

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-14-0615

TLC Holdings, LLC, Richard Clark, and
Jimmy S. Lovell,

Plaintiffs,

vs.

M. B. Hutson a/k/a M. B. Hudson,

Defendant.

RECEIVED

MAY 21 2018

SC Court of Appeals

ORDER

This matter is before the Court on Defendant M. B. Hutson a/k/a M. B. Hudson's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. For the reasons set forth below, the Court denies the motions.

BACKGROUND

A trial was held in this matter during the week of January 22, 2018. Defendant moved for a directed verdict at the close of Plaintiffs' case and at the close of all of the evidence. The Court denied those motions. On January 26, 2018, the jury rendered a verdict in favor of Plaintiffs. Following the trial, Defendant filed a motion for JNOV and for a new trial. In support of his JNOV motion, Defendant argues that (1) Plaintiffs' claims are barred by the doctrine of absolute privilege, and (2) Plaintiffs' damages are barred by the evidence at trial stating that the damaged entity was Big Water Resort, LLC, a non-plaintiff in this matter. In support of his new trial motion, Defendant argues that (1) Plaintiffs' damages are barred by evidence which he argues infers that Big Water Resort, LLC, not a party to this action, was the damaged entity, (2) Plaintiffs' evidence of lost business income and value was speculative, and

(3) this Court erred in instructing the jury as to the common law defense of justification, which he claims was not asserted by Defendant.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. Legal Standard

“In ruling on a motion for JNOV, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them. In making this determination, the judge must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party.” Burns v. Universal Health Svcs, Inc., 361 S.C. 221, 231-32, 603 S.E.2d 605, 611 (Ct. App. 2004) (citations omitted). The trial court must deny the motion when the evidence yields more than one inference or its inferences are in doubt. Jamison v. Hilton, 413 S.C. 133, 139, 775 S.E.2d 58, 61 (Ct. App. 2015).

In deciding a motion for JNOV, the trial judge is concerned with the existence of evidence, not its weight. Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003). When considering a JNOV motion, neither an appellate court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. Id at 320, 585 S.E.2d at 274.

“A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. If more than one inference can be drawn from the evidence, the grant of a JNOV is improper and the case must be left to the jury’s determination. The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury’s verdict.” Burns, 361 S.C. at 232, 603 S.E.2d at 611 (citations omitted).

B. Absolute Privilege

Defendant has asserted that his defamatory statements were absolutely privileged. Under South Carolina law, “absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial action of any official nature provided those steps bear reasonable relation to it.” Crowell v. Herring, 392 S.E.2d 464, 467 (S.C. Ct. App. 1990).

Defendant, in arguing that his defamatory statements were absolutely privileged, has relied on Crowell. In that case, the plaintiff, who was the president of a Veterans of Foreign Wars (“VFW”) chapter, came under investigation by the VFW with regard to allegations that the plaintiff was improperly receiving money from a company that maintained video machines at the VFW. Id. at 465-66. After the investigation, a VFW investigatory committee was formed which looked into the allegations further and unanimously recommended court-martialing the plaintiff. Id. at 466. The court-martial resulted in an acquittal on all charges against the plaintiff. Id. The plaintiff then sued several individuals for libel and slander, including two VFW trustees who were involved in the investigation against the plaintiff. Id.

The Crowell Court explained the law of privilege in the context of a judicial investigation as follows: “absolute privilege exists as to any utterance arising out of the judicial proceeding **and having any reasonable relation to it**, including preliminary steps leading to judicial action of any official nature **provided those steps bear reasonable relation to it.**” Id. at 467 (emphasis added). After holding that the VFW trustees’ testimony during the court-martial proceeding was absolutely privileged, the court then turned to their allegedly defamatory statements made during their investigation:

It has already been decided a court-martial is a judicial proceeding. Carrying the analogy a logical step forward, the investigation of [the plaintiff’s] alleged misdeeds can be likened to a prosecutor gathering evidence, interviewing witnesses and preparing a case. Accordingly, we hold the statements made by

[the VFW trustees] during the course of their investigation of [the plaintiff] as trustees and as members of the investigatory committee, were absolutely privileged, inasmuch as the statements bore relation to the contemplated proceeding.

Id. at 467.

Defendant argues that both his postcard and his communications with attorney Bill Padgett were pre-litigation, pre-investigation writings that were absolutely privileged. In contrast to the facts of Crowell, Plaintiffs argue that Defendant's statements bear no reasonable relationship to any judicial investigation. They further argue that his reference in the postcard to his alleged damages was merely an attempt to stir up resentment against Plaintiffs and to strong-arm Plaintiffs into backing off of their eviction proceedings against him, and they assert that Defendant had advised Plaintiffs that he would withhold his outline of Plaintiffs' alleged misdeeds from Padgett if Plaintiffs would settle these claims and forbear their eviction rights.

The postcard was mailed to a mailing list allegedly consisting of current and former members of Big Water Resort. The evidence at trial established that Mr. Hutson did not own a membership at Big Water Resort, and it was undisputed that he would not qualify to be a member in any contemplated class action. Further, Defendant's statement in the postcard that "I too have been scammed . . . as a member and purchaser of Big Water Resort" cannot reasonably be asserted to be part of any investigation leading to a legitimate lawsuit. Not only was he not eligible to participate in the lawsuit, at the time of sending the postcard, Defendant had already signed a full release in favor of the Plaintiffs preventing him from asserting any such claims. (Trial Exhibit 31). Accordingly, the statements of Mr. Hutson cannot meet the threshold Crowell standard of bearing a *reasonable relation* to any judicial investigation.

Having no interest in the putative class claims Mr. Hutson was promoting to the campground members in his postcard, the communications are more accurately categorized as

champertous, maintenance or barratry¹ instead of “reasonably related” to a legitimate legal proceeding. Inciting others to bring a legal action was, until very recently, actionable in and of itself under the common law claim of barratry (Osprey, Inc. v. Cabana Ltd. P’ship, 340 S.C. 367, 373, 532 S.E.2d 269, 273 (2000)), and cannot, therefore, be considered as having any reasonable relationship to contemplated litigation.

Defendant also made certain other defamatory statements in the postcard that had no reasonable relation to any contemplated proceeding. He accused Plaintiff TLC Holdings of racketeering, which is defined as “a system of organized crime traditionally involving the extortion of money from businesses by intimidation, violence, or other illegal methods; a pattern of illegal activity (such as bribery, extortion, fraud, and murder) carried out as part of an enterprise (such as a crime syndicate) that is owned or controlled by those engaged in the illegal activity.” *Black’s Law Dictionary* (10th ed. 2014). There was no evidence presented from which a reasonable relation can be found between the allegation of racketeering and the class action lawsuit or any other proceeding contemplated.

¹ See Osprey, Inc. v. Cabana Ltd. P’ship, 340 S.C. 367, 373, 532 S.E.2d 269, 273 (2000). “Champerty is defined as a bargain by a person with a plaintiff or a defendant for a portion of the matter involved in a suit in the event of a successful termination of the action, which the person undertakes to maintain or carry on at his own expense. State v. Chitty, 17 S.C.L. (1 Bail.) 379, 400 (1830); 14 C.J.S. *Champerty and Maintenance* § 2 (1991); 14 Am.Jur.2d *Champerty and Maintenance* § 3 (1964). A champertor is one who purchases an interest in the outcome of a case in which he has no interest otherwise. A champertous agreement is unlawful and void where the rule of champerty is recognized, and the tainted agreement is unenforceable. 14 C.J.S. *Champerty and Maintenance* § 17; 14 Am.Jur.2d *Champerty and Maintenance* § 7. Barratry (or barrety) is the offense of frequently exciting and stirring up quarrels and suits between other individuals. Chitty, supra; 14 C.J.S. *Champerty and Maintenance* § 2; *Black’s Law Dictionary* 150 (1990). Champerty and barratry have been described as forms of maintenance, which is defined as ‘an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend [the suit].’ 14 C.J.S. *Champerty and Maintenance* § 2(b); 14 Am.Jur.2d *Champerty and Maintenance* § 2.”

The evidence further supports the inference that Defendant is not entitled to the protection of the privilege because his publication of the defamatory statements was not uttered in furtherance of the litigation. The privilege provides protection only upon a “bipartite showing that the statements were issued as *part of a judicial proceeding* and the alleged defamation is relevant to a matter at issue in the case.” Crowell, 301 S.C. at 430, 392 S.E.2d at 467. Defendant’s defamatory accusations are more akin to a party broadcasting defamatory information about another on the courthouse steps, which is generally held to enjoy no privilege. The privilege does not protect the publication of defamatory statements when not required in furtherance of any litigation. See, e.g., Asay v. Hallmark Cards, 594 F.2d 692 (8th Circuit); Bender v. Smith Barney, 901 F. Supp 863, 871 (D.N.J. 1994); Pratt v. Nelson, 164 P.3d 366 (Utah 2007) (stating that privileged statements made “excessively,” i.e. to more persons than necessary to resolve the dispute, lose their privileged status; publication must somehow further resolution of a dispute to be privileged).²

The litigation privilege does not give Defendant *carte blanche* to disseminate defamatory information about Plaintiffs to anyone so long as Defendant can articulate some connection, no matter how tenuous, between the recipient and a contemplated lawsuit. Instead, the privilege is limited to “legitimate investigations or inquiries,” and there is no evidence that Defendant made an investigation or inquiry. Crowell, 301 S.C. at 432, 392 S.E.2d at 468. The publications of

² Defendant in his brief also conflates the standards used to assess false statements contained in actual pleadings (“Defamatory matter contained in pleadings filed according to law in a court having jurisdiction, if relevant and pertinent to the issues in the case, is absolutely privileged; and it is immaterial that the allegations are false and malicious and are made under cover and pretense of a wrongful or groundless suit”) with the standard Defendant urges in this motion related to pre-suit investigations (“bipartite showing that the statements were issued as *part of a judicial proceeding* and the alleged defamation is relevant to a matter at issue in the case.” Crowell, 301 S.C. at 430, 392 S.E.2d at 467). Further, contrary to Defendant’s assertions in his brief, Plaintiffs did not present any evidence of, nor seek any recovery at trial for attorney’s fees or costs associated with the class action litigation.

Defendant's statements were foreign to the interest of the privilege and "serve only the interests" of Defendant. Bender, 901 F. Supp. at 871. Defendant's statements were disseminated only *after* Defendant received legal papers from Plaintiffs and was faced with eviction. The evidence indicates that Defendant's statements were not part of any legitimate investigation or inquiry and instead were made for the sole purpose of coercing Plaintiffs into letting him and his operating company, BWR, Inc., remain in possession of the campground. The litigation privilege is carefully circumscribed to include only the legitimate investigations or inquiries made outside of the court proceedings in order to avoid providing litigants, like Defendant, with free rein to smear the reputation of opponents without consequence.

Accordingly, Defendant has failed to satisfy the elements of the defense of absolute privilege.

C. Damages

Defendant, in his motion, argues that the only proof of damages presented to the jury was evidence of lost profits to Big Water Resort, LLC. Plaintiffs argue that ample evidence of damages to each of the Plaintiffs was presented at trial.

Defendant's argument overlooks the fact that in an action for libel, general damages are presumed, meaning that no proof of general damages is necessary. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 510, 506 S.E.2d 497, 502 (1998). Even if this were not the case, Plaintiffs Clark and Lovell testified about how their reputations have suffered as a result of Defendant's statements. Lovell testified about how he has relatives and associates who live in the area that saw the postcard and heard about Defendant's defamatory statements.

Additionally, Plaintiffs presented detailed evidence to the jury of the significant financial damages sustained by TLC Holdings, LLC due to the defamation. Clark testified about how TLC suffered damages resulting from the loss of the established business model due to Defendant's

statements, and how the defamation damaged TLC Holdings, LLC as well as diminished the value of property it owned.

Defendant also claims that Plaintiffs presented speculative testimony about lost profits. The testimony supports the inference that due to the defamation, TLC was unable to rent the property for use as Big Water Resort, which would have supported substantial rent revenue had they been able to continue with the then existing business model. The probative nature of the proof of this revenue stream was supported by the historic development of the start-up business venture and Clark's substantial expertise in real estate development. Further, Clark testified about the diminished value of TLC Holdings as an entity due to Defendant's defamatory statements. Clark also offered his opinion as to the diminished value of TLC Holdings' property, which is permissible under South Carolina law. See Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 598, 493 S.E.2d 875, 881 (Ct. App. 1997) ("The rule that a property owner is competent to present an opinion as to the property's value is well recognized."). The evidence of diminished value of real property owned by TLC Holdings, LLC in and of itself supports the amount of the jury's verdict.

Plaintiffs presented a substantial amount of evidence about the damages they themselves suffered, not about any damages Big Water Resort, LLC may have suffered. Plaintiffs' evidence was sufficient to support the jury's damages award. Further, the general verdict form, which was agreed to by all parties, makes it impossible for the court to determine which elements of damage sustained by which Plaintiff or Plaintiffs supported the jury's verdict. It is clear that admissible evidence and legally recoverable damages (actual and/or general damage) are sufficient to support the verdict of \$3.5 million returned by the jury.

Viewing the evidence in the light most favorable to Plaintiffs, the Court finds that there is sufficient evidence and legal basis to sustain the jury's verdict. Accordingly, the Court denies Defendant's motion for JNOV.

MOTION FOR NEW TRIAL

A. Legal Standard

Rule 59(a) of the South Carolina Rules of Civil Procedure provided in part as follows: "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State. . . ." Historically, trial courts have granted motions for new trial in order to correct trial errors such as evidentiary rulings and jury charges that are preserved by timely trial objections. See, e.g. *Winters, et al v. Fiddie, et al*, 394 S.C. 629, 716 SE 2d 316 (Ct. App. 2011).

B. Damages

As explained above, Plaintiffs presented substantial evidence as to damages suffered by each of the Plaintiffs. That analysis does not need repeating here.

C. Jury Instruction

Defendant argues that it is entitled to a new trial because the court erroneously charged the jury in accordance with Plaintiffs' requested charge number 8. The charge was from the case of Leevy v. North Carolina Mut. Life Ins. Co., which provides as follows:

It is next contended that the trial judge erred in charging the jury as follows: "If the defendants undertook to justify the slander and prove the truth of the statements, and failed because justification is unsupported by the evidence, it may be considered a circumstance of aggravation, and a continued and express malice, and may properly be considered by the jury in estimating the damages."

It is generally held that there is peril to the defendant in his plea of justification. It is, to a certain extent, a repetition of the slander or libel, and unless sustained, may be considered by the jury as aggravating damages.

184 S.C. 111, 191 S.E. 811, 814 (1937). Many other cases from this state set forth the same proposition. See, e.g., Burckhalter v. Coward, 16 S.C. 435, 441 (1882); Finch v. Finch, 21 S.C. 342, 344-45 (1884); Duncan v. Record Pub. Co., 145 S.C. 196, 143 S.E. 31, 40 (1927).

Defendant seeks to distinguish the common law rule by asserting that the plea of justification "was not asserted by defendant." Defendant's memorandum at p. 1. This position lacks merit. The common law defense of justification is equivalent to the modern defense of "truth" which was pled by Defendant and charged to the jury as a complete defense, about which the Defendant bore the burden of proof. Johnston v. Belk-McKnight Co. of Newberry, 188 S.C. 149, 198 S.E. 395 (1938) ("It is true that the defendant did not plead justification; that is to say, it did not plead the truth of the alleged slanderous utterances charged to it.").

Defendant argues that if a plea of justification is the legal equivalent of the defense of truth, then there was abundant evidence introduced at trial of justification. Defendant's argument, however, begs the question. The jury obviously did not find justification (i.e., truth) was "supported by the evidence," and it rejected Defendant's claim that his statements were true. It is the jury, not defense counsel, who determines whether or not the defense of truth was "supported by the evidence."

Defendant also claims that the charge was in error because Plaintiffs withdrew their demand for punitive damages. According to Leevy, supra, a failed defense of truth can be considered by the jury as a republication of the defamatory utterance and as causing additional damages. Further, the Leevy decision did not involve or even mention punitive damages.

Accordingly, the Court finds that the jury's verdict was properly supported by the evidence at trial. The Court finds that a new trial is not necessitated here. Thus, Defendant's motion for a new trial is denied.

CONCLUSION

For the reasons set forth above, the Court DENIES Defendant's motion for judgment notwithstanding the verdict and motion for a new trial.

IT IS SO ORDERED.

April ____, 2018

George M. McFaddin, Jr.
Presiding Judge, Third Judicial Circuit



Clarendon Common Pleas

Case Caption: TLC Holdings LLC , plaintiff, et al VS M B Hutson , defendant, et al

Case Number: 2015CP1400615

Type: Order/JNOV

So Ordered

S/George M. McFaddin, Jr., #2759