

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

C. Victor Pyle, Jr., Circuit Court Judge
Edward W. Miller, Circuit Court Judge

Case No. 2005-CP-23-06048

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APR 25 2013

SC Court of Appeals

Sherrie Mann McBride,

Appellant

v.

School District of Greenville County,

Respondent

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the court err in directing a verdict in favor of the School District on the plaintiff's causes of action for abuse of process and defamation of character?
2. Did the court err in excluding relevant evidence and in limiting the presentation of the evidence related to the causes of action, and did the conduct of the proceedings deny the plaintiff due process?
3. Did the court err in allowing the defendant to amend its answer to assert affirmative defenses the defendant had waived?
4. Did the court err in reconstructing the testimony of Nancy Mann not preserved by the court reporter by simply adopting her testimony from the first trial?

ARGUMENT IN REPLY

Appellant, Sherrie Mann McBride, has fully briefed the above-stated issues in her principal brief. She files this reply brief to address only certain arguments made and authorities cited by respondent, the School District of Greenville County, not previously addressed in her brief; otherwise, appellant rests on the arguments and authorities set forth in her principal brief.

I. THE COURT ERRED IN DIRECTING A VERDICT IN FAVOR OF THE SCHOOL DISTRICT ON THE ABUSE OF PROCESS AND DEFAMATION OF CHARACTER CAUSES OF ACTION.

Respondent addresses this issue at Argument II of its brief. Its first contention is that it is immune from liability on the abuse of process cause of action pursuant to two provisions of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-60(3) and (23). (Final Brief of Respondent, Argument II, A, pp. 15-17). Contrary to respondent's argument, this cause of action does not stem from "execution, enforcement, or lawful implementation of any process" or from "institution or prosecution of any judicial . . . proceeding." Rather, it stems from the misuse of the process and proceedings – the use of

the process for a purpose other than that which it was intended by law to effect. *See Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 695 (1967). “[T]he essence of the tort of abuse of process centers on events occurring *outside* the process.” *See Swicegood v. Lott*, 379 S.C. 346, 353, 665 S.E.2d 211, 214 (Ct. App. 2008) (emphasis in original), *cert. denied*, June 24, 2009. It is the improper purpose, the use of process to obtain a collateral advantage, that is at the heart of the cause of action; the issuance or any formal use of the process itself does not constitute the tort. *See Swicegood*, 379 S.C. at 353, 665 S.E.2d at 695, *quoting Huggins*, 249 S.C. at 209, 153 S.E.2d at 694.

The existence of probable cause does not preclude recovery for abuse of process. If it did, an element of the tort of abuse of process would be the absence of probable cause. *Cf. Law v. South Carolina Dep’t of Corrections*, 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006) (lack of probable cause is an essential element of malicious prosecution). The tort of abuse of process is aimed at conduct apart from the *implementation* of process or the *institution* of criminal proceedings – it addresses the motivation behind such action. A governmental entity is not insulated from liability for abuse of process under Section 15-78-60(3) or (23) merely because probable cause existed.

Swicegood is instructive. There, it was undisputed the Richland County Sheriff’s Department had probable cause to arrest one of its deputies for “double-dipping” with respect to his pay as a deputy and his pay for special duty (“moonlighting”) assignments. Nonetheless, a jury question existed on the cause of action for abuse of process because, taking the evidence in the light most favorable to the deputy, the evidence was susceptible to the inference that the primary purpose of the investigation and issuance of

warrants was to coerce or extort the deputy's testimony against another officer. *See Swicegood*, 379 S.C. at 353-54, 665 S.E.2d at 214-15. Similarly, here, even if probable cause existed to arrest McBride, the evidence supported an inference that Roach and Oslager worked in concert to trump up the charges against McBride, for the ulterior and improper collateral purpose of having her terminated from her employment. Such conduct is not immune under Section 15-78-60(3) or (23).

The District contends the court appropriately directed a verdict on the abuse of process claim. (Final Brief of Respondent, Argument II, B, pp. 17-23). On this issue, the District argues its version of the facts and the inferences to be drawn therefrom. This argument, however, ignores the standard of review applicable to the grant of a directed verdict. The appellate court is not free to make credibility determinations or resolve conflicts in the evidence. Rather, it must determine if the evidence and the inferences that can reasonably be drawn therefrom, viewed in the light most favorable to the non-moving party, create a jury issue. *See McBride v. School Dist. of Greenville Co.*, 389 S.C. 546, 558, 698 S.E.2d 845, 854 (Ct. App. 2010). The District's argument also ignores the law-of-the-case doctrine and the decision of the Court of Appeals in the first appeal of this action, which held that more than one reasonable inference could be drawn from substantially the same evidence presented in the first trial, creating a jury issue on the abuse of process cause of action. *Id.*, 389 S.C. at 564-65, 698 S.E.2d at 854-55.

The same evidence on which this Court relied in the first appeal was again presented in the second trial: the animosity and ill-will Roach harbored against McBride; the close working relationship and friendship between Roach and Oslager; the involvement of Roach in Oslager's interrogation of Doe through repeated telephone calls;

and Doe's testimony that Oslager pressured him into implicating McBride. This evidence supports an inference that Roach and Oslager acted in concert to elicit information from Doe to use against McBride and orchestrated her arrest for the improper purpose of silencing her and having her fired. As this Court held in the first appeal, the trial court should have allowed the abuse of process cause of action to go to the jury. *Id.*

The District also contends the court appropriately directed a verdict on the defamation cause of action. (Final Brief of Respondent, Section II, C, pp. 23-31). On this issue, the District again ignores the law-of-the-case doctrine and the decision of the Court of Appeals in the first appeal, which held the statement made by William Roach, the school principal, was defamatory *per se*. *See id.*, 389 S.C. at 559-61, 698 S.E.2d at 852-53. That decision was not appealed by the District, and the holding of the Court of Appeals is conclusive.

Despite the Court of Appeals's prior decision, the District now contends Roach's assertion that McBride "cleaned us out" could have had a non-defamatory meaning. If this question is not precluded by the Court's 2010 determination that the statement was actionable *per se*, which McBride disputes, the District's argument again ignores the standard for a directed verdict. The contention that Roach's statement was not defamatory is but one inference to be drawn from the assertion that McBride "cleaned us out." The other inference, recognized by the Court of Appeals in the first appeal, is that the statement accused McBride of stealing school property. *See id.*, 389 S.C. at 561, 698 S.E.2d at 852. Even apart from the binding nature of the prior decision of this Court, where the evidence is susceptible of more than one inference, the issue is one for the jury and a directed verdict is inappropriate.

The District further argues that the statement, if defamatory, should not subject the District to liability under the doctrine of qualified privilege. This assertion again ignores the decision of the Court of Appeals in the first appeal, which rejected a claim of qualified privilege, both on its merits and on procedural grounds. The Court noted the District's argument that Roach's statement to a teacher's aide was not a publication to a third party but was privileged because they were both District employees, but the Court distinguished the authority cited by the District and rejected the claim of privilege. *See id.*, 389 S.C. at 562, 698 S.E.2d at 853. Moreover, the Court found the defense of qualified privilege, an affirmative defense, was not included in the District's answer and could not be asserted. *Id.* The District did not appeal these determinations, and they are the law of the case.

The District claims the discussion of qualified privilege in the 2010 opinion was "effectively dicta" and is not subject to the law-of-the-case doctrine. (Final Brief of Respondent, Argument I, p. 10). To the contrary, the Court's discussion of publication and privilege was a key component of the analysis of the directed verdict issue. As the District stated in its brief in the first appeal and as the Court of Appeals stated in its decision, the second element of the tort of defamation is an "unprivileged publication . . . to a third party." *See id.*, 389 S.C. at 559-60, 698 S.E.2d at 852; *see also* Final Brief of Respondent, Court of Appeals Appellate Case No. 2007-074169, filed May 8, 2009, p. 19). As part of its analysis of the sufficiency of the evidence to create a jury issue on the defamation cause of action, the Court was required to review the evidence pertaining to each element of the claim. The Court's holding with respect to privilege and publication is part and parcel of that analysis and is not *dictum*. The Court's rejection of the defense

of qualified privilege, a defense that operates to defeat the second element of the tort, was a binding adjudication of the issue then, and now, before the Court. The District did not appeal this ruling, and it is the law of the case.

The District cites a single case, *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989), in support of its contention that the law-of-the-case doctrine does not apply to *dicta*. The *Weil* decision is inapplicable to this case. In *Weil*, the Court of Appeals addressed whether a trial judge deciding a case on the merits was bound by a statement of another judge contained in an earlier order denying summary judgment. Because orders denying summary judgment are interlocutory in nature and never appealable, not even after final judgment, the Court refused to apply the law-of-the-case doctrine to bind the parties and the court to the statement made in the prior interlocutory order. *See Weil*, 299 S.C. at 89, 382 S.E.2d at 473-74.

Unlike *Weil*, the issue of publication and privilege decided by the Court of Appeals in the first appeal of this case was not *dictum*. It was a binding adjudication of the issue raised in the appeal – whether the evidence presented at trial was sufficient, in light of the elements of the tort of defamation, to submit that cause of action to the jury. Unlike *Weil*, the decision of the Court of Appeals on this issue was appealable. However, the District chose not to pursue further review of the issue in the Supreme Court. It cannot now assert a position inconsistent with the Court of Appeals's binding adjudication of the issue.

If it can be said that the Court's ruling on qualified privilege is somehow not subject to the law-of-the-case doctrine, this defense does not establish a basis for affirming the directed verdict. The District devotes a significant portion of its brief to

addressing the many components of a claim of qualified privilege. (Final Brief of Respondent, II, C, pp. 25-29). What is clear from the District's discussion is that the issue is one of fact for the jury. The District points to its version of the facts and the inferences it seeks to have drawn from the facts. However, other reasonable inferences may be drawn from the evidence – that Roach's statement was not made privileged by the occasion; that the privilege, if any, was abused by the ill-will Roach harbored against McBride and his motivation to cast her in a bad light; that the statement was not made in good faith, but as the product of his animosity toward McBride and his purpose of destroying her reputation and having her terminated; that it went beyond the scope of the purpose of the privilege, if any, and the interests it was designed to protect; and that it was made in reckless disregard of McBride's rights and of the truth. The authorities cited by the District acknowledge that abuse of privilege is ordinarily a jury issue. Upon the evidence in this case, viewed in the light most favorable to McBride, not the District, if the defense of privilege is allowed to be asserted, a jury issue existed on that question.

The District also contends the directed verdict was proper because McBride did not present evidence of damage to her reputation. This argument is without merit. This Court has held that the statement of Roach was actionable *per se*. *See McBride*, 389 S.C. at 560, 698 S.E.2d at 852. With respect to a statement that is actionable *per se*, general damages are presumed. *Id.*, 389 S.C. at 560, 698 S.E.2d at 852-53. Contrary to the District's contention, no additional proof of damages was required. Moreover, general damages are not limited to injury to reputation but also include mental suffering, hurt feelings, emotional distress, and similar types of injuries. *Id.*, 389 S.C. at 560, 698 S.E.2d at 852. Even if it could be argued that some level of proof were required, which

McBride disputes, the record documents McBride's resulting emotional distress and mental suffering.

Finally, for the first time in this case, the District has injected a completely irrelevant argument, citing First Amendment case law stemming from the decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). As the District acknowledges (Final Brief of Respondent, Argument II, C, p. 30), the United States Supreme Court has not extended the holding of *Gertz* to situations that do not involve public concern. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985). The remainder of the authorities cited by the District on this issue are from other jurisdictions and do not represent the law of South Carolina applicable in this case. The Court should reject the District's contention that proof of damage to reputation was required.

II. THE COURT ERRED IN EXCLUDING RELEVANT EVIDENCE AND IN PREVENTING THE PLAINTIFF FROM FULLY PRESENTING THE EVIDENCE IN SUPPORT OF THE CAUSES OF ACTION, AND THE COURT'S RULINGS DEPRIVED THE PLAINTIFF OF DUE PROCESS.

The District claims the evidentiary issues asserted in the second issue on appeal are not preserved. (Final Brief of Respondent, Argument III, pp. 31-34). To the contrary, a reading of the transcript reveals that McBride was repeatedly cut off and limited by the court in the presentation of her evidence. Although she was presenting her case *pro se*, she attempted throughout the trial to articulate the basis for the evidence she sought to have admitted. Frequently, the court ruled on objections before giving McBride an opportunity to respond, and frequently the court sustained objections that had not even been made, depriving her of any opportunity to put her argument on the record. At one point, McBride attempted to introduce an exhibit, which the court did not allow, and she explained the purpose for which she sought to have it admitted. Although the

excluded exhibit was not marked and made part of the record, a sufficient proffer was made through McBride's explanation that the exhibit showed the offices of Officers Lambert and Smith, located on school property. R. p. 233. This evidence was relevant to McBride's claim that the officers in the school services unit were agents of the District and was in response to testimony of Officer Oslager on cross-examination concerning Lambert being assigned as an "outside investigator." *See* R. pp. 217, 219-20, 233. To the extent that McBride's claims of error may not have been adequately preserved with respect to some of the court's evidentiary rulings, under the circumstances of this case, any deficiency in error preservation should be excused under the rule of futility. *Cf. State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (where, from tone and tenor of judge's remarks, it is apparent that objection would be futile, failure to make objection does not waive issue for appellate review).

III. THE COURT ERRED IN ALLOWING THE DEFENDANT TO AMEND ITS ANSWER TO ASSERT AFFIRMATIVE DEFENSES THE DEFENDANT HAD WAIVED.

Less than a week before trial, the court allowed the District to amend its answer to plead two affirmative defenses not previously pled in its original answer. One of those defenses was the defense of qualified privilege rejected by the Court of Appeals in the first appeal. The District contends the lower court properly allowed the amendment. (Final Brief of Respondent, Argument I, pp. 9-15).

The District first contends the Court of Appeals's discussion of qualified privilege in the first appeal of this case was "effectively dicta" and not subject to the law-of-the-case doctrine. This contention is addressed in the argument of the directed verdict issue, *supra* pp. 4-6, and that argument is incorporated herein by reference. The law-of-the-

case doctrine applies to the Court's analysis of the elements of the offense of defamation and its determination that a jury question was presented with respect to Roach's statement that McBride "cleaned us out." That doctrine applies to the Court's analysis of the issue of publication and privilege. That doctrine applies to the Court's determination that the District may not assert qualified privilege, which it failed to raise as an affirmative defense in its answer. Just as that doctrine applies to the merits determination made by the Court of Appeals on the directed verdict issue, it applies to the procedural component of the Court's decision as well. *See McBride*, 389 S.C. at 559-62, 698 S.E.2d at 852-53. The District did not appeal the Court's rulings, and they are binding on the litigants and the trial court as the law of the case. The trial court abused its discretion in allowing the assertion of a defense that the District waived by its failure to plead it in its answer and by its failure to appeal the adverse ruling of the Court of Appeals.

Relying on *Hall v. Woodward*, 30 S.C. 564, 9 S.E.684 (1889), the District contends that allowing amendment of an answer to assert new defenses following an appeal and remand is appropriate. *Hall* is not applicable to the facts of this case. The defenses allowed by amendment in *Hall* were not affirmative defenses, which are deemed waived if not pled. In this case, both defenses the District sought to add following remand were affirmative defenses – qualified immunity and immunity under Section 15-78-60(3).

Additionally, the defenses asserted in *Hall* had not been addressed in the decision of the original appeal, as the defense of qualified privilege was in the case. In *Hall*, the first appeal addressed the lower court's finding in favor of the defendant on a plea of payment of an obligation based on a presumption arising from lapse of time. The

appellate court reversed, finding certain payments by other obligors rebutted that presumption, and remanded the case for consideration of other defenses. *See Hall v. Woodward*, 26 S.C. 557, 2 S.E. 401 (1887). Following remand, the defendant was allowed to amend his answer to assert additional defenses. On appeal, the Court approved the lower court's allowance of the amendment. *See Hall v. Woodward*, 30 S.C. 564, 9 S.E.684 (1889). Significantly, the newly asserted defenses had not been addressed in the decision of the first appeal and were not precluded by the holding of the appellate court in that appeal. While the second *Hall* decision may generally stand for the proposition that parties may, under certain circumstances, amend their pleadings to assert new theories of defense, its holding does not apply to the unique situation presented by this case and the Court of Appeals's prior decision on the defamation cause of action, including its conclusions concerning publication and privilege. The Court should find that, under the circumstances of this case, amendment of the answer on the eve of trial to assert new defenses, one of which was rejected in the first appeal, was reversible error.

IV. THE LOWER COURT ERRED IN RECONSTRUCTING THE TESTIMONY OF NANCY MANN BY SIMPLY ADOPTING HER TESTIMONY FROM THE FIRST TRIAL.

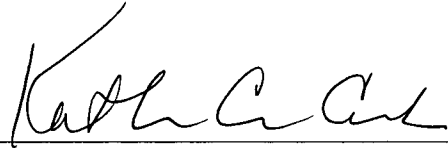
McBride challenges the lower court's failure to reconstruct the testimony of Nancy Mann, instead adopting her testimony from the first trial. Her proffered reconstruction of the witness's testimony pertained to the defamatory statements Roach was making in the school and community. The District claims McBride was not prejudiced thereby, arguing she could have elicited the same testimony through other witnesses or developed it through her own testimony. To the contrary, during the presentation of her case, McBride did not know the court reporter would fail to record

Ms. Mann's testimony. At trial, under an appropriate assumption that all of the testimony would be recorded, she had no need to develop the same testimony through other witnesses. Her own testimony was truncated, based on the court's admonition to get it concluded. R. pp. 350-51. The District seeks to have McBride penalized on this issue based on a situation that was unforeseen and completely outside of her control. She is entitled to a new trial at which she can fully develop the evidence related to the statements Roach made throughout the school and community.

CONCLUSION

For the foregoing reasons and for the additional reasons argued in appellant's principal brief, this Court should reverse the lower court's order granting a directed verdict in favor of the School District and remand the case for a new trial on both the defamation and abuse of process causes of action. The Court should also reverse the order allowing amendment of the District's answer. Moreover, the Court should reverse the reconstruction order and adopt the reconstruction proffered by McBride as the 2011 trial testimony of Ms. Mann.

Respectfully submitted,



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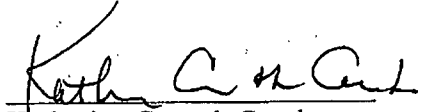
School District of Greenville County,

Respondent

CERTIFICATE OF COUNSEL

Counsel hereby certifies that the appellant's final brief and final reply brief comply with Rule 211(b) of the South Carolina Appellate Court Rules.

Counsel further certifies that the appellant's final brief and final reply brief comply with the Order of the Supreme Court of South Carolina entitled *Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings*, 375 S.C. 56, 650 S.E.2d 462 (August 13, 2007).


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