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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2022-0907

Karen Watters and Cheryl Yarbrough

v.

**Birmingham Hematology and Oncology Associates, LLC, d/b/a
Alabama Oncology, and Brian Adler**

**Appeal from Jefferson Circuit Court
(CV-20-902969)**

STEWART, Justice.

Karen Watters and Cheryl Yarbrough ("the plaintiffs") appeal from a summary judgment entered in favor of Birmingham Hematology and

Oncology Associates, LLC, d/b/a Alabama Oncology ("Alabama Oncology"), and Brian Adler on their claims alleging defamation and wantonness. We affirm the judgment.

Facts and Procedural History

Alabama Oncology has several office locations in Alabama, and it is managed by numerous physicians. The plaintiffs were formerly employed by Alabama Oncology at its St. Vincent's Birmingham location. In August 2019, an anonymous letter was delivered to various physicians at several Alabama Oncology locations. The letter alleged that there had been illegal and unethical behavior by four staff members, two of whom were the plaintiffs, and that there was "a massive lawsuit brewing." The letter also warned that an attorney would be contacting Alabama Oncology regarding a class-action lawsuit. In response to the letter, Alabama Oncology's executive director, Chris Barnes, contacted Alabama Oncology's outside legal counsel, Bradley Arant Boult Cummings LLP ("Bradley Arant") for advice on responding to the letter and preparing for the threatened litigation. Bradley Arant began conducting an internal investigation regarding the allegations in the anonymous letter. Adler, Alabama Oncology's president, sent correspondence to Alabama

Oncology's physicians and other staff members advising them to cooperate with the investigation and to refrain from discussing the investigation among themselves. On September 12, 2019, Bradley Arant received correspondence from counsel retained by the plaintiffs asking them to preserve evidence in the event litigation was necessary. On October 9, 2019, the plaintiffs' counsel sent additional correspondence indicating that, if the plaintiffs were not exonerated by the investigation, their "legal path will be clear" and "there will be significant exposure to compensatory and punitive damages" Ultimately, after the conclusion of the internal investigation, Alabama Oncology terminated the plaintiffs' employment.

The plaintiffs sued Alabama Oncology, Adler, and Ira Gore,¹ one of Alabama Oncology's managing physicians, alleging that their employment had been wrongfully terminated based on Adler and Gore's conspiracy to defame the plaintiffs and the results of what they alleged was a "sham investigation." The plaintiffs further alleged that, even if Adler and Gore were not responsible for drafting and disseminating the

¹Ira Gore was initially named as an appellee in this appeal. However, on March 20, 2023, this Court issued an order granting the plaintiffs' motion to dismiss Gore from the appeal, with prejudice.

anonymous letter, they had republished the defamatory information in the letter to other Alabama Oncology employees. Alabama Oncology, Adler, and Gore ("the defendants") moved for a summary judgment, arguing, among other things, that any purported intracompany communications regarding the letter and the allegations in the letter between employees of Alabama Oncology were insufficient to support the "publication" element of the plaintiffs' defamation claims. The plaintiffs filed a response in opposition to the defendants' summary-judgment motion in which they asserted that any such communications were not made during the course of transacting Alabama Oncology's business and as part of certain employees' responsibilities and that, therefore, the communications had been "published."

On August 31, 2022, the trial court entered a summary judgment containing a detailed recitation of the undisputed facts and analysis, which provided, in pertinent part:

"THE RECORD EVIDENCE

"Plaintiffs were employed as a nurse [Watters] and an office administrator [Yarbrough] at Alabama Oncology's St. Vincent's Birmingham location. Plaintiff Watters worked directly for Dr. Cara Bondly, with interactions with Dr. Steven Beck. The other physicians at the St. Vincent's Birmingham location were Dr. John Piede and Individual

Defendant Dr. Ira Gore. Individual Defendant Dr. Brian Adler was the President of Alabama Oncology and had his office at the Brookwood location. Alabama Oncology has offices at nine separate locations throughout the Birmingham area.

"Prior to August of 2019, there was considerable discord in ... Alabama Oncology's St. Vincent's Birmingham location. There was tension between certain physicians and staff, and various witnesses -- including the Plaintiffs -- described the working atmosphere as 'toxic.'

"In August of 2019, physicians at Alabama Oncology received an anonymous letter setting forth allegations of wrongdoing occurring at the St. Vincent's Birmingham location including, but not limited to, bullying, intimidation with a firearm, regulatory violations, and medical malpractice. Plaintiffs have conceded in both their brief and at oral argument that Plaintiffs have been unable during the course of discovery to identify the author of the anonymous letter.

"The anonymous author attributed the allegations in the letter and the resulting corporate liability to four persons at Alabama Oncology: two physicians identified by name in the letter and an unidentified 'office manager' and 'physician nurse.' The anonymous letter identified Dr. Bondly and Dr. Beck by name. Although not explicitly named, the Parties understood the 'office manager' and 'physician nurse' to refer to Plaintiffs. The letter also warned the practice that a 'massive lawsuit' was brewing and to 'be prepared to be contacted by an attorney for a class action lawsuit.'

"Alabama Oncology's Executive Director Chris Barnes first became aware of the anonymous letter on August 12, 2019, when a physician-partner reported that he had received a concerning anonymous letter in the mail threatening litigation against Alabama Oncology. After receiving a copy of

the anonymous letter that day, the Executive Director contacted legal counsel for guidance on what Alabama Oncology's next steps should be in responding to the letter and preparing for the litigation referenced therein. The Executive Director did not consult with the Individual Defendants prior to engaging counsel on behalf of Alabama Oncology.

"Dr. Adler, as President of Alabama Oncology, wrote to the practice's physicians that legal counsel would be 'conducting interviews of various staff members and physicians' and asked for the cooperation of anyone contacted for that purpose. Dr. Adler also instructed all physicians to refrain from discussing the matter with anyone other than counsel: 'I am sure it goes without saying that maintaining the confidentiality of this process is of the highest importance to all of us. For that reason, please do not discuss it among yourselves, and instead leave it to outside counsel to handle.' Dr. Adler sent a similar letter to Alabama Oncology's staff, again instructing everyone to refrain from discussing the matter other than with counsel. During its investigation, legal counsel interviewed Alabama Oncology physicians, employees, and management personnel who potentially had knowledge relating to the St. Vincent's Birmingham clinic, which was the focus of the anonymous letter.

"....

"Following the conclusion of the investigation, the law firm delivered oral presentations of its findings and the resulting legal advice over several dates. On October 9, 2019, counsel presented to Alabama Oncology's President -- Dr. Brian Adler -- and its Executive Director [Chris Barnes]. On October 11, 2019, counsel presented to the St. Vincent's partners. Then, on October 14, 2019, counsel presented to the quarterly physicians' owners' meeting. As a regular practice, the executive management team attends all quarterly partner meetings. Consistent with this practice, the meeting on October 14 was attended by Alabama Oncology's partners and

executive management team. Counsel presented to the partnership once more on October 23, 2019. Following the conclusion of this meeting, Alabama Oncology's partnership held an anonymous vote to determine what, if any, employment actions should be taken with respect to Plaintiffs. The partnership ultimately voted 13-2 in favor of terminating Plaintiffs' employment.

"Following their termination from Alabama Oncology, Plaintiffs filed the present action. It is apparent from the pleadings and subsequent filings in this matter that Plaintiffs contend they were wrongfully terminated based on alleged workplace disputes outside their control. However, whether Plaintiffs were rightly or wrongly terminated is not before the Court in this case. The Parties have stipulated that Plaintiffs were at-will employees and thus could be fired for any reason or no reason at all under Alabama law. That stipulation was recognized in this Court's Order, dated November 17, 2021.

"The Court's consideration for purposes of summary judgment is limited solely to the two counts remaining in the case: Count One (Defamation Against All Defendants) and Count Two (Wanton Conduct As To All Defendants).

"Plaintiffs initially based their claims on allegations that Defendants wrote and sent the anonymous letter to Alabama Oncology and St. Vincent's Birmingham Hospital, and then republished the letter to partners and other employees of Alabama Oncology. Following discovery, Plaintiffs have presented no evidence that Defendants wrote or sent the letter to Alabama Oncology, St. Vincent's, or any other third party. Plaintiffs now argue that Defendants defamed them through internal 'republishing' of the anonymous letter's allegations. The merits of Plaintiffs' claims will be discussed below."

The trial court went on to analyze the merits of the plaintiffs' claims. The trial court reduced the arguments to two main issues: 1) whether the defendants had "published" the anonymous letter or its contents and 2) if so, whether certain communications regarding the letter fell under a privilege. The trial court considered the following five communications that the plaintiffs asserted constituted publication.

"Plaintiffs identify five communications that they contend satisfy the requisite element of publication:

"[1] Alabama Oncology's Practice Administrator received the anonymous letter through interoffice mail from an unknown person at the St. Vincent's East location;

"[2] Dr. Adler printed and handed an exact copy of the anonymous letter to Alabama Oncology's Director of Clinical Services;

"[3] Dr. Gore recognized the existence of the anonymous letter to his nurse and assistant;

"[4] Two former Alabama Oncology nurses heard rumors that a letter concerning the St. Vincent's Birmingham location was sent to Alabama Oncology physicians; and

"[5] Legal counsel made oral presentations to Alabama Oncology's physician-partners and executive management team at the quarterly partnership meeting regarding the law firm's internal investigation and resulting legal advice.

"The Court groups these communications into three categories: (A) the receipt or transmission of a verbatim copy of the letter by management; (B) communications regarding the existence of the letter, but not its allegedly defamatory contents; and (C) legal counsel's presentation of its internal investigation and resulting legal findings to management and the owners of the business. The Court addresses each category in turn."

After extensive analysis, the trial court found that the plaintiffs had not presented substantial evidence creating a genuine issue of material fact to satisfy the element of publication to support their defamation claims. The trial court determined that the alleged defamatory communications occurred between Alabama Oncology's employees and, thus, were not considered to be publications. The trial court went on to find that, even if there had been a publication, the internal communications among management personnel were protected by the absolute litigation privilege.

The trial court also entered a summary judgment in favor of the defendants on the plaintiffs' wantonness claims. The plaintiffs' wantonness claims were based on Alabama Oncology's alleged continued circulation and republication of the allegations in the anonymous letter to the various employees at different Alabama Oncology locations who, the plaintiffs asserted, had no reasonable involvement or interest in the

investigation. The trial court concluded that the plaintiffs' wantonness claims were based on the same allegations underlying their defamation claims and that, ultimately, the plaintiffs had failed to establish genuine issues of material fact regarding whether the defendants had breached a duty owed to the plaintiffs and, thus, whether the defendants' conduct was wanton.

With regard to the individual defendants, Adler and Gore, the trial court determined that there was no evidence indicating that either defendant had been involved in drafting the anonymous letter or had transmitted the letter to another Alabama Oncology location or a third party. The plaintiffs alleged that Adler and Gore had conspired to engage Bradley Arant to conduct a "sham investigation," but the trial court determined that the evidence established that Alabama Oncology's executive director, Barnes, had engaged Bradley Arant to pursue the investigation before informing Adler and Gore about the anonymous letter.

The plaintiffs timely appealed the summary judgment, naming Alabama Oncology, Adler, and Gore as appellees. Gore was later dismissed from the appeal on the plaintiffs' motion. See note 1, *supra*.

Standard of Review

The plaintiffs appeal from a summary judgment, which this Court reviews de novo, applying the same standard as that applied by the trial court. We must first determine whether, when viewing the evidence in the light most favorable to the plaintiffs, Alabama Oncology and Adler made a prima facie showing that there existed no genuine issue of material fact and that they were entitled to a judgment as a matter of law. See Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). If Alabama Oncology and Adler met that burden, then we must determine whether the plaintiffs produced "substantial evidence" demonstrating the existence of a genuine issue of material fact. Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

Discussion

The plaintiffs challenge the summary judgment entered in favor of Alabama Oncology and Adler on their claims alleging defamation and wantonness.

I. Defamation

This Court has discussed the requisite elements of a defamation claim, explaining that a plaintiff must establish: "[1] that the defendant was at least negligent, [2] in publishing [3] a false and defamatory statement to another [4] concerning the plaintiff, [5] which is either actionable without having to prove special harm (actionable per se) or actionable upon allegations and proof of special harm (actionable per quod)." Delta Health Grp., Inc. v. Stafford, 887 So. 2d 887, 895 (Ala. 2004)(quoting Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085, 1091 (Ala. 1988)).

The main element at issue in this case is the element of publication. "If there is no publication, there is no defamation." Dixon v. Economy Co., 477 So. 2d 353, 355 (Ala. 1985)(quoting Willis v. Demopolis Nursing Home, 336 So. 2d 1117, 1118, 1120 (Ala. 1976)). "Publication of the alleged defamatory words is essential to the maintenance of the action for libel and slander, and there must be a communication to one or more persons other than the parties." Burney v. Southern Ry. Co., 276 Ala. 637, 639, 165 So. 2d 726, 728 (1964). Because a business entity "can act only through its servants, agents, or employees, ... when officers and employees of a corporation act within the scope of their employment and

within the line of their duties, they are not third persons," and their communications are, therefore, communications of the company with itself. Nelson, 534 So. 2d at 1093 (citing Home Indem. Co. v. Anders, 459 So. 2d 836 (Ala. 1984), and Burney, 276 Ala. at 640, 165 So. 2d at 729).

"Communications among the managerial personnel of a corporation about the company's business do not constitute a publication, under the rule of McDaniel v. Crescent Motors, Inc., 249 Ala. 330, 31 So. 2d 343 (1947)." Dixon, 477 So. 2d at 354. Further, "[a]s long as a communication to a non-managerial employee falls within the proper scope of that employee's knowledge or duties, the McDaniel/Burney rule applies to non-managerial employees as well as to managerial employees." Nelson, 534 So. 2d at 1093. See also Luxottica of America, Inc. v. Bruce, [Ms. SC-2022-0867, June 30, 2023] ___ So. 3d ___, ___ (Ala. 2023)("The McDaniel/Burney rule has been applied to insulate legal entities and their employees from liability based on communications amongst those employees. Burks v. Pickwick Hotel, 607 So. 2d 187, 190 (Ala. 1992).").

The plaintiffs argue that the trial court misapplied as absolute the "McDaniel/Burney rule" because, they argue, that rule is limited and inapplicable in this scenario. The plaintiffs do not identify in the

argument section of their brief which actions of Alabama Oncology and Adler they believe constitute publication. The plaintiffs assert, generally, that the alleged defamatory communications occurred outside the scope of the duties of Alabama Oncology's employees and that the communications did not concern Alabama Oncology's business. The plaintiffs argue that there is no evidence demonstrating that all the physicians at the different Alabama Oncology locations shared in revenue or had managerial roles to justify their coverage under the McDaniel/Burney "no publication" rule. The plaintiffs also assert that the anonymous letter concerned solely the St. Vincent's Birmingham location and that the physician partners who were physically located at other locations "had no involvement in the investigation" and "were not officers or managers" of the St. Vincent's Birmingham location.² Plaintiffs' brief

²The plaintiffs also argue that whether the employees involved in the communications were managerial and whether the allegedly defamatory statements were made within the line and scope of employment and in furtherance of Alabama Oncology's business are questions for a jury to decide. As the opponents of the summary-judgment motion, however, the plaintiffs bore the responsibility of presenting substantial evidence demonstrating a factual dispute regarding the status and roles of the physicians and other employees of Alabama Oncology, which they failed to do.

at 34. However, the employees' physical locations are irrelevant. This Court has explained "'that a corporation, although it can act only through officers and agents, is not guilty of publishing a libel, when it writes a libelous letter at one of its branch offices and mails it to another.'" Burney, 276 Ala. at 641, 165 So. 2d at 730 (quoting Prins v. Holland-North America Mortg. Co., 107 Wash. 206, 209, 181 P. 680, 681 (1919)). Likewise, the particular job titles of the employees are also irrelevant. It is undisputed that each person involved in allegedly sharing or receiving information regarding the anonymous letter was an employee of Alabama Oncology. See Nelson, 534 So. 2d at 1093 (applying the McDaniel/Burney rule to nonmanagerial employees as well as to managerial employees when the communication "falls within the proper scope of that employee's knowledge or duties"). Allegations of hostility and unrest among employees, the investigation regarding such allegations, and the preparation for potential legal action against Alabama Oncology is certainly transacting Alabama Oncology's business and within the scope of its employees' duties.

The plaintiffs rely on Hoover v. Tuttle, 611 So. 2d 290 (Ala. 1992), in support of their assertion that Alabama Oncology published the false

claims regarding the plaintiffs to employees who had no connection to the investigation. Hoover is inapposite, however, because it involved intentional and indisputably false defamatory communications among executive committee members about an applicant to prevent that applicant from obtaining an employment position. In Hoover, there was sufficient evidence of publication and of conspiracy to defame the plaintiff to submit the defamation claims to a jury for resolution. In this case, the plaintiffs have not presented any evidence indicating the identity of the author of the anonymous letter or otherwise demonstrating that any particular employee was "not acting pursuant to any duty owed to" Alabama Oncology in advising other employees of the existence of the letter, or even the allegations contained within it. Hoover, 611 So. 2d at 293.

The plaintiffs seemingly base their assertions of publication on Bradley Arant's presentation of its investigative findings to the attendees of Alabama Oncology's quarterly partners' meeting on October 14, 2019. The plaintiffs assert that four "administrative" employees attended that meeting despite having no involvement in the investigation and no managerial role for Alabama Oncology. It is undisputed, however, that

those employees were members of Alabama Oncology's executive management team and that they regularly attended the partners' meetings. Regardless of whether those employees were actively involved in the investigation, an internal investigation regarding allegations of illegality and potential legal action against Alabama Oncology was certainly in furtherance of Alabama Oncology's business and within the scope of those employees' duties as members of Alabama Oncology's executive management team.

This Court considered a similar question involving representation by agency in the context of a defamation claim in Brackin v. Trimmier Law Firm, 897 So. 2d 207 (Ala. 2004). In Brackin, the Alabama Credit Union Administration ("ACUA") issued a directive to Family Security Credit Union ("FSCU") to engage an outside firm to conduct an audit and to review certain improprieties that had been identified in a previous audit. FSCU retained a law firm to conduct the investigation, and the law firm, in turn, retained Jo Lynn Rutledge, a certified public accountant employed by the Alabama Credit Union League ("ACUL"), to conduct the investigation. During the course of her investigation, Rutledge questioned FSCU employees and uncovered other concerns

related to one of FSCU's employee's, Karen Brackin. Rutledge orally advised a senior examiner with ACUA regarding her findings, and she submitted her written findings to the law firm. ACUA took action that resulted in FSCU's termination of Brackin's employment. Brackin sued FSCU, Rutledge, ACUL, and the law firm, asserting, among other claims, defamation. Brackin asserted that FSCU employees had defamed her in their statements to Rutledge. On appeal, this Court explained that Rutledge was FSCU's agent and that Rutledge's questions to FSCU employees and statements made by FSCU employees to Rutledge during her investigation fell within the McDaniel/Burney "no-publication" rule. This Court explained that the statements were "given by employees of FSCU to an agent of FSCU in the course of transacting legitimate FSCU business; those communications were within the scope of both the employees' and the agent's duties." Brackin, 897 So. 2d at 222. Further, this Court explained that, by compiling information and completing the investigation regarding alleged improper activities occurring at FSCU, "Rutledge was unquestionably performing a legitimate business task for FSCU." Id.

Similarly, here, Bradley Arant was retained to investigate allegations contained in the anonymous letter. Some of those allegations involved instances of employee hostility, medical malpractice, and illegal activity conducted by or occurring between Alabama Oncology employees. Bradley Arant's presentation of the information that it gathered from its investigation to Alabama Oncology's executive management team and physician partners, and those employees' receipt of that information, was certainly within the scope of Bradley Arant's employment and "a legitimate business task" of Alabama Oncology. 897 So. 2d at 222. "Stated otherwise, statements made to an agent, under these circumstances, are the legal equivalent of statements made directly to oneself. Consequently, as logic commands, no publication has taken place, and without publication no actionable claim for defamation can exist." Davis v. Legal Servs. Alabama, Inc., 472 F. Supp. 3d 1123, 1136 (M.D. Ala. 2020), *aff'd*, 19 F.4th 1261 (11th Cir. 2021). Accordingly, the trial court correctly entered a summary judgment in favor of Alabama Oncology and Adler on the plaintiffs' defamation claims.

The plaintiffs also challenge the summary judgment on their defamation claims on the basis that, they argue, the absolute litigation

privilege was inapplicable. However, because "there is no publication to a third party, there can be no defamation and there is no need to consider malice, privilege, or any of the other elements of defamation." Brackin, 897 So. 2d at 222. See also Burney, 276 Ala. at 640, 165 So. 2d at 729 (quoting McDaniel v. Crescent Motors, Inc., 249 Ala. 330, 333, 31 So. 2d 343, 345 (1947))(" 'We do not reach the matter of privilege, malice or any other question until there is a publication.'"). Accordingly, we pretermitt discussion of the plaintiffs' additional arguments relating to the potential application of privilege.³

Furthermore, because we have not considered the plaintiffs' arguments regarding the applicability of privilege, we, likewise, have not considered the arguments of Alabama Oncology and Adler related to privilege in reaching our decision, and, as a result, we have issued a

³The plaintiffs also challenge the trial court's reliance on Age-Herald Publishing Co. v. Huddleston, 207 Ala. 40, 41, 92 So. 193, 194 (1921), in holding that any republications that occurred were "aggravations" of the preexisting defamation claim, rather than new causes of action. Addressing this argument is unnecessary, however, because all the alleged communications, whether framed as a publication or a republication, fall under the McDaniel/Burney "no publication" rule as communications between employees.

separate order denying as moot the plaintiffs' motion to strike certain arguments in Alabama Oncology and Adler's brief relating to privilege.

II. Wantonness

The plaintiffs also argue that substantial evidence supported their wantonness claims and that the trial court erred in holding that the wantonness claims were duplicative of their defamation claims. The plaintiffs present a plethora of legal authority for the propositions that defamation claims and wantonness claims are different claims and that wantonness claims should be presented to a jury.

The plaintiffs state that they "adduced substantial evidence to create a genuine question of fact on whether [Alabama Oncology and Adler] published and republished the defamatory contents of the Anonymous Letter 'with reckless or conscious disregard' of Plaintiffs' rights, or while knowing that such actions 'will likely result in injury'. See Statement of Facts, supra." Plaintiffs' brief at 64. The plaintiffs do not identify what substantial evidence they presented that demonstrated wanton conduct by Alabama Oncology or Adler so as to support submitting their wantonness claims to a jury. The plaintiffs do not address the trial court's holding that they presented no evidence

indicating who was responsible for the original publication of the anonymous letter. Moreover, as discussed above, the trial court correctly determined that there was no publication, or republication, because all the alleged communications occurred between Alabama Oncology's employees. The plaintiffs' bare assertion that they satisfied their burden to defeat the summary-judgment motion is insufficient to warrant reversal on this issue.

Conclusion

The summary judgment in favor of Alabama Oncology and Adler on the plaintiffs' defamation and wantonness claims is affirmed.

AFFIRMED.

Parker, C.J., and Wise, Sellers, and Cook, JJ., concur.