THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2015-000058

William McFarland and Jennifer McFarland.....Appellants,

v.

Mansour Rashtchian and Amy Rashtchian.....Respondents

RESPONDENTS' RETURN TO PETITION FOR REHEARING

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COME NOW Respondents, Mansour Rashtchian and Amy Rashtchian (collectively "Respondents"), filing the Return to Appellants Petition for Rehearing.

ARGUMENT/SUSTAINING GROUNDS

Jury charges are within the sound discretion of the trial court. "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 495-96, 514, S.E.2d 570, 475 (1999) (citations omitted). "However, when reviewing a jury charge for alleged error, the appellate court must consider the charge as a whole in light of the evidence and issues presented at trial." Dixon v. Ford, 362 S.C. 614, 619, 688 S.E.2d 879, 882 (Ct. App. 2005). The trial court will only be reversed for improper jury charges where an appellant can show error and prejudice. Arkwright Mills v. Clearwater Mfg. Co., 217 S.C. 530, 553 61 S.E.2d 165, 175 (1950). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497-98, 514 S.E.2d 570, 575 (1999). A jury charge that is substantially correct and covers the law does not require reversal. Id. at 496, 514 S.E.2d at 574.

1. The Trial Court Did Not Commit Reversible Error Because the Jury Instruction Was Not Erroneous[1]

Appellants concede that self-defense is a defense to defamation, but argue the Jury was improperly instructed on the nature of that privilege. Respondents disagree that the charge, as a whole, fails to explain the qualified privilege of self-defense as described in Duncan v. Record Pub. Co., 145 S.C. 196, 280, 143 S.E. 31, 58 (1927) and Cartwright v. Herald Pub. Co., 220 S.C. 492, 68 S.E.2d 415 (1951).

[1] The relevant portions of the charges as stated in the Respondent's brief is incorporated as if restated fully herein.

The trial court properly and completely instructed the jury on the Respondents' burden to prove their affirmative defenses. The court further charged:

> If the plaintiff verbally attacked the defendant, the defendant is allowed to reply to that attack *as long as the reply is made in good faith and without malice.* However, the defendant is responsible or the defendants are responsible if the statement in response to the plaintiff's attack goes beyond the plaintiff's attack or uses language that is unnecessarily defamatory.

R. p. 517, lines 9-15 (emphasis added). The court also instructed:

> Now, ladies and gentlemen, if a defamation is actionable per se, then *the law presumes the defendant acted with common law, actual malice and that the plaintiff or plaintiffs suffered general damages. Such defamation is actionable without proof of special damages.* Words actionable per se carry with them the presumption that actual damage to reputation and character directly and proximately resulted therefrom, and it is not necessary to allege or prove any actual or special damages.

R. p. 520, line 22- p. 521, line 5 (emphasis added).

The charge, read in its entirety, is a correct statement of the law and sufficiently explains to the jury that 1) the Respondents have to prove their affirmative defense and 2) this defense is only available when the reply is made in good faith and without malice. Therefore, the charge, read as a whole, is proper and does not constitute reversible error. Once this issue was submitted to the jury after being properly charged, the jury verdict should not be disturbed.

2. The Trial Court's Decision to Charge the Jury on Self-Defense was Well Within the Trial Court's Discretion

Appellants assert that Respondents cannot avail themselves to the affirmative defense of self-defense where they initiated the events leading to the defamatory statement. Despite being an inaccurate statement of the facts, this Court should not "disturb the jury's factual findings unless a review of the record discloses there is no evidence which reasonably supports the jury's findings." Small v. Pioneer Mach., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997).

Without giving too much credence to this portion of the argument, we will address the position that Mr. Rashtchian "sparked the whole defamatory episode."

The record is clear that the incident on April 26, 2011 was precipitated by years of racially charged insults towards Mr. Rashtchian, as well as Mr. McFarland's inconsiderate actions immediately prior to their interaction where Mr. McFarland directed two cars around his landscaper's truck and onto the Rashtchian property. Mr. McFarland would surely agree that homeowners, including he and his wife, take great pride in the maintenance of their lawn and that he would take offense to someone driving on his grass.[2] Appellants attempt to explain Mr. McFarland's actions by arguing Fludd Street is "not a thoroughfare" and only "two vehicles" drove onto the "right-of-way' grass." As such, they have essentially admitted that their own actions started the sequence of events leading up to the defamatory publication. Additionally, the record is similarly clear that the two had been arguing with each other and Mr. McFarland escalated the level of the altercation by making his own defamatory statement, "I know what kind of shoddy contractor you are." R. p. 448, line 24; p. 499, lines 5-7. Mr. Rashtchian 's response was proportional.

The charge, which is an accurate one, clearly instructs a jury:

> *If the plaintiff verbally attacked the defendant*, the defendant is allowed to reply to that attack as long as the reply is made in good faith and without malice. However, the defendant is responsible or the defendants are responsible if the statement in response to the plaintiff's attack goes beyond the plaintiff's attack or uses language that is unnecessarily defamatory.

R. p. 517, lines 9-15 (emphasis added).

More specifically, the use of the conditional word "if" requires a jury to first find the Plaintiff initiated the event or escalated the escalated the level of the event. Stated in the

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[2] "[N]othing is more pleasant to the eye than green grass kept finely shorn...." FRANCIS BACON, OF GARDENS (1625) reprinted in THE ESSAYS OF LORD BACON: WITH CRITICAL AND ILLUSTRATIVE NOTES, 185 (John Hunter ed., 1873).

negative the jury charge reads: "If the plaintiff did not verbally attack the defendant, the defendant is not allow to reply to that attack...." By its verdict, the jury here necessarily found the Appellants initiated the action and Mr. Rashtchian's reaction was justified. The jury's finding supports the charge. Appellants are now asking this Court to look into the minds of the jurors and to question their interpretation of the evidence as presented. As the verdict is supported by evidence in the record, the jury's verdict should not be overturned.

INCORPORATION OF RESPONDENT BRIEF

Respondents' brief is hereby incorporated to support the denial of Appellants' Petition for Rehearing as if restated fully herein, verbatim.

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Charleston, South Carolina
April 10, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
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The Honorable Diane Schaefer Goodstein, Circuit Court Judge

Case No. 2015-000058

William McFarland and Jennifer McFarkland, Appellants,

v.

Mansour Rashtchian and Amy Rashtchian, Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served all counsel of record with a copy of Return to Petition for Rehearing by mailing a copy of the same by United States Mail with first class postage prepaid to the following:

Stephen Brown
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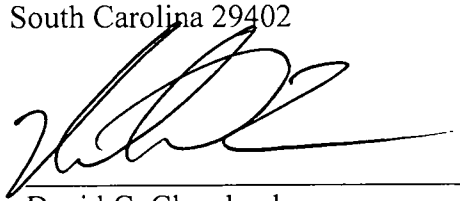

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April 10, 2017

File No.: 20130547.000

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211-1629

Re: William McFarland and Jennifer McFarland v. Mansour Rashtchian and Amy Rashtchian
Case No.: 2015-000058

Dear Ms. Kitchings:

Enclosed please find an original and six copies of the Respondents' Return for Petition for Rehearing in the above-referenced case. Please file the original along with the other documents in this case and return the file stamped copy to our office in the enclosed self-addressed stamped envelope. Should you have any questions, please do not hesitate to contact me.

Thank you very much for your attention to this matter.

Very truly yours,

CLAWSON and STAUBES, LLC

Michael L. Leech

MLL/sns
Enclosure
cc: Russell G. Hines, Esq. (with enclosure)