

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

VERONICA A. JACKSON

Appellant

v.

NEWCOURTLAND, INC.

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 506 EDA 2013

Appeal from the Order Entered January 15, 2013
In the Court of Common Pleas of Philadelphia County
Civil Division at No.: Aug. Term, 2011, No. 03079

BEFORE: DONOHUE, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.:

FILED DECEMBER 19, 2013

Veronica Jackson appeals from the order granting summary judgment in favor of NewCourtland, Inc. ("NewCourtland"). We affirm.

The trial court set forth the pertinent facts of the case as follows:

On September 23, 2010, [NewCourtland] suspended [Jackson's] employment as a Therapeutic Recreation Aide at [NewCourtland's] Care Pavilion facility (providing services, including nursing care, to senior citizens) pending an investigation of a resident's statement that [the resident] entrusted to Jackson \$2000 of [resident's] own funds to hold for her, an action that [NewCourtland] deemed a misappropriation of property. On September 24, 2010, [NewCourtland] reported the incident to [the Pennsylvania Department of Health ("DOH")], as it was required to do pursuant to 28 Pa.Code [§] 51.3. On October 26, 2010, [NewCourtland] followed up with a report to DOH (DOH form PB-22) that it was unable to substantiate the allegation of misappropriation of property but

* Retired Senior Judge assigned to the Superior Court.

that it terminated Jackson on January 18, 201[1], because she had violated [NewCourtland's] rules prohibiting contact during an investigation between the subject employee and the subject resident.

Jackson denies that she had misappropriated any resident funds and, indeed, [NewCourtland's] investigation exonerated her on this allegation. More important[ly], [Jackson] denies the allegation that she violated [NewCourtland's] "no-contact" rule and claims that [NewCourtland's] investigation of this matter was faulty and incomplete. She charges that she was wrongfully discharged in violation of a "clear mandate of public policy" because she "was terminated for spurious reasons after [NewCourtland's] investigation found no credible evidence of abuse" and because "the totality of the actions taken by [NewCourtland] against [Jackson] strikes at the heart of a citizen's social right, duties and responsibilities." [Jackson] also claims that [NewCourtland] committed "trade slander" when it falsely communicated to the Commonwealth an allegation of patient abuse and failed to correct that falsehood.

Trial Court Opinion ("T.C.O."), 5/16/2016, at 1-2 (citations to the certified record omitted).

Following her termination, Jackson filed suit against NewCourtland, seeking damages for wrongful termination and "trade slander," which the trial court, we, and Jackson recognize as substantially a claim for defamation. However, because Jackson has declined before this Court to challenge the trial's court grant of summary judgment to NewCourtland regarding her wrongful termination claims, we concern ourselves only with the defamation claim.

In support of that claim, Jackson alleged, in sum, that "[a]lthough investigation failed to show patient abuse and [the patient] never accused [Jackson] of abusive conduct or misappropriation of funds, [NewCourtland]

has refused and continues to refuse to correct the record and remove the allegation of patient abuse from [Jackson's] record." Second Amended Complaint ("Complaint") at 6 ¶40. She further asserted that the record of the allegations against her had impaired her ability to obtain new employment. *Id.* at 6-7 ¶¶44, 46.

Following discovery, NewCourtland filed a motion for summary judgment. With regard to defamation, NewCourtland set forth various arguments for summary judgment, but only one is relevant to our analysis. Specifically, NewCourtland argued that the communication in question was subject to a qualified privilege, and that Jackson had failed to provide any evidentiary basis upon which a jury could conclude that NewCourtland had abused that privilege such that a defamation claim would lie. Motion of NewCourtland for Summary Judgment at 13-16.

On January 14, 2013, the trial court granted New Courtland's motion for summary judgment. On February 7, 2013, Jackson filed a notice of appeal. On February 12, 2013, the trial court ordered Jackson to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Jackson timely complied. On May 16, 2013, the trial court filed its Rule 1925(a) opinion.

Jackson presents two issues for our consideration:¹

¹ Although Jackson identifies two questions for our review, she does not correspondingly divide her argument into two sections. Our Rules of *(Footnote Continued Next Page)*

1. [NewCourtland] reported the incident to the Commonwealth and never corrected the record when the investigation showed [Jackson] had not misappropriated funds or verbally abused the resident as alleged. Did the lower court err in granting [NewCourtland's] motion for summary judgment?
2. The lower court found there was no trade slander and no evidence [that NewCourtland] abused its conditional privilege when the record showed [that NewCourtland] failed to inform the Commonwealth that no abuse of the patient occurred following the results of its investigation. Did the lower court err in granting [NewCourtland's] motion for summary judgment?

Brief for Jackson at 4.²

Jackson's primary contention before us relates to the trial court's grant of summary judgment based upon its conclusion that NewCourtland's communications to DOH were conditionally privileged and that the privilege was not abused. Our standard of review of a trial court's order granting summary judgment is well-settled:

[S]ummary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Summary judgment may be granted only where the right is clear and free from legal doubt. The moving party has the burden of proving that there is

(Footnote Continued) _____

Appellate Procedure require that the argument section be "divided into as many parts as there are questions to be argued." Pa.R.A.P. 2119(a). Jackson also failed to attach her Rule 1925(b) statement or the trial court opinion to her brief, or to include either of those items in her reproduced record, as required by Pa.R.A.P. 2111. Nonetheless, we will exercise our discretion to overlook these procedural errors because they do not impede our review of the merits of this appeal. **See** Pa.R.A.P. 105(a), 2101.

² Jackson has not challenged summary judgment as to her common-law claim for wrongful termination.

no genuine issue of material fact. The record and any inferences therefrom must be viewed in the light most favorable to the nonmoving party, and any doubt must be resolved against the moving party. The trial court will be overturned on the entry of summary judgment only if there has been an error of law or a clear abuse of discretion.

First Wisc. Trust Co. v. Strausser, 653 A.2d 688, 691 (Pa. Super. 1995) (internal citations, quotation marks, and modifications omitted). An abuse of discretion occurs “if, in resolving the issue for decision, [the trial court] misapplies the law or exercises its discretion in a manner lacking reason.” ***MacNutt v. Temple Univ. Hosp., Inc.***, 932 A.2d 980, 991 (Pa. Super. 2007).

Jackson seeks relief for defamation, as to which the following burdens of proof apply:

(a) Burden of plaintiff.—In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

- (1) The defamatory character of the communication.
- (2) Its publication by the defendant.
- (3) Its application to the plaintiff.
- (4) The understanding by the recipient of its defamatory meaning.
- (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
- (6) Special harm resulting to the plaintiff from its publication.
- (7) Abuse of a conditionally privileged occasion.

(b) Burden of defendant.—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

- (1) The truth of the defamatory communication.
- (2) The privileged character of the occasion on which it was published.
- (3) The character of the subject matter of defamatory comment as a public concern.

42 Pa.C.S. § 8343.

Jackson alleges that defamatory content was found in both the initial incident report and the subsequent PB-22 form, each of which NewCourtland submitted, or published, to DOH. A statement is defamatory if it tends to harm an individual's reputation in the estimation of the community, or if it deters third persons from associating or dealing with her. **Zartman v. Lehigh Cty. Humane Soc.**, 482 A.2d 266, 268 (Pa. Super. 1984). However, one who publishes or communicates a defamatory statement is not liable when he or she acts in furtherance of some interest of social importance. Such reports are conditionally privileged, even at the expense of uncompensated harm to the plaintiff's reputation. **Berg v. Consol. Freightways, Inc.**, 421 A.2d 831, 834 (Pa. Super. 1980).

A conditional privilege inheres under the following circumstances:

- (1) when some interest of the publisher of the defamatory matter is involved;
- (2) when some interest of the recipient of the matter, or a third party is involved; or
- (3) when a recognized interest of the public is involved.

Elia v. Erie Ins. Exch., 634 A.2d 657, 660 (Pa. Super. 1993).

When an allegedly defamatory communication is subject to a conditional privilege, the publisher will face liability only if it abuses that privilege. ***Chicarella v. Passant***, 494 A.2d 1109, 1112 (Pa. Super. 1985). In an action for defamation, the defendant has the burden of proving, when relevant to the defense, the privileged character of the occasion on which it was published. 42 Pa.C.S. § 8343(b). However, Jackson concedes that a conditional privilege applies to the communications *sub judice*. Consequently, to survive summary judgment, she bears the burden of establishing a substantial question of material fact requiring submission to a jury. 42 Pa.C.S. § 8343(a).

This Court has held that a conditional privilege may be abused “when the publication is actuated by malice or negligence, is made for a purpose other than that for which the privilege was given,” or “include[s] defamatory matter not reasonably believed to be necessary for the accomplishment of [a proper] purpose.” ***Moore v. Cobb-Nettleton***, 889 A.2d 1262, 1269 (Pa. Super. 2005).

Pennsylvania law requires that all health care facilities notify DOH of any “event at the facility which could seriously compromise quality assurance or patient safety.” 28 Pa.Code § 51.3. This duty to report applies to all “complaints of patient abuse **whether or not confirmed by the facility.**” 28 Pa. Code § 51.3(g)(6) (emphasis added). Patient abuse includes “deprivation by an individual, including a caretaker, of goods or

services that are necessary to attain or maintain physical, mental and psychosocial well-being.” 28 Pa.Code § 201.3.

Jackson argues that the reports submitted to the Commonwealth were not based upon supported facts. Although NewCourtland’s initial report documented the resident’s allegation that Jackson was holding over \$2000 of the resident’s funds, NewCourtland’s subsequent PB-22 report admitted that the initial allegation could not be substantiated, and that the resident had repudiated her earlier claim. Brief for Jackson at 14. Jackson further contests NewCourtland’s related allegation of mental and/or verbal abuse arising from an improper communication between Jackson and the resident during the pendency of the investigation into the resident’s initial allegations. Jackson contends that there were no witnesses to any such conversation, and alleges that “[t]he report of the conversation is not based on disclosed or assumed facts but was based on interrogation of the [resident] to get her to say what they wished. There was no evidence [that Jackson] . . . made any effort whatsoever to influence, coerce or in any way abuse the resident.” *Id.* at 15.

NewCourtland’s statutory duty was triggered when the facility became aware of any allegations of abuse. **See** 28 Pa.Code § 51.3(f). NewCourtland is required to report complaints of patient abuse to DOH, irrespective of whether they can be substantiated. 28 Pa.Code § 51.3(g)(6). The mere fact that the resident later repudiated her accusation is insufficient without more to constitute an abuse of conditional privilege.

Jackson has failed to plead facts sufficient to show abuse of the conditional privilege.³ **See** 42 Pa.C.S.A. § 8343. The only evidence or allegation of abuse in the record is an ambiguous statement in Jackson's complaint, which asserts that the "report of the allegation of patient abuse to [DOH] was not privileged and was made in reckless disregard as to its truth or falsity as there was no incident or report of suspected resident abuse." Complaint at 42. Such a conclusory assertion does not suffice to create a genuine issue of material fact regarding NewCourtland's intent. **See *Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co.***, 905 A.2d 462, 468 (Pa. 2006) ("All well-pleaded, material facts set forth in the complaint and all inferences fairly deducible from those facts are considered admitted and are accepted by the trial court as true; conclusions of law are neither deemed admitted nor deemed true.").

³ Jackson also argues that there is "a question [of fact] as to whether [NewCourtland] was required to file a report under the circumstances of this case." **Id.** Jackson did not assert that error in her Rule 1925(b) statement, nor was such an allegation fairly encompassed by any of the issues raised in her statement. Consequently, this argument is waived. **See** Pa.R.A.P. 1925(b)(4)(vii); ***Cobbs v. SEPTA***, 985 A.2d 249, 255-56 (Pa. Super. 2009). Moreover, because this comprises Jackson's only direct challenge to the propriety of NewCourtland's section 51.3 report in its own right, we treat as undisputed the proposition that NewCourtland acted properly in filing its initial report and its follow-up PB-22 report based upon the residents' later-repudiated allegations. Thus, we concern ourselves only with determining whether Jackson established an issue of material fact requiring submission to a jury regarding NewCourtland's alleged abuse of the applicable privilege.

Nothing in the certified record demonstrates that NewCourtland's reporting of the alleged incident was the product of intentional, reckless, wanton, or even negligent conduct.⁴ The record shows that, prior to submitting a PB-22 report, NewCourtland made considerable investigative efforts to determine the veracity of the resident's allegation. Specifically, both a social worker and the resident services director questioned the resident on several occasions, and Jackson gave multiple statements to NewCourtland's director of human resources. Complaint, Exh. A. At best, Jackson rests solely upon her vague averments that are patently at odds with the record.

Our Supreme Court has held as follows:

[A] non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

⁴ It is not clear in any event that Jackson would be entitled to relief if she established only negligence, although the question is immaterial to our disposition of this case. We have held that a conditional privilege pertaining to matters of public concern, which is an aspect of the privilege implicated in this case, is not abused by mere negligence. Rather, cases holding "that a conditional privilege can be lost by negligence are restricted to matters which are not of public concern." **Moore v. Cobb-Nettleton**, 889 A.2d 1262, 1269-70 (Pa. Super. 2005) (internal quotation marks and citations omitted).

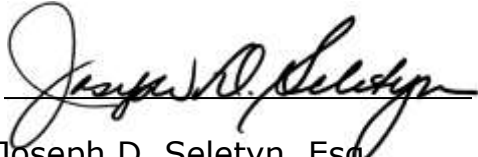
Ertel v. Patriot-News Co., 674 A.2d 1038, 1042 (Pa. 1996). A non-moving party “may not avoid summary judgment by resting upon the mere allegations or denials of his pleading.” ***Id.*** (internal quotation marks and modifications omitted).

Jackson does not materially dispute that NewCourtland acted within the scope of its legal duty in reporting the resident’s allegation that Jackson had misappropriated the resident’s funds. ***But see supra*** at 8 n.2 (acknowledging that Jackson waived a half-hearted attempt to make that argument). Thus, Jackson’s claim for defamation only warranted submission to a jury if she made a *prima facie* showing that NewCourtland abused the conditional privilege that arose from its legal duty to report such an incident. The record is devoid of any obvious basis upon which to so conclude, and to the extent that Jackson makes a cogent argument on this point at all, that argument is based upon no more than the bald averments of her complaint and her rejection without substantiation of various specific records of the investigation that ultimately exonerated Jackson of the initially alleged misappropriation. Thus, Jackson failed to make the showing necessary to avoid entry of summary judgment on behalf of NewCourtland, and the trial court neither erred as a matter of law nor abused its discretion in entering judgment for NewCourtland.

Order affirmed.

J-S54023-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/19/2013