whether Walmart made a false or defamatory statement or whether Walmart’s call to the police exceeded the scope of the conditional privilege granted to it, even when viewing the evidence in a light most favorable to her. Therefore, the trial court properly granted summary judgment in favor of Walmart on the cause of action of slander and this Honorable Court must affirm that judgment.

CONCLUSION

For the reasons set forth herein, Respondent Walmart respectfully requests that this Honorable Court affirm summary judgment in its favor.

Respectfully submitted,



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PROOF OF SERVICE

I do hereby certify, on this 26th day of August, 2016, that a copy of the foregoing Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal and Proof of Service were served by depositing a copy of the same in the United States Mail, first-class, postage prepaid, addressed to: Ralph J. Wilson, Esquire, P.O. Box 860, Conway, South Carolina 29528.



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August 26, 2016

The Honorable Jenny Abbott Kitchings
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AUG 26 2016

SC Court of Appeals

Re: *Jacqueline Buie v. Walmart, Inc.*
Appellate Case No: 2016-000982

Dear Ms. Kitchings:

Enclosed please find the original and two copies of Respondent's Initial Brief, Designation of Matter and Proof of Service in regard to the above matter. Please return the filed copies to the courier.

By copy of this correspondence, Respondent is serving these same documents upon the Appellant via certified mail, return receipt requested. Should you have any questions, please do not hesitate to contact our office.

Sincerely,

Kelli F. Spinks
Paralegal

Enclosures

cc: Jacqueline Buie (via certified mail, RRR)