

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Alex Kinlaw, Jr., Circuit Court Judge

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FEB 22 2019

SC Court of Appeals

Case No.: 2018-CP-23-02513
Appellate Case No.: 2018-001600

Gregory T. Christian,

Appellant,

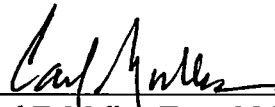
vs.

Anna Healy,
Greenville Police Officer Andrew League,
City of Greenville, South Carolina,

Defendants.

Of whom Anna Healy is the Respondent.

INITIAL BRIEF OF RESPONDENT



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STATE COURT RULES:

Rule 4(d)(8) SCRCPP 2, 3
Rule 12(b)(5) SCRCPP 1, 2, 3, 4, 6
Rule 12(b)(6) SCRCPP 1, 2, 3, 4, 6
Rule 15(a) SCRCPP 2, 6

OTHER AUTHORITIES:

First Amendment of the United States Constitution
Article I, Section 2 of the South Carolina Constitution 4
South Carolina Jurisprudence, Vol. 20, Libel and Slander, p. 110 5

STATEMENT OF THE CASE

This is an action for defamation against a private individual, the City of Greenville and a City of Greenville police officer. Slander is the variant of defamation as to the Defendant/Respondent Anna Healy. The case was commenced by the filing of a Summons and Complaint on April 23, 2018. On July 17, 2018, the Hon. Alex Kinlaw, Jr., Circuit Judge, dismissed the Complaint from the bench after a hearing, followed by a written order on July 30, 2018. He also denied the Plaintiff's oral motion made at the hearing to amend the Complaint. The Plaintiff filed a notice of appeal on August 30, 2018, only with respect to the individual defendant, Anna Healy.

The Respondent Healy had responded to the Complaint on May 21, 2018 with a Motion to Dismiss under Rules 12(b)(5), SCRPC for insufficiency of service of process and Rule 12(b)(6), SCRPC for failure to state facts sufficient to constitute a cause of action.

The City of Greenville and Greenville Police Officer Andrew League responded to the Complaint, also on May 21, 2018, with an Answer and a separate Motion to Dismiss. Both the Answer and the Motion to Dismiss contained defenses under Rules 12(b)(5) & (6), SCRPC. They also were based upon *res judicata*. In addition, the Answer contained a denial and affirmative defenses common to defamation actions and suits against governmental entities and employees.

On July 3, 2018, more than 30 days after the Defendants had responded to the Summons and Complaint, the Plaintiff filed an Amended Summons and Amended Complaint. He did not file a motion to amend and did not receive approval from the court to amend. He attempted service in the absence of both.

STATEMENT OF FACTS RELEVANT TO THE ISSUES

This lawsuit is the Plaintiff's second attempt. The first was in federal court. It was dismissed. At the hearing on the motions to dismiss in this case the Plaintiff acknowledged that the reason he filed this one is that he was unhappy with the result in federal court. Tr. p. 18, l. 17 – p. 19, l. 15.

The Complaint itself and the Plaintiff's responses to the motions to dismiss, in writing and at the hearing, make clear that the Plaintiff has no case and that he failed in service of process.

The Court of Appeals should affirm.

1. DID THE TRIAL COURT PROPERLY DISMISS THE COMPLAINT UNDER RULE 12(B)(5), SCRCP BECAUSE IT WAS NOT SERVED ACCORDING TO LAW?

In Plaintiff's Response to Defendant Healy's Motion to Dismiss, the Plaintiff acknowledged that he did not serve her properly. "Plaintiff mistakenly believed the proviso concerning restricted delivery was fulfilled by certified mail with return receipt." P. 6, Par. 10.

Likewise, at the hearing, he acknowledged that service on Healy was deficient. All that he could muster in response was, "And she's here now." Tr. p. 29, ll. 7 -20, and Tr. p. 33, ll. 9- 17. Of course, she was in court. She was there to challenge service of process as well as the Complaint itself.

The Plaintiff attempted to serve Healy by certified mail, but he did not send the Summons and Complaint or the Amended Summons and Amended Complaint to her address. Also, the Summons and Complaint were not sent restricted delivery, as required by Rule 4(d)(8), SCRCP. Nor did the Plaintiff have court approval to serve the Amended Summons and Amended Complaint, as required by Rule 15(a), SCRCP. Court approval was required because he did not attempt to amend within 30 days of the Motions to Dismiss.

In personam jurisdiction is essential for the exercise of judicial power. (“... a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction ...”). *Hanson v. Denckla*, 357 U.S. 235, 250 (1958). “A court generally obtains personal jurisdiction by the service of a summons. The purpose of the summons is to acquire jurisdiction of the person of the defendant.” *BB&T v. Taylor*, 369 S.C. 548, 633 S.E.2d 501,503 (2006) citing *Ex parte S.C. Dep’t of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920).

The Plaintiff attempted service by certified mail. Rule 4(d)(8), SCRCP sets out the specific requirements of such service. It must include “delivery restricted to the addressee.” That was not done. Affidavit of George Greer. In addition, it was not sent to Ms. Healy’s address.

The Court dismissed the Complaint against Ms. Healy under Rule 12(b)(5) for insufficiency of service of process, specifically finding that “service of process on Defendant Healy did not comply with Rule 4(d)(8) of the South Carolina Rules of Civil Procedure as it was not mailed certified mail, return receipt requested, restricted delivery.” Order, pp. 5 & 6. Precedent for dismissal is found in *Langley v. Graham*, 322 S.C. 428, 472 S.E.2d 259, (Ct.App.1996), in which “service by mail was defective in that delivery was not ‘restricted to the addressee.’” Id. 260.

“The trial court’s findings of fact regarding validity of service of process are reviewed under an abuse of discretion standard.” *Graham v. Makawi*, 396 S.C. 290, 721 S.E.2d 430, 432 (2012), citing *Clark v. Key*, 304 S.C. 497, 500, 405 S.E.2d 599, 601 (1991). There was no abuse of discretion on the part of the court. Service of process was insufficient.

2. DID THE TRIAL COURT PROPERLY DISMISS THE COMPLAINT UNDER RULE 12(B)(6), SCRPC BECAUSE THE SOLE CAUSE OF ACTION AGAINST THE DEFENDANT/RESPONDENT ANNA HEALY WAS SLANDER AND THE COMPLAINT ALLEGED THAT SHE DID NOT SLANDER HIM?

Paragraph 24 of the Complaint alleges “Defendant Andrew League falsely claimed in writing that Defendant Anna Healy told police Plaintiff stole a ring.” That allegation completely undermines the Plaintiff’s slander claim against Healy.

3. DID THE TRIAL COURT PROPERLY DISMISS THE COMPLAINT UNDER RULE 12(B)(6), SCRPC BECAUSE THE SOLE CAUSE OF ACTION AGAINST THE DEFENDANT/RESPONDENT HEALY WAS SLANDER AND THE COMPLAINT DID NOT PLEAD THE REQUIRED ELEMENTS OF SLANDER?

There are elements of slander that are required by the common law and there are elements of slander that are required by the First Amendment of the United States Constitution and Article I, Section 2 of the South Carolina Constitution. “[W]e are cognizant of ... the need to reconsider many of our defamation cases in light of changing constitutional principles. *** [A]ll prior decisions must be read in the context of the current state of the law.” *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 508, 506 S.E.2d 497 (1998) (*Holtzscheiter II*).

“The elements of defamation include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” *Holtzscheiter II*, *id.*, 518. This is the common law.

The Complaint does not allege publication to a third party. Paragraph 6 alleges that the communication by Healy was to the Plaintiff. There is no mention of any third parties. Nor is there an allegation that the communication was to them.

Moreover, under the facts alleged, the communications by Healy would not have been unprivileged. *Manley v. Manley*, 312 S.C. 291, 353 S.E.2d 312 (Ct.App.1987). This is doubly

so because the Complaint alleges in Paragraph 7 that the Plaintiff told Healy to call the police. By doing so, he ratified her alleged prior communication to him and consented to her subsequent communications to the police. South Carolina Jurisprudence, Vol. 20, Libel and Slander, p. 110.

The Complaint does not allege fault.

“[T]he focus of defamation is not on the hurt to the defamed party’s feelings, but on the injury to his reputation.” Holtzscheiter II, Supra, 517, citing Wardlaw v. Peck, 282 S.C. 199, 318 S.E.2d 270 (Ct.App.1984). The Plaintiff does not allege injury to his reputation.

In addition to these fatal common law deficiencies, the Complaint fails for constitutional reasons. Citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), in Holtzscheiter II the South Carolina Supreme Court stated that, as to the plaintiff in that case, “...the constitution requires she prove ‘actual injury’: She may not rely on the common law presumption of general damages arising from a defamation actionable *per se*.” Id, 512. “Stated succinctly, ‘general damages’ are those which arise by inference of law and need not be proved by evidence, while ‘special damages’ must always be pleaded and proved. Holtzscheiter II, Supra, Footnote 12, citing Lily v. Belk’s Dep’t Store, 178 S.C. 278, 284, 182 S.E. 889, 891 (1935). The Plaintiff did not plead the required elements of damage.

Fault is also a required element under constitutional law. Gertz, Supra. The Plaintiff’s failure to plead that is not limited to the common law.

The Complaint seeks punitive damages, but does not allege constitutionally required “actual malice”. “In Gertz, the Court declared, ‘the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.’” Holtzscheiter II, Supra, 523, citing Gertz, id. 349.

Failure to plead the required elements of defamation is ground for dismissal. *Costas v. Florence Printing Co.*, 237 S.C. 655, 118 S.E.2d 696 (1961). The Plaintiff has failed and his Complaint was correctly dismissed.

4. DID THE TRIAL COURT ABUSE ITS DISCRETION IN REFUSING TO ALLOW THE PLAINTIFF TO AMEND HIS COMPLAINT TO ALLEGE THE ELEMENTS OF SLANDER WHEN THE FACTS ALLEGED IN THE COMPLAINT SHOWED THAT THE PLAINTIFF DID NOT HAVE A VIABLE CAUSE OF ACTION FOR SLANDER?

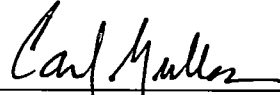
In *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252, 262 (2017) the South Carolina Supreme Court noted, "... we have consistently held that a circuit court's ruling on a Rule 15 motion to amend is within its discretion...". It is clear from everything that the Plaintiff presented to the court that he has no case. An amendment should not be allowed when it cannot affect the outcome. ("Furthermore, even if the circuit court permitted this amendment, Holland could not successfully sue ...") *Holland v. Morbark*, 407 S.C. 227, 236, 754 S.E.2d 714 (Ct. App. 2014). The court correctly refused amendment. Certainly, that decision was not an abuse of discretion.

CONCLUSION

The trial court correctly dismissed the Plaintiff's complaint under Rule 12(b)(5), SCRPC for insufficiency of service of process and Rule 12(b)(6), SCRPC for failure to state facts sufficient to constitute a cause of action. The trial court did not abuse its discretion in

refusing to allow the Plaintiff to amend his Complaint under Rule 15(a), SCRPC. His rulings should be affirmed.

Respectfully,



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February 20, 2019

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The Honorable Alex Kinlaw, Jr., Circuit Court Judge

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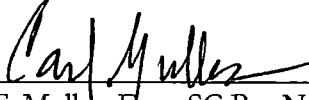
Defendants.

Of whom Anna Healy is the Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing a copy to him in the U.S. Mail, postage prepaid, on February 20, 2019, at his address at:

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February 20, 2019

The Honorable Jenny Abbott Kitchings, Clerk
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SC Court of Appeals

Re: Gregory T. Christian v. Anna Healy
Appellate Case No.: 2018-001600

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Respondent, Respondent's Designation of Matter to be Included in the Record on Appeal and Proof of Service. Please file the enclosed and return a stamped copy to me for my records.

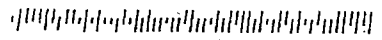
Very truly yours,


Carl F. Muller

CFM:dph

c: Mr. Gregory T. Christian

Enclosure



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