

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

Case No. 2011-CP-42-4538
Appellate Case No. 2016-002125

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DEC 05 2016

S.C. SUPREME COURT

Gary G. Harris,..... Petitioner,

v.

Tietex International Ltd, Respondent,

PETITION FOR A WRIT OF CERTIORARI

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INDEX

Certificate of Counsel 1
Question Presented1
Statement of the Case. 1
Argument
 I. The Court of Appeals erred by finding that Petitioner had not presented sufficient evidence to support his defamation claim and sufficient evidence of actual malice to overcome any qualified privilege4
 II. The Court of Appeals erred by failing to toll the statute of limitations for the defamation claim while the case was pending in Federal Court pursuant to §1367(d) 5
Conclusion 7

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 23, 2016.

QUESTIONS PRESENTED

- III. Did the Court of Appeals err by finding that Petitioner had not presented sufficient evidence to support his defamation claim and sufficient evidence of actual malice to overcome any qualified privilege?
- IV. Did the Court of Appeals err by failing to toll the statute of limitations for the defamation claim while the case was pending in Federal Court pursuant to §1367(d)?

STATEMENT OF THE CASE

Respondent manufactures various textiles in Spartanburg County, South Carolina. Petitioner began working as a Senior Research Chemist for Respondent on July 14, 1994. Petitioner had a spotless work record until Respondent assigned Wade Wallace (“Wallace”) to be his immediate supervisor on February 1, 2007. Wallace was several years Petitioner’s junior and had no chemical expertise.

Petitioner contends that Respondent assigned Wallace to be his immediate supervisor to create pretextual grounds to terminate him. Petitioner contends that

Wallace sent libelous email and other written communications to Petitioner's superiors which ultimately led to Petitioner's termination on July 19, 2007. Throughout his deposition testimony Petitioner clearly demonstrated that he believed Wallace's writings to be false and that Wallace intentionally "made up" the allegations in those writings in order to get Petitioner terminated. Petitioner has specifically identified the following communications as being defamatory:

- February 9, 2007, email (Appendix 683). This writing claims that Petitioner advised Wallace, that "he was confused, disoriented, and could not function." Petitioner testified that this email was defamatory and that email was a "farce." (Appendix 696 ll. 10-23). Petitioner maintained that this statement was false and that Wallace had fabricated the claim that Petitioner was emotionally unstable. (Appendix 706 ll. 19-23). Petitioner also testified that this email "is not representative of what took place." (Appendix 709 ll. 19-24);
- March 5, 2007, memo (Appendix 686). This writing accused Petitioner of becoming "emotional and overly vocal," "not honoring the chain of command," and harboring "negativity over past grievances with management..." Petitioner clearly testified that the statements were defamatory. (Appendix 697 ll. 9-16). Petitioner was asked whether any of the statements were false and he testified that all of them were. (Appendix 714 l. 25 – R. 715 l. 5). Again, Petitioner was clear that he believed Wallace was fabricating the statements in this memo – "I mean, just to be frank, I think he's making it up." (Appendix 717 ll. 8-13);

- June 18, 2007, memo (Appendix 688). This writing accused Petitioner of being incompetent in his job performance: “[Petitioner] exercised poor judgment by making claims and commitments that he could not deliver,” (Appendix 688) and “I can conclude that [Petitioner] did not conduct adequate scientific and numerical analysis of the first trial ... [and] this negligence and applying the proper scientific analysis is unacceptable in the work of a Sr. Research Chemist.” (Appendix 689). Again, Petitioner clearly testified that this memo was defamatory. (Appendix 697 ll. 17-22). He specifically testified that the content of this memo was “incorrect” and it was a “pretext memo” to justify terminating him. (Appendix 716 ll. 5-21); and
- July 18, 2007, memo (Appendix 690). This memo restates the defamatory allegations raised in the February email and the June memo. It also accuses him of various “poor work habits.” Again, Appellant clearly testified that this memo was defamatory (R. 695 ll. 1-3) and that Petitioner “disagree[d] with what [Wallace] said about my performance.” (R. 736 ll. 12-16).

On August 15, 2008, Petitioner sued Respondent in State Court for wrongful termination and for defamation. (Appendix 64). Respondent remove the case to federal court. On October 28, 2010, the District Court entered judgment dismissing the Federal law claims and declining to exercise jurisdiction over Petitioner’s State law claims. Petitioner appealed this decision to the Fourth Circuit Court of Appeals which affirmed the District court’s decision and issued its Mandate on August 3, 2011. On October 21, 2011, Petitioner filed this action in state court, pro se, alleging wrongful termination and

defamation. (Appendix 73). On September 5, 2012, Petitioner filed an Amended Complaint specifying his various causes of action, including defamation. (Appendix 86).

Petitioner withdrew all claims except for his defamation claim prior to trial. Respondent moved for and was awarded summary judgment by the Trial Court. Petitioner's appeal to the Court of Appeals was denied in this Petition follows.

ARGUMENT

I. The Court of Appeals erred by finding that Petitioner had not presented sufficient evidence to support his defamation claim and sufficient evidence of actual malice to overcome any qualified privilege.

Despite the overwhelming evidence of defamation, the Court of Appeals determined that Petitioner had not specifically identified any defamatory statements. The Court of Appeals relied on McBride v. Sch. Dist. Of Greenville Cty., 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010), which was in error. The statements at issue in McBride were described as 1) public comments made by the District superintendent and 2) public comments attributed to unnamed teachers at the school. Id. at 559, 698 S.E.2d at 851. The evidence for this was "vague references to the local newscast concerning McBride's arrest..." Id. at 562, 698 S.E.2d at 853. In McBride there was not a sufficient description of the alleged slander for the Court to analyze. In contrast, Petitioner has identified specific written documents (Appendix 683, 686, 688, and 690) which contain the actual written statements which Petitioner claims are defamatory. As discussed above in the Statement of the Case, Petitioner identified and brought before the Trial court and the Court of Appeals specific statements that he alleged to be defamatory. These claims are not too vague to be evaluated.

The Court of Appeals also erred in relying on McBride for the proposition that the alleged defamatory statements are subject to a qualified privilege. According to McBride, the Respondent has the burden of proving the statements were made in good faith in order to claim the qualified privilege. Id. at 562, 698 S.E. 2d at 853. The Court of Appeals did not properly hold Respondent to this burden. In addition, the Court of Appeals ignored Petitioner's testimony cited above that Wallace intentionally fabricated events and various emails and written communications so that Petitioner would be terminated. Because the Court of Appeals did not properly consider testimony which was properly cited to the Courts below, this Court should issue a writ of certiorari try and reverse the decision of the Court of Appeals and Trial Court.

II. The Court of Appeals erred by failing to toll the statute of limitations for the defamation claim while the case was pending in Federal Court pursuant to §1367(d).

Petitioner initially filed his state court claims on August 15, 2008, which is roughly 13 months after Petitioner was terminated and 18 months after Wallace was assigned to be Petitioner's immediate supervisor. This means that at the time the initial State Court Complaint was filed, Petitioner had roughly 6 months remaining on the statute of limitations to assert any claims related to Wallace's actions in causing his termination.

As discussed above, the Mandate from the Fourth Circuit Court of Appeals was not issued until August 3, 2011. According to 28 U.S.C.A 1367(d), the statute of limitations should have been tolled during the pendency of the initial State Court Complaint plus an additional 30 days. Therefore, the statute of limitations was tolled from August 15, 2008 until September 2, 2011. Petitioner filed his second State Court Complaint on October 21, 2011. (Appendix 73). Therefore, the statute of limitations

continued to run on Petitioner's defamation claim for an additional month and a half. As of October 21, 2011, Petitioner still had four a half months remaining on the statute of limitations relating to Wallace's actions and having him terminated.

In a tortured analysis, the Court of Appeals reasoned that the defamation claims asserted in the August 15, 2008, Complaint were somehow different from the defamation claims raised in the October 21, 2011, Complaint. This reasoning was in error. It is clear that the initial Complaint filed on August 15, 2008, alleged that Wallace's actions from February 2007 onward were the basis of the defamation claim.

The Court of Appeals overlooked evidence that initial Complaint (Appendix 64) included pre-termination defamatory statements and should have been liberally construed this pleading to do "substantial justice" under Rule 8(f), SCRC. The defamation cause of action specifically incorporates all previous allegations of the Complaint. (Appendix 71). Paragraph 25 of the Complaint specifically references pretextual reasons given to terminate Appellant. This language was incorporated into the defamation cause of action. Furthermore, the specific statements identified above allege Appellant's lack of confidence in his trade or profession. Paragraph 42 of the Complaint should be read to include all of the defamatory statements cited above. It was error for the Court of Appeals to conclude that the August 15, 2008, Complaint did not refer or relate to Wallace's conduct from February 2007 onward.

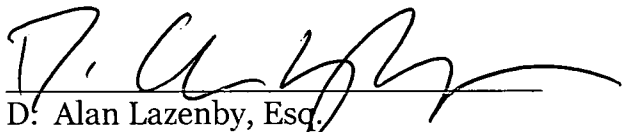
Additionally, The Court of Appeals misapprehended Petitioner's testimony regarding whether the initial Complaint referred to Wallace's conduct from February 2007. It is clear in reading Petitioner's testimony that although the February 9 email and the subsequent memoranda were not specifically referenced in the original

Complaint, the defamation claims in the initial Complaint referred to Wallace's favorite 2007 conduct. (Appendix 700 – 701). Furthermore, Petitioner testified that the intent of the initial Complaint was to include those memoranda, and if they were not included then it was because of an oversight on the part of his counsel. (Appendix 700 ll. 11-15). Because the Court of Appeals failed to apply the tolling provisions of 28 U.S.C.A. 1367(d), it erroneously concluded that Petitioner's claim for barred by the statute of limitations, even though some four and a half months remained on the statute of limitations for these claims.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that the Supreme Court grant their Petition for Writ of Certiorari to review the decision of the Court of Appeals.

December 1, 2016



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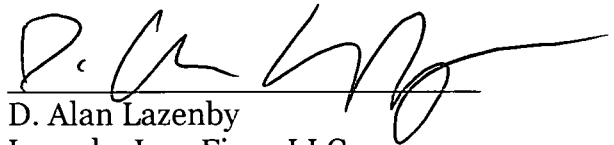
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PROOF OF SERVICE

I, the undersigned, hereby certify the Appellant's Petition for Writ of Certiorari 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 1, 2016.



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