IN THE SUPREME COURT OF MISSISSIPPI
CA
NO.: 2007-~~TS~~-00764

HAZEM BARMADA — APPELLANT

VERSUS — reply brief

ARA K. PRIDJIAN, M.D. — APPELLEE

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
CIVIL ACTION NUMBER A2401-2002-0083

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ARGUMENTS IN REPLY

I. Whether the trial court erred in finding that the defendant was protected by qualified privilege.

AND

II. Whether the trial court erred in finding that there was no genuine issue of material fact regarding actual malice, bad faith, and/or abuse of qualified privilege.

Appellee begins his less than one page Argument on the issue of Qualified Privilege as follows: "Although Dr. Barmada's brief on qualified immunity makes repeated accusations of defamation and slander against Dr. Pridjian, there is not one statement set forth for the Court to examine as to whether not it constitutes slander." Brief for Appellee at 7. Dr. Pridjian is, of course, mistaken. Plaintiff sufficiently opposed the Motion for Summary Judgment by, *inter alia*, providing an Affidavit by Registered Nurse First Assistant David Kutlina who unequivocally demonstrated that Dr. Pridjian had repeatedly slandered Dr. Barmada by never missing an "opportunity to tell others that Dr. Barmada had 'terrible results', that he was a 'lousy surgeon', an 'incompetent surgeon', a 'horrible surgeon' and other like defamatory words which imputed upon Dr. Barmada an unfounded charge of lack of capacity in his profession as a heart surgeon." (CP—191-192) (RE—15-16). This is, by definition, is slander per se. "[A]ny attack on the

capabilities of a plaintiff in his trade or profession (so long, only, as the trade or profession is a legal one)" constitutes slander per se. *McFadden v. United States Fidelity and Guaranty Co.,* 766 So.2d 20 (Miss. Ct. App. 2000) (citing *W.T. Farley, Inc. v. Bufkin,* 159 Miss. 350, 132 So. 86, 87 (1931). It seems disingenuous, as best, to argue that repeated instances of slander per se could be done in good faith and subject to a qualified privilege. *See Eckman v. Cooper Tire & Rubber Company*, 893 So.2d 1049 (Miss. 2005).

For purposes of a summary judgment proceeding, it does not matter whether Dr. Barmada presented one Affidavit from a competent witness or 100 Affidavits from 100 competent witnesses illustrating genuine issues of material fact. The Mississippi Supreme Court has stated as follows, **"It is not our duty to weigh the competing evidence; it is our duty to determine if there is conflicting evidence for trial"**. *Estate of Johnson* v. *Chatelain,* 943 So.2d 684, (Miss. 2006) (citing *Miller v. Meeks,* 762 So.2d 302, 304 (Miss. 2000). All evidence must be viewed in the light most favorable to the non-movant, and **the court should presume that all evidence in the non-movant's favor is true**. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993); *McFadden v. State*, 580 So. 2d 1210, 1214 (Miss. 1991); *Webster v. Mississippi Publishers Corp.*, 571 So. 2d 946, 949 (Miss. 1991); *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So. 2d 1346, 1354 (Miss. 1990); *Brown v. Credit Center, Inc.*, 444 So.2d 358 (Miss. 1983).

Even, *arguendo*, if a qualified privilege existed, which is denied, Dr. Barmada submitted sufficient evidence of malice, bad faith, and/or abuse of the privilege to create a jury question. Where a qualified privilege exists, it may be overcome by malice, bad faith, or abuse. *Eckman v. Cooper Tire & Rubber Company*, 893 So.2d 1049, (Miss. 2005). Evidence of malice is found in Nurse Kutlina's Affidavit whereby he recounted specific acts of slander per se and stated, "Dr.

Pridjian made it his quest to run Dr. Barmada out of town for no legitimate reason. Dr. Pridjian served as a ring leader in his attempts to turn the surgical team against Dr. Barmada without just cause. It was quite obvious that Dr. Pridjian's agenda was to get rid of Dr. Barmada." (RE—17-19). Dr. Pridjian himself testified that he saw Dr. Barmada as his competition and that he wanted his competition gone. (CP—152-58). According to his own testimony, Dr. Pridjian spoke with others about Dr. Barmada's "faults" as many as a few times a day for a few months. (CP—152-58). Additionally, other clear evidence of malice and bad faith is found in the report of the independent reviewer, Dr. Paul Robison, fully discussed in the original Brief for Appellant. (CP—163-179) (RE—25-41).

The Mississippi Supreme Court has held that if any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed. *Estate of Johnson* v. *Chatelain,* 943 So.2d 684, (Miss. 2006) (citing *Miller v. Meeks,* 762 So.2d 302, 304 (Miss. 2000). Clearly, triable issues have been amply illustrated in the present case. Genuine issues of material fact remain and the Defendant/Appellee was not entitled to summary judgment. M.R.C.P. 56.

CONCLUSION

Based on the above and foregoing, it is apparent that the circuit court erred in its decision to grant summary judgment in favor of the Defendant. Dr. Barmada is entitled to have this cause decided by a jury of his peers. Appellant respectfully requests that the circuit court's decision to grant summary judgment be reversed, and that this matter be remanded for a full trial on the merits.

Respectfully submitted,
HAZEM BARMADA
BY: LAW OFFICES OF WENDY HOLLINGSWORTH PLLC

BY: _____
WENDY HOLLINGSWORTH

CERTIFICATE OF FILING AND SERVICE

I, WENDY HOLLINGSWORTH, of the law firm of LAW OFFICES OF WENDY HOLLINGSWORTH PLLC do hereby certify that I have mailed this day, first-class postage prepaid, a true and correct copy of the Reply Brief for Appellant to the following at their usual mailing address:

Honorable Roger T. Clark, Judge
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SO CERTIFIED that I have deposited the Reply Brief for Appellant for Appellant in the United States mail on this the 6 day February, 2008.

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