EXHIBIT
A

STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY	)	IN THE COURT OF COMMON PLEAS FOR THE EIGHTH JUDICIAL CIRCUIT
ANTHONY WISE, Plaintiff, v. KENNETH E. LEAP, NEWBERRY HOSPITAL, LLC D/B/A NEWBERRY COUNTY MEMORIAL HOSPITAL and WEST FRASER, INC., Defendants.	)	Civil Action No. 2019-CP-36-00103 **ORDER**

This matter came before the Court on Defendant West Fraser, Inc.'s ("West Fraser") Motion for Summary Judgment and Supporting Brief (the "Motion") seeking the entry of summary judgment on Plaintiff's defamation claim. The Motion was heard on August 11, 2021. After hearing oral argument and reviewing the initial and supplemental submissions of the parties, for the reasons explained more fully herein, the Court finds that West Fraser's Motion should be granted.

ALLEGATIONS OF THE COMPLAINT

This defamation case arises from what appeared to be a workplace accident injuring the Plaintiff that occurred on November 7, 2017 at West Fraser's mill in Newberry County, South Carolina. Plaintiff alleges that while lifting the hood of a forklift, he felt something pull and experienced pain running from his groin to his stomach. Following this incident, West Fraser's safety director responsible for managing workplace injuries and overseeing workers' compensation claims, Keith Nelson ("Nelson"), took Plaintiff to the emergency room at Newberry County Memorial Hospital ("NCMH"). Plaintiff alleges that following an examination by NCMH

physician Dr. Keith Leap ("Dr. Leap"), Dr. Leap made the statements: "Looks like someone has been changing sexual partners. Looks like an STD." Plaintiff alleges that Dr. Leap's alleged statements falsely accused him of having a sexually transmitted disease ("STD") and of adultery since Plaintiff is married. Plaintiff alleges that Nelson, while acting within the scope of his employment duties for West Fraser, repeated Dr. Leap's alleged false statements to other employees at the mill and the alleged false statements spread throughout the mill. Plaintiff alleges that West Fraser is liable for Nelson's alleged defamatory statements which Plaintiff alleges caused him to suffer reputational and emotional injuries.

UNDISPUTED FACTS

Following the forklift incident, Nelson drove Plaintiff to NCMH where Plaintiff was admitted and examined by Dr. Leap. Plaintiff was treated for an infection, received a prescription antibiotic and was released later that day.[1]

After Plaintiff was discharged from NCMH Nelson returned to the mill, but Plaintiff did not return for several days. When Nelson arrived at the mill after returning from the hospital, Plaintiff's coworker, George Wilson ("Wilson"), saw Nelson walking in the parking lot. Wilson had learned from other co-workers who were aware of the forklift accident that Nelson had taken Plaintiff to the hospital. Wilson asked Nelson how Plaintiff was doing to which Nelson replied, "[h]e's doing fine. He has an infection so he got a prescription…" (Def.'s Ex. 2, Dep. of Keith

[1] Plaintiff testified in his deposition that he was diagnosed with an infection and prescribed an antibiotic. (Def.'s Ex. 1, Dep. of Plf. at pp. 145, 192). Plaintiff further testified that the day after he was discharged from NCMH, he followed up with his primary care physician and she confirmed he had an infection – specifically, a prostate infection. (Def.'s Ex. 1, Dep. of Plf. at pp. 156-57). The November 7, 2017 medical records produced by NCMH and the records produced by Plaintiff's primary care provider corroborate that Plaintiff was diagnosed with an infection and prescribed an antibiotic. (*See* Def.'s Ex. 7, NCMH ED records stamped 009-10 and Def.'s Ex. 8, Lexington Family Practice Irmo records stamped 161, 177-78).

Nelson at p. 22; Def's Ex. 4, Dep. of George Wilson at p. 6). Wilson testified that no one was in close proximity to overhear Nelson's statements. Nelson's and Wilson's recollection of the conversation, as described in their sworn deposition testimony, is identical in all material respects.

Nelson testified that his reply to Wilson was not intended to communicate that Plaintiff had an STD or anything sexually related and that he believed he was simply answering the question of a concerned co-worker. More importantly, Wilson testified he did not interpret Nelson's statements as suggesting Plaintiff had an STD or communicating anything of a sexual nature. Wilson further testified he never told anyone that Plaintiff had an STD, had no reason to believe Plaintiff had an STD, and that the only person at the mill he heard discussing the alleged accusation that Plaintiff had an STD was the Plaintiff. (Def's Ex. 4, Dep. of George Wilson at pp. 7, 8, 10-11).

Plaintiff acknowledged in his deposition he has no personal knowledge of any statements Nelson made to Wilson or anyone else during the time period he was absent from the mill. Plaintiff further admitted that he could offer no testimony that he or any of his co-workers personally heard Nelson state that Plaintiff had an STD or had been changing sexual partners, (Def's Ex. 1, Dep. of Plf. at p. 140 ("I can't sit here and say that they [co-workers] heard it directly from him [Nelson], but it went through the plant like a wildfire.")) Nevertheless, Plaintiff contends that Nelson's statement to Wilson that Plaintiff had an infection and/or had an infection and had received a prescription would reasonably be understood as suggesting that Plaintiff had a *sexual* infection. When asked in his deposition why Plaintiff believed Nelson's statement insinuated Plaintiff had an STD, Plaintiff testified, "[w]hen you a black man, that's all people think that you supposed to do. You got to be some kind of little whore or something like that" and "when mens

[*sic*] talk like that, that's what they talking about, sex. They ain't talking about no just plain infection." (Def's Ex. 1, Dep. of Plf. at pp. 164, 175).

SUMMARY JUDGMENT STANDARD

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). In determining whether a genuine factual issue exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the non-moving party. *Id*. When a motion for summary judgment is made and supported by such facts as would be admissible in evidence at trial, the non-moving party may not rest upon the mere allegations of his pleadings but must identify specific facts establishing a genuine issue for trial. S.C. R. Civ. P. 56(e). As the South Carolina Supreme Court has explained:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

The Court recognizes the scintilla of evidence rule and thoroughly analyzed the issues under that standard. "[A] scintilla of evidence is material evidence which, taken as true, would tend to establish the issue in the mind of a *reasonable* juror." *Crosby v. Seaboard Air Line Ry.*, 81 S.C. 24, 31, 61 S.E.2d 1064, 1067 (1908) (emphasis added). Importantly, the evidence put forward by the party opposing summary judgment must be probative. When a scintilla of evidence is

susceptible to only one reasonable inference, no issue of fact arises and the Court can decide as a matter of law. *National Bank v. Barrett of Honea Path*, 174 S.E.2d 581 (1934). "[A]ny evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative. *Bass vs. Gopal Inc.*, 384 S.C. 238, 246 n.6, 680 S.E.2d 917, 921 n.6 (Ct. App. 2009), *aff'd* 395 S.C. 129, 716 S.E.2d 910 (2011). The circuit court "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." *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a *genuine* issue of fact remaining for trial." *Sims v. Amisub of S..C, Inc.*, 408 S.C. 202, 208, 758 S.E.2d 187, 190-91 (Ct. App. 2014), *aff'd* 414 S.C. 109, 777 S.E.2d 379 (2015) (emphasis added) (quoting *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004)).

DEFAMATION – CONTROLLING LAW

To prove defamation under South Carolina law, a plaintiff must establish the following elements:

(1) A false and defamatory statement was made;

(2) The unprivileged publication was made to a third party;

(3) The publisher was at fault; and

(4) Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Fountain v. First Reliance Bank, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012)

Defamation is classified as either actionable *per se* or not actionable *per se* (i.e., defamation *per quod*.) *Id.* at 442, 730 S.E.2d at 309. Where, as here, the alleged defamation involves slander,

the statements are actionable *per se* if they charge the plaintiff with any of the following five acts and/or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession. *Id*. The classification of a statement as actionable *per se* is significant because in such instance the defendant " 'is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages.' " *Id*. (*quoting Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006)). On the other hand, if the statement is not actionable *per se*, " 'the plaintiff must plead and prove both common law malice and special damages.' " *Id*. (quoting *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664). In other words, where a statement is actionable *per se*, the plaintiff is not required to establish elements (3) or (4) to prove defamation. *See id*.

Whether the statement is actionable *per se* is a question of law for the court to resolve. *Id.*; *see also Erickson*, 368 S.C. at 465, 629 S.E. 2d at 664. In deciding this question, "[t]he trial court has the duty to determine whether words are reasonably capable of having the defamatory meaning attributed to them by the plaintiff." 20 S.C. JUR. *LIBEL AND SLANDER* § 19 (May 2021) (*citing Appliance Buyers Credit Corp. v. Baxley*, 241 S.C. 64, 68-69, 127 S.E.2d 8, 9 (1962)). In making this determination, words must be given their plain and popular or ordinary meaning. *Id*. Further, and as the South Carolina Supreme Court has explained, "[t]he court will not hunt for a forced and strained construction to put on ordinary words, but will construe them fairly, according to their natural and reasonable import and the plain and popular sense in which the average reader naturally understands them." 20 S.C. JUR. *LIBEL AND SLANDER* § 19 (internal quotation omitted); *Hospital Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 379, 9 S.E.2d 796, 800 (1940).

While statements that are not defamatory on their face may become actionable considering the context in which they were made or other insinuation or innuendo, the statement's defamatory meaning must be apparent based on a reasonable construction. *Fountain*, 398 S.C. at 442, 730 S.E.2d at 310. A construction based on "purely conjectural interpretations" is not reasonable and is insufficient to avoid summary judgment. *Id.*

Regardless of whether a statement is actionable *per se* or *per quod*, truth is an absolute defense to any defamation claim. *Id*. When the alleged defamatory statements are made by a private figure in a matter of private concern, it is the defendant's burden of "proving the substantial truth of each of the alleged defamatory statements." *Kunst v. Loree*, 424 S.C. 24, 41, 817 S.E.2d 295, 303 (2018). If the defendant presents evidence establishing the truth of the statements and there is no conflicting evidence to challenge the truth of the statements, summary judgment is appropriate. *Fountain*, 398 S.C. at 442, 730 S.E.2d at 310 (even if statements were actionable *per se*, they could not be deemed defamatory because they were unquestionably true; affirming summary judgment).

LEGAL ANALYSIS

I. West Fraser Has Established the Substantial Truth of Nelson's Statements.

West Fraser has submitted undisputed testimony from the only two individuals with personal knowledge of the statements Nelson made to Wilson: Nelson and Wilson. The record evidence establishes that Nelson told Wilson Plaintiff had an infection and/or had an infection and received a prescription. Both statements are undisputedly true. (*Supra*, at p. 2 n.1).

While Plaintiff urges that there is a factual issue concerning the veracity of the testimony concerning what Nelson stated to Wilson, (Hearing Tr. at p. 17), Plaintiff has not identified any actual evidence that rebuts or contradicts Nelson's or Wilson's testimony. As such, Plaintiff has

not met his burden to overcome West Fraser's properly supported Motion. *See Moody v. McClellan*, 295 S.C. 157, 163-64, 367 S.E.2d 449, 452-53 (where defendant's summary judgment motion was supported by supervisor's sworn testimony denying he made alleged defamatory statements, plaintiff could not rely on speculation or hearsay testimony about what others allegedly told him supervisor said to defeat summary judgment); Rule 56€, SCRCP.

There is insufficient evidence to support that Nelson's statements to Wilson, on their face, charged Plaintiff with having an STD or changing sexual partners (i.e., adultery). The statements Nelson actually made to Wilson, as supported by the uncontested record evidence, were true. Therefore, West Fraser has established a complete defense to Plaintiff's defamation claim based on the literal meaning of Nelson's statements.

II. Nelson's Statements Cannot Reasonably Be Construed as Defamatory by Innuendo.

During oral argument, Plaintiff conceded there was no direct evidence that Nelson made the defamatory statements alleged in the Complaint but argued the defamatory nature of Nelson's statements could be inferred from circumstantial evidence. (Hearing Tr. at pp. 18-19) The circumstantial evidence Plaintiff relies on consists primarily of evidence that a rumor that Plaintiff had an STD started at the mill. From this Plaintiff surmises that no one other than Nelson could have started the rumor. According to Plaintiff, since Nelson and Plaintiff were the only West Fraser employees at the hospital and Plaintiff did not return to the mill for several days, Nelson is the only possible source of how the rumor that Plaintiff had an STD started. (Hearing Tr. at pp. 12-13)

In response, West Fraser asserted that Plaintiff's argument is both legally and factually deficient. First, Plaintiff's argument still fails to properly rebut Nelson's sworn testimony.

Further, it disregards the considerable record evidence. West Fraser's Motion identified testimony by multiple West Fraser employees attesting that the Plaintiff himself repeated Dr. Leap's alleged statements around the mill and that the only person they heard talking about the alleged STD accusation was the Plaintiff. (Def.'s Ex. 4, Dep. of George Wilson at pp. 7, 8, 10-11; Def's Ex. 9, Dep. of Dolan J. Russell at pp. 7-8). Likewise, several of the co-workers Plaintiff's Counsel identified during oral argument as providing testimony that they heard a rumor that Plaintiff had an STD also testified they heard this from the Plaintiff and/or heard Plaintiff telling others about it. (*See* Dep. of Ralph Maybin, at pp. 8-9 (testifying he heard the statement from Plaintiff and also heard Plaintiff tell others); Dep. of Joseph Praylow at p. 7 (testifying "I know Hopp [Plaintiff] had told me himself me about it.")).[2] West Fraser's Motion also identified evidence that mill employees saw Plaintiff immediately after the incident occurred before he went to the hospital and Plaintiff was visibly experiencing pain in his groin area. At least one co-worker testified this led to joking that Plaintiff was not really injured and had "probably been with, you know … [some woman]." (Def.'s Ex. 3, Dep. of Anthony Cannon Dep. at p. 3).

Based on the evidence of record, Nelson's statements were not the only possible source of the rumors. *See, e.g., Williams v. Lancaster Cty. School Dist*., 369 S.C. 293, 304, 631 S.E.2d 286, 292 (Ct. App. 2006) (plaintiffs could not defeat summary judgment where there was no direct evidence that principal told anyone plaintiff was an adulterer and plaintiffs' indirect evidence suggesting principal was only possible source of adultery rumor disregarded that other school

[2] At the conclusion of the summary judgment hearing and at Plaintiff's request, the complete transcripts of the depositions referenced during oral argument, including several of the co-worker depositions, were offered into the record and subsequently filed with the Court. There are references in some of the transcripts to "Hopp" and/or "Hop," which is the Plaintiff's nickname.

employees were in the area after married male teacher was found in bathroom with female secretary).

Next, Plaintiff points to a letter of reprimand that West Fraser plant manager, D.J. Russell ("Russell"), issued to Nelson for disclosing Plaintiff's medical information to an hourly employee (i.e., Wilson). (Hearing Tr. at p. 19). Russell issued the letter as a warning to Nelson following Russell's investigation of complaints Plaintiff made to Russell and other members of West Fraser management. Although Plaintiff characterizes the letter as an admission by West Fraser that Nelson's statements to Wilson were slanderous, the plain wording of the letter states that "disclosing medical information about an employee can be considered *by the employee* as slanderous," not that West Fraser considered Nelson's statement to be slanderous. (Plf.'s Ex. 4, Hearing Tr. at p. 20) (emphasis added). Russell, the person who authored the letter, testified unequivocally the letter was intended to address Nelson's statement to Wilson disclosing that Plaintiff had an infection, "strictly that and nothing else." (Def's Ex. 9, Dep. of Dolan J. Russell, at pp. 15-16). At best, the letter of reprimand establishes West Fraser considered Nelson's statements to be inappropriate and contrary to company procedure. It does not support that Nelson's statements to Wilson implied a defamatory meaning. *See Fountain*, 398 S.C. at 443, 730 S.E.2d at 310 (banker's testimony that statements were inappropriate and not something a banker should say "falls far short of establishing an implied defamatory meaning.")

The only other evidence offered as purported support that Nelson's statements were defamatory by inference is the Plaintiff's testimony concerning stereotypes and assumptions men make about other men and/or black men who have been diagnosed with any type of infection. Plaintiff's testimony is more conjecture and insufficient, based on a reasonable construction, to show Nelson's statements were defamatory by innuendo.

The Court finds that the only competent evidence of the statements Nelson made to Wilson establishes that Nelson told Wilson Plaintiff had an infection and/or had an infection and received a prescription. These statements are true based on their literal meaning, and there is no evidence to establish the statements reasonably would be construed as defamatory. Indeed, the person who actually heard Nelson's statements, Wilson, testified he did not interpret the statements as implying Plaintiff had an STD or anything defamatory.

III. Nelson's Statements to Plant Manager Russell Are Qualifiedly Privileged.

As an alternative basis for his defamation claim, during oral argument Plaintiff pointed to Nelson's testimony purportedly establishing that Nelson "told Mr. Russell that the doctor had said that he [Plaintiff] had an infection of a sexually transmitted disease." (Hearing Tr. at pp. 22-23). Plaintiff asserts that Nelson's alleged statement to Russell was in itself defamatory.

As an initial matter, Plaintiff's counsel's account of what Nelson told Russell is a true statement since Plaintiff alleges Dr. Leap did make this statement. However, a review of Nelson's deposition testimony plainly shows that what Nelson actually told Russell is that the Plaintiff was "very upset" that Dr. Leap asked Plaintiff about changing sexual partners.[3] (Def.'s Ex. 2, Dep. of Keith Nelson at p. 22). More specifically, Nelson testified that after returning from NCMH he went to Russell's office to discuss Plaintiff's apparent on-the-job injury. (Def.'s Ex. 2, Dep. of Keith Nelson at pp. 22, 25). Nelson testified this conversation was held "behind closed doors" in the privacy of Russell's office. (Def.'s Ex. 2, Dep. of Keith Nelson at p. 22). Nelson informed Russell that Plaintiff had been diagnosed with an infection and that Nelson did not believe Plaintiff had been injured in an on-the-job accident that would be covered by worker's compensation.

[3] West Fraser asserts that this also is a true statement since Plaintiff was upset by Dr. Leap's alleged comment.

(Def.'s Ex. 2, Dep. of Keith Nelson at pp. 22, 25-26). Nelson testified he also told Russell Plaintiff was upset about the question Dr. Leap asked him because Russell was the plant manager, but that this information stayed between Nelson and Russell. (Def's. Ex. 2, Dep. of Nelson at p. 22).

West Fraser asserts at the outset that there is no evidence nor even allegation that Nelson's conversation with Russell was overheard by other employees in the mill or repeated to anyone else at the mill, and the private conversation between Nelson and Russell has never been Plaintiff's theory of the publication that started the alleged rumor that Plaintiff had an STD.

Additionally, West Fraser contends Nelson's statements to Russell are qualifiedly privileged. At oral argument West Fraser asserted that Nelson's statements to Russell were made during a private conversation between two members of West Fraser management talking about a personnel issue – i.e., that Plaintiff was upset about remarks allegedly made by the doctor the company took him to for treatment following an apparent work-related accident. (Hearing Tr. at pp. 26-27).[4] Agents of a company have a common interest in discussing employee concerns that could lead to complaints or claims against the company. The appropriateness of Nelson telling Russell that Plaintiff was very upset about Dr. Leap's alleged comment is evidenced by the fact that it preceded Plaintiff's direct complaint to Russell asserting that Dr. Leap was a "quack," made

[4] West Fraser emphasized Plaintiff also complained about Dr. Leap's comment to other members of West Fraser management and the record includes testimony and written statements by the managers documenting Plaintiff's complaints. (Hearing Tr. at p. 27). *See* Dep. of Keith Nelson at pp. 48-49 (reading written statement by West Fraser superintendent Quinton Wilson documenting Plaintiff's complaint about the doctor West Fraser took him to because the doctor made comments about Plaintiff changing sexual partners in front of Plaintiff's wife and that Plaintiff never wanted to be taken to NCMH again). *See also* Dep. of Dolan J. Russell at pp. 25-26 (testifying Plaintiff complained about Dr. Leap's comments to Russell); Exhibit 1 to Dep. of Dolan J. Russell Dep. (documenting meeting to discuss Plaintiff's complaints following forklift incident).

inappropriate comments about Plaintiff changing sexual partners, and that Plaintiff never wanted to be taken to NCMH again. (*See* Dep. of D.J. Russell at pp. 25-26. *Supra*, at p. 11 n.4).

Under South Carolina law, statements that are subject to a qualified privilege, even if defamatory, are not actionable unless the privilege is rebutted. *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310. Communications between agents of the same corporation made in the course of normal business are generally regarded as subject to a qualified privilege. C*onwell v. Spur Co. of Western South Carolina*, 240 S.C. 170, 179, 125 S.E.2d 270, 275 (1962). *See also Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 560, 459 S.E.2d 315, 317 (Ct. App. 1995) (*citing Prentiss v. Nationwide Mut. Ins. Co.*, 256 S.C. 141, 147, 181 S.E.2d 325, 327 (1971). The elements of a qualified privilege include:

> [G]ood faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.

Bell, 318 S.C. at 560-61, 459 S.E.2d at 317 (quoting *Prentiss*, 256 S.C. at 147, 181 S.E.2d at 327).

Whether an occasion gives rise to a qualified privilege is a question of law for the court to decide. *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310; *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506-07 (Ct. App. 1989). Where an occasion giving rise to a qualified privilege exists, the burden shifts to the plaintiff to show the privilege was abused. *Wright*, 298 S.C. at 474, 381 S.E.2d at 506-07. Further, a statement that is qualifiedly privileged requires the plaintiff to prove the publisher was motivated by actual malice. *Id*.

The Court agrees that Nelson's report to Russell is the type of communication South Carolina courts have held give rise to a qualified privilege. It is clear from Nelson's deposition testimony that his statements to Russell were made pursuant to his duties as safety director and in

the interest of reporting an employee concern raised during Nelson's response to an apparent on-the-job accident. *See Bell*, 318 S.C. at 317, 459 S.E.2d at 560-61 (trial court did not err in finding statements made during employer's investigation of potential harassment claim were protected by qualified privilege); *Wright*, 298 S.C. at 474, 381 S.E.2d at 506-07 (employer's statements made about employee's job performance in meeting to discuss employee's termination were qualifiedly privileged).

Plaintiff pointed to no evidence that would tend to show that Nelson's statements to Russell were motivated by actual malice or that the qualified privilege was abused. Instead, Plaintiff argued that the question of whether the privilege has been abused is an issue for the jury. [Hearing Tr. at p. 28]. While that would be accurate if Plaintiff had presented evidence to show an improper manner of publication, actual malice, or to otherwise rebut the qualified privilege, the South Carolina Supreme Court has clearly held "'in the absence of a controversy as to the facts … it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.'" *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (*quoting Woodward v. S.C. Farm Bureau Ins. Co*., 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981)). *See also Wright*, 298 S.C. at 474, 381 S.E.2d at 506-07 (affirming summary judgment on issue of qualified privilege absent evidence of actual malice to rebut privilege); *Bell*, 318 S.C. at 560-61, 459 S.E.2d at 317 (affirming directed verdict because there was no issue for jury where qualified privilege was established and plaintiff failed to present evidence to rebut it).[5]

[5] Plaintiff cites *Murray v. Holnam, Inc*., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) as supporting Plaintiff's contention that whether the qualified privilege was abused is necessarily a jury question. Based on the authorities cited above, that is not the case where there is a lack of evidence to indicate the privilege was exceeded. *Murray* is factually distinguishable because in that case there was evidence to support the alleged defamatory statements were made to improper parties for an improper purpose. In *Murray*, the plaintiff presented testimony by two of his former co-workers establishing that following accusations that plaintiff had stolen company

If Plaintiff's defamation theory against West Fraser is reliant on the Nelson-Russell communication, it was incumbent on Plaintiff to identify some evidence to rebut the qualified privilege. Plaintiff failed to do so. Therefore, even assuming Plaintiff could establish a defamatory statement based on Nelson's statement to Russell, summary judgment still is warranted because Plaintiff has not presented evidence to support the qualified privilege was abused.

PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT

During oral argument, Plaintiff raised the possibility of amending the Complaint to assert an additional claim for breach of an alleged duty of confidentiality based on Nelson's disclosure of Plaintiff's medical information to Wilson. (Hearing Tr. at p. 17). This claim was not pled as of the date of the summary judgment hearing, and in fact, as of that date, Plaintiff had not even filed his motion seeking permission to plead the claim. Six (6) days after the summary judgment hearing, Plaintiff filed his motion to amend along with a proposed Amended Complaint.

Rule 6(d) of the South Carolina Rules of Civil Procedure requires that a motion be filed ten (10) days before a hearing on that motion. Although the merits of Plaintiff's motion to amend were not properly before the Court on the date of the summary judgment hearing, after Plaintiff filed his motion to amend the Court allowed the parties to submit supplemental briefing to address whether Plaintiff's proposed amendment had any impact on West Fraser's Motion. Plaintiff's

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property, the shift supervisor held a meeting that was attended by at least six of the plaintiff's co-workers to announce the plaintiff had been terminated for misappropriating company property. *Murray*, 344 S.C. at 136, 542 S.E.2d at 746. The supervisor did not deny holding the meeting but testified he stated the plaintiff had been suspended for misusing company property pending investigation. *Id*. There was no apparent or articulated reason for the supervisor to disclose plaintiff's alleged misconduct to the other employees on plaintiff's shift, and as such, there were factual issues concerning whether the supervisor's statements were made in good faith and only to the proper parties. *Murray*, 344 S.C. at 136, 542 S.E.2d at 746. In contrast, here, there is no evidence from which a jury could reasonably conclude that Russell, the manager of the entire facility, was not properly informed of Plaintiff's complaint or that Nelson told this information to anyone other than Russell.

proposed amended claim is premised on the same factual allegations as his defamation claim (i.e., that Nelson published false statements accusing Plaintiff of having an STD and/or adultery). For the reasons discussed above, these allegations lack evidentiary support.

Further, the proposed amended claim attempts to assert a cause of action for breach of the alleged duty of confidentiality, a claim that has never been recognized in South Carolina against an employer. This is apparent from the authorities both parties cited in their supplemental briefing. Accordingly, Plaintiff's amendment would be futile.

In addition to the futility of Plaintiff's proposed amendment, the timing makes it unfairly prejudicial. This case has been pending since March 7, 2019. Plaintiff offered no justification for waiting until just 27 days before the September 13, 2021 trial date to file a motion seeking to add a new claim based on an entirely different theory of liability. Plaintiff's assertion that the proposed amendment is based on existing evidence and this somehow eliminates the prejudice to West Fraser is unsupported. Allowing Plaintiff to inject a new theory of liability at the eleventh hour after the case has been pending for approximately 2 ½ years is precisely the type of late notice and timing that is considered unfairly prejudicial. *Holland ex. Rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014); *Collins Entm't, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005)

For all of the foregoing reasons, the Court finds Plaintiff's motion to amend the Complaint has no impact on the Court's summary judgment analysis or the appropriate outcome of West Fraser's Motion.

WHEREFORE, for the reasons stated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that West Fraser's Motion for Summary Judgment is **GRANTED.**

Entered this the ___ day of _____, 2021.

_____
G.D. Morgan, Jr.
Presiding Judge

Newberry Common Pleas

Case Caption: Anthony Wise VS Keith E Leap , defendant, et al

Case Number: 2019CP3600103

Type: Order/Summary Judgment

So Ordered

G.D. Morgan Jr.