NO. COA07-1041

NORTH CAROLINA COURT OF APPEALS

Filed: 17 June 2008

KATHLEEN RADCLIFF,
Plaintiff
v.
Guilford County
No. 06 CVS 7834

ORDERS DISTRIBUTING COMPANY, INC. and BENNIE LEE TOWNSEND,
Defendants

Appeal by plaintiff from order entered 27 April 2007 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 17 March 2008.

Hill Evans Jordan & Beatty, PLLC, by Martha R. Sacrinty, for plaintiff-appellant.

Cranfill Sumner & Hartzog, LLP, by Ryan D. Bolick, for defendants-appellees.

CALABRIA, Judge.

Kathleen Radcliff ("plaintiff") appeals an order granting summary judgment in favor of Orders Distributing Company, Inc. ("Orders") and Bennie Lee Townsend ("Townsend," collectively "defendants") for plaintiff's claims of defamation, intentional interference with a contractual relationship, unfair and deceptive practices ("UDP"), and punitive damages. We affirm.

I. Facts

Plaintiff was employed with TranSouth Logistics ("TranSouth") in Georgia. TranSouth warehouses and transports goods manufactured

and/or purchased by other companies. In December 2004, plaintiff was promoted to branch manager and transferred to the Greensboro, North Carolina office. TranSouth's Greensboro office shared warehouse and office space with Orders, a floor covering distributor. TranSouth and Orders contracted for TranSouth to provide delivery and logistical services to Orders' customers. Orders provided the supplies and TranSouth delivered the products to Orders' customers. Townsend was employed with Orders as the operations manager at the Greensboro office.

As branch manager, one of plaintiff's duties was handling the logistics of deliveries to Orders. Before plaintiff arrived, Townsend handled the logistics of deliveries. Townsend and plaintiff did not have a good working relationship. Several times Townsend disagreed with plaintiff's management of TranSouth's drivers. In addition, Townsend requested that plaintiff communicate changes in deliveries to him directly. According to plaintiff, Townsend avoided talking to plaintiff and complained about plaintiff to other employees at Orders.

Orders was responsible for preparing delivery paperwork and providing it to TranSouth. In early November 2005, supervisors from Orders contacted TranSouth about the problems with customer service and specifically plaintiff's conduct. Also in November of 2005, there were several mix-ups concerning one of Orders' customers. On one occasion, a TranSouth driver was unable to complete a delivery because he did not have the proper paperwork from Orders.

On 30 November 2005, the customer's sales representative called Townsend to complain about TranSouth's failure to pick up carpet padding as scheduled. After Townsend received the complaint, he entered plaintiff's office and confronted plaintiff directly about the problem. According to the plaintiff, Townsend complained about TranSouth, and plaintiff responded that Townsend always blamed TranSouth, although Orders was responsible for preparing the paperwork. Plaintiff then left her office and walked with Townsend to a table in the warehouse to finish her paperwork.

Townsend told his supervisors that plaintiff chased him around his office and the warehouse and also yelled at him. Orders' supervisors e-mailed this information to TranSouth and Townsend repeated this information to TranSouth in a conference call. On 2 December 2005, Michael Smith ("Smith"), the President of Orders, told TranSouth to either remove plaintiff or lose Orders' business.

In December of 2005, plaintiff was removed from the position at the Greensboro office and given the option of commuting to the Georgia office. Plaintiff temporarily commuted to the Georgia office until 31 January 2006. At that point, she decided she could not afford to commute or relocate to Georgia. The parties dispute the issue regarding whether plaintiff was terminated or voluntarily resigned.

On 27 June 2006, plaintiff filed a complaint against defendants alleging defamation, interference with contract, UDP, and punitive damages. After plaintiff filed an amended complaint on 24 April 2007, defendants moved for summary judgment. On 27

April 2007 the Honorable Catherine C. Eagles granted defendants' motion for summary judgment on all claims. Plaintiff appealed.

As a preliminary matter, we note that plaintiff failed to state the standard of review for a summary judgment motion in violation of N.C.R. App. P. 28(b)(6) (2007). However, this nonjurisdictional rule violation does not constitute a substantial or gross violation of the Rules of Appellate Procedure, therefore we will not sanction plaintiff and we reach the merits of plaintiff's appeal. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008).

II. Standard of Review

"The standard of review for whether summary judgment is proper is whether the trial court properly concluded that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law." *Phelps v. Spivey*, 126 N.C. App. 693, 696, 486 S.E.2d 226, 228 (1997) (citation omitted). "The record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences reasonably arising therefrom." *Ausley v. Bishop*, 133 N.C. App. 210, 214, 515 S.E.2d 72, 75 (1999) (citing *Averitt v. Rozier*, 119 N.C. App. 216, 458 S.E.2d 26 (1995)). A defendant demonstrates he is entitled to summary judgment by: "(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *Kinesis Advertising, Inc.*

v. Hill, __ N.C. App. __, __, 652 S.E.2d 284, 292 (Nov. 6, 2007) (No. COA06-1224), *rev. denied by* 362 N.C. 177, 658 S.E.2d 485 (2008) (citations and internal quotations omitted).

III. Defamation

Plaintiff contends the trial court erred in granting summary judgment for defendants because there was a genuine issue of material fact whether the statements made by Townsend and communicated to Orders were false, whether defendants were privileged to make the statements and whether the statements were made with malice. We disagree.

"In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002). According to North Carolina law, "slander *per se* is an oral communication to a third party which amounts to (1) an accusation that the plaintiff committed [a] crime involving moral turpitude, (2) an allegation that impeaches the plaintiff in his trade, business, or profession, or (3) an imputation that the plaintiff has loathsome disease." *Kinesis Advertising, Inc.*, __ N.C. App. at __, 652 S.E.2d at 296 (internal quotations omitted). Statements are *per se* defamatory where false words impute to a businessman "conduct derogatory to his character and standing as a businessman" and prejudicing him in his business. *Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E.2d 466, 468 (1955). The statements "must touch the plaintiff in his

special trade or occupation, and . . . must contain an imputation necessarily hurtful in its effect on his business. . . . To be actionable *per se*, they must be uttered of him in his business relation." *Id.* Generally, this requires that on its face, the statement clearly damages an individual's business reputation. *Id.* (statements by a competitor to sewing machine retailer's customers that plaintiff engages in "shady" deals is defamatory *per se*); *Broadway v. Cope,* 208 N.C. 85, 179 S.E.2d 452 (1935) (statement by butcher that competitor slaughtered an infected cow was defamatory *per se*); *contrast Williams v. Rutherford Freight Lines, Inc.,* 10 N.C. App. 384, 179 S.E.2d 319 (1971) (union leader's statements that plaintiff is a gangster and an "SOB" not defamatory on its face).

Even where a statement is defamatory *per se*, a defendant may raise the affirmative defense of qualified privilege. *Kinesis Advertising, Inc.*, __ N.C. App. at __, 652 S.E.2d at 297 (citations omitted). A communication may be subject to qualified privilege where the communication is made in good faith, the subject of the communication is one that the speaker has a legal right or duty or a valid interest to uphold, the statement is limited in its scope to this purpose, and the communication is made to one with a corresponding interest or duty. *Id.* "Whether a communication is privileged is a question of law for the court to resolve, unless a dispute concerning the circumstances of the communication exists, in which case it is a mixed question of law and fact." *Id.* Privileged communications are presumed to have been made in good

faith and without malice. *Id.* "To rebut this presumption, the plaintiff must show actual malice or excessive publication." *Id.* Malice may be shown where the declarant publishes the defamatory statement with reckless disregard for the truth or with a high degree of awareness of its probable falsity. *Barker v. Kimberly-Clark, Corp.*, 136 N.C. App. 455, 461, 524 S.E.2d 821, 825 (2000). "If plaintiff's forecast of evidence of malice is 'not sufficient to permit reasonable minds to conclude' that the [defendant's] presumed good faith was nonexistent, then summary judgment for defendant is proper." *Dobson v. Harris*, 352 N.C. 77, 85, 530 S.E.2d 829, 836 (2000).

Here, plaintiff alleged Townsend falsely stated to his supervisors at Orders that she yelled or shouted at Townsend and she ran or "chased" him around the office. Plaintiff also alleges that Townsend's complaints to his supervisors about her management of deliveries for Orders were also false and defamatory. Plaintiff argues the statements were *per se* defamatory because they impacted her profession or trade and the supervisors at Orders published these statements to TranSouth.

Defendants argue the statements do not rise to the level of defamation *per se* because they are not blatantly derogatory and it is not clear from their face that they impact plaintiff's business. Defendants also argue the statements did not injure her business relationship because she was retained as an employee and was offered another position in another branch. In the alternative, defendants contend the statements were made in good faith and in

the context of plaintiff's responsiveness to customers' orders. In addition, defendants argue the communication was subject to a qualified privilege since the communication was made regarding a valid business interest.

Even assuming that use of the words "chase" and "yelling" without innuendo clearly imputes plaintiff's professional reputation and are defamatory *per se*, we agree with defendants' argument that summary judgment was proper because defendants demonstrated the communications were made subject to a qualified privilege. *See Kinesis Advertising, Inc., supra*. Furthermore, plaintiff failed to rebut the presumption of good faith with a showing of actual malice on the part of the defendants. *See Dobson, supra.*

Townsend was the branch manager for Orders and worked directly with plaintiff to ensure that Orders' customers were receiving the product. There were at least two other instances where a delivery mix-up occurred under plaintiff's supervision prior to the November 30th incident. Townsend had a good faith business interest in reporting conflicts within the branch to his supervisors, who in turn had a good faith business interest in reporting the conflict to TranSouth. Townsend communicated the statements to his supervisors and to some employees of Orders. This is not excessive communication. *Ponder v. Cobb*, 257 N.C. 281, 296, 126 S.E.2d 67, 78 (1962) (where a communication only concerns a limited number of persons, it will lose its privilege if communicated to the general public).

In addition, plaintiff has failed to present any evidence that defendants' actions were motivated by malice or bad faith. At best, plaintiff presented evidence that Townsend disagreed with her management of the Greensboro office and she believed Townsend resented her control of the drivers because prior to her arrival Townsend supervised the drivers. However, without more, speculations about resentment and disagreements over plaintiff's management style are not sufficient to present a genuine issue of material fact as to proof of actual malice. *See Dobson, supra* (evidence to rebut the presumption of good faith "must be . . . supported by fact, not by surmise"). TranSouth's director of logistic services, Winston White ("White") testified that although Townsend could be prone to exaggeration, his complaints about the plaintiff were based on some facts. White also testified he believed Orders' motivation in requesting plaintiff's removal was based on an interest in providing quality customer service. Plaintiff herself testified that none of the disagreements between herself and Townsend were personal, that Townsend's complaints related to customer service issues, and Townsend's motivation to complain stemmed from his disagreement over plaintiff's management of the drivers and deliveries. Plaintiff presented no evidence that her removal from the Greensboro branch resulted in Townsend regaining control over TranSouth's drivers. Since plaintiff did not "surmount [the] affirmative defense" of qualified privilege, we affirm the trial court's grant of summary judgment to defendants on

the defamation claim. *Kinesis Advertising, Inc.*, __ N.C. App. at __, 652 S.E.2d at 292.

We also note that plaintiff contends in her reply brief that she stated a claim for defamation *per quod*. Defamation *per quod* still requires a showing of actual malice on the part of the defendants. *Griffin v. Holden*, 180 N.C. App. 129, 136, 636 S.E.2d 298, 304 (2006). Since we conclude plaintiff did not demonstrate actual malice, we reject this argument.

IV. Intentional Interference with Contract

Plaintiff next argues the trial court erred in granting summary judgment to defendants because a genuine issue of material fact existed to determine whether defendants were justified in their inducements to TranSouth to terminate plaintiff's employment. Plaintiff asserts defendants intentionally induced TranSouth to terminate her employment, without justification, and she was damaged by being forced to take a lesser paying job. We disagree.

Defendants argue plaintiff did not present evidence that defendants induced TranSouth to terminate plaintiff since TranSouth did not fire her and offered her an alternative position. Defendants also argue their actions were justified under a "business privilege."

To establish a claim for tortious interference with contract, a plaintiff must show:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the

> contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

White v. Cross Sales & Eng'g Co., 177 N.C. App. 765, 768-69, 629 S.E.2d 898, 901 (2006). Interference is without justification if a defendant's motive is not "reasonably related to the protection of a legitimate business interest." *Privette v. University of North Carolina,* 96 N.C. App. 124, 134, 385 S.E.2d 185, 190 (1989).

We affirm summary judgment for defendants because plaintiff presented no evidence that defendants were motivated by any interest other than more efficient customer service relations in the Greensboro branch. On more than one occasion there was mis-communication between TranSouth's drivers and Orders' customers regarding deliveries. One of plaintiff's duties was management of the drivers who picked up and delivered products for Orders' customers. Townsend's duties included overseeing the customer service operations for Orders. Townsend heard from Orders' customers that certain deliveries were not made as scheduled. Although plaintiff was not employed by Orders, plaintiff's performance of her job duties affected Orders' business relationship with its customers. Even before the 30 November 2005 incident, Orders received complaints regarding deliveries to their customers. Plaintiff has not presented any evidence that Orders' demand to TranSouth to remove plaintiff from the Greensboro branch was not reasonably related to Orders' legitimate interest in maintaining consistent service for customers. This assignment of error is overruled.

V. Unfair and Deceptive Practices

Plaintiff also contends that because a genuine issue of material fact remains regarding her defamation claim, an issue of fact necessarily exists barring summary judgment on her unfair and deceptive practices claim. We disagree.

A claim of unfair and deceptive practices under section 75-1.1 of the North Carolina General Statutes requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant. *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 593, 619 S.E.2d 577, 582 (2005). "[A] libel *per se* of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of N.C. Gen. Stat. § 75-1.1, which will justify an award of damages . . . for injuries proximately caused." *Ellis v. Northern Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 131 (1990) (citation omitted). To recover, a plaintiff must have suffered actual injury as a proximate result of the deceptive statement or misrepresentation. *Boyce & Isley, PLLC*, 153 N.C. App. at 35-36, 568 S.E.2d at 901-02.

Plaintiff argues because the statements were slander *per se*, they were also an unfair or deceptive practice. Since we conclude plaintiff is not entitled to recover under her defamation claim and plaintiff's unfair and deceptive practices claim is predicated upon an actionable defamation claim, summary judgment on the unfair and deceptive practices claim is also affirmed.

VI. Punitive Damages

Since we affirm the summary judgment order dismissing plaintiff's claims, we need not reach plaintiff's remaining argument concerning punitive damages. *See* N.C. Gen. Stat. § 1D-15(a) (2007) (punitive damages are awarded where plaintiff is entitled to compensatory damages).

Affirmed.

Chief Judge MARTIN and Judge GEER concur.

Report per Rule 30(e).