

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2006-CP-39-1826
Appellate Case No. 2015-001536

J. Scott Kunst, Respondent

v.

David Loree..... Petitioner

REPLY BRIEF OF PETITIONER

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Introduction

This Court granted certiorari on two legal issues raised by Petitioner Loree and ordered briefing on those two legal issues, as governed by Rule 242(i), SCACR. Rule 242(i), SCACR specifically states that, “The briefs shall, to the extent possible, comply with the requirements of Rule 208(b).” Respondent Kunst wholly failed to refute Petitioner’s legal arguments related to the questions under consideration by this Court. Instead, Respondent Kunst seeks to rely on his opinion and conjecture. Further, Respondent Kunst, more often than not, fails to cite to the Appendix and legal precedent in his Brief of Respondent. Because of Petitioner Kunst’s failures to follow established appellate practice and procedure, Respondent Loree’s arguments stand unrefuted.

Statement of Facts

First, Respondent Kunst writes statements in the Statement of Facts portion of his brief that must be addressed for the sake of clarity. In the second paragraph of page 1 of the Brief of Respondent (“Respondent’s Brief”), Kunst writes that Loree was not an employee of Richard and Barbara Gaby and he went on to state that Loree worked for JVA Enterprises, citing Appx. 291 as his authority. Br. of Resp. at 1. This is unsupported by the record. Appendix 291 is a business card identified at trial by Loree as an old card. (Appx. 959, Tr. 158: 1-13). Loree’s unrefuted testimony is that his employers are the Gabys, who are members of VA Enterprises. (Appx. 960, Tr. 159: 11-17). At trial, Kunst produced no documents or witness testimony to show that the Gabys were not Loree’s employers or that Loree acted without their permission. More importantly, the Court of Appeals found that Loree was the employee of Richard and Barbara Gaby. (Appx. 1475).

Second, in the same paragraph Kunst stated, “the Gabys used him for personal chores such as their fraudulent actions involving their Pickens, SC property as well as managing other private properties.” Br. of Resp. at 1. Despite Petitioner’s assertions now, there is no evidence of fraud in the record on the part of the Gabys, such a matter was not part of the trial nor this appeal, and Kunst did not bring an action for fraud against the Gabys. (Appx. 32-42, Kunst v. Loree complaint). The only remaining cause of action before the trial court and this Court is that of defamation and the only remaining defendant is David Loree.

Third, Kunst stated that the tax liens “were put in place in 2009.” Kunst attempts to mislead here. Br. of Resp. at 3. As a former CPA, Kunst knows that when the liens were actually filed is not the relevant issue. Appendix pages 440-446, 452-454, and 457-459 show that Kunst and/or his concern Kunstwerke owed taxes to the State of South Carolina for tax periods beginning at least in 2004. Appendix pages 461-464 are IRS tax liens for tax periods beginning in 2003. The tax liens, admitted as defense trial exhibits, conclusively show that Kunst’s financial woes began long before Loree ever allegedly defamed him. When the liens were filed or whether they have been removed is irrelevant to the subject matter of this appeal.

Argument

- I. The Court of Appeals erred concerning the defense of qualified privilege when it made a *factual* finding that Petitioner acted in a reckless and wanton manner with a conscious disregard of Respondent’s rights.**

To counter the question raised and authorities cited by Petitioner, and to refute the error raised by Petitioner, Respondent Kunst should have addressed the legal issues raised by Petitioner. At a bare minimum, for Kunst to prevail, he needed to establish that the Court of Appeals is not in error by making *factual* findings not found below. Kunst did neither.

A. The Court of Appeals Made *Factual* Findings that Loree Exceeded the Scope of Qualified Privilege.

Kunst merely asserts in his brief that the Court of Appeals did not make any factual findings. He overlooks the fact that the Court of Appeals made three findings of fact in its opinion. The factual findings are found at Appendix 1475 and are referenced in Petitioner's Brief on page 7. These "findings" alone warrant reversal of the Court of Appeals. Clearly, these "findings" (not found below) are not corrections of law.

B. Regardless of the Lengthy Recitations of "Facts" (some in the Record, some not) in Respondent's Brief, Kunst Presented No Evidence at Trial to Meet His Burden That the Qualified Immunity Did Not Apply to Loree.

Even a cursory review of the Appendix and trial record shows that Kunst misstates the evidence admitted at trial and considered by the Court of Appeals. Regardless of Kunst's recitation of lengthy swaths of trial testimony, at no place can Kunst provide record evidence that shows Kunst met his burden at trial regarding the loss of immunity.

Respondent Kunst also resorts to including statements/alleged facts in his brief that were never admitted at trial and that are demonstrably not accurate. For example, on page 6 of Respondent's Brief, Kunst previews a "crowd standing around Alfonso." Br. of Resp. at 6. Kunst also references this "crowd" on page 18 of his brief. *Id.* at 18. However, this "crowd" is not supported by the uncontroverted testimony of Kunst's own witness. Rather than a "crowd," the witness identified one other person – Kunst's own employee – who may have been involved in the conversation between Loree and Alfonso. When Kunst attempted to impeach his own witness, Kunst pointed to inconclusive deposition testimony (which was not admitted at trial and not in the trial record nor Appendix) that there may have been other workers on the job site – not

talking with Petitioner Loree and Alfonso. Witness Alfonso reiterated that he could not remember others in the conversation between Loree and Alfonso. (Appx. 949, Tr. p. 148: 6-20).

Such testimony and evidence clearly contradicts Kunst's positions. Moreover, regardless of the number of times Kunst repeats the alleged statements, it does nothing to change one important fact: Kunst did not meet his burden to show actual malice or the exceeding of the scope of qualified immunity by Loree. And the Court of Appeals is not allowed to make *factual* findings that are not in the record.

Respondent Kunst appears to re-argue the factual issues related to the defense of truth in defamation allegations. Kunst writes approximately ten pages on this issue. *See* Br. of Resp. at 10-20. Any issues regarding truth as a defense to defamation claims are not before this Court. Rather, this Court is asked to decide whether the Court of Appeals is allowed to make factual findings that are not supported by the record in order to find that a defendant acted with malice when plaintiff failed to address the issue at the trial court.

C. The Court of Appeals Narrowed the Scope of Qualified Privilege Beyond This Court's Holding in *Constant*.

Respondent Kunst did not address this issue in his brief and therefore Petitioner Loree's argument is uncontested.

D. Petitioner Loree Does Not Misunderstand the Elements of the Qualified Immunity and the Role of Fact-Finding by an Appellate Court.

Respondent Kunst spends considerable time to convince this Court that Petitioner Loree does not understand the law of defamation in South Carolina. To be clear, Petitioner Loree understands well the difference in in conjunctive and disjunctive conjunctions. The qualified privilege may be lost by actual malice *or* by exceeding the scope of the privilege. In fact, it is

Respondent Kunst who conflates legal elements: Respondent equates “actual malice” with “a reckless and wanton manner with a conscious disregard for the rights of another.” Br. of Resp. at 5. These elements are not synonymous. Nonetheless, this issue is not germane to the issues before this Court.

Rather, Respondent Kunst uses his argument that Petitioner misunderstands the elements of qualified privilege to then argue pages and pages of factual issues not before this Court. At no place does Petitioner state that there is no evidence of the alleged defamation in the trial record. Instead, Petitioner argues that in no place in the Record (and now, nowhere in Respondent’s brief) does Respondent point to evidence in the record that shows that Respondent met his burden to show that Loree acted with actual malice or that the scope of the privilege was exceeded. Instead, the Court of Appeals made that *factual* finding itself. This is beyond the authority of the Court of Appeals.

E. *Fulton* and *Conwell* Do Not Relieve Kunst of His Burden at Trial.

On page 7 of Respondent’s Brief, it seems that Kunst cites *Fulton v. Atlantic Coast Line R.R.*, 220 S.C. 287, 67 S.E.2d 425 (1951) to argue that evidence of malignity or ill will need not be proven by the plaintiff at trial. Kunst apparently overlooks that *Fulton* dates from 1951 and that the case law on qualified privilege has been developed by this Court over the past 68 years. *Constant*, *Swinton* and their progeny are clear: the burden is on the plaintiff to show that the defendant acted with actual malice or exceeded the scope of privilege. See *Constant*, v. *Spartanburg Steel Products, Inc.*, 316 S.C. 86, 477 S.E.2d 194 (1994), *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 514 S.E.2d 126 (1999).

However, for the sake of argument only, even if Respondent Kunst was correct about the *Fulton* case, Kunst still fails to provide any Record evidence to support his contentions. For

example, on page 14 of his brief, Kunst writes that “circumstantial evidence as prescribed in *Fulton*” showed Loree’s ill will toward Kunst, but cites nothing in the Appendix to support his contention. Instead, Kunst continues with ad hominem attacks and non sequiturs.

Apparently Respondent Kunst also cites *Conwell v. Spur Oil Co. of Western South Carolina*, 240 S.C. 170, 125 S.E.2d 270 (1962) in an effort to show that Petitioner Loree’s seven statements themselves must show ill will or malice. Br. of Resp. at 20. This is not the holding of this Court in *Conwell*. *Conwell* holds that, “the burden was upon the respondent to show express malice or malice in fact on the part of the [petitioner] toward the respondent.” *Id.* at 181, 125 S.E.2d at 276. *Conwell* stands for the exact proposition Petitioner Loree advocates here: Kunst must have proven malice (or exceeding of scope, though not addressed by *Conwell*) at the trial of this matter. Kunst did not. And the Court of Appeals is not permitted to make its own factual findings – but instead may only make corrections to mistakes of law.

II. The Court of Appeals erred in failing to find that the trial court should have determined as a matter of law as to whether Petitioner had proven the defense of qualified privilege.

Respondent Kunst fails to address Petitioner Loree’s contentions of error. Petitioner’s argument is straightforward: The trial court found that the defense of qualified privilege should be allowed in the trial, but refused to determine as a matter of law whether the qualified privilege should apply. (Appx. 1309-1312). This is an error of law.

The elements of the qualified privilege were established by Kunst’s own direct examination of Loree and were not disputed. The trial court should have found the qualified privilege applied as a matter of law, but declined to do so. (Appx. 1310-12, Tr. 507:20-509:3). This was prejudicial error. See *Murray v. Holnam, Inc.*, 344 S.C. 129, 140, 542 S.E.2d 743 (Ct.

App. 2001) (it is the duty of the trial judge to determine if the statement is privileged). In fact, the trial court explicitly stated that the “...Supreme Court can overturn me...” on the issue. (Appx. 1310-12, Tr. 507:20-509:3).

In his Respondent’s Brief, Kunst quotes from *Bell v. Bank of Abbeville*. However, the quotation cited by Kunst is nowhere to be found in the *Bell* case. Kunst then returns to arguing elements of the privilege, instead of the legal determination of the application of the privilege.

Because Kunst has not addressed the question asked by this Court, Loree’s argument is uncontested.

Conclusion

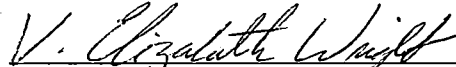
There are two legal questions before this Court. Respondent Kunst had an opportunity to address these legal issues. The legion extraneous matters raised by Kunst should be ignored by this Court. Alternatively, if the Court desires briefing on the extraneous matters raised by Kunst, Petitioner will gladly supply briefs on those.

Rhetorical questions, conjecture about facts not in evidence at trial, and personal insults do not change the fact that the Court of Appeals is not allowed to make *factual* findings that are not in the trial record.

This Court should not allow Kunst and the Court of Appeals to change the long established law in this State. After proving qualified immunity exists, the defamed party must bear his burden to show that the immunity was lost. Any other result here would leave employees in South Carolina in an untenable position. The Court of Appeals is not allowed to make its own factual findings regarding whether an employee acted with malice or in a reckless manner – that is the province of the jury.

The Court of Appeals and the trial court verdict should be reversed.

Respectfully submitted.


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July 23, 2019

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Petitioner on *pro se* Respondent at his last-known address of 950 Progress Street, #217, Pittsburgh, PA 15212, by depositing it into the U.S. Mail, first class postage prepaid on July 23, 2019.

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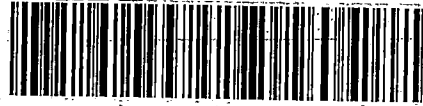
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