

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

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SC Court of Appeals

John Doe Appellant,

v.

Beaufort-Jasper Academy for Career Excellence Respondent.

INITIAL BRIEF OF RESPONDENT

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February 13, 2019

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT PROPERLY GRANT RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WHERE PLAINTIFF ADMITTED THAT THE ALLEGED DEFAMATORY STATEMENT MADE BY ANY PURPORTED EMPLOYEE OF RESPONDENT WOULD BE OUTSIDE THE SCOPE OF THE EMPLOYEE'S DUTIES?

- II. DID THE TRIAL COURT CORRECTLY DETERMINE THAT ADDITIONAL DISCOVERY WAS UNNECESSARY AS THERE WAS NO DISPUTED GENUINE ISSUE OF MATERIAL FACT?

STATEMENT OF THE CASE

On August 18, 2015, Appellant brought this action against Respondent alleging claims of defamation and negligence. Respondent filed a Motion for Summary Judgment on June 15, 2017. Prior to Respondent filing its motion, Respondent engaged in written discovery and deposed Appellant. Appellant did not engage in either written discovery or notice any depositions. Accordingly, following a hearing on Respondent's Motion, on August 24, 2017, the Honorable Kristi L. Harrington, entered a Form 4 Order granting Respondent's Motion for Summary Judgment. However, Appellant filed a Motion for Reconsideration on October 5, 2017, on the grounds that summary judgment was granted prematurely as discovery was not complete and that the "intentional act" exemption in the governing statute was inappropriate and requesting that the court enter a written order setting forth specific findings of fact and conclusions of law.¹ On February 20, 2017, the Court, in a Form 4 order, denied Appellant's Motion for Reconsideration finding that:

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 59. At the hearing on August 24, 2017, Defendant moved for Summary Judgment based on a lack of genuine issue of material fact, arguing Plaintiff's claims were barred by the South Carolina Tort Claims Act and that Plaintiff failed to produce 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. The Form 4 granting summary judgment should indicate the case is ended.

Thereafter, Appellant filed his Notice of Appeal with this Court on April 11, 2018.

¹ Pursuant to Rule 52(a), SCRCP, findings of fact and conclusions of law are unnecessary on decisions of motions made under Rules 12 or 56. Rule 52, SCRCP; see also Woodson v. DLI Props. LLC, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014).

STATEMENT OF THE FACTS

Appellant, a former employee of Respondent Beaufort-Jasper Academy for Career Excellence (“BJACE”), brought claims against BJACE for defamation and negligence.²

As set forth in the Complaint, on or about August 21, 2013, Appellant’s wife received an anonymous letter alleging that Appellant was engaged in an extramarital affair with a female co-worker. (Compl. ¶5; Exhibit A: Anonymous Letter 1). Appellant notified the school resource officer (“SRO”) of the letter but declined to file an official report at that time. As alleged by Appellant, on August 23, 2013, Appellant received another anonymous letter addressed to his wife and mailed to his father’s post office box. The author of the letters stated that he or she witnessed Appellant and his co-worker kissing in Appellant’s classroom, and observed Appellant engaged in other interactions with the co-worker which suggested an affair. Appellant alleged that his mailing addresses contained in his personnel file was used to mail the letters. On that same day, former BJACE Director, Deonia Simmons, received an anonymous letter alleging that Appellant was engaged in an affair with the same female co-worker. (Exhibit B: Anonymous Letter 2).

After receipt of the second letter addressed to his wife, Appellant contacted the SRO to file a report. (Exhibit C: Jasper County Sheriff’s Office Incident Report). The Jasper County Sheriff’s Office (“JCSO”) conducted an investigation of the incident. Despite BJACE’s policy against the use of confidential information gained in the course of employment, Appellant asserted his belief that an employee of BJACE published the letters. (Exhibit C: Policy GBEA). Based on Appellant’s belief that the letters were published by a BJACE employee, the JCSO retrieved computer hard-drives from several BJACE staff.

² In his initial brief, Appellant waived any claim for negligence against Respondent.

By Court Order dated November 14, 2013, JCSO retained possession of the computers until the parties agreed on a successor custodian. (Exhibit D: Consent Order for Permanent Injunction). However, criminal charges were not pursued; thus, the computer hard-drives were not inspected and the JCSO investigation concluded. Thereafter, Appellant filed the instant civil action on August 18, 2015.

On June 7, 2016, Respondent served Appellant with its First Set of Interrogatories and Requests for Production. Appellant failed to respond within the allotted time. In response to Appellant failing to provide responses to discovery, on August 26, 2016, Respondent filed a Motion to Compel with the court seeking Appellant's responses to written discovery. (Exhibit E: Motion to Compel). On September 20, 2016, at a hearing on Respondent's motion to compel, Respondent granted Appellant an extension to provide his responses by September 23, 2016. (Exhibit F: Form 4 Order dated 9/20/2016). Appellant failed to provide his responses and neither did he request an extension. As a result, on November 4, 2016, Respondent filed a Rule to Show Cause why Appellant should not be held in contempt. (Exhibit G: Rule to Show Cause). Thereafter, on January 4, 2017, Appellant finally provided his responses to discovery. Upon receipt of Appellant's responses to written discovery, Respondent conducted the deposition of Appellant on January 24, 2017.³

During Appellant's deposition, when asked whether he knew who wrote or published the letters, Plaintiff answered "No, I don't. But it had to be someone in the front office that had access to the file cabinets." (Depo. p. 37, lines 1-14, p. 41, lines 4-12). While Appellant contends that an employee of BJACE published the letters, he testified that such conduct by a person would be knowingly wrongful and not be in the performance of the individual's job duties, nor for the benefit

³ During this time of Respondent's discovery, Appellant made no effort to conduct discovery.

of BJACE. (Depo. p. 38, lines 5-10, p. 40, line 23 – p. 41, line 3, p.41, lines 13-16). Moreover, Appellant testified that such action was for personal reasons. (Depo p. 38, lines 11-13, p. 41, lines 13-16).

Thereafter, Respondent contacted Appellant in an attempt to inspect the computer hard-drives in the possession of the JCSO pursuant to the Consent Order for Injunction. (Exhibit H: Email dated 2/4/2017; Exhibit I: Letter dated 4/25/2017; Exhibit J: Letter dated 7/26/2017). In or around August 2017, the parties agreed to have Respondent inspect the hard-drives and provide a summary of its contents to Appellant. Prior to Respondent's request, Appellant did not take any steps to inspect the hard-drives or discover its contents.

On June 15, 2017, Respondent filed its Motion for Summary Judgment. During the approximately two (2) year discovery period prior to Respondent's motion, Appellant did not serve Respondent with any written discovery, neither did Appellant notice or conduct the depositions of any witnesses identified by Appellant.

STANDARD OF REVIEW

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 2 (2006). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that 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 court must view the evidence in the light most favorable to the nonmoving party. Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013). The nonmoving party may not rest on the mere allegations of his complaint but must set forth, by affidavit or other evidence, specific facts

showing that there is a genuine issue for trial. Id.; see also Bd. or Trs. for the Fairfield County Sch. Dist. v. State, 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014).

ARGUMENT

As an initial matter, Appellant has waived all arguments related to his negligence claim, as such we will only address Appellant's defamation claim.

I. **THE TRIAL COURT CORRECTLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE RESPONDENT CANNOT BE HELD LIABLE FOR DEFAMATORY ACTS OF EMPLOYEES WHICH ARE OUTSIDE THE SCOPE OF HIS OR HER OFFICIAL DUTIES.**

Appellant's claim that an employee misused personal information of Appellant to publish defamatory statements fail as a matter of law because such conduct, if done by an employee, is outside the scope of his or her official duties. In the instant case, no credible argument can be offered to show that the conduct alleged in this action can logically be included within the scope of official duties for any employee of the Respondent.

The South Carolina Tort Claims Act (hereinafter "the Tort Claims Act") abridges this State's absolute immunity under certain prescribed circumstances to provide for liability on the part of a governmental entity and its employees "while acting within the scope of official duty." S.C. Code Ann. § 15-78-20. The Act pointedly sets out that an act of an employee must be within the scope of his or her official duties for liability to attach to the entity. The Act defines "scope of official duty" to mean acting in and about the official business of a governmental entity and performing official duties. S.C. Code Ann. § 15-78-30(i).

The Tort Claims Act sets out thirty-seven "exceptions" to the waiver of sovereign immunity which significantly limit the tort liability of government entities. The provisions establishing limitations on and exemptions to liability are to be liberally construed in favor of limiting the liability. S.C. Code Ann. § 15-78-20(f). One such exemption from liability is that a

governmental entity cannot be held liable for a loss resulting from “employee conduct outside the scope of his official duties...” S.C. Code Ann. § 15-78-60(17). Accordingly, as an initial threshold, a person must first prove that an employee was acting in and about the official business of the governmental entity and performing official duties. See S.C. Code Ann. § 15-78-30(i).

In this instance, Appellant claims that an employee of BJACE misused the personal information of Appellant to publish defamatory statements accusing Plaintiff of engaging in an extramarital affair. At the hearing on Respondent’s motion for summary judgment, Appellant conceded that he did not know who published the defamatory letters. However, while there is no evidence in the record that an employee of BJACE published the defamatory statements, in taking Appellant’s allegation as true, Appellant failed to produce any evidence that such conduct was inside the scope of the employee’s official duties. On the contrary, Plaintiff admitted during his deposition that to the extent an employee published the defamatory statements, such act was neither for any purpose in the fulfillment of the duties of his position nor for carrying out any purpose or objective of BJACE. During Appellant’s deposition, he testified to the following:

Q: So in your opinion was the person who made this statement, was this person doing –acting [sic] doing their job when they made the statement? Were they doing it for the benefit of BJACE, for the school?

A: No, they wasn’t.[sic]

Q: So it wasn’t for the benefit of the school? It was in a personal regard?

A: Personal.

(Depo. p. 38, lines 5-13).

Q: But you are assuming it was an employee of ACE?

A: Someone in the front office. Someone that had access to the cabinets or access to my files.

Q: But you said personal was not doing in their official capacity?

You know, a personal nature against you?

A: Right.

(Depo. p. 41, lines 13-16).

Notwithstanding Appellant's lack of evidence that an employee published the defamatory letters, Appellant admitted that to the extent an employee engaged in such conduct, the conduct was for personal reasons not for the benefit of BJACE. Moreover, BJACE has a policy prohibiting the use of confidential personnel information. (See Exhibit K: Policy GBEA). In taking Appellant's allegations as true as to the misuse of his personal information, a violation of policy is inconsistent with the position that an employee was operating within the scope of his or her official duties by publishing the defamatory letters.

Appellant's reliance on Murphy v. Jefferson Pilot Communications Company and WCSC, 364 S.C. 353, 613 S.E.2d 808 (Ct. App. 2005) and Crittendon v. Thompson-Walker Co., 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986) is misplaced. As an initial matter, neither of the cases address the scope of official duties as defined under the Act. Rather, they contemplate an individual's scope of employment.

In addressing coverage issues under insurance policies, our Supreme Court has found that the term "scope of employment" is broader than the term "scope of official duties" as used in the Tort Claims Act. Frazier v. Badger, 361 S.C. 94, 102, 603 S.E.2d 587, 591(2004). As stated by the Court, whether an act is within the "scope of employment" may be determined from the circumstances of a particular case. Id. Nonetheless, to establish that an employee's conduct is in the course of employment requires an act in furtherance of the employer's business. Id.; see also

Crittendon, at 116, 341 S.E.2d at 387 (“ . . . 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). Appellant has not articulated any business purpose for the act about which he complains against BJACE.

While Appellant argues that it is possible that the alleged employee went beyond his authority in publishing the defamatory statement, it is clear that such conduct was not done in furtherance of BJACE’s mission to educate students. In support of liability against BJACE, Appellant purports that an employee’s use of an employer’s chattel creates an issue as to whether the employee was acting in the scope of his official duties. This argument is without merit. There is no evidence in the record showing that any person had authority to use school property for the purpose of sending the letters and thereby defaming Appellant. The publishing of the defamatory statements by an employee would be for an independent purpose wholly disconnected from BJACE’s mission. As Plaintiff stated, it was “personal.” (Depo., p. 38, lines 5-13, p. 41, lines 13-16).

Nonetheless, Appellant asserts that to the extent there is doubt as to whether an employee is acting within the scope of his or her duties, such issue should go to the jury. As detailed above, there is no dispute as to whether the alleged employee was acting within the scope of his or her official duties. Rather, Appellant admitted, on more than one occasion, that such person would not be performing their official duties or acting for the benefit of BJACE, but solely for personal reasons. Against the entire record showing otherwise, Appellant’s position lacks any evidence upon which a reasonable juror could find that the conduct described in Appellant’s pleadings is within an employee’s scope of work. This Court has held that “[t]he judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is

introduced solely in a vain attempt to create an issue of fact that is not genuine.” Priest v. Brown, 302 S.C. 405, 408-09, 396 S.E.2d 638, 639-40 (Ct. App. 1990).

Further, at the summary judgment hearing before the trial court, Appellant failed to produce any evidence by affidavit or otherwise in opposition to Respondent’s summary judgment motion as contemplated by the rule, relying solely on the allegations contained in his complaint. See Woodson, 406 S.C. 517, 753 S.E.2d 428 (2014); Bd. or Trs. for the Fairfield County Sch. Dist. v. State, 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014). “A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of material fact for the purpose of resisting summary judgment.” Shupe v. Settle, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994) (finding a plaintiff’s conclusory statement in an affidavit that she was a third-party beneficiary to a contract was insufficient where there was no evidence in the record indicating the same). Appellant failed to produce a scintilla of evidence in support of his claims and to defeat Respondent’s arguments that Appellant’s claims were barred by the Tort Claims Act as stated in the trial court’s order denying Appellant’s motion for reconsideration.

Accordingly, this Court should affirm the dismissal of Appellant’s defamation claim as the record is devoid of any evidence establishing a genuine dispute of material fact as to whether an individual was acting in the scope of his or her official duties at BJACE, contrary to the argument of counsel.

II. SUMMARY JUDGMENT WAS PROPERLY GRANTED BECAUSE ADDITIONAL DISCOVERY WOULD NOT UNCOVER ADDITIONAL RELEVANT EVIDENCE AND APPELLANT WAS DILATORY IN SEEKING DISCOVERY

The trial court properly granted Respondent’s summary judgment motion because Appellant failed to demonstrate that additional discovery would uncover relevant evidence creating a genuine issue of material fact and that he was not dilatory in seeking discovery.

While summary judgment is a drastic remedy, further discovery should not be granted unless the nonmoving party can show that further discovery will uncover additional relevant evidence and that the request is not a fishing expedition, and that they were not dilatory in seeking discovery. Padgett v. South Carolina Ins. Reserve Fund, 340 S.C. 250, 252, 531 S.E.2d 305(Ct. App. 2000) (citing Baughman v. American Tel. And Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)); see also Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438-38 (2003); John Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). The party claiming summary judgment is premature must advance a good reason why the time was insufficient under the facts of the case and why further discovery would reveal additional relevant evidence and create a genuine issue of material fact. Guinan v. Tenet Health Systems of Hilton Head, Inc., 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct App. 2009).

No additional discovery will cure the legal deficiencies of Appellant's claim. Further discovery will not uncover additional evidence as to whether the alleged defamatory conduct was in the scope of an employee's official duties. Moreover, as stated earlier, while it is unknown who published the defamatory statement, there is no disputed factual issue or doubt as to whether such conduct would be in the scope of an employee's duties. As Appellant testified, such conduct was for personal reasons not in performance of any official duties neither to further the interests of BJACE. Further discovery is unlikely to create any genuine issue of material fact. See Dawkins at 71, 580 S.E.2d at 440.

Moreover, Appellant failed to engage in the discovery process. Appellant was aware of the name of the individual whom he believes published the defamatory letters since 2013 but did not move to depose this individual or any other employee of the District. (Depo. p. 37, lines 1-13). In addition, Appellant knew of the existence of the hard-drives at the outset of this litigation, as Appellant was a party to the original consent order establishing the custodian of the hard-drives.

At the time of Respondent's motion, there was no scheduling order governing discovery. While the parties were engaged in joint inspection of the computer hard-drives retained by JCSO, the record does not reflect that Appellant served interrogatories, requests for production, or noticed any depositions in pursuit of his claims. Appellant had a full and fair opportunity to complete discovery. Appellant has not advanced a good reason why almost two (2) years was insufficient time under the facts of this case to complete discovery. See Middleborough Horizontal Prop. Regime Council of Co-owners v. Montedison S.p.H., 320 S.C. 470, 479-80, 465 S.E.2d 765, 771 (Ct. App. 1995) (finding that the nonmoving party had a full and fair opportunity to complete discovery where he failed to advance a good reason why four months was insufficient time under the facts to develop documents in opposition to the motion for summary judgment). Further, as stated by this Court, Appellant's conclusory statements as to the ultimate issue in the case is insufficient to defeat summary judgment where Appellant presented no evidence in opposition to Respondent's motion for summary judgment after having a full and fair opportunity to produce evidence. See Shupe, at 516-17, 445 S.E.2d at 655. Appellant should not be able to come to court seeking to benefit from his dilatory efforts in discovery.


Accordingly, the trial court's grant of summary judgment was appropriate where Appellant failed to establish that additional discovery would reveal relevant evidence related to any disputed factual issues and where Appellant was dilatory in seeking discovery.

CONCLUSION

The trial court, after viewing the undisputed facts in the light most favorable to Appellant and applying established law to the undisputed facts, found that Appellant's claims were barred by the Tort Claims Act. Accordingly, the trial court granted Respondent's motion for summary judgment. Respondent requests that this Court affirm the trial court's order.

Respectfully Submitted,

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February 13, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In The Court Of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2018-000641

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John DoeAppellant.

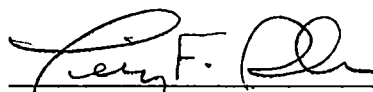
vs.

Beaufort-Jasper Academy for Career ExcellenceRespondent.

CERTIFICATE OF SERVICE

The undersigned of Boykin & Davis, LLC., hereby certifies that he has served the following counsel of record with the foregoing **INITIAL BRIEF OF RESPONDENT**, by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 13th day of February, 2019.

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February 13, 2019

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SC Court of Appeals

VIA HAND-DELIVERY

The Honorable Jenny Kitchings
Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: John Doe v. Beaufort-Jasper Academy for Career Excellence
C.A. No.: 2015-CP-27-0364

Dear Ms. Kitchings:

Please find enclosed the original and two (2) copies of the Initial Brief of Respondent and the Designation of Matters to Be Included in the Record on Appeal in the above-referenced matter. Please return a time-stamped copy to our courier.

Thank you for your assistance in this matter.

Sincerely,



Tierney F. Dukes

/clm

Enclosures

cc: Matthew V. Creech, Esq. (w/ encls. via U.S. Mail)
Kenneth A. Davis, Esq. (w/o encls.)
Charles J. Boykin, Esq. (w/o encls.)