

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2014-CP-40-4666
Appellate Case No. 2016-001198

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SC Court of Appeals

Kim Murphy.....Appellant,

v.

Richland-Lexington School District 5 Board of Trustees, Robert Gantt, and Bobby Merle Bowers, in their individual capacities,

Of Whom Robert Gantt and Bobby Merle Bowers are.....Respondents.

FINAL REPLY BRIEF OF APPELLANT TO RESPONDENT BOWERS' BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS II

TABLE OF AUTHORITIES III

ARGUMENT..... 1

 I. MURPHY HAS AN ACTIONABLE CIVIL CONSPIRACY CLAIM
 AGAINST BOWERS. 1

 A. **There is sufficient evidence to demonstrate that Bowers and Gantt
 worked in concert to harm Murphy..... 2**

 B. **There is sufficient evidence to demonstrate that Bowers and Gantt
 caused Appellant special damages 5**

 C. **Bowers and his office did not act within the scope of their duties. 4**

CONCLUSION..... 9

TABLE OF AUTHORITIES

Cases

Allegro, Inc. v. Scully, No. 2014-002055, 2016 WL 4474336 (S.C. Aug. 24, 2016).....5
Austin v. Torrington Co., 810 F.2d 416 (4th Cir. 1987).....1
Benedict College v. Nat'l Credit Sys., Inc., 400 S.C. 538, 735 S.E.2d 518 (2012)5
Crittenden v. Thompson-Walker Co., Inc., 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986).....2
Grady v. Spartanburg Sch. Dist. Seven et. al., No. 7:13-CV-02020-GRA, 2014 WL 1159406
(D.S.C. Mar. 21, 2014).....5
Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987).....2
McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 626 S.E.2d 884 (2006)1
Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007)2
Pridgen v. Ward, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010).....1
Vaught v. Waites, 300 S.C. 201, 387 S.E.3d 91 (Ct. App. 1989).....1

Statutes

S.C. Code Ann. § 7-5-2304
S.C. Code Ann. § 27-2-105.....3, 7

ARGUMENT

This case involves the unprecedented mid-term removal of Appellant “Murphy” from the Lexington-Richland Five School Board of Trustees. Murphy asserts that she, a political opponent of Respondent Gantt, was wrongfully removed by Gantt, in conjunction with Respondent Bowers, as a part of an actionable civil conspiracy. The Circuit Court granted summary judgment to Gantt and Bowers, which Murphy timely appealed. Bowers filed a response brief to Murphy’s initial brief on December 22, 2016. There, Bowers argues that Murphy did not establish the elements of civil conspiracy against him (Respondent Bowers’ Initial Brief pp. 20-32). Murphy respectfully replies in opposition, and asks this Court to remand this case to trial for the reasons that follow.

I. MURPHY HAS AN ACTIONABLE CIVIL CONSPIRACY CLAIM AGAINST BOWERS.

A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. *McMillan v. Oconee Mem’l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes the plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 387 S.E.3d 91 (Ct. App. 1989).

“To establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise.” *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010) (citing *Cowburn v. Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005)). A civil conspiracy claim can be shown where a plaintiff pleads that she has been maliciously blacklisted. *Austin v. Torrington Co.*, 810 F.2d 416 (4th Cir. 1987). “Conspiracy may be inferred

from the nature of the acts committed, the relationship of the parties, the interests of the alleged conspirators, and other relevant circumstances.” *Moore v. Weinberg*, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007). “Because civil conspiracy is ‘by its very nature covert and clandestine,’ it is usually not provable by direct evidence.” *Id.* (quoting *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987)). “Moreover, the field of admissibility of evidence is broadened in proof of conspiracy.” *Island Car Wash, Inc.*, 292 S.C. at 601 (citing *Hall v. Walters*, 226 S.C. 430, 85 S.E. (2d) 729 (1955)).

A. There is sufficient evidence to demonstrate that Bowers and Gantt worked in concert to harm Murphy.

Respondent Bowers argues that there is insufficient evidence that he and Respondent Gantt combined to harm Murphy. This argument, in light of the record and broadened scope of review applicable to civil conspiracy claims is unpersuasive. *See, Island Car Wash, Inc.*; 358 S.E.2d at 153. Civil conspiracies between the employees of a principal and an agent are recognized in South Carolina where the employees and agents act outside of the scope of their employment. *See, Pridgen* at 246, 705 S.E.2d at 63; *see also, Crittenden v. Thompson-Walker Co., Inc.*, 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986) (*holding*, “On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master’s business, his conduct falls outside the scope of his employment”). *Pridgen* envisions that conspirators are not protected from liability simply due to official designation if the conduct they engaged in was outside of their ordinary scope of authority. Such is the case here.

Bowers and Gantt together brought about the mid-term removal of Murphy from the Board by attempting to show that she did not live in Richland County. (R. pp. 1059, 1109, 1204, 1857). The procedures employed by Bowers and Gantt did not follow established law. *See*, S.C.

Code Ann. §§ 27-2-105 (1976), 27-2-105 (2014). Thus their actions together, outside of the realm of their authority as a matter of law, are reasonably inferred to raise at least a triable inference of an actionable combination to harm. The timing of the Individual Respondents' actions bolsters this inference. Bowers and Gantt were previously aware of an alleged residency issue with respect to Murphy's residence; as early as 2004, Respondents were told that Murphy may not live in Richland County, and they chose not to challenge her residency through several election cycles. (R. pp. 1099, 1845-46). Furthermore, Bowers and Gantt did not challenge Murphy's residency via the appropriate channels. Gloria Wilson, a former chairman of the Richland County Board of Voter Registration, testified that the most appropriate course of conduct would have been to challenge Murphy's fitness to run for office through the County Board of Voter Registration. (R. p. 1119). Instead, in 2012, after Murphy became a staunch political opponent to Gantt, Gantt contacted Bowers and they worked together to remove Murphy from her elected position on the basis of residency without involving the appropriate parties (Richland and Lexington Counties) and without following the legal procedures for residency determination in the case of a county boundary dispute. S.C. Code Ann. § 27-2-105, (R. pp. 1845-46).

Removal of a board member in the middle of their term based on residency when the location of the board member's residence has remained the same has not occurred before, and the procedure pursued by Bowers and Gantt was without a basis in the law. Their failure to follow the law in this endeavor raises an actionable inference of conspiracy. Bowers' brief focuses on the amount of time Gantt and Bowers knew each other and for what reasons they met to determine that they did not combine to harm her. (Respondent Bowers' Initial Brief p. 24). However, the amount of time the Respondents knew each other is not remotely dispositive to the

elements of a civil conspiracy and the above circumstantial and direct evidence is enough to overcome summary judgment.

Furthermore, the timing of Gantt's notification to Murphy and Bowers's subsequent communications to both Lexington and Richland Counties are subject to suspicion. Bowers and Gantt decided against notifying Murphy of their investigation; despite her being arguably the best source for determining her county of residence. (R. p. 1857). Bowers and Gantt met, planned, and worked with others for nearly three months before Murphy was notified of their investigation into her residency. (R. p. 1857). It is reasonably inferable that the investigation into Murphy's residence was concealed from her to prevent her from taking action to defend herself.

The Supreme Court of South Carolina held in *Moore* that conspiracy may be inferred by parties' relationships and actions. *Moore*, at 228, 644 S.E.2d at 750. Applying *Moore*, a conspiracy can be inferred because: (1) Bowers and Gantt worked together to find that Murphy lived in Lexington County rather than file an appeal with the Election Commission, which was required by law, (S.C. Code Ann. § 7-5-230); (2) Bowers and Gantt met in advance to discuss their investigation before a formal request letter was sent; (3) Bowers performed a rudimentary investigation into Murphy's residence; and (4) Bowers provided his unsupported findings to Gantt, so he could use the same as grounds to remove Murphy from the Board. *Pridgen* does not require anything more than circumstantial evidence to be produced to establish civil conspiracy. *Pridgen* at 208, 387 S.E.3d at 95. Based on *Pridgen*, Bowers and Gantt conspiring to remove Murphy can reasonably be inferred by their conduct.

B. There is sufficient evidence to demonstrate that Bowers and Gantt caused Appellant special damages.

Respondent Bowers argues that there is insufficient evidence of special damages. "Special damages must be alleged in the complaint to avoid surprise to the other party." *Allegro*,

Inc. v. Scully, No. 2014-002055, 2016 WL 4474336 *4 (S.C. Aug. 24, 2016) (citing, *Sheek v. Lee*, 289 S.C. 327, 329, 345 S.E.2d 496, 497 (1986)). The primary consideration with respect to special damages, prevention of a double recovery, requires that damages for a conspiracy be distinct from those sought on a plaintiff's other claims. See, *Allegro, Inc.*, 2016 WL 4474336, at *6 (Pleicones, *dissenting*) ("In *Todd*, the Court created a new rule of pleading for civil conspiracy claims, holding that the plaintiff in a civil conspiracy action must allege damages different from those alleged in any other of her tort causes of action."). Furthermore, the cost of prosecuting an action is a cognizable special damage under South Carolina Law. *Benedict College v. Nat'l Credit Sys., Inc.*, 400 S.C. 538, 735 S.E.2d 518 (2012).

Murphy alleged that she suffered reputational harm, diminished likelihood of re-election, humiliation, embarrassment, and pain and suffering as a result of her defamation claim. (R. p. 62, ¶ 25). Murphy alleged that she was blacklisted, ostracized, suffered economic loss from her loss of position on the Board, reputational harm, pain and suffering, and incurred costs and fees from prosecuting this action as a result of her civil conspiracy claim. (R. p. 64, ¶ 31). Murphy's inability to be re-elected is a very particularized special damage in this case. Now Murphy is not considered a citizen of either Lexington or Richland County at law, and is thus singularly disenfranchised from seeking local public service. Murphy, has, therefore, been effectively blacklisted from her Board position.

Murphy's civil conspiracy damages are distinct in substance and form from her defamation damages. See, *Grady v. Spartanburg Sch. Dist. Seven et. al.*, No. 7:13-CV-02020-GRA, 2014 WL 1159406 *14 (D.S.C. Mar. 21, 2014) ("Plaintiff has alleged that these emotional damages came from being ostracized from her peers, distinct from the emotional damages of losing her job"); *Austin v. Torrington Co.*, 810 F.2d 416, 421 (4th Cir. 1987) ("Rather, to

effectuate a recovery under a blacklisting theory, the plaintiff must prove that there was a blacklist, a combination of employers who exchanged the information contained on the blacklist, and a willful or malicious use of that blacklist by one or more of the members of the combination, with resultant injury to the plaintiff.”) (interpreting South Carolina Law); and, *Benedict Coll. v. Nat'l Credit Sys., Inc.*, 400 S.C. 538, 548-49, 735 S.E.2d 518, 523 (Ct. App. 2012) (“The civil conspiracy claim then explicitly incorporates that assertion and limits the special damages it seeks to ‘the costs and attorney's fees associated with the defense of [the College]’s allegations.’ . . . NCS does not assert amorphous or unlimited grounds for special damages. The language provides sufficient specificity . . . [as to the] alleged special damages [that] are being sought.”).

Bowers’ brief argued that Murphy lacked special damages separate and apart from her damages from her defamation claim. (Respondent Bowers’ Initial Brief pp. 27-28). Even if Murphy’s damages were duplicative, the special damages rule would not be applicable to Respondent Bowers, and is questionable in its applicability in its entirety. *See, Allegro, Inc.*, fn. 6. Chief Justice Pleicones, dissenting in the Court’s August 24, 2016 decision in *Allegro*, reasoned “even if the Court were to preserve the *Todd* rule, the sole claim asserted against petitioner Corbin was civil conspiracy, and thus as to him the ‘special damages’ rule created by *Todd* [*v. S.C. Farm Bureau Mut. Ins. Co.*] does not apply.” Notably Chief Justice Pleicones dissent in *Allegro* (joined in concurrence by Justice Beatty) concerned whether or not special damages should even be an element in the civil conspiracy analysis; the *Allegro* majority did not reject Pleicones’ position on this point, but observed that *Allegro*, a 12 year old case, was not the appropriate vehicle to reverse *Todd*. *Id.* at fn. 3. However here, this Court need not address the

propriety of the special damages element, as Murphy properly and sufficiently pled special damages.

Murphy has presented sufficient evidence that Bowers and Gantt acted together with personal motivation to harm her, and that she suffered special damages as a result of the same. The Circuit Court's holding to the contrary is reversible.

C. Bowers and his office did not act within the scope of their duties.

Respondent Bowers' brief argues that "[Office of Research and Statistics] discovered the residency through the course and scope of its ordinary duties totally unrelated to Murphy or her difficulties with the School Board." (Respondent Bowers' Initial Brief pp. 28-29). Although Murphy's residence may have arguably been flagged in the ordinary scope of Bowers' duties, the actions taken by Bowers and his office towards the investigation of Murphy's residency and her removal from the Board were not within the scope of Bowers' duties. Gantt only requested that Bowers determine Murphy's residency issue; however, Bowers went beyond that request. Bowers' employees contacted Lexington County regarding Murphy's removal from the voter and tax rolls from Richland County without consulting Murphy, although he admittedly did not have authority to do so. (R. p. 1183).

Respondent Bowers and his office did not have the statutory authority to conduct the research into Murphy's residence at the time they performed the research. It was not until a 2014 bill gave SCB&CB complete authority over residential county border issues through an appellate-like process, which may, arguably, have justified Respondents' actions. (S.C. Code Ann. 27-2-105¹). Roberts, Bowers' employee, testified that along with Murphy's property, several other properties were flagged as being registered to vote in the wrong county. (R. p.

¹ Even the statutory requirements of the 2014 amendments to S.C. Code Ann. § 27-2-105 were not followed with respect to Murphy's residency.

1182). However, no one under Bowers' authority or at SCB&CB took action to address these additional flagged properties; Murphy's property was, for all intents and purposes, singled out. (R. pp. 1204-08). Bowers did not have a specific reason to only look into Murphy's property, which alludes to the conspiracy between him and Gantt. Roberts', an employee of Bowers, and Gantt's testimonies consistently agree that they all met before the formal December 20, 2012 request to discuss Murphy's residence and its investigation. (R. pp. 1059, 1109, 1204). Bowers and Gantt met with District attorneys and others to discuss their plans. (R. pp. 1059, 1109, 1204). Bowers, Gantt, and others discussed, devised, and determined their course of action well before any formal action was taken or notice given to Murphy. (R. pp. 1059, 1109, 1204).

The methods used by Bowers infer a combination to harm because they were not proper. Bowers stated he and his staff relied on three sources to determine that Murphy was not a resident of Richland County. (R. pp. 1756-57). Bowers, Roberts, and another of Bowers' employees, Zupan, each admitted that they did not perform a survey, visit Murphy's property, or examine any physical markers on or around the boundary in dispute. (R. p. 1199). However, Respondent Bowers' brief argued that the proper methods were used because the office had previously performed the fieldwork seventeen years prior to this issue arising. (Respondent Bowers' Initial Brief p. 29). However, fieldwork conducted almost two decades prior to the issue arising does not amount to properly surveying, visiting the property, or examining physical markers on or around the boundary in dispute. Zupan even testified that he did not locate any ground evidence, such as the stake viewed by Ronnie L. Tyler, a land surveyor expert hired by Murphy to testify in this case. (R. pp. 1472-73). Tyler testified that the actions taken by Bowers and his office deviated from standard surveying practice and procedure. (R. pp. 1814-1818). Tyler concluded that Bowers' office's finding regarding Murphy's property was incorrect

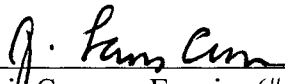
because: they did not utilize and rely upon recorded surveys; they failed to confirm the location of the statutorily defined “Rocky Ford;” they failed to inspect ground evidence on or near Murphy’s property; and there were discrepancies in the maps they used to support their findings. (R. pp. 1790-1813).

CONCLUSION

Appellant respectfully replies to the Respondent’s brief as set forth above and asks this Honorable Court to Reverse the holding of the Circuit Court, and Remand this case for trial.

Respectfully Submitted,

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