COPY

IN THE SUPREME COURT OF MISSISSIPPI

NO.: 2007-CA-00764

HAZEM BARMADA — APPELLANT

VERSUS

ARA K. PRIDJIAN, M.D. — APPELLEE

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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CERTIFICATE OF INTERESTED PERSONS

Supreme Court of Mississippi (original and three copies)
P. O. Box 249
Jackson, MS 39205-0249

Honorable Roger T. Clark, Judge
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First Judicial District
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Barmada Hazem, Appellant

Ara K. Pridjian, Appellee

RESPECTFULLY SUBMITTED, this the 19th day of October, 2007.

WENDY HOLLINGSWORTH
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STATEMENT OF THE ISSUES

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

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.**

STATEMENT OF THE CASE

A.
(Nature of the Case, Proceedings and Disposition)

Dr. Hazem Barmada filed a Complaint alleging defamation against Dr. Ara Pridjian on February 27, 2002. (CP—10). On May 2, Defendant filed his Answer and Counterclaim. (CP—20). Plaintiff filed an Answer to Counterclaim on May 20, 2002. (CP—14). On May 30, 2002, Plaintiff filed a Motion to Disqualify Defendant's Counsel alleging that he had twice consulted with Defendant's attorney regarding the matters which were the subject of the instant action. (CP—22). After the circuit court denied the Motion to Disqualify on September 9, 2002, the Plaintiff filed an Interlocutory Appeal. The Mississippi Supreme Court reversed the circuit court's decision and ordered that Defendant's counsel be disqualified and disgorge his fees. (CP—40). Discovery thereafter ensued, followed by Defendant's Motion for Summary Judgment. (CP—67). Ultimately, the circuit court erroneously granted Defendant's Motion for Summary Judgment. This matter is now on appeal from the circuit court's grant of summary judgment.

B.
(Statement of Facts)

Before the court is a slander action involving two Gulfport heart surgeons, the Plaintiff, Dr. Hazem Barmada, and the Defendant, Dr. Ara Pridjian. Dr. Barmada moved to the Mississippi Gulf Coast from Massachusetts in October of 2000. (CP—83-84, 145). Despite having moved to the "Hospitality State", Dr. Barmada soon learned that the atmosphere at Memorial Hospital at Gulfport was anything but hospitable. The self-proclaimed "dominant surgeon", Dr. Pridjian, did not like Dr. Barmada from the start. (CP—144). Dr. Pridjian testified that he saw Dr. Barmada as his competition and that he wanted Dr. Barmada gone.

(CP—152). Registered Nurse First Assistant David Kutlina submitted an Affidavit stating as follows:

> I, David Kutlina, after first being duly sworn, do depose and state on my oath the following:
>
> 1. I David Kutlina, have personal knowledge of the following facts or events.
>
> 2. I am a Registered Nurse First Assistant. I have been a Registered Nurse for 26 years and a Registered Nurse First Assistant for 6 years.
>
> 3. I worked as an independent contractor at Memorial Hospital at Gulfport for approximately 22 months.
>
> 4. During the time that I worked at Memorial Hospital at Gulfport, I had the opportunity to work as First Assistant on numerous occasions to both Doctor Hazem Barmada and Dr. Ara K. Pridjian.
>
> 5. I found Dr. Barmada to be a joy to work with. Dr. Barmada is a highly competent heart surgeon, very professional, a perfect gentleman, and a respectable man. He does not lose his temper and he does not show frustration or arrogance during procedures. Dr. Barmada had consistently good outcomes with his procedures. I would prefer working with Dr. Barmada over any other cardiac surgeon and I have worked with hundreds over the years.
>
> 6. During those times that I served as a First Assistant to Dr. Ara K. Pridjian, I heard him wrongfully slander and defame Dr. Hazem Barmada countless times in front of the heart team while procedures were being performed.
>
> 7. When I was assisting Dr. Pridjian, it seemed that he never missed 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.
>
> 8. 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."

(CP—191-92). (RE-15-16)

Dr. Pridjian, while mostly quite careful with his language during in his deposition, did admit that he found Dr. Barmada to be a "problem surgeon. At the time, he had made himself the focus of an investigation. At the time, he was making life difficult for the operating room, and they were reporting it and talking about it. At the time, he was talked about." (CP—157). Dr. Pridjian admitted that he told others that he found Dr. Barmada to be "difficult, arrogant, someone who makes problems, someone who ties up the operating team for hours, someone who ties them up in knots". (CP—156-57). He admitted that he had engaged in conversation in the doctors' lounge and surgeons' lounge from time to time about Dr. Barmada's skills and interpersonal relationships. (CP—157). Dr. Pridjian admitted that before Dr. Barmada's competency was completely vindicated by the external reviewer, Dr. Robison, who was called in to get to the bottom of the unfortunate situation, that Dr. Pridjian spoke with others about Dr. Barmada's "faults" as much as a few times a day for a few months. (CP—158).

SUMMARY OF THE ARGUMENT

The circuit court erred in its decision to grant summary judgment in favor of the Defendant as genuine issues of material fact remain in dispute and the Defendant is not entitled to summary judgment as a matter of law. 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). The non-movant should be given the benefit of every reasonable doubt, as the burden of demonstrating no genuine issue of material fact exists rests upon the moving party. *Smith v. Sanders*, 485 So. 2d 1051, 1054 (Miss. 1986).

Plaintiff sufficiently opposed the Motion for Summary Judgment by, *inter alia*, providing an Affidavit by a competent witness who clearly illustrated that Dr. Pridjian had committed non-privileged slander per se by repeatedly telling 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."

The lower court erroneously concluded that Dr. Pridjian's statements were subject to a qualified privilege on the sole basis that the slanderous statements were made to the heart team and other medical personnel. The court held that Plaintiff could only prevail upon a showing actual malice, which the court found that Plaintiff had failed to do. The court erroneously failed to consider evidence of bad faith or abuse of qualified privilege, which would have clearly demonstrated that the slanderous statements were not privileged. Furthermore, 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). Furthermore, Dr. Pridjian himself testified that he saw Dr. Barmada as his competition and that he wanted his competition gone and that 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). The lower court also erred by refusing to consider the report of the independent examiner utilized by both parties in the summary judgment proceedings for any evidence favorable to the Plaintiff (though the court did utilize the independent examiner's reports for some purposes).

ARGUMENT

STANDARD OF REVIEW

Orders granting or denying summary judgment are subject to a *de novo* review. *Cities of Oxford v. Northeast Mississippi Electric Power Assn*, 704 So. 2d 59, 64 (Miss. 1997). As provided by Mississippi Rules of Civil Procedure 56, summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." M.R.C.P. 56. "If there is a doubt as to whether there exists a genuine issue of material fact, the non-movant receives the benefit of that doubt . . . . It is reversible error for the trial court to substitute summary judgment for a jury's consideration of disputed factual issues if material to the case. *Downs v. Choo*, 656 So. 2d 84, 85-86 (Miss. 1995).

A motion for summary judgment lies only when there is no genuine issue of material fact and is not a substitute for a trial of disputed fact issues, nor is summary judgment to be used to deprive a litigant of a full trial of genuine fact issues. *Dethlefs v. Beau Maison Development*

Corp., 458 So. 2d 714, appeal after remand 511 So. 2d 112 (Miss. 1984). *See also Garrett v. Northwest Miss. Jr. College*, 674 So. 2d 1 (Miss. 1996). A fact is "material" for purposes of summary judgment if it tends to resolve any of the issues properly raised by the parties. *Morgan v. City of Ruleville*, 627 So. 2d 275 (Miss. 1993); *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So. 2d 413 (Miss. 1988); *Pearl River County Bd. of Sup'rs v. South East Collections Agency, Inc.*, 459 So. 2d 783 (Miss. 1984).

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). It is not the court's duty to weigh the competing evidence; it is the court's duty to determine if there is conflicting evidence for trial. *Id.* 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). The non-movant should be given the benefit of every reasonable doubt, as the burden of demonstrating no genuine issue of material fact exists rests upon the moving party. *Smith v. Sanders*, 485 So. 2d 1051, 1054 (Miss. 1986).

I. Whether the trial court erred in finding that the defendants were protected by qualified privilege.

The tort of defaming a person's character or reputation through the spoken word is actionable under the common law doctrine of slander. *McFadden v. United States Fidelity and Guaranty Co.,* 766 So.2d 20 (Miss. Ct. App. 2000) (citing W. PAGE KEETON ET AL.,

PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th ed.1984)). For a statement to be defamatory, the statement must tend to injure one's reputation, to "diminish the esteem, respect, goodwill, or confidence in which [one] is held," or to "excite adverse, derogatory or unpleasant feelings or opinions" against one. *Speed v. Scott*, 787 So.2d 626, 631 (Miss. 2001) (quoting Prosser & Keeton on the Law of Torts §111, at 771 (5th ed. 1984). Any 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).

Nurse Kutlina, testifying by Affidavit, unequivocally stated that, "During those times that I served as a First Assistant to Dr. Ara K. Pridjian, I heard him wrongfully slander and defame Dr. Hazem Barmada countless times in front of the heart team while procedures were being performed." He further testified, "When I was assisting Dr. Pridjian, it seemed that he never missed 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, slander per se.

In its Final Judgment, the circuit court correctly recognized the holding in *Eckman v. Cooper Tire & Rubber Company*, 893 So.2d 1049 (Miss. 2005), which provides that Mississippi courts employs a bifurcated process when analyzing defamation claims by first determining whether the occasion calls for a qualified privilege, and then, if a qualified privilege does exist, determining whether the privilege is overcome by malice, bad faith, or abuse. *Eckman v. Cooper Tire & Rubber Company*, 893 So.2d 1049 (Miss. 2005).

> A communication made in good faith and on a subject matter in which the person making it has an interest, or in reference to which he has a duty, is privileged if made to a person or persons having a corresponding interest or duty, even though it contains matter which without this privilege would be slanderous, provided the statement is made without malice and in good faith."

Id. at 1052 (emphasis added).

Dr. Pridjian's statements were not subject to qualified privilege. According to the Affidavit of Nurse Kutlina, Dr. Pridjian repeatedly slandered Dr. Barmada in front of the heart team and other medical personnel. Dr. Pridjian and Dr. Barmada were both heart surgeons in the same hospital and they relied on the same heart team. Dr. Pridjian would go into the operating room and slander Dr. Barmada, repeatedly telling the nurses, anesthesiologists, perfusionists scrub tech, assistant scrub tech, nurse first assistant, nurses, and other medical personnel 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—144, 191-92). How could these repeated slanders have been made in good faith? The only purpose could have been to undermine those people's confidence in Dr. Barmada, who they would later be asked to assist in surgeries, thus furthering Dr. Pridjian's goal of eliminating his competition. (CP—152).

By his own admission, Dr. Pridjian would go into the doctors' lounge and the surgeons' lounge, places where he was sure to see people in a position to provide Dr. Barmada with referrals, and disparage Dr. Barmada's "skills" and "interpersonal relationships". (CP—156) (RE—17). He admitted speaking to referring physicians regarding his negative opinions of Dr. Barmada:

> Ms. Hollingsworth: Have you ever told any other doctors that in your opinion they should not refer a patient or patients to Dr. Barmada because you felt he was not competent or other words to that effect?

> Dr. Pridjian: If I did, I don't recall saying that Dr. Barmada was not competent to referring doctors.
>
> Q: You stated earlier in your deposition that you didn't typically use the term "competent" or "incompetent." Do you recall that?
>
> A: Yes.
>
> Q: What phrase or words would you use to convey that same message? Certainly, after Dr. Barmada's external review, there was no stated concern of his competence. Before then, there were issues that were being brought up in the operating room, as I explained to you, and when asked about them, I would report them as I understood them.
>
> Q: I don't think you understood what I was asking. You testified earlier that you don't use the words "competent" or "incompetent." That implies to me that you would use some other words or phrase to get across that same message.
>
> A: I think the adjectives might be – and again, we're talking about Dr. Barmada at that point in time. I think the adjectives would be difficult, arrogant, someone who makes problems, someone who ties up the operating team for hours, someone who ties them up in knots.

(CP—156-57) (RE—17-18). Dr. Pridjian estimated that before Dr. Barmada's competency was completely vindicated by the external reviewer, Dr. Robison, who was called in to get to the bottom of the unfortunate situation, that Dr. Pridjian spoke with others about Dr. Barmada's "faults" as much as a few times a day for a few months. (CP—158).

These slanderous statements made by Dr. Pridjian were not made in the context of voicing official complaints up the chain of command to hospital administrators or in a peer review setting as was the case in *Hayden v. Foryt*, 407 So.2d 535 (Miss. 1982) (hereinafter more thoroughly discussed). It was a doctor repeatedly slandering his competition, whom he wanted to be rid of. In a parallel line of cases concerning slander in the context of "retention, tenure, and termination of college faculty members", the Mississippi Supreme Court has recognized that publication of slanderous statements "outside the circle of decision-makers is not privileged".

Holland v. Kennedy, 548 So.2d 982 (Miss. 1989) (citing *Webster v. Byrd*, 494 So.2d 31, 35 (Ala. 1986)). There certainly should not be in blanket immunity in the context of all hospital personnel, as was argued by Defendant and accepted by the trial court judge, simply because the doctor was slandered to his peers and colleagues. (TR—19). Could there be worse groups of people to slander a professional to that his peers and colleagues? What we are talking about here is tantamount to a lawyer repeatedly going to the courthouse and telling every lawyer, court administrator, judge, court reporter, and deputy clerk who he runs into that Lawyer X is an "incompetent lawyer" has "terrible results", is a 'lousy lawyer", a "horrible lawyer". Does merely the fact that these statements are made within the confines of the courthouse make them privileged? Of course not. Then certainly it is error to conclude that all members of the "cardiac and heart related personnel" are within the circle of protection of qualified privilege. The fact that the slanderous statements are made to a professional's peers and colleagues makes them all the worse. However, Dr. Pridjian himself admitted he published negative statements regarding Dr. Barmada to someone outside of the hospital: his wife. (TR—28).

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.

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. Even 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). The lower court erred, by failing to fully consider what constitutes "abuse", and by failing to consider all the evidence in the record substantiating malice, bad faith, and/or abuse.

A. Abuse of Qualified Privilege

The issue of abuse of a qualified privilege was discussed in the case of *Garziano v. E.I. Du Pont Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987), which was cited with approval by the Mississippi Supreme Court in *Eckman v. Cooper Tire & Rubber Company*, 893 So.2d 1049, (Miss. 2005). In *Garziano,* the court held:

> The law also allows a jury to find that a qualified privilege was abused by excessive publication. There are two ways to abuse a qualified privilege. First, the defense of qualified privilege may not be invoked if the scope of the statements exceeded what was necessary. The language used "must be careful to go no further than [the declarant's] interest or duties require." *McCrory Corp. v. Istre,* 252 Miss. 679, 173 So.2d 640, 646 (1965). Secondly, a qualified privilege does not protect a defamatory statement where there is excessive publication to persons not within the "circle" of those people who have a legitimate and direct interest in the subject matter of the communication. *Hayden v. Foryt, supra,* 407 So.2d at 536; *Love v. Commercial Casualty Insurance Co.,* 26 F.Supp. 481 (S.D.Miss.1939).
>
> Although the qualified privilege does not provide a defense if the scope of the statement exceeded what was necessary, the fact that Du Pont "used strong words ... is no evidence of malice. The fact that the expressions are angry and intemperate is not enough; the proof must go further and show that they are malicious." *Scott-Burr Stores Corp. v. Edgar,* 181 Miss. 486, 177 So. 766 (1938). In essence, the statement is not privileged if the person claiming the privilege could have done all his interest or duty demanded without defaming the plaintiff.

Garziano v. E.I. Du Pont Nemours & Co., 818 F.2d 380, 391-92 (5th Cir. 1987)

1. Scope of Statements Exceeded What Was Necessary

"The defense of qualified privilege may not be invoked if the scope of the statements exceeded what was necessary. The language used 'must be careful to go no further than [the declarant's] interest or duties require.'" *McCrory Corp. v. Istre,* 252 Miss. 679, 173 So.2d 640, 646 (1965).

> The protection of a qualified privilege may be lost by the manner of its exercise, although belief in the truth of the charge exists. The privilege does not protect any unnecessary defamation. In order for a communication to be privileged, the person making it must be careful to go no further than its interests or his duties require. Where the person exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected, and the fact that a duty, a common interest, or a confidential relation existed to a limited degree is not a defense, even though he acted in good faith.

McCrory Corp. v. Istre, 252 Miss. 679 173 So.2d 640 (Miss. 1965).

The Mississippi Supreme Court, in the case of *Southwest Drug Stores of Miss., Inc. v. Garner*; 195 So.2d 837 (Miss. 1967), provided an example of how a qualified privilege may be lost by statements exceeding what is necessary:

> Appellants argue that Ratcliff had observed Mrs. Garner and believed by her actions that she was committing an act of shoplifting; that her actions gave him probable cause to investigate, and that he acted in good faith and upon an occasion of privilege in carrying out his duties to protect his employer's property.
>
> Although the occasion was one of qualified privilege, the privilege was lost by the manner in which it was exercised. Mrs. Garner testified, and the jury found, that she was wrongfully accused of stealing in a rude and loud voice in the presence of other people outside the place of business. Granting that Ratcliff had reason to believe that Mrs. Garner had put a bar of soap in her purse and left the store without paying for it, and that he had probable cause to make inquiry, still he was careless and negligent in his method of ascertaining whether Mrs. Garner had paid for the soap.
>
> Had Ratcliff asked the cashier if Mrs. Garner had paid for a bar of soap, he would have ascertained that she had. Instead, he asked if she had paid for a bar of Lowilla soap. Then, instead of making inquiry in a reasonable manner, he accused Mrs. Garner of stealing a bar of soap. When he did so he exceeded the qualified privilege. In order for a communication to be privileged the person making it must be careful to go no further than his interest or duties require. *Sumner Stores v. Little*, 187 Miss. 310, 192 So. 857 (1939).
>
> Whether privilege is available as a defense may depend on the manner in which the communication is made. The protection of a qualified privilege may be lost by the manner of its exercise, although belief in the truth of the charge exists. *Mc-Crory Corp. v. Istre*, 252 Miss. 679, 173 So.2d 640

(1965); *Montgomery Ward & Co. v. Skinner*, 200 Miss. 44, 25 So.2d 572 (1946).

Southwest Drug Stores of Miss., Inc. v. Garner; 195 So.2d 837 (Miss. 1967). Just as the store clerk when too far when he rudely and loudly accused Mrs. Garner of stealing, Dr. Pridjian also went too far. By repeated telling the medical personnel that Dr. Barmada was an "incompetent surgeon", "horrible surgeon", "lousy surgeon", in front of Nurse Kutlina, Dr. Pridjian was certainly not careful to go no further than whatever his interests or his duties—assuming there were any—required. Dr. Pridjian clearly exceeded any privilege and the communications complained of went beyond what the occasion may have allowed him to publish. He unnecessarily defamed Dr. Barmada, and he cannot be protected under the law. *McCrory Corp. v. Istre*, 252 Miss. 679 173 So.2d 640 (Miss. 1965). "In essence, the statement is not privileged if the person claiming the privilege could have done all his interest or duty demanded without defaming the plaintiff." *Garziano v. E.I. Du Pont Nemours & Co.*, 818 F.2d 380, 391-92 (5th Cir. 1987).

2. Excessive Publication to Persons Not Within Circle

> This Court is committed to the rule that although the law guards jealously the enjoyment of a good reputation, public policy, good morals, the interests of society, and sound business principles demand that an employer, or his representative, should be permitted to discuss freely with an employee charges made against an employee affecting the latter's employment. On such occasions there is a qualified privilege, and statements made within the scope of the privilege, in good faith and without malice, are not actionable. *Killebrew v. Jackson City Lines, Inc.*, 225 Miss. 84, 82 **So.2d** 648 (1955). (339 **So.2d** at 572)
>
> And: When qualified privilege is established, statements or written communications are not actionable as slanderous or libelous absent bad faith or malice if the communications are limited to those persons who have a legitimate and direct interest in the subject matter. The qualified privilege may be likened to a circle insofar as its area of protection is concerned. Depending upon the circumstances, the circle encloses those people who have a legitimate and direct interest in the subject matter of the communication, and publication to them is not actionable. If

> publication is made to persons outside the circle---those not having a legitimate and direct interest in the subject matter of the communication--- the protection of the privilege may not be invoked.

Hayden v. Foryt, 407 So.2d 535 (Miss. 1982) (quoting *Benson v. Hall,* 339 So.2d 570, 573 (Miss.1976)) (emphasis added).

"A qualified privilege does not protect a defamatory statement where there is excessive publication to persons not within the 'circle' of those people who have a legitimate and direct interest in the subject matter of the communication. *Hayden v. Foryt,* 407 So.2d at 536; *Love v. Commercial Casualty Insurance Co.,* 26 F.Supp. 481 (S.D.Miss.1939).

The lower court apparently found that Dr. Pridjian's slanderous statements were privileged on the sole basis that, "There is no proof before the Court that such alleged derogatory comments were made to anyone outside the cardiac and heart related personnel." (CP—275) (RE—11).

In his Motion for Summary Judgment, Dr. Pridjian argued that this case is on point with the *Hayden v. Foryt* case. However, the two are readily distinguishable. In the *Hayden* case, which also involved two surgeons, the defendant doctor voiced his complaints against a fellow doctor to hospital administration on various occasions. *Id.* On one such occasion, the complaints were taken up at the monthly surgical staff meeting which was also attended by both attorneys for the parties. *Id* at 537-38. Thus, the defendant doctor in *Hayden* voiced his complaints appropriately up the chain of command and those individuals involved were found to be "directly interested in the matter and the qualified privilege prevailed". *Id.* The defendant doctor in *Hayden* did not run around the hospital slandering the other doctor as in the present case. Similarly, in the case of *Eckman v. Cooper Tire & Rubber Company*, 893 So.2d 1049

(Miss. 2005), the Mississippi Supreme Court held that certain defamatory statements made about a surgeon remained within the qualified privilege because the statements had been confined to those "interested in the review process". *Eckman v. Cooper Tire & Rubber Company*, 893 So.2d 1049 (Miss. 2005). However, in the present case, the anesthesiologists, nurses, scrub techs and perfusionists in the room with Nurse Kutlina and Dr. Pridjian were not in involved in the review process, nor were they hospital decision-makers. They should not be categorized as within the 'circle' of those people who have a legitimate and direct interest in the subject matter of the communication. *Hayden v. Foryt, supra,* 407 So.2d at 536; *Love v. Commercial Casualty Insurance Co.,* 26 F.Supp. 481 (S.D.Miss.1939). Cases such as this should be no different than slander cases involving "retention, tenure, and termination of college faculty members", whereby Mississippi Supreme Court has recognized that publication of slanderous statements "outside the circle of decision-makers is not privileged". *Holland v. Kennedy*, 548 So.2d 982 (Miss. 1989) (citing *Webster v. Byrd*, 494 So.2d 31, 35 (Ala. 1986)).

B. Malice and Bad Faith

Appellant is of the strong belief that no qualified privilege was in effect at the time of the slanderous statements and, thus, there is no requirement to show that the defamatory statements were made in good faith and without malice. However, in an abundance of caution, Appellant will set forth evidence of bad faith and malice.

First, what is malice in the context of slander?

> Actual or express malice, as distinguished from malice in law, in its ordinary sense denotes ill will, a sentiment of hate or spite, especially when harbored by one person towards another, and exists when one with a sedate, deliberate mind and formed design injures another, as where the person is actuated by ill will in what he does and says, with a design to willfully or wantonly injure

> another. Newell on Slander and Libel, 4th Ed. § 271 et seq. (181 Miss, at 503-504, 177 So. at 770).
>
> And:
>
> In Newell on Slander and Libel, § 292, it is stated that, "If the defendant honestly believed the plaintiff's conduct to be such as he described it, the mere fact that he used strong words in describing it is no evidence of malice. The fact that the expressions are angry and intemperate is not enough; the proof must go further and show that they are malicious."
>
> The following rule is announced in Newell on Slander and Libel, 3d Ed., § 397: "If the evidence adduced is equally consistent with either the existence or the nonexistence of malice, there can be no recovery, for there is nothing to rebut the presumption which has arisen in favor of the defendant from the privileged communication." *Gust v. Montgomery Ward & Co.,* 229 Mo.App. 371, 80 S.W.2d 286; *Rosenberg v. Mason,* 157 Va. 215, 160 S.E. 190, 202. In the *Rosenberg* Case the court in dealing with a privileged occasion, said: "It is not sufficient in a case such as this that the evidence be consistent with the existence of actual malice, or even that it raise a suspicion that the defendant might have been actuated by malice or a doubt as to his good faith. It must affirmatively prove the existence of actual malice, and to do so it must be more consistent with the existence of actual malice than with its nonexistence."

Hayden v. Foryt, 407 So.2d 535, 539 (Miss. 1982) (quoting *Scott-Burr Stores Corp. v. Edgar,* 181 Miss. 486, 177 So. 766 (1938).

According to the Affidavit of Nurse David Kutlina, he heard Dr. Pridjian slander Dr. Barmada "countless times." "When I was assisting Dr. Pridjian, it seemed that he never missed 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—191-92) (RE—15-16). "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." (CP—191-92) (RE—15-16).

The circuit court relied upon *Jacox v. Circus Circus Mississippi, Inc.* 908 So.2d 181, 184 (Miss. Ct. App. 2005) as authority for deeming Nurse Kutlina's Affidavit to be "so vague and generalized as to be of no evidentiary value for purposes of determining malice". (CP—276) (RE—12). *Jacox* is quite distinguishable from the present case inasmuch as Mr. Kutlina's Affidavit set forth specific facts known to him of his own personal knowledge, which would have been admissible into evidence. Jacox is not even applicable here:

> Jacox asserts that the trial court erred as a matter of law in determining that he failed to establish a prima facie case of negligence. Much of Jacox's argument on appeal asserts broadly that he has been abused by the forces of our judicial system. Jacox avers, in short, that he suffered a fall in the Gold Strike Casino, that the fall must assuredly be through the fault of Gold Strike, and that he is therefore entitled to $4,000,000 in damages. It seems that, in essence, Jacox seeks to impose a sort of strict liability upon Gold Strike. Jacox repeatedly alludes to the fact that he is not versed in the law, and does not have the resources to compete on fair grounds with a large and "filthy rich" defendant like Gold Strike. He further asserts that Gold Strike sought to dismiss his suit through "legal trickery." Jacox even goes so far as to fault the trial judge for leading and aiding Gold Strike throughout the short duration of his suit.
>
> 6. Unfortunately for Jacox, bare allegations cannot defeat a motion for summary judgment. The ritualized combat of the courtroom demands that favorable outcomes may be obtained only after meeting clearly established legal and procedural standards. The Mississippi Supreme Court has held that "[p]ro se parties should be held to the same rules of procedure and substantive law as represented parties." Dethlefs v. Beau Maison Development Corp., 511 So.2d 112, 118 (Miss. 1987). We simply may not rely upon unsupported, conclusory allegations to defeat a motion for summary judgment where there are no issues of material fact. See Richardson v. Oldham, 12 F. 3d 1373, 1378-79 (5th Cir. 1994) (affidavits in opposition to summary judgment that contain conclusions or conjecture not based on personal knowledge and insufficient factual specificity are not competent summary judgment evidence); Forsyth v. Barr, 19 F. 3d 1527, 1533 (5th Cir. 1994) (unsubstantiated assertions are not competent summary judgment evidence); Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1449 (5th Cir. 1993) (if the nonmoving party rests merely upon conclusory allegations, improbable inferences and unsupported speculation, summary judgment may be appropriate).

Jacox v. Circus Circus Mississippi, Inc. 908 So.2d 181, 184 (Miss. Ct. App. 2005). Here, Nurse Kutlina's Affidavit was based on his personal knowledge and provided specific allegations of slander per se, bad faith and malice.

Furthermore, Dr. Pridjian himself has admitted that he harbored ill feelings toward Dr. Barmada. He admittedly found him to be "difficult, arrogant, someone who makes problems, someone who ties up the operating team for hours, someone who ties them up in knots." (CP—156-57). He also admitted that he wanted Dr. Barmada gone because Dr. Barmada was his competition. (CP—152) (RE—17).

Other clear evidence of malice and bad faith is found in the report of the independent reviewer, Dr. Robison. (CP—163-179) (RE—25-41). Dr. Robison's report is an exhibit to Dr. Pridjian's deposition and Dr. Pridjian admitted in his deposition that he is identified in the report as doctor 552. Both Plaintiff and Defendant utilized Dr. Robison's report during discovery and during the summary judgment proceedings. Dr. Robison's report was attached as Exhibit D2 to Defendant's Motion for Summary Judgment and is also relied upon in Defendant's Itemization of Undisputed Facts Submitted in Support of his Motion for Summary Judgment. (CP—163, 185-87). Judge Clark himself utilized portions of the report in sustaining the summary judgment motion. The following are some excerpts from Dr. Robison's report evidencing malice and bad faith on the part of the Dr. Pridjian against Dr. Barmada:

a. "It should be noted that before I received these records, I was contacted by one of the surgeons[1] at this hospital who clearly had in mind influencing my impression of Dr. Barmada.. . . . [H]is **brutal criticism** of Dr. Barmada seemed self-serving and **highly inappropriate**." (CP—176-77) (RE—39). (emphasis added).

[1] Defendant, Dr. Pridjian, admitted in his deposition that he was the surgeon who called Dr. Robison. (CP—153).

b. "I have read the letters of complaint submitted in regard to Dr. Barmada. I have found them to be insulting and based largely on the political agenda of the dominant surgeon[2] the hospital. Clearly the campaign against Dr. Barmada began on the Board of Directors level before he even arrived. He has been constantly undermined, his every decision called into question. **There has been a campaign of backbiting, to which even I was subjected in an attempt to paint an obviously very decent man as an incompetent**." (CP—177) (RE—39). (emphasis added).

c. "I also wonder about the ethics of a surgeon or a group of doctors who would attack another surgeon before he even arrived at a hospital, call into question his credentialing, call into question his training, call into question his morality. I am concerned that a physician [Defendant, Dr. Pridjian] would talk to me over the phone, without having met me and having no knowledge of my world view, and assume that I would simply think that because he performs a certain percentage off-pump procedures that he is technically superior." (CP—177) (RE—39).

d. "I find these letters to be insulting and filled with innuendoes. They clearly are expressing the political agenda of the dominant surgeon, and are not based on the reality that there is no difference between these gentlemen in terms of the results I reviewed." (CP—177) (RE—39). (emphasis added).

e. "I believe that the current political climate is crass and inhospitable. I do not see how Dr. Barmada has been able to function in this dysfunctional cauldron and maintained the pleasant demeanor and openness, which I personally witnessed." (CP—177) (RE—39).

[2] Defendant, Dr. Pridjian, admitted in his deposition that he was the "dominant surgeon." (CP—144).

f. "The Office of Medical Staff and specifically the President of the Medical Staff should control the surgeons, and specifically those with a political agenda, to immediately put an end to practices that are dysfunctional and not in the best interest of your hospital." (CP—178) (RE—40).

Thus, it seems there can be no doubt that sufficient proof of malice and bad faith exists so as to survive summary judgment. Dr. Pridjian, actuated by ill will in what he said and did, acted with a design to willfully injure Dr. Barmada.

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 his day in trial and 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 Brief for Appellant and Record Excerpts for Appellant to the following at their usual mailing address:

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SO CERTIFIED that I have deposited the Brief for Appellant and Record Excerpts for Appellant in the United States mail on this the 19th day October, 2007.

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