IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

G.D. Morgan, Jr., Circuit Court Judge

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Appellate Case No.: 2021-001463

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Anthony Wise, …….....Appellant,

-v-

Kenneth E. Leap, Newberry Hospital, LLC d/b/a Newberry County Memorial Hospital, and West Fraser, Inc., Defendants,

Of Whom, West Fraser, Inc. is ……..…Respondent.

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# APPELLANT'S INITIAL BRIEF

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## STATEMENT OF THE CASE

This appeal arises from defamatory statements that were made by Keith Nelson, an employee of Respondent West Fraser, Inc., which cascaded into a series of defamatory rumors that ran unabated through Respondent's work force. These statements and rumors followed a workplace injury that involved Appellant Anthony Wise and falsely accused him of having a sexually transmitted infection. Wise filed a Complaint against West Fraser and others on March 7, 2019, in the Newberry County Court of Common Pleas, alleging a cause of action for defamation. (Compl.). On June 3, 2019, West Fraser filed its Answer in which it (1) denied its safety director, Keith Nelson, published defamatory statements to other workers, (2) denied that the statements spread through its mill and damaged Wise's reputation, (3) denied that Nelson's statements were defamatory or capable of possessing a defamatory meaning, (4) raised the truth as an affirmative defense, and (5) raised the qualified privilege as an affirmative defense. (Answer).

After discovery, West Fraser filed a Motion for Summary Judgment on June 8, 2021, contending that any statements made by Nelson were true and that Nelson's statements were not defamatory *per se*. (Mot. Summ. J.). The motion came up for hearing before the Circuit Court on August 11, 2021, with appearances by counsel for Wise and counsel for West Fraser. (Hr'g Tr.). Following the hearing, on August 17, 2021, Wise filed a Motion to Amend Complaint to add a claim for breach of confidentiality. (Mot. Amend). Wise subsequently filed a supporting memorandum, which also contained arguments in opposition to West Fraser's Motion for Summary Judgment, on August 26, 2021.

On August 27, 2021, the Circuit Court issued a Form 4 Order granting West Fraser's motion and requesting a proposed order from West Fraser. (Form 4 Order, Aug. 27, 2021). Wise filed a Motion for Reconsideration on September 2, 2021. (Mot. Recons.). On October 11, 2021, the Circuit Court issued a formal Order granting West Fraser's motion on the grounds that (1) there

was not a jury issue as to whether Nelson's statements were true, (2) Nelson's statements could not be reasonably construed as defamatory by innuendo, (3) Nelson's statements to plant manager Dolan J. Russell were qualifiedly privileged, and (4) Wise's Motion to Amend Complaint was futile and unfairly prejudicial to West Fraser. (Order, Oct. 11, 2021).

Wise filed a Memorandum in Support of his Motion for Reconsideration on October 14, 2021, arguing that (1) there was sufficient evidence in the record casting doubt on Nelson's testimony and creating a jury issue as to Nelson's credibility, (2) there was sufficient evidence to reasonably support an inference that Nelson told employees that Wise had a sexually transmitted infection, (3) in the alternative, Wise had adduced facts sufficient to create a jury issue as to whether Nelson's statements were defamatory by innuendo, (4) Nelson's statements were a separate defamatory republication of Dr. Keith Leap's statements, (5) any statements made by Nelson to non-essential employees of West Fraser were not qualifiedly privileged, and (6) the Order inappropriately weighed the merits of Wise's proposed amendment and did not conduct a thorough prejudice analysis. (Mem. Supp. Mot. Recons.). In a November 23, 2021, Form 4 Order, the Circuit Court denied Wise's Motion for Reconsideration. (Form 4 Order, Nov. 23, 2021). Wise timely filed his Notice of Appeal on December 15, 2021.

## STATEMENT OF FACTS

On November 7, 2017, Wise was working for West Fraser at its Newberry facility.[1] After reporting to work, he began to check the fluids in a forklift he would be operating during his shift. (Anthony Wise Dep. p. 101, lines 1-2). When he began to pull up on the hood of the forklift, he felt something "give". (*Id.* at p. 101, lines 10-12). Wise was asked by a co-employee if he was ok, to which he responded that "something gave", ostensibly indicating that he had suffered a sprain or some

[1] West Fraser is a Canadian forestry company that produces lumber, pulp, and woodchips, amongst other products. West Fraser maintains an operating lumber mill in Newberry.

other manner of physical injury. (*Id.* at p. 101, lines 13-15). After indicating to his supervisor that he was experiencing pain in his groin, Wise went to a restroom and upon inspection discovered that his testicles were swollen and painful. (*Id.* at p. 101, lines 19-22-p. 103, lines 1-12).

Wise immediately notified West Fraser management that he needed to see a doctor. (*Id.* at p. 101, line 23-p. 102, line 8). Wise was given an icepack to place on his groin area. (*Id.* at p. 102, line 8-p. 105, line 13). During this time, according to Wise and Anthony Cannon's deposition testimony, at least seven West Fraser employees were aware that Wise was experiencing significant pain in his groin area. (*Id.*; Anthony L. Cannon Dep. p. 7, lines 11-18).[2] It was obvious that Wise was in pain in his groin area, and that he was very uncomfortable. (Keith Nelson Dep. p. 19, lines 20-24).

Keith Nelson was West Fraser's Environmental Health and Safety Director in charge of overseeing any medical care employees would receive after they suffered a workplace injury. (*Id.* at p. 10, lines 4-6-p. 15, lines 16-20). Nelson took Wise to the emergency room at Newberry County Memorial Hospital ("NCMH"). (Wise Dep. p. 111, lines 5-18). Wise's wife, Pauline Wise, arrived at the hospital sometime after Wise and Nelson. (*Id.* at p. 112, lines 21-23). While diagnosing Wise, the attending physician, Dr. Keith Leap, made comments that there may have been a change in sexual partners that prompted Wise's condition. (*Id.* at p. 126, line 19-p. 132, line 2). It is disputed whether this comment was made in the presence of Nelson, with Wise and his wife contending that Nelson was present. (*Id.* at p. 132, lines 3-23; Pauline Wise Dep. p. 27, lines 3-13). This statement was false and untrue.

In his deposition, Nelson stated that after Dr. Leap left the room, he tracked the doctor down and requested an explanation as to what was really going on, to which Dr. Leap replied that

[2] Cannon is a forklift operator who works with Wise. (Cannon Dep. p. 4, lines 21-24).

Wise had an "infection" and would need a prescription.[3] (Nelson Dep. p. 18, lines 6-17). Wise has confirmed that Nelson left the exam room as Dr. Leap did, and that he could see Nelson speaking to him in the hall but could not hear what they were discussing. (Wise Dep. p. 150, lines 13-17). Nelson has claimed that he had no idea that anyone could infer any sexual component or innuendo from the fact that Wise had an infection, but this assertion is contradicted by the statement of Melody Jepsen, which documents that Nelson returned to West Fraser from the hospital and informed her and others that Wise had a "long worded infection" that possibly originated from his sexual history, and that the doctor had asked him about his sex partners in front of his wife. (Nelson Dep. at p. 68, line 15-p. 69, line 6; Jepsen Statement). Nelson also asked Wise if he thought that his wife had some kind of infection as well. (Wise Dep. p. 146, lines 3-6).

Wise left the hospital with his wife and did not return to work until the next Monday, six days later. (*Id.* at p. 146, line 12). Nelson, on the other hand, immediately returned to the Newberry mill. (Nelson Dep. p. 21, lines 11-12). Upon returning to the mill, Nelson saw George Wilson, Jr., an employee and co-worker of Wise. (George Wilson, Jr. Dep. p. 6, lines 11-14). Apparently, by this time word had spread to other employees, like Wilson, that Wise had suffered sudden pain and discomfort in his groin that morning, with the prevailing belief being that he had likely pulled a muscle while lifting something. (Jeremy L. Neal Dep. p. 6, lines 9-14; Cannon Dep. p. 5, lines 2-6; Pauline Wise Dep. p. 24, lines 11-16). According to Wilson and Nelson, Wilson asked Nelson how Wise was doing, to which Nelson claims he merely replied that Wise had an "infection," supposedly without further explanation. (Wilson Dep. p. 6, lines 15-17; Nelson Dep. p. 22, lines

[3] A prescription for an antibiotic was provided to Nelson for Wise. (Nelson Dep. p. 15, lines 11-14; p. 48, lines 9-10).

9-12). Wilson, in turn, claims that he told several other employees only that Wise had an "infection". (Wilson Dep. p. 6, line 24-p. 7, line 3).

Curiously, under oath Nelson and Wilson both testified as to the contents of this discussion in nearly identical terms, stating that Wilson asked Nelson how Wise was doing, to which the only reply Nelson gave was that Wise had an infection, after which the conversation immediately ceased. Even more curious, no follow up questions were asked by Wilson as to the nature of the infection, given the employees' awareness of the location of Wise's injury, nor were any questions as to the nature of the infection asked of Wilson when he reported Wise's condition to his co-employees. Importantly, at this point, Nelson no longer believed that Wise's condition was related to the workplace incident; his belief was that Wise's infection arose from other circumstances. (Nelson Dep. p. 25, lines 1-11).

As previously noted, Nelson proceeded to the front office, where he informed Jepsen and others that the doctor had told him that Wise had an infection that was possibly sexual in origin, and that the doctor had inquired about multiple sexual partners. (Jepsen Statement). However, in his deposition, Nelson claimed that the conversation in the front office only took place with facility manager Dolan J. Russell behind closed doors. (Nelson Dep. p. 22, lines 13-25). Nelson testified that he told Russell about the doctor's diagnosis of an infection for which Wise was given a prescription, and he also testified that he informed Russell of the doctor's accusation that Wise had been with multiple sexual partners. (*Id.* at p. 22, lines 19-25).

However, Russell has denied that Nelson ever told him anything about Wise's condition being related to multiple sexual partners or a sexually transmitted disease. (Dolan J. Russell Dep. p. 7, lines 6-16-p. 19, line 20-p. 20, line 4). According to Russell, the only way a rumor concerning Wise's condition could have made its way into the West Fraser workforce before Wise returned to

work was from the aforementioned conversation between Nelson and Wilson, and he did not know exactly what Nelson had told Wilson. (*Id.* at p. 20, line 21-p. 21, line 11). Nelson has also admitted to telling Wise's supervisor, Mike Shealy, that Wise had an "infection" and would be missing time from work. (Mike Shealy Dep. p. 5, lines 18-23). Shealy was only responsible for keeping up with Wise's time, a task which did not require knowledge of the specifics of Wise's condition. (Nelson Dep. p. 73, line 17-p. 74, line 5).

Unsurprisingly, in the coming days the rumor that Wise had been diagnosed with a sexually transmitted infection spread throughout West Fraser like wildfire. These rumors started well before Wise returned to work after recovering from his injury. (Neal Dep. p. 5, line 23-p. 6, line 2). Upon returning to work six days later, Wise was humiliated and ridiculed by numerous West Fraser employees for having a sexually transmitted infection, despite that this was not in fact what he was suffering from. (*Id.* at p. 7, lines 7-15; Anthony Byrd Dep. p. 4, line 24-p. 6, line 8; Raphael Maybin Dep. p. 5, line 22-p. 7, line 8; Joseph Praylow Dep. p. 8, lines 16-24; Julian Shelton Dep. p. 6, lines 9-21; Cannon Dep. p. 5, line 9-p. 6, line 22). No less than six West Fraser employees other than Wise have testified that they heard accusations in the workplace that Wise had a sexually transmitted infection. Somehow, in the days following Wise's departure from work, the discussion around West Fraser concerning Wise's condition transmuted from the belief that he had pulled a muscle into accusations that he had a sexually transmitted infection. And in that intervening period, only one person who was present at NCMH to hear the allegations of Dr. Leap had returned to the West Fraser mill: Keith Nelson.

Wise confronted several of his coworkers in an attempt to find out how the rumor had started. (Maybin Dep. p. 7, lines 9-19; Neal Dep. p. 8, line 21-p. 9, line 4; Praylow Dep. p. 10, lines 4-14). Frustrated, Wise went to Russell to inform him of the rumors and mistreatment he was

experiencing. (Russell p. 10, line 5-p. 11, line 9). Notes from the meeting document that Wise informed Russell of the conversation between Nelson and Wilson, and that Nelson had told Wilson that Wise had a sexually transmitted infection after returning from NCMH. (Meeting Notes, Nov. 13, 2017). Russell promised Wise that he would investigate the situation and take corrective action. (Russell Dep. p. 11, lines 10-15). Russell called West Fraser's regional manager and corporate human resources representative and was advised to investigate the situation. (*Id.* at p. 11, line 17-p. 12, line 1). Four days later, Russell had another meeting with Wise and told him that he had investigated the incident and taken appropriate action. (Meeting Notes, Nov. 17, 2017). Russell had sent a letter to Nelson, reprimanding him and informing him that he had very serious concerns about his conduct. In particular, Russell was concerned that the disclosures made by Nelson to Wilson could have been considered slanderous by Wise, and that his behavior had put West Fraser at risk. (Warning Letter, Nov. 17, 2017).

## STANDARD OF REVIEW

The Circuit Court's Order does not properly apply the summary judgment standard. Rather than construing all inferences in the light most favorable to Wise, the Order's findings inappropriately weigh the evidence and resolve all conclusions in favor of West Fraser. In essence, the Order places a premium on Nelson and Wilson's testimony, ignores direct and circumstantial evidence indicating that Nelson and Wilson's testimony is not credible, and requires Wise to produce direct evidence proving that Nelson specifically told Wilson, verbatim, that Wise had a sexually transmitted infection. This is not what is required by the summary judgment standard and is a clear error of law.

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact . . . ." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 524, 787 S.E.2d 485, 489 (2016). "Summary judgment should not

be granted even when there is no dispute as to evidentiary facts **if there is dispute as to the conclusion to be drawn from those facts**." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000) (emphasis added). Summary judgment is a drastic remedy that should be cautiously granted. *BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005).

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). Once the moving party carries its initial burden, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "In order to withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a **mere scintilla** of evidence.'" *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 308 (2012) (emphasis added) (quoting *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330 673 S.E.2d 801, 803 (2009)).

Here, there are many reasonable inferences and conclusions that could be drawn from the facts, including an inference that Nelson told Wilson that Wise had a sexually transmitted infection. In the alternative, even if Nelson only told Wilson that Wise had an "infection," it could have been defamatory by way of innuendo and by implication under all of the relevant circumstances, when viewed in the light most favorable to Wise.

## ARGUMENTS

There are some statements that are clearly defamatory on their face. Statements such as "X is a pedophile" or "Y embezzles money from his clients" do not require much by way of explanation for the impartial observer to understand how damaging they could be to one's reputation if untrue. Other statements, however, are much more insidious as they may appear

harmless when taken out of context. For example, "X is enjoying his honeymoon with Y" seems innocent enough. When construed alongside the fact that X is in fact married to Z, the statement becomes defamatory. Likewise, the statement that "X has an infection" typically only informs the listener that X is sick, and may even elicit sympathy for X. When accompanied by a wink, a raised eyebrow, or a smirk, it can take on an entirely different meaning and become incredibly harmful to one's good name, depending on the surrounding facts and circumstances. Unfortunately, the above-described scenario is exactly what befell Anthony Wise after he was injured at West Fraser's mill on November 7, 2017.[4]

A plaintiff must prove the following four elements to state a claim for defamation: (1) a false and defamatory statement was made; (2) the unprivileged communication was made to a third party; (3) the publisher was at fault; and (4) actionability irrespective of special harm or the existence of special harm caused by the publication. *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). In this case, Wise alleges that the defamatory statements, either on their face or by innuendo, concerned the "contraction of a loathsome disease" and "unchastity", making the statements actionable per se. *Goodwin v. Kennedy*, 347 S.C. 30, 36, 552 S.E.2d 319, 322-23 (Ct. App. 2001). Thus, Wise is not required to prove the fault and special harm elements. *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664.

The question of whether a statement is capable of a defamatory meaning involves determining if a statement classifies under either of two categories of defamatory statements:

> The defamatory meaning of a message or statement may be obvious on the face of the statement, in which case the statement is defamatory *per se* . . . If the defamatory meaning is not clear unless the hearer knows facts or circumstances not contained in the statement itself, then the statement is defamatory *per quod*. In cases involving

[4] An occupational health doctor determined that Wise did pull a groin muscle while working on the forklift. (Mot. Summ. J. at 14 n. 7).

> defamation *per quod*, the plaintiff must introduce facts extrinsic to the statement itself in order to prove a defamatory meaning.

*Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 508-09, 506 S.E.2d 497, 501 (1998). Thus, even if Nelson merely stated that Wise had an infection, it is an issue for the jury to decide as to whether it had a defamatory meaning if Wise can adduce a mere scintilla of extrinsic facts supporting that the hearer could infer from the statement that Wise had a ***sexually transmitted*** infection.

In essence the Circuit Court's Order finds that (1) Nelson and Wilson's testimony is undisputedly credible and supports that Nelson only told Wilson that Wise had an "infection" in good faith and out of concern for his well-being, and (2) any statements made by Nelson to Wilson were not reasonably susceptible to a defamatory meaning. Additionally, the Circuit Court's Order finds that any statements made by Nelson to plant manager Russell were protected by the qualified privilege.

However, the Court's Order ignores that the evidence supports multiple other inferences and conclusions, including that: (1) despite their testimony indicating otherwise, Nelson told Wilson that Wise had a sexually transmitted infection, (2) even if Nelson only told that Wise had an "infection," for the purposes of summary judgment there is sufficient evidence that this could be defamatory by way of innuendo, (3) there is a genuine dispute of material fact as to whether Nelson was the source of the defamatory rumors, (4) the warning letter written from Russell to Nelson constitutes a mere scintilla of evidence that his statements were defamatory, (5) the repetition of a defamatory statement made by another is in itself defamation, and (6) any statements made by Nelson, Russell, or any other member of management to the West Fraser workforce concerning Wise's condition would not be qualifiedly privileged. Additionally, the Circuit Court erred in denying Wise's Motion to Amend his Complaint.

## I. **There is Sufficient Evidence in the Record to Create an Issue of Fact, and Reasonably Support the Inference, That Nelson Told Wilson and Others That Wise had a Sexually Transmitted Infection.**

The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community. *Harris v. Tietex International Ltd.*, 417 S.C. 533, 540, 790 S.E.2d 411, 415. (Ct. App. 2016). The evidence in the record gives rise to a reasonable inference that Nelson told Wilson that Wise had a sexually transmitted infection, and that this publication was subsequently spread throughout West Fraser. Nelson and Wilson have denied that any references to a ***sexually transmitted*** infection were made by Nelson, and that the communication consisted only of the message that Wise had an "infection." (Wilson Dep. p. 6, lines 15-17; Nelson Dep. p. 22, lines 9-12). Despite this, there is sufficient circumstantial evidence to the contrary to give rise to the inference that Nelson's testimony is untrue, rendering summary judgment inappropriate.[5]

Prior to leaving West Fraser's mill to travel to NCMH, a handful of employees were aware that Wise was suffering from a groin injury of some nature. (Wise Dep. p. 101, line 19- p. 105, line 13; Cannon Dep. p. 7, lines 11-18). The testimony of several West Fraser employees indicates that the prevailing belief at the time was that Wise had pulled a muscle. (Neal Dep. p. 6, lines 9-14; Cannon Dep. p. 5, lines 2-6). The only West Fraser employee to accompany Wise to NCMH was Nelson. (Wise Dep. p. 111, lines 5-18). Upon arriving at NCMH, Nelson learned that Wise had an infection and would need treatment. (*Id.* at p. 126, line 19- p. 132, line 2; Nelson Dep. p. 18, lines 6-17). In the light most favorable to Wise, Nelson also overheard the defamatory allegation that Wise had multiple sexual partners and that the infection may have been sexually transmitted. Nelson then returned to West Fraser, while Wise went home and did not return to work in the next week. (*Id.* at p. 68, line 15-p. 69, line 6; Jepson Statement; Wise Dep. p. 146, lines 3-6).

[5] It is undisputed that Wise did not in fact have a sexually transmitted infection.

Upon arriving back to West Fraser, Nelson claims to have only told Wilson that Wise had an "infection." Nelson claims to have then entered the front office and only told plant manager Russell behind closed doors of the statements made by Dr. Leap. (Nelson Dep. p. 22, lines 13-25). Russell, on the other hand, denies that Nelson ever told him of a sexual component to the injury. (Russell Dep. p. 7, lines 6-16; p. 19, line 20-p. 20, line 4). These claims are contradicted by the statement of Jepson, which provides that Nelson returned to the front office and related to Jepson and others that Wise had a "long worded infection" that possibly originated from his sexual history, and that the doctor had asked him about his sex partners in front of his wife.[6] In accepting Nelson and Wilson's testimony as true, and requiring Wise to rebut their testimony with direct evidence as to its falsity, while ignoring all of the circumstantial evidence favorable to Wise, the Circuit Court's Order improperly weighed the evidence and usurped this role from the factfinder.

Before Wise could return to work, the consensus of the employees at West Fraser seems to have shifted from believing he had a pulled muscle to thinking that he had a sexually transmitted infection. This communication was repeated and spread throughout the West Fraser workforce at least four days before Wise ever returned to West Fraser. (*See* Wise Dep. p. 146, line 12). In the immediate aftermath of these incidents, Russell noted that Wise had learned that Nelson told Wilson that Wise had a sexually transmitted infection. (Meeting Notes, Nov. 13, 2017). Russell subsequently investigated and reprimanded Nelson, informing him that the statements he made

[6] Nelson's deposition testimony is impeached by several other facts in the record. Nelson also denies having any idea that Wise's infection could be construed as sexual in nature when he spoke to Wilson, yet Jepson's statement indicates that Nelson clearly believed it could have been when he initially entered the front office spoke to her. (Nelson Dep. p. 69, lines 2-6). The credibility of Nelson's testimony that he only told Wilson that Wise had an "infection", with no mention that it was sexually transmitted, must be weighed by a jury, and his testimony should not have been accepted by the Circuit Court as undisputed direct evidence on a motion for summary judgment. Additionally, Jepson's statement is admissible and is not hearsay under Rule 801, SCRE, in that Jepson can testify at trial and be subject to cross-examination concerning the statement.

about Wise could be considered slanderous by him. (Warning Letter, Nov. 17, 2017). While Russell's slander assertion is susceptible to many different interpretations, the Circuit Court should have been confined to resolving its meaning in Wise's favor. And in the light most favorable to Wise, considering that Russell made this assertion immediately following his investigation, the most reasonable inference is that he made the assertion because he had learned that Nelson communicated untrue, defamatory information to Wilson. This evidence is more than sufficient to create the inference that despite his denials, Nelson told Wilson, and possibly others outside the scope of the qualified privilege, that Wise had a sexually transmitted infection, which was subsequently published by others throughout the West Fraser mill. For these reasons alone, West Fraser's Motion for Summary Judgment should have been denied.

The Circuit Court's Order cites *Moody v. McClellan*, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988), to support the proposition that a plaintiff must come forward with direct evidence rebutting a defendant's denial that he made defamatory statements, and that a plaintiff cannot rely on circumstantial evidence to overcome such a denial on a motion for summary judgment. This is not the holding of *Moody*. In *Moody*, the plaintiff contended that his supervisor made four defamatory remarks about him during his employment, which was denied by the supervisor. *Id.* at 163, 367 S.E.2d at 452. However, the plaintiff in *Moody* produced no admissible evidence probative of whether his supervisor actually made the statement. *Id.* The only evidence produced by the plaintiff in *Moody* was the plaintiff's own testimony about other employee's prior statements. *Id.* The court's holding in *Moody* is merely a reiteration of the well-known rule that a non-moving party must come forward with admissible evidence showing there is a genuine issue for trial.

Here, there is an overwhelming amount of admissible circumstantial evidence indicating that the most likely, and only, source for the rumor was Nelson. Wise does not rely solely on his own testimony of what other people told him that Nelson said; rather, the circumstantial evidence, including testimony from Wise's co-employees, indicates that the only possible source of the defamatory communications other than Wise was Nelson. The evidence also indicates that Wise could not have been the source, as he did not return to work for six days. There is admissible impeachment evidence demonstrating that Nelson's testimony is not credible, and there is additional admissible evidence, when viewed in the light most favorable to Wise, indicating that Russell likely discovered immediately after the incident, in the course of his investigation, that Nelson's communications with Wilson were slanderous. *Moody* is inapposite, and the Circuit Court's Order erroneously relies on the decision to support its finding that there is no factual issue concerning Nelson's communications with Wilson. This error necessitates a reversal of the Order and denial of West Fraser's Motion for Summary Judgment.

## II. Even if Nelson only told Wilson that Wise had an infection and needed an antibiotic, there is more than a mere scintilla of extrinsic evidence showing that the statement could be defamatory by way of innuendo.

In the alternative, even if Nelson only stated to Wilson that Wise had an infection, there are facts in the record extrinsic to the statement itself indicating that this statement could be susceptible to a defamatory meaning. The Circuit Court's analysis of whether the statement that Wise had an infection and needed an antibiotic was defamatory is flawed and focuses on irrelevant facts in deciding whether the statement was defamatory by way of innuendo. The Circuit Court's Opinion finds that the statement is not susceptible to a defamatory meaning based on the following grounds: (1) there is no direct evidence rebutting Nelson's testimony that he only stated that Wise had an "infection," (2) Wise discussed the sexually transmitted infection accusations with other West Fraser

employees after he returned to work, (3) other employees were aware that Wise had suffered a groin injury before he and Nelson went to NCMH, (4) the warning letter only established that Nelson's actions were contrary to company policy, and (5) Wise's testimony concerning assumptions or stereotypes of black men and sexually transmitted infections is mere conjecture.

Most of these points have no bearing on whether the statement that Wise had an infection and needed antibiotics was defamatory by way of innuendo, and in the light most favorable to Plaintiff, some of these points are extrinsic facts indicating that the statement could have a defamatory meaning. Since it is reasonable under the circumstances for the statement that Wise had an infection to possess multiple meanings, including a defamatory meaning, a jury must decide which view they will take.

> To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain. Statements therefore may be either defamatory on their face, or defamatory by way of innuendo. Innuendo is extrinsic evidence used to prove a statement's defamatory nature. It includes the aid of inducements, colloquialisms, and explanatory circumstances.

*Fountain*, 398 S.C. at 441-42, 730 S.E.2d at 309.

For example, the statement that "A had a baby" does not have a defamatory meaning obvious from the face of the statement, but it could be defamatory by way of innuendo where the extrinsic fact is that A is unmarried. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 509, 506 S.E.2d 497, 501 (1998). Thus, our courts have found that the statements such as "there was simply no family support to encourage her to continue her education" and "I don't believe I ever called Don Capps a paranoid bastard. I called him a paranoid sonofabitch" are capable of defamatory meanings in light of the extrinsic facts. *See id.*; *Capps v. Watts*, 271 S.C. 276, 246 S.E.2d 606 (1978). It is for a court to decide whether a communication is reasonably capable of conveying a defamatory meaning. *Holtzscheiter*, 332 S.C. at 530, 506 S.E.2d at 512 (Toal, J. concurring). However, if reasonable minds

might differ as to whether the statement is capable of a defamatory construction, then the issue must be submitted to the jury. *Id.* at 531, 506 S.E.2d at 513.

There is sufficient extrinsic and explanatory evidence to create a jury issue as to whether Nelson's statement that Wise had an infection and needed antibiotics had a defamatory insinuation. Before he left to go to NCMH, multiple employees, including Nelson, were aware that Wise had an injury to his groin. In fact, as noted in the Circuit Court's Opinion, one of the employees at the time remarked on whether the injury was related to Wise's sexual relationships. Upon returning, Nelson told Wilson and others that Wise had an "infection." Shortly thereafter, a rumor was being passed between employees of West Fraser that Wise had a sexually transmitted infection, whereas initially, it appeared that the employees believed that Wise had strained a groin muscle. In the light most favorable to Wise, the warning letter sent from Russell to Nelson acknowledges that Nelson's statements were capable of a defamatory meaning, as it recognizes that others, including Wise, could have interpreted Nelson's comments as slanderous insinuations that Wise had a sexually transmitted infection, given the nature and location of his injury, and the workforce's awareness of its circumstances. Within the context of the nature of Wise's injury and the extent to which other employees were aware of it, these facts could reasonably support the conclusion that Nelson's statement to Wilson had a defamatory meaning by way of innuendo. The lack of direct evidence rebutting Nelson's testimony, as well as the fact that Wise discussed the accusations with other employees, are wholly irrelevant to the issue of whether Nelson's statement had a defamatory meaning. On the other hand, the extrinsic facts and explanatory circumstances addressed above create a reasonable inference in the light most favorable to Wise that the statement of Nelson was defamatory in nature and by insinuation.

## III. The Circuit Court Inappropriately Determined that the Defamatory Rumors Were not Started by Nelson.

Although the Circuit Court's Order does not make a specific finding that the rumor at West Fraser specifically originated with Wise, it cites to passages from witness testimony creating the appearance that this is the case. To the contrary, almost every witness who acknowledged that Wise spoke to them about the rumors clarified that he did so to try to find out who was spreading them, and that the conversations happened as a result of the rumor having been previously repeated amongst the West Fraser workforce.

"If a reasonable juror looking at the evidence in the light most favorable to the non-movant could draw more than one inference about a material fact from it, summary judgment must be denied." *Abdelgheny v. Moody*, 432 S.C. 346, 350, 852 S.E.2d 225, 227 (Ct. App. 2020). Multiple reasonable inferences could be drawn from the testimony of all witnesses who have been deposed in this action as to the source of the rumors concerning Wise. While one inference could be that the rumors originated independently of Nelson, the most reasonable inference is that the rumors began after Nelson returned to West Fraser's mill and spoke to Wilson, Russell, Jepson, Shealy, and others about what he had observed at NCMH.

The testimony of Wise's co-employees indicates that the rumors started well before he returned from injury leave.

> A. Well, yeah. Like I said, once he got back from, I guess, the kiln or whatever he had going on, he came back to work and I guess he heard the rumors going on about it. And he was talking to see what I heard and he was going around to everybody else to see what they heard and I guess he was upset about it.

(Maybin Dep. p. 7, lines 9-19).

> Q. Did you hear him talk about it with other people at the mill?
>
> A. The guys when they was messing with them, yes, he talked back to them.
>
> Q. But did you hear Hopp initiate conversations about it with other people?

A. No.

(Praylow Dep. p. 10, lines 4-17).

Q. And when did you learn that there was something going on, people said that Mr. Wise had a disease?

A. It was going around the plant site maybe like a day after, two days after.

(Neal Dep. p. 5, line 23-p. 6, line 2).

Thus, in the light most favorable to Wise, the rumors started well in advance of his return to the mill. The only individual who was present at the hospital to overhear the accusations of Dr. Leap was Nelson, making the inference that he was the origin of the rumors not only reasonable, but probable. This is substantiated by the fact that many West Fraser employees believed that Wise had pulled a muscle prior to Nelson's return to the mill. To the extent that the Circuit Court's Order finds that Wise was the source of the rumor, it is in error and improperly weighs the evidence.

## IV. The Warning Letter from Russell to Nelson can be Reasonably Interpreted as an Admission that Nelson's Statements Were Defamatory.

In determining that the warning letter from Russell to Nelson on its face was only an admonishment that Nelson's statements could be considered by Wise, but not by anyone else, as slanderous, the Circuit Court improperly viewed the evidence in the light most favorable to West Fraser. The Circuit Court found that the letter only established that West Fraser considered Nelson's statements inappropriate and contrary to company procedure. However, if the intention of West Fraser had been to inform Nelson that he had violated company policies, the letter would have been confined to stating its purpose in those terms, and only reprimanding Nelson for violating an employee's confidentiality. Instead, plant manager Russell, in the immediate aftermath of his investigation of the incidents giving rise to this action, chose to write, "Verbally

disclosing medical information about an employee can be considered by the employee as slanderous." (Warning Letter, Nov. 17, 2017).

The Circuit Court's interpretation of the letter renders the statement superfluous. Why would Russell have been concerned that Wise could have interpreted the statements as slanderous if they were true? Disseminating an employee's medical information could only be considered by the employee as slanderous if untrue statements had been made in connection with the information. Only when the disclosed medical information is untrue could it begin to be considered slanderous, thus, West Fraser's admission that the dissemination could be slanderous necessarily entails an inference that Russell discovered Nelson had falsely misconstrued Wise's diagnosis to unprivileged employees. When viewed in concert with the contradicting testimony of Russell and Nelson, the statement of Jepson, and the timing of the origins of the rumor and Wise's return to work, a jury issue is created as to whether Nelson made defamatory statements concerning Wise's condition. The Circuit Court erred in resolving the inferences from the warning letter in West Fraser's favor.

## V. Even if Nelson was Only Repeating What he was Told by Dr. Leap, the Communication Could Still Have a Defamatory Construction and is a Separate Defamatory Publication.

The Circuit Court's Order finds that Nelson's statement that Wise had an infection and needed an antibiotic was "undisputedly true," an accurate report of Wise's diagnosis, and not defamatory. However, as explained above, even though Wise was eventually diagnosed with prostatitis, the statement that he had an "infection" is capable of an altogether different, and defamatory, insinuation, given the circumstances under which the publications took place. And even if Nelson was only repeating what he had been told by Dr. Leap, since Dr. Leap's statements could be defamatory by way of innuendo or otherwise, then Nelson's repetition of the statement is also a separate and actionable publication.

"[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." Restatement (Second) of Torts § 578 (Am. L. Inst. 1975). "This is true although the speaker accompanies the slander with a statement that it is a rumor only, or designates the name of the author or the original publisher." *Id.* cmt. c. "It would otherwise be too easy for a writer or publisher to defame freely by repeating the defamation of others and defending it as simply an accurate report of what someone else had said." *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 250 (1st Cir. 2000). Thus, if Dr. Leap implied to Nelson that Wise suffered a sexually transmitted infection, and Leap's statements to Wise and Nelson concerning an infection were susceptible to a defamatory meaning by way of innuendo or otherwise, then the mere fact that Nelson repeated these statements to Wilson, Russell, Jepson, and Shealy, during which the evidence indicates he likely implied to Wilson and others that Wise had a sexually transmitted infection, does not absolve him of liability. The Court's Opinion contains a clear error in that it assumes that (1) if Nelson only stated that Wise had an infection, then (2) he was only speaking the truth and could not have been insinuating that Wise had a sexually transmitted infection. It should be left to a jury to determine whether Nelson's statement was merely the repetition of a factual diagnosis of prostatitis by Dr. Leap, or whether the statement was defamatory and insinuated that Wise had a sexually transmitted infection.

## VI. **While any Statements Made by Nelson to Russell Could Have Been Qualifiedly Privileged, any Statements Made by Nelson, Russell, or any Other Member of West Fraser Management in the Presence of Other Members of the Workforce Would Exceed the Scope of the Privilege.**

The Circuit Court's Order erroneously states that Plaintiff may only overcome the qualified privilege by demonstrating actual malice. (Order, Oct. 11, 2021 at 12). In finding that the communications were qualifiedly privileged, the Order ignores that (1) the privilege does not protect communications outside its scope, such as unnecessary communications to employees, (2) there is evidence in the record that the conversation between Russell and Nelson did not take place "behind

closed doors," as claimed by Nelson and Russell, and (3) there is evidence in the record that communications to nonessential employees occurred. Thus, Wise may also overcome the privilege by demonstrating that Nelson, Russell, or other West Fraser employees unnecessarily conveyed the defamatory message to others, such as Wilson and Shealy. Wise does not have to overcome the privilege by demonstrating actual malice.

The protection of a qualified privilege may be lost by the manner of its exercise. *Fulton v. Atlantic Coast Line R.R.*, 220 S.C. 287, 67 S.E.2d 425 (1951). In order for a communication to be privileged, the person making it must be careful not to go further than his interests require. *Id.* While communications between officers and employees of a corporation may be qualifiedly privileged, the privilege may clearly be lost by excessive publication or publication to persons not required by the occasion involved, even if they are employees. *See Prentiss v. Nationwide Mut. Ins. Co.*, 256 S.C. 141, 148, 181 S.E.2d 325, 327 (1971); *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 125-26, 341 S.E.2d 622, 624-25 (1986). If there are any facts in the record indicating that a publication went beyond what an occasion required, it is for the jury to determine whether the privilege has been abused or exceeded. *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001). Factual inquiries, such as whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999).

The Circuit Court's Order bases its finding of qualified privilege on the assumptions that Nelson only told Russell that Wise had an infection in privacy behind closed doors, that Nelson only conveyed to Russell that Wise was upset because Dr. Leap had asked Wise about changing sexual partners, and that this information stayed between Russell and Nelson. However, there is evidence in the record indicating that this is not true. The statement of Melody Jepson indicates that the

communications between Nelson and Russell were not made behind closed doors, that others were present for Nelson's report, and that Nelson said the infection was possibly a sexually transmitted disease. (Jepson Statement). Russell has denied that Nelson conveyed to him any information indicating the infection could have been a sexually transmitted infection. Further, any statements to Wilson and Shealy would clearly have exceeded the scope of the privilege, as both are nonessential employees who did not have the need to know the specifics of Wise's diagnosis in able to perform their respective job functions.

This evidence is contradictory and obviously calls into question the credibility of both Nelson and Russell concerning the occasion on which Nelson made these comments. Further, the circumstantial evidence, when resolved in Wise's favor, demonstrates that at some point before Wise returned to work, the statement that Wise had a sexually transmitted infection was republished to nonessential employees of West Fraser, such as Wilson and Shealy. This is in direct contradiction to the Circuit Court's finding that there is no evidence of an improper manner of publication. Since there is evidence that the Nelson-Russell communication did not occur as claimed by Nelson and Russell, that others were present or received the communication at other times, that Nelson did convey that there was a sexual component to Wise's infection, and that other West Fraser employees learned of the false assertion that Wise had a sexually transmitted infection, it was error for the Circuit Court's Order to find that any communications concerning Wise were privileged on a motion for summary judgment. Since there is a controversy as to the facts, the factfinder must determine whether the privilege was abused or exceeded.

## VII. The Circuit Court Erroneously Denied Wise's Motion to Amend Based Upon West Fraser's View of the Merits of the Amendment and Does not Contain an Appropriate Prejudice Analysis.

As a basis for denying Wise's Motion to Amend, the Circuit Court inappropriately weighed the evidence and ruled on the merits of Wise's proposed amendment. This is clearly not the analysis mandated by the South Carolina Rules of Civil Procedure for determining whether a proposed amendment should be granted. Rule 15(a) mandates that "leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. The rule strongly favors amendments, and courts are "encouraged to freely grant leave to amend." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005) (citation omitted). "[U]nless there is a substantial reason to deny leave to amend, the discretion of the [court] is not broad enough to permit denial." *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988) (quoting *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 598 (5th Cir. 1981)). The party opposing the motion has the burden of establishing prejudice. *Stanley v. Kirkpatrick*, 357 S.C. 169, 175, 592 S.E.2d 296, 298 (2004).

Wise's motion is timely and based on the same facts as his original Complaint. Therefore, it should have come as no surprise to West Fraser that he sought to amend the pleadings to add a cause of action seeking damages for the disclosure of his confidential medical information by a member of West Fraser's management. Rule 15 states that leave to amend the pleadings "shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Tanner v. Florence County Treasurer*, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999). The Circuit Court found that the motion failed based on the merits of the amended claim, and that the motion was untimely.

South Carolina courts have rejected the arguments provided by West Fraser, and relied upon by the Circuit Court, as grounds for denying a motion to amend. *See Stanley v. Kirkpatrick*, 357 S.C.

169, 592 S.E.2d 296 (2004) (finding that the amendment of a complaint over two years after the incident and after the applicable statute of limitations had passed did not prejudice the nonmoving party where the amendment is related to the facts in the original pleadings and depositions did not have to be retaken); *Parker*, 362 S.C. at 276, 607 S.E.2d at 711 (finding the amendment of an answer on the first day of trial did not prejudice the opposing party because the amendment directly related to the content of the original pleadings).

Wise's Amended Complaint was based on the same facts that were included in his original Complaint. The Complaint included allegations based upon the publication of Wise's confidential medical information, just as Wise's proposed Amended Complaint did. The Amended Complaint arose from the same group of operative facts as the original Complaint. Additionally, West Fraser would have still had an opportunity to conduct further discovery to refute Plaintiff's claims if necessary. The amendment would not have necessitated the retaking of any depositions. West Fraser had adequate notice and ample opportunity to gather further evidence to refute the new claim.

More importantly, Wise's motion furthered the interests of justice. Wise has suffered tremendous humiliation, embarrassment, and damage to his reputation as a result of the events alleged in his Complaint. The Circuit Court's Order does not fully explain how West Fraser would have been deprived of the opportunity to prepare a legal defense rebutting Wise's claims as a result of his proposed amendment of the Complaint. Disapproval of the merits of a new claim does not meet the burden of establishing prejudice as defined by South Carolina courts under Rule 15. *See Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019) ("A court's decision to deny a motion to amend should not be based on the court's perception of the merits of an amended complaint.").

## CONCLUSION

For these and all other reasons previously put forth to the Circuit Court, the Circuit Court's October 11, 2021 Order should be reversed.

PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A.

By: 

February 18, 2022
Hampton, South Carolina

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

G.D. Morgan, Jr., Circuit Court Judge

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Appellate Case No.: 2021-001463

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Anthony Wise, …….....Appellant,

-v-

Kenneth E. Leap, Newberry Hospital, LLC d/b/a Newberry County Memorial Hospital, and West Fraser, Inc., Defendants,

Of Whom, West Fraser, Inc. is ……..…Respondent.

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**CERTIFICATE OF SERVICE**

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This is to certify that I, ***Claudia Cartier***, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellants, have this date emailed a true and correct copy of the within ***Appellant's Initial Brief*** to:

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February 18, 2022
Hampton, South Carolina

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SC Court of Appeals

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The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
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***Re: Anthony Wise v. Newberry Hospital, et al***
***Appellate Case No.: 2021-001463***

Dear Ms. Kitchings:

Please find enclosed for filing, Appellant's Initial Brief and Designation of Matter to be Including in the Record on Appeal in the above-referenced case.

By copy of this letter, Appellant's Initial Brief and Designation of Matter is being served on all counsel of record.

With kind regards, I am

Sincerely,

John E. Parker Jr.

JAY/cc
Cc: Christopher B. Major, Esquire.
Anne Laurie McClurkin, Esquire