IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No.: 2015-CP-27-0364

John Doe .....Appellant,

-v-

Beaufort Jasper Academy for Career Excellence,.....Respondent

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Initial Brief of Appellant

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STATEMENT OF THE ISSUES ON APPEAL

I. **DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENT BEAUFORT-JASPER ACE WHEN THE RECORD CONTAINS AMPLE EVIDENCE TO OVERCOME THE MOTION, AND WHEN DISCOVERY WAS INCOMPLETE?**

STATEMENT OF THE CASE

This case arises from false and defamatory statements published by a member of the administration of Beaufort-Jasper Academy for Career Excellence (hereinafter, "ACE"), against John Doe, who was an instructor at the school. Through letters mailed to John Doe's home addresses, the ACE administration employee published to Doe's wife that John Doe was having an affair with another instructor at ACE. The allegation was patently untrue.

Due to the sensitive and personal nature of the false allegations, on October 29, 2013, John Doe filed a Motion for Leave of Court to Protect the Identity of the Plaintiff and to Proceed Under an Order of Confidentiality. (Motion for Confidentiality, 10/29/13). The circuit court granted this request. At the same time, Doe filed a Motion for an *Ex Parte* Temporary Restraining Order, without notice, pursuant to Rule 65(b), SCRCP. (Motion for *Ex Parte* TRO, 10/29/13). The motion for temporary restraining order sought to enjoin Respondent, its employees, and the Jasper County Sheriff's Office from altering, repairing, or manipulating a computer hard drive that had been taken into evidence from ACE by the Sheriff's Office in investigating the creation of the false letter(s) mailed to Doe's home. On October 30, 2013, the circuit court granted the *Ex Parte* Temporary Restraining Order. (Order Granting *Ex Parte* TRO, 10/30/13). Thereafter, counsel for Doe, ACE, and Jasper County entered a Consent Order for Permanent Injunction concerning the preservation of the computer equipment at issue. (Consent Order for Permanent Injunction, 11/20/13).

On August 18, 2015, pursuant to the South Carolina Tort Claims Act, John Doe brought this action in the Jasper County Court of Common Pleas. (Summons and

Complaint). Doe alleged causes of action for negligence and defamation as against Respondent ACE, the Beaufort County School District, and Jasper County School District.[1] Specifically, Doe alleged that on August 21, 2013, and on multiple dates thereafter, an employee or employees in ACE's administration published to third parties, including Doe's family, false accusations that Doe had an extramarital sexual relationship with a co-worker. (Complaint, Paragraph 5).

The parties conducted limited discovery. On June 15, 2017, Respondent filed the Motion for Summary Judgment from which this appeal arises. Around the same time, the parties jointly sought a Scheduling Order allowing the parties to complete discovery and to mediate the case by September 30, 2017. (Consent Order, July 3, 2017). Also, in July of 2017, the parties agreed to a protocol for inspecting Respondent's hard drive that was subject to the Consent Order for Permanent Injunction. The parties agreed to split the costs for ACE's technology specialist to inspect the hard drive and provide the parties with a list of its contents. (Correspondence, Dukes to Creech, July 26, 2017).

Respondent's Motion for Summary Judgment was heard by the trial court on August 24, 2017, and the trial court informed the parties that the matter would be taken under advisement. Next, by email from Respondent's counsel on September 25, 2017, as ACE's counsel inquired whether the trial court would require a proposed written order, counsel for Doe was provided with a copy of a Form 4 Order granting summary judgment to ACE. Prior to this email, Doe nor his counsel received any notice, electronic or otherwise, of the entry of any order in this case.

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[1] As its name implies, Beaufort-Jasper Academy for Career Excellence was created and funded by both Jasper and Beaufort counties' school districts. After instituting this suit, the parties were able to agree that Doe and BJACE were the proper parties to the suit; Jasper County School District and Beaufort County School District were dismissed by agreement.

The Form 4 Order signed by Judge Harrington on the date of the hearing states "Defendant Beaufort Jasper Academy for Career Excellence's Motion for Summary Judgment is granted," yet, the Order has a box checked indicating that the Order did not end the case. (Form 4 Granting Summary Judgment, August 24, 2017.)

Because the Form 4 had never been "entered" or served on any counsel through the Clerk's office, and due to the facially confusing Form Order, ten days after receipt of the Order, on October 5, 2017, Doe timely served and filed Plaintiff John Doe's Motion to Alter, Amend, and/or Reconsider Pursuant to Rule 59(e). (Motion to Reconsider, October 5, 2017.) Doe's motion sought clarification of the Form 4, raised numerous substantive and procedural issues, and specifically sought reconsideration and withdrawal of the Order granting summary judgment. More specifically, Appellant requested that if, indeed, the trial judge intended to grant summary judgment through the initial Order, then the Court should enter an Order with specific findings of fact and conclusions of law on the issues raised by the parties so that appellate review could be had. (Id.)

On March 8, 2018, Judge Harrington again issued a Form 4 Order denying Doe's Rule 59 Motion to Reconsider, written entry of which was received through Jasper County's electronic filing system that same day.

On April 11, 2018, John Doe served his Notice of Appeal of two decisions by the trial court: (1) the March 8, 2018 Order Denying Plaintiff's Rule 59 Motion to Reconsider, Alter, and/or Amend; and, (2) the August 24, 2017 Order granting Defendant's Motion for Summary Judgment.

STATEMENT OF THE FACTS

John Doe was an instructor at Beaufort Jasper Academy for Career Excellence located in Jasper County. (Deposition of Doe). On August 21, 2013, Doe's wife received a typed letter addressed to her and signed anonymously as "sister to sister." (JCSO Incident/Investigation Report). The letter is filled with vulgar, misogynistic, and racist language, and relative to the claims of defamation, the letter falsely accuses Doe of an extramarital affair:

> Ms. [REDACTED]
>
> I heard the rumors for a long time. I figure I should mine my own business because it did not concern me or my job. but i cant sit by and watch that white bitch mess with your husband and diss you. I am sure you know who I am talking about. [NAME REDACTED]. That aint right at all. I really was not gonna say anything but it was not until i saw hi, kiss her the other day in his classroom…

("Sister to Sister" letter). The letter goes on explicitly and profanely to state (amongst many other things) that the Doe was in fact having sexual intercourse with the female ACE employee. (Id.)

Immediately following his wife confronting him with the "Sister to Sister" letter, Mr. Doe reported the letter to the School Resource Officer, a member of the Jasper County Sheriff's Office ("JCSO"). JCSO opened an Incident Report and the entire JCSO investigative file is part of the record in this case, through discovery. Doe immediately suspected that the letter was written by an employee of ACE, as the letter contained the names of former ACE employees, as well as a private, internal phone number to Doe's alleged paramour that would only have been known to ACE employees. (JCSO Supplemental Incident Report, p. 3).

On August 23, 2013, the same "Sister to Sister" letter addressed to Doe's wife was received at a post office box belonging to Doe's father. That post office box belonging to Doe's father was the address that Mr. Doe had on file with ACE in his employment records, and Mr. Doe had not updated the school with a subsequent change of address. (JCSO Supplemental Incident Report, P. 5). In the course of investigating the matter, the investigating officer from JCSO also received confirmation from ACE's administration that the envelope containing the second letter was indeed from ACE, and "came from someone at the school." (Id., p. 5).

During the process of investigating the matter, Doe and others believed that the Director of ACE, Deonia Simmons, was involved in the creation and publication of the "Sister to Sister" letter. In fact, during the investigation by JCSO, Mr. Simmons ultimately turned over to the police a second letter, addressed to Simmons and signed "i saw it." This letter to Director Simmons, in the same racist and profane language as that to Doe's wife, purports to verify, bolster, and prove Doe's infidelity. ("I saw it" Letter.)

Ultimately, during the course of investigating the matter, the JCSO took into evidence the computer hard drive from ACE which was the subject of the Consent Permanent Injunction and which was being forensically examined at the time of the trial court's grant of summary judgment to the Defendant.

STANDARD OF REVIEW

"Since it is a drastic remedy, 'summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.'" Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E. 2d 537 (1991).

The standards governing summary judgment are well established, and appellate courts apply the same standard as the trial court. Summary judgment is only appropriate where there is no genuine issue of material fact, and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. 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. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). On a motion for summary judgment, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Summary judgment is an extreme remedy to be cautiously invoked." Hollomon v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Baughman, 306 S.C. at 112, 410 S.E. 2d at 543.

ARGUMENT

I. The Trial Court Erred in Granting Summary Judgment on Doe's Defamation Cause of Action Because Ample Evidence Exists to Create Genuine Issues of Material Fact as to the Issues and Defenses Raised by Respondent, and, Because the Parties Had Not Yet Completed Discovery.

The trial court erred in granting summary judgment in this matter. Substantively, as to the defamation cause of action, John Doe presented more than the mere scintilla of evidence required to survive the motion. These factual issues preclude legal findings that ACE, an entity that falls under the S.C. Tort Claims Act, is entitled to judgment as a matter of law on the issues/defenses raised by its summary judgment motion. Second,

from a procedural standpoint, the trial court erred by granting summary judgment when the parties had not completed discovery, were under an existing consent scheduling order allowing continuing discovery, and the parties were jointly pursuing the gathering of forensic computer analysis through the discovery process.

A. The Grant of Summary Judgment Must be Reversed Because as to Each Issue or Defense Raised by ACE, Sufficient Evidence Exists to Defeat Summary Judgment for Doe's Defamation Cause of Action.

Through its motion to reconsider, Appellant Doe requested that the trial court issue an order that included findings of fact and conclusions of law. However, the trial judge failed, or refused, to issue such findings and the language of the Order of March 8, 2018 denying reconsideration from which this appeal arises reads, in relevant part, as follows:

> Plaintiff John Doe's Motion to Alter, Amend, or Reconsider this Court's Order granting summary judgment to Defendant Jasper Academy for Career Excellence is denied pursuant to SCRCP Rule 59. At the hearing on August 24, 2017, Defendant moved for Summary Judgment based on a lack of genuine issues of material fact, arguing Plaintiff's claims were barred by the South Carolina Tort Claims Act and that Plaintiff had failed to produced evidence to support its claim for negligence. The Court Granted Defendant's Motion as Plaintiff failed to produce a scintilla of evidence to defeat these arguments.

(Order of March 8, 2018). The Order makes no findings of fact or conclusions of law as to the particular issues/defenses raised. Nor does the Order speak to the main cause of action for defamation. Therefore, Appellant must presume that the trial judge ruled for Defendant as to both the negligence and defamation causes of action, and as to all issues/defenses raised. Through its motion, ACE claimed entitlement to summary judgment on four grounds:

1. Plaintiff's claims for negligence fail as a matter of law as Plaintiff has no and cannot establish that ACE committed any negligent act or omission which proximately caused Plaintiff's alleged damages.

2. Plaintiff's claims fail as a matter of law as ACE is not liability for any alleged failure to adopt or enforce any written law or policy concerning management of personnel records or to prevent an employee from creating and publishing the alleged defamatory statements. S.C. Code Ann. § 15-78-60(4).

3. To the extent an employee of ACE created and published the alleged defamatory statements, ACE is immune from liability for all of Plaintiff's claims as a matter of law pursuant to S.C. Code Ann. § 15-78-60(17), as such conduct was outside the scope of any employee's official duties.

4. Plaintiff's claim for defamation fails as a matter of law as ACE is not liable for any alleged employee conduct which constitutes actual malice or intent to harm. S.C. Code Ann. § 15-78-60(17).

(Motion for Summary Judgment, June 15, 2017).

At its heart, this is a defamation case. Accordingly, at the hearing on this matter, the core issues raised and argued were the immunities and protections provided by the S.C. Tort Claims Act exceptions to Section 15-78-60(17), which relate to the defamatory statements at issue. For that reason, and to simplify the scope of the appeal, Doe waives any claim to damages arising from alleged negligence by ACE or its employees. (First Cause of Action for Negligence). Similarly, as to the second issue/defense raised by ACE in its motion for summary judgment (SCTCA exception to waiver of immunity found in §15-78-60(4) concerning the adoption, enforcement, or compliance with procedures), Appellant waives any claim of entitlement to damages resulting from ACE's negligence through failure to manage personnel records or to prevent an employee from creating and publishing the defamatory statements. While waiving or conceding the negligence action, as to the Second Cause of Action for Defamation, the Orders below must be reversed.

Section 15-78-60(17) of the SCTCA provides that a governmental entity is not liable for a loss resulting from:

> (17) employee conduct outside the scope of his official duties or which constitutes, actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.

Id. Under this exception, ACE argues that even if an employee of ACE did create and publish the defamatory statements, as a matter of law, ACE is immune from liability because such conduct was necessarily outside the scope of any employee's official duties. This extremely broad reading of the exception flies in the face of existing case law and the evidence in the record.

First, the factual analysis to be applied in the case at bar on the issue of "the scope of official duties" is not unlike the analysis undertaken by this Court in the case of Murphy v. Jefferson Pilot Communications Company and WCSC, Op. No. 3988 (Ct. App. 2005). In Murphy, Donald Feldman was the "Assistant VP News" for Jefferson Pilot and "news director" of WCSC and defamed the plaintiff. The trial judge granted directed verdicts in favor of Jefferson Pilot and WCSC and refused to extend the principle of vicarious liability to them from Feldman's defamatory actions/statements. The Murphy Court reversed, explaining:

> Clearly, there is legal authority that "a principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority." Murray v. Holnam, Inc., 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct. App. 2001). "Under fundamental principles of South Carolina law, a master is liable for and is charged with knowledge of the acts and conducts of his servants operating within the scope of their employment." Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 227, 317 S.E.2d 748, 753 (Ct. App. 1984). "If the servant is doing some act in furtherance of the master's business, he will be regarded as

> acting within the scope of his employment, although he may exceed his authority." Crittenden v. Thompson-Walker Co., 288 S.C. 112, 115, 341 S.E.2d 385, 387 (Ct. App. 1986) (citations omitted). **If there is doubt as to whether the servant was acting within the scope of his employment, the doubt will be resolved against the master at least to the extent of requiring the question to go to the jury. Id. at 116, 341 S.E.2d at 387.**

Murphy, (emphasis added). The agent/principle, servant/master analysis of Murphy and the cases cited therein is no different than the "scope of official duties" analysis for the ACE employee at issue and his TCA entity employer, ACE.

Even on the limited record before the Court before the completion of discovery, Appellant Doe presented evidence from which a jury could find that the creation and publication of the defamatory statements were conducted by the ACE administration employee within the scope of his duties. The record shows evidence that an employee of ACE within the administration's office – and even without regard to the ultimate identity of that person – used ACE equipment and property to create and publish the defamatory statements at issue. The ACE employee used ACE's computer, accessed ACE personnel files to locate private information to publish the letter, and mailed the letters in envelopes ordered for and specifically used by the ACE office. (JCSO Supp. Report, p. 5). Moreover, the subject of the defamatory statement (Doe) and his alleged paramour were both members of the ACE staff, subject to supervision and control by ACE's administration. Thus, a scintilla of evidence exists from which a jury might conclude that the subject of, creation of, and publication of the defamatory statements were conducted within the official scope of the ACE employee's duties.

As in Crittenden, even if the ACE employee in fact exceeded his authority, if the ACE employee was doing some act in furtherance of ACE's business, he should be

"regarded as acting within the scope of his employment." Id., 288 S.C. at 115, 341 S.E.2d at 387. Furthermore, Crittenden and Murphy instruct that if there is doubt as to whether the ACE employee was acting within the scope of employment, "the doubt will resolved against the master at least to the extent of requiring the issue to go to the jury." Crittenden, at 116, 341 S.E.2d at 387.

Finally, to grant summary judgment on Doe's defamation cause of action based on this issue and §15-78-60(17), fundamentally misunderstand and misapplies the nature of exceptions to the waiver of immunity under the Tort Claims Act. It is blackletter law that the burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense. Wooten by Wooten v. S.C. Dept. of Transp. 326 S.C. 516, 485 S.E.2d 119 (Ct. App. 1997). Here, there is no showing, factually, or legally by ACE, to carry its burden on this defense. ACE has made no showing to meet its burden, of what the "official duties" of its employee are. Rather, the only evidence in the limited record at hand shows evidence and inferences from which a jury could conclude the ACE employee's publication was within the official duties. To grant summary judgment on this affirmative defense/TCA exception on the record before the trial court is reversible error.

ACE's last ground for summary judgment (No. 4 in its Motion for Summary Judgment) argued that ACE was immune from liability to Doe because the conduct complained of constituted actual malice or intent to harm under §15-78-60(17). This argument also fails, and summary judgment should have been denied.

Again, on this issue, ACE bears the burden to prove the affirmative defense. There has been no showing, factually or legally, which carries ACE's burden and which would have allowed the trial court to rule that the defamatory statements here were made with "actual malice" or "intent to harm." The fallacy of ACE's argument is borne of the fact that the defamatory statements here – accusing a married man of adultery – are actionable *per se*. Falsely accusing one of adultery or unchastity is defamatory on its face, and actionable *per se*. Holtzscheiter v. Thomson Newspapers, Inc. 332 S.C. 502, 511, 506 S.E.2d 497, 502 (1998). When a defamatory statement is actionable *per se*, the Defendant is presumed to have acted with common law malice." Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). "Common law malice means the defendant acted with ill will toward the plaintiff, or acted recklessly or wantonly…" That the type of defamatory statement made is actionable *per se*, and therefore carries the legal presumption of common law malice, does not shield ACE from liability.

In fact, recently this very Court has ruled that a similar defamatory statement – made by an employee of a school district subject the Tort Claims Act and which was actionable *per se* – should have gone to the jury.

In McBride v. School Dist. of Greenville County, 389 S.C. 546, 298 S.E.2d 845 (Ct. App. 2010), plaintiff McBride appealed the trial court's grant of a directed verdict on her claim that she was defamed by a school district employee who alleged that McBride stole school property. "As to the first item that McBride claims is defamatory, we believe [district employee's] allegation that McBride stole school property should go to the jury." Id., 298 S.E.2d at 852. This court explained that the allegation of theft was actionable *per se*. Id. Like the actionable *per se* defamatory statements against Doe, the statement

against McBride carried the presumption of common law malice. Yet, this Court ruled McBride was entitled to reach a jury on the actionable *per se* statement charging her with theft. Likewise, had the trial court considered the cases presented to it, the judge should have ruled that Doe survives summary judgment on the actionable *per se* statements of adultery made against him by a school employee.

Finally, the trial court erred in granting summary judgment on the "intent to harm" language of §15-78-60(17), another affirmative defense for which ACE did not meet its burden. The question of intent under this is exception is not the intent to act. Rather, it is the intent to harm. Eldeco, Inc. v. Charleston County School District, 372 S.C. 470, 642 S.E.2d 726 (2007). While damages are presumed for defamatory statements that are actionable *per se*, that presumption does not prove that the publisher of the statement intended harm. In fact, here there is no showing whatsoever as to the intent of the ACE employee publisher. In relying on this defense, ACE has not met its burden. Moreover, as discussed briefly below, because the grant of summary judgment was premature and before the end of discovery, the intent of the ACE employee who published these statements is unknown by both parties, as well as the court. The grant of summary judgment on this argument was inappropriate.

B. The Trial Court Erred in Granting Summary Judgment Before the Completion of Discovery and this Matter Should be Remanded to the Circuit Court to Allow the Parties to Complete Discovery.

"Summary judgment is an extreme remedy to be cautiously invoked." Hollomon v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full

and fair opportunity to complete discovery." Baughman, 306 S.C. at 112, 410 S.E. 2d at 543.

At the time of the hearing on ACE's Motion for Summary Judgment, the parties were within their agreed upon scheduling order providing for the completion of discovery and a date to mediate. (Order; Transcript of Hearing). The parties were jointly paying for a forensic computer analyst to remove information contained upon ACE's hard drive which had been seized as evidence by the Jasper County Sheriff's Office. At the hearing on this matter, counsel for Doe objected to the hearing of the matter and explained that the deposition of Deonia Simmons, the ACE director suspected of authoring and publishing the defamatory statements had been requested, but not taken yet.

Under these circumstances, and with the seriousness of the allegations made against Doe, the trial judge should have allowed for the completion of discovery rather than issuing two orders which allow neither the parties, nor this reviewing Court, to determine the basis for the relief granted. This Court is now left to consider and unfinished record and to perform the task which the trial court should have performed in the first place. The trial court's order should be reversed, and the case remanded to the Circuit Court for the parties to finish depositions, written discovery, and the forensic analysis of the computer at issue.

CONCLUSION

For the reasons addressed herein the trial court's grant of summary judgment to Respondent ACE must be reversed.

Respectfully submitted,

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January 14, 2019
Ridgeland, S.C.

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

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-v-

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Initial Brief of Appellant* and *Designation of Matter to be Included in the Record on Appeal* have been served upon the following counsel of record by mailing a copy of the same, postage prepaid, in the United States Mail, addressed as shown below this 14th day of January, 2019.

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January 14, 2019
Ridgeland, South Carolina

BY: _____
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January 14, 2019

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211-1629

Re: ***John Doe v. Beaufort Jasper Academy for Career Excellence;***
Civil Action No.: 2015-CP-27-0364

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

(1) two (2) copies of Appellant's Initial Brief;
(2) two (2) copies of Appellant's Designation of Matter to be Included in the Record on Appeal; and,
(3) two (2) copies of Appellant's Proof of Service of the same.

Please return a filed copy of the Brief, Designation, and Proof of Service in the envelope I have provided.

With kind regards, I am

Sincerely,

Matthew V. Creech

cc: R. Alexander Murdaugh, Esq.
Kenneth A. Davis, Esq.

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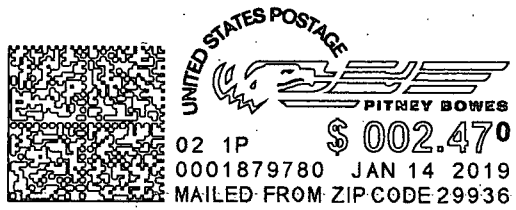

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