

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2009-CP-32-2430

Frances Castine, Respondent,

v.

David W. Castine, Appellant.

APPELLANT'S PETITION FOR REHEARING

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ATTORNEY FOR THE RESPONDENT

RECEIVED

MAY 15 2013

SC Court of Appeals

Pursuant to Rule 221, SCACR, the Appellant submits the following as his petition for rehearing on Opinion No. 5120, filed on May 1, 2013:

1. THE COURT INCORRECTLY APPLIED THE DEFENSE OF TRUTH TO EACH STATEMENT MADE, RATHER THAN THE COMMUNICATION AS A WHOLE.

The Appellant contends that summary judgment was not appropriate because the contents of the two letters that form the basis of the defamation claim against him were substantially true. Those two letters are located in the Record on Appeal at pages 249-252. The Appellant has contended that the content of both letters is substantially true and that it was error to grant the Respondent summary judgment on liability in light of that. See Appellant Final Brief at pages 5-10. This Court incorrectly held that “[s]ubstantial truth must be proven as to each individual statement David made, not as to the content of the letters he sent as a whole.” This Court cites no law at all in support of that broad, and incorrect, statement. In Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 221 S.E.2d 770 (1976), the Supreme Court held that substantial truth, rather than absolute truth, provides the basis for the truth defense and that holding does not require anything other than that the communication, considered as a whole, be found to be substantially true. Simply put, this Court erred in requiring the Appellant to prove the substantial truth of each statement made, rather than requiring him to prove the substantial truth of both letters as a whole. This Court did find that there was evidence that the other statements made by the Appellant were substantially true because it also ruled that “[w]hether the other statements were false is a matter for the jury.” This Court incorrectly decided to distinguish Ross on this basis of the present case not being a newspaper case, however, there is nothing within the language of the Ross opinion that limits the Supreme Court’s mandate to construe communications as a whole to the newspaper context only. This case should be reheard so that a decision can be made on the substantial truth of both letters as a whole.

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2. THIS COURT ERRED IN HOLDING THAT THE APPELLANT'S DESIRE TO SEE THE RESPONDENT LOSE HER JOB NEGATED THE DEFENSE OF PRIVILEGE.

In ruling against the Appellant on the issue of privilege, this Court held “in light of David’s admission of his intent to harm Frances and get her fired, we find the circuit court did not err in finding privilege did not exist.” By ruling this way, this Court has basically eliminated the defense of privilege in the employment context by equating a desire to see someone fired with the type of intent to harm that leads to loss of the privilege. There is absolutely nothing wrong or improper with wanting see a person lose a job if that person is engaged in behavior that makes him or her unqualified to hold the job. Bear in mind that this Court also ruled that the Appellant’s concerns that the Respondent was a habitual drug user, had an arrest record, lost prior government employment under unfavorable circumstances and overdosed on prescription medications were all factually supported so as to have the truth of those statements remain a jury issue. As this Court believes there to be facts to support the truth of those allegations, what is gained by way of sound public policy by refusing to grant a privilege to the person passing that information on to the Respondent’s employer? In this context it is significant to note that this Court did not find that the Appellant lost the privilege because he broadcast the information in an inappropriate fashion, or to an improper third person. This Court cites no case law supporting its holding that a desire to see a person fired necessarily results in loss of the privilege, because there is none. This Court erred in ruling that the Appellant could not rely upon the defense of privilege simply because he wanted to see the Respondent lose her job.

3. THE COURT DID NOT ADDRESS THE APPELLANT'S CONSTITUTIONAL PRIVILEGE CLAIM.

At pages 10, 11 and 14 of his final brief the Appellant asserted that his communications were privileged under Article I, Section 2 of the state constitution as being part of his right to "petition the government or any department thereof for a redress of grievance...." The opinion of this Court does not even address the constitutional argument raised by the Appellant. In this regard it is important to understand that the Respondent was a Lexington County employee and that the Appellant was a Lexington County resident and taxpayer. The Appellant believed that his county was using his tax dollars to employ a person that was a habitual drug user, with a criminal arrest record and a history of a drug overdose requiring hospitalization. This Court has already ruled that there was enough evidence in the record to preclude summary judgment on these allegations. In its opinion this Court provides no guidance or discussion why the Appellant's constitutional right to petition his government would not apply in this context. This Court simply does not address this issue at all. Rehearing should be granted so that this issue is ruled upon by the Court. Without a definitive ruling on this issue, it will remain unclear under what circumstances a taxpayer that has credible negative information about a county employee can safely communicate those concerns to his or her county government.

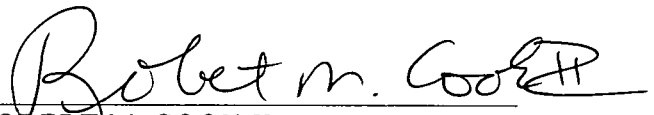
4. THE COURT ERRED IN RULING THAT COMMON LAW MALICE EXISTED.

This Court's ruling on common law malice, as opposed to common law actual malice, presupposes that no privilege existed. For the reasons discussed above, the Appellant contends that the Court erred in its ruling on privilege and, if that ruling is changed, it would necessarily require reconsideration of the ruling on common law malice. Additionally, this Court's common law malice ruling was premised upon the statement about misuse of a credit card being actionable per se and this Court cites to Erickson v. Jones St. Publishers, L.L.C., 368 S.C.444, 629 S.E.2d 653 (2006). There is no discussion by the Court as to how or why the statement about misuse of a credit card (the truth of all the other statements were found to be factually supported enough to be a jury issue) is actionable per se. The decision of the Court is simply devoid of any explanation as to why, as a matter of law, that one statement equates to common law malice. Rehearing should be held on this issue also so that the opinion of the Court is clear on all the issues raised by the Appellant.

Respectfully submitted,

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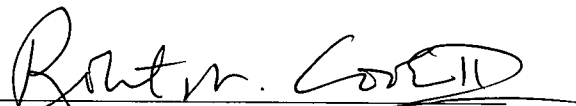
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David W. Castine,..... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on the attorney for the Appellant by depositing a copy of it in the United States Mail, postage prepaid, on May 15, 2013, addressed to S. Jahue Moore, Moore, Taylor and Thomas, 1700 Sunset Blvd., West Columbia, SC 29169.

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