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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-40-08590

Ammie McNeil, Appellant/Petitioner,

v.

South Carolina Department of Corrections
And Jon E. Ozmint, Robert Ward and
Bernard McKie in their individual capacities, Defendants,

Of whom South Carolina Department of
Corrections is Respondent.

PETITION FOR REHEARING

J. Lewis Cromer & Associates, L.L.C.
J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Pursuant to Rule 221, SCACR, Appellant/Petitioner, Ammie McNeil, respectfully petitions the Court for rehearing on the Opinion filed on May 1, 2013, affirming the trial court's order to dismiss Appellant's claims against the South Carolina Department of Corrections ("Respondent" or "SCDC"). Appellant believes the subject Opinion overlooked or misapprehended points as to both the underlying public policy discharge claim and defamation claim.

ARGUMENT

I. THE SUBJECT OPINION OVERLOOKED OR MISAPPREHENDED THAT APPELLANT'S PUBLIC POLICY DISCHARGE CLAIM IS SUFFICIENTLY PLED AND ESTABLISHES A NOVEL ISSUE OF STATE LAW AND WAS IMPROPERLY DISMISSED.

The Appellant's complaint is sufficiently pled in a manner that shows there is a novel issue worthy of factual development. The Appellant agrees with the dissent in subject Opinion which states, "While the trial court and, to some extent, the majority, seem focused on only these two situations, our supreme court has made clear the public policy exception is not limited to only these situations." McNeil v. S.C. Department of Corrections, Op. No. 5122 (S.C.Ct.App. filed May 1, 2013) (citing Barron v. Labor Finders of S.C., 393 S.C. 609, 614, 713 S.E.2d 637 (2000)). The South Carolina Supreme Court took the opportunity in *Barron* to not only address the case at hand, but to give the courts clear direction that public policy discharge is not limited to only the two recognized exceptions that have been determined to clearly apply. As the majority in the subject Opinion notes, the public policy exception has not yet been extended beyond the two recognized situations since the *Barron* decision. However, this should not deter the Court from allowing factual development of the novel issue. If anything, the instruction by our supreme court in *Barron* that public policy discharge is not so limited combined with the unexplored landscape of public policy discharge speaks to the heart of why this issue is truly novel and worthy of further factual development.

Upon review of a Rule 12(b)(6), SCRCP motion to dismiss, the facts and inferences reasonably drawn therefrom should be viewed in the light most favorable to the plaintiff and consider whether the pleadings articulate any valid claim for relief; and the Rule 12(b)(6) motion to dismiss should be denied if such analysis would entitle the plaintiff to relief on any theory of the case. See Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999); Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999); and Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

The complaint alleges that Appellant did not receive appropriate notice of the inmate's suicidal condition and medication; that the inmate was not placed in an appropriate cell with closed circuit television as was required by regulation for suicidal inmates; that only Appellant and one other officer were in the unit despite regulations and directives mandating four to six officers; that Appellant and others have repeatedly requested assistance but none was given; that Appellant was interviewed and questioned by SLED and SCDC and initially cleared of any wrongdoing and even received a subsequent promotion; that the family of the deceased inmate then filed a wrongful death lawsuit to which Appellant testified in a deposition; that the case was scheduled for trial in July 2009; that the case settled prior to trial for a large sum of money; that SCDC and the upper management feared reprisal from the media and legislators because of the lawsuit and used Appellant as a scapegoat; and that the Appellant was suspended immediately after the lawsuit settled and shortly thereafter terminated in September 2009. (R. pp. 7-9). The complaint then alleges that the defendant punished and terminated the plaintiff for "personal, political, pretextual and scapegoating reasons" which violate the public policy of South Carolina. (R. pp. 9-10).

The pled allegations and reasonable inferences drawn therefrom are more than sufficient to survive a Rule 12(b)(6) motion to dismiss. The complaint describes how Appellant was initially

cleared of wrongdoing; that she then testified in compliance with a subpoena/deposition in the wrongful death suit; and that she was suspended immediately after the lawsuit settled on the eve of trial and soon thereafter terminated. It is clearly inferred that she was retaliated against for such compliance and testimony. Moreover, it is reasonable to infer that the failures by Respondent alleged in the complaint are in violation of S.C. Code Ann. § 24-1-130 (1993), which charges the director of SCDC with the responsibility "for the proper care, treatment, feeding, clothing, and management of the prisoners confined therein." Retaliating against Appellant for testifying as to these matters and in an effort to scapegoat her to remove the spotlight from their own failures would indeed be in violation of this clearly mandated public policy as well as public policy relating to compliance with subpoenas, testifying under oath in a deposition, and compliance of individuals with investigations by SLED and internal investigations by a state agency. Based on the foregoing, these issues are clearly novel and worthy of further development of facts.

While both the *Garner* and *Keiger* cases each have their own unique set of facts, that assertion only strengthens the argument that this issue is novel. See generally, Garner v. Morrison Knudsen Corp., 318 S.C. 223, 456 S.E.2d 907 (1995); Keiger v. Citgo, Coastal Petroleum, Inc., 326 S.C. 369, 482 S.E.2d 792 (Ct.App. 1997). In both cases, the courts reversed trial court grants of motions to dismiss under Rule 12(b)(6), SCRCP because the courts found the allegations were indeed novel and that there should be additional development of the facts. *Id.* In the *Barron* case, the Supreme Court held that the Court of Appeals erred in its analysis limiting public policy discharge to the two clearly applicable situations, however they found the circuit court's grant of summary judgment was properly affirmed for other reasons. Specifically, they found that upon review of the evidence in a light most favorable to the plaintiff there was no genuine issue of material fact. This decision was made at the summary judgment stage upon evidence the parties had

an opportunity to develop. In the present action, the Appellant should have the same opportunity to develop facts to support the public policy discharge claim and resolve the novel issue; rather than be dismissed upon a Rule 12(b)(6) motion. The majority's concern that the at-will doctrine would be circumvented by allowing further factual development on a novel issue is misconceived. The Appellant has shown above why the pleadings are sufficient to establish the novel issue; thus this is a case specific inquiry. Just as the *Barron* court did, the trial court should make the legal determination on public policy discharge at the summary judgment stage after the Appellant has an opportunity to develop the facts in a case with novel issues such as the present action.

II. THE SUBJECT OPINION OVERLOOKED OR MISAPPREHENDED THAT APPELLANT'S DEFAMATION CLAIM IS PROPERLY PLED AND SHOULD NOT HAVE BEEN DISMISSED.

Appellant has properly pled a defamation cause of action under South Carolina defamation law and the applicable pleading standard. "To recover for defamation under South Carolina law, a plaintiff must show: '(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.'" Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 629 S.E.2d 653, 664 (2006). Under Rule 12(b)(6), SCRCP, "if the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal . . . is improper." Baird, 333 S.C. 511.

Here, Appellant, a former state correctional employee, pled: (1) that she was discharged on the grounds of alleged negligence in association with an inmate's death; (2) that the grounds for her discharge were false; (3) that they have been published by the Respondent through both word and act within the South Carolina Department of Corrections and to the community at large; and (4) that

such publication was defamatory *per se*. (R. pp. 9 & 11) (Complaint ¶¶ 20, & 30-32). It is necessary to note that in South Carolina, defamation need not be accomplished in a direct manner. Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987); Tyler v. Macks Stores of S.C., Inc., 275 S.C. 456, 272 S.E.2d 633 (1980). A mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain. *Id.* That is, in South Carolina, defamation can occur by word, act and insinuation. Tyler, 275 S.C. at 458, 272 S.E.2d at 634.[1] Furthermore, plaintiff's defamation claim is *per se* actionable as she was charged with unfitness in her trade or profession. Wilhoit v. WCSC, Inc., 293 S.C. 34, 358 S.E.2d, 397, 399-400 (Ct.App. 1987). Here, Appellant has alleged and it is reasonably deductible from her allegations that she has been defamed by both word and act by the insinuation to her co-employees and to the public at large that she was negligent with regard to an inmate's suicide death.

Moreover, the allegations in plaintiff's complaint and reasonable inferences deduced therefrom demonstrate that the defamatory publications were not privileged. Communications are not privileged where they exceed the scope of their privilege or are made with express or actual malice. See Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) (scope); see also, Padgett v. Sun News, 278 S.C. 26, 292 S.E.2d 30 (1982). Also, where a statement is *per se* defamatory malice is presumed. See Holtzchieter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998); see also, Manley v. Manley, 291 S.C. 325, 330, 353 S.E.2d 312, 315 (Ct. App. 1987) (holding "where words are actionable *per se*, malice will be implied", *citing,* Jones v. Garner,

[1] In *Tyler*, an employee was forced to take a polygraph examination along with his manager. Tyler, 275 S.C. at 456. After he and the manager took the examination, the manager was terminated. The employee was terminated soon thereafter. *Id.* The employee sued for defamation, arguing that his termination shortly after the polygraph examination and the manager's discharge created the impression and insinuation that the employee was terminated for some wrongful activity. *Id.* The Court agreed and held, in part, that words and actions can be defamatory and that "it is not necessary that the false charge be made in a direct, open and positive manner." *Id.* at 458.

250 S.C. 479, 158 S.E.2d 909 (1968)). Here since malice is presumed and since it is reasonably inferable from plaintiff's allegations that publications to her co-workers and to the community at large would be unprivileged; plaintiff has properly alleged a lack of privilege. Accordingly, the Appellant properly pled her defamation claim.

CONCLUSION

The Appellant respectfully requests a rehearing on the basis that the Court of Appeals overlooked or misapprehended the points addressed herein.

Respectfully Submitted,

J. LEWIS CROMER & ASSOCIATES, L.L.C.

BY: 

J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533

Attorneys for Plaintiff

Columbia, South Carolina
May 16, 2013

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the Respondent on May 16, 2013, addressed to its attorney of record, Stephen M. Pruitt, Esq. by depositing a copy of it in the United States Mail, postage prepaid to McDonald Patrick Poston Hemphill & Roper, LLC, PO Box 1547, Greenwood, SC 29648.

J. LEWIS CROMER & ASSOCIATES, L.L.C.

BY: Julius W. Babb

J. Lewis Cromer, Esquire (#1470)
Julius W. Babb, IV, Esquire (#77216)
1522 Lady Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533

Attorneys for Plaintiff