

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
GREENVILLE DIVISION  
CIVIL ACTION NO.: 6:06-CV-02723-RBH

RITA CANTRELL, )  
)  
Plaintiff, )  
)  
vs. )  
)  
TARGET CORPORATION )  
a/k/a TARGET STORES, INC., )  
)  
Defendant. )  
\_\_\_\_\_ )

**PLAINTIFFS' RESPONSE TO  
TARGET'S MOTION FOR  
SUMMARY JUDGMENT**

This e-mail defamation case is before the Court on the Defendant Target Corporation's ("Target") motion for summary judgment. The basis for the motion is the two-pronged assertion by Target that: (1) the defamatory communication at issue in this case is protected by a qualified privilege; and (2) there is no evidence which would permit a jury to find actual malice sufficient to overcome its qualified privilege. More particularly, Target contends that in order to overcome its qualified privilege, Ms. Cantrell must produce evidence that Target acted with "ill-will" towards her, with the intent and design to "causelessly and wantonly" injure her.

For purposes of Target's motion only, Ms. Cantrell concedes the e-mail in question is probably entitled to a qualified privilege. Likewise, Ms. Cantrell concedes that the recitation of facts in Target's motion is sufficiently detailed and accurate to permit the Court to understand the basic underlying events. Images of the \$100 bill in question are attached. (Exhibit A) The only issue for the Court to determine in resolving Target's motion is whether there is any evidence the proper scope of the qualified privilege was exceeded either by the wording of the e-mail or by the manner and

extent of its publication.

Under South Carolina law, the question whether a qualified privilege has been abused is one for the jury. Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001). In making that determination, the jury is entitled to find that the protection of a qualified privilege has been lost by the manner of its exercise. Id. A privileged communication must not wander beyond the scope of the occasion. Id. The privilege does not protect unnecessary defamation. Id. In order for a communication to be privileged, the person making it must be careful to go no further than his interests or his duties require. Id. Where the speaker exceeds the privilege and the communication complained of goes beyond what the occasion demands, and is unnecessarily defamatory of the plaintiff, the speaker will not be protected. Id. When the scope of the privilege has been exceeded, the existence of a duty, common interest, or a confidential relation in making the communication is no longer a defense. Id.

### **Statement of Facts in Dispute**

Contrary to the implication of Target's motion, several witnesses in this case have provided testimony on the issue of whether the e-mail in question (Exhibit B) went beyond the proper scope of a qualified privilege. Kristie Guerry has been an asset protection and loss prevention employee of Target for 16 years. She provided the following testimony:

- Q Speaking now in somewhat general broad brush terms, the incident involving Ms. Cantrell, were mistakes made?
- A Personal opinion, you know, I don't think that it was wrong to share information. I think that, but as far as the e-mail that was sent he could have partnered with somebody and it definitely could be worded differently. \* \* \*
- Q And you say the wording could have been handled differently. What in particular is it about the wording of the e-mail that Mr. Proctor sent that you believe could have been handled differently?
- A If I had sent the e-mail I would have put that it was suspected to be

counterfeit, not confirmed, and the last comment about the Belk's bag I think that was a matter of opinion and it wasn't factual.

Deposition of Kristie Guerry, page 100, lines 3 thru 22. (Exhibit C)

Further in the same vein was the testimony of Kristie Guerry's husband, Douglas Guerry, who has enjoyed a 20-year career in loss prevention with such companies as Target, Kohl's, Rich's, and now Macy's. It was Douglas Guerry who founded the CORTTF organization and to whom the Proctor e-mail was initially sent for wider distribution on the 66-member CORTTF list serve. Mr. Guerry testified as follows:

- Q Now, it looks like you've been in the asset protection business for . . .
- A Twenty years.
- Q . . . 20 years, yeah. Do you view the e-mail that Mr. Proctor sent as being appropriate?
- A The language, no; the communication, yes; the language, no.
- Q So in your view, the language of his e-mail would exceed the proper scope of the information that CORTTF was formed to share?
- A Having the ability to look at it in hindsight, I would have changed the wording on his e-mail.
- Q Well, and that's what I say, I mean, the wording, in your view, was over the top. Fair enough?
- A Reading it now, yes. \* \* \*
- Q [Y]our own personal view as a guy who's spent 20 years in asset protection is that the language in Mr. Proctor's e-mail was excessive in terms of the allegation that it made?
- A Yes, sir.

Deposition of Douglas Guerry, page 31, line 15 thru page 32, line 17. (Exhibit D)

In addition, Dennis Caruso has been in the retail loss prevention business for over 20 years. He was working at Belk when the Proctor e-mail was received by his office through the CORTTF list serve. Mr. Caruso testified as follows:

- Q [I]t's because of the absolute nature of the accusation that you felt it was unprofessional. Is that right?
- A Yes.

Q And you yourself would never have sent such an e-mail?

A No.

\* \* \*

Q Well, and so again, with your background as a man with 20-years experience in loss prevention, do you consider the sending of the e-mail that's Exhibit 1 [Proctor e-mail] to have been reasonable?

A No.

Deposition of Dennis Caruso, page 43, lines 15 thru 21; page 47, line 21 thru page 48, line 3.

(Exhibit E)

These three witnesses, each of whom have spent 15 to 20 years in retail loss prevention and asset protection, and including current Target employee Kristie Guerry and former Target employee Douglas Guerry, all agreed the Proctor e-mail was over-the-top, excessive, unprofessional, and unreasonable. A jury could find this translates into what the law of defamation calls "causeless and wanton."

In addition, the Plaintiff's retained expert, John Villines, offered the following testimony at his deposition:

Q And based on your 40 years of experience in the industry and the various publications that we've got here with us today, do you believe that Mr. Proctor's conduct in sending the e-mail was reasonable and appropriate in the context of the loss prevention and security management industry?

A No, sir

\* \* \*

Q And do you have an opinion, as a man with 40 years of experience in the loss prevention and security management industry, as to whether or not that type of e-mail that contains a photograph and an unsubstantiated accusation of criminal activity is a reasonable and appropriate thing for someone like Michael Proctor or anyone at Target to have sent out?

A It would be unreasonable for anyone with any organization, not just a loss prevention person, it would not be reasonable for anyone to disseminate that type of e-mail.

\* \* \*

Q Okay. Well, and let me make sure the record is clear. Let me ask the question again then. Would the sending of the e-mail as Mr. Proctor did to

the CORTTF listserv exceed the proper scope for which that listserv was created?

A Absolutely. Certainly it would exceed the ones that I'm familiar with.

\* \* \*

Q Now, do members of the loss prevention and security management community have a legitimate interest in the dissemination of false information and false accusations?

A No, sir.

Deposition of John Villines, page 104, lines 11 thru 17; page 106, lines 3 thru 14; page 107, lines 6 thru 13; page 118, lines 16 thru 20. (Exhibit F)

### Argument

On the principal issue of whether the Proctor e-mail was sent with the explicit intent and design to causelessly and wantonly injure Ms. Cantrell, counsel poses the following rhetorical questions: Did Target intend to somehow *benefit* Ms Cantrell by publishing an e-mail accusing her of being a felon? Was that accusation designed to *help* Ms. Cantrell? And most importantly: *Did* it help Ms. Cantrell? The wording of the accusation, the crimes alleged, the breadth of the publication, and the ultimate outcome of the e-mail all support a reasonable inference that the e-mail was *intended to injure* Ms. Cantrell. Perhaps not like punching her in the mouth, but being called a criminal is not typically considered a compliment.<sup>1</sup> Having your picture attached to an e-mail accusing you of being a crook is not generally recognized as an honor.

Michael Proctor himself testified that by sending the e-mail, he intended to bring the \$100 bill incident to the attention of the Secret Service:

A \* \* \* Douglas [Guerry] was, he'd been in the loss prevention industry for years and years and years and he knew everybody from the drug investigators, check fraud detectives, all the way up to the Secret Service. And from what

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<sup>1</sup> In certain areas of Appalachian America, for example, calling someone a criminal will often result in a punch in the mouth.

I remember, it [sic] think the reason why I forwarded it to him in the first place is because this e-mail membership he has, CORTFF [sic], the Organized Retail Theft Task Force, I remember seeing a name in there that said Secret Service. So I assumed, well, he can probably, if it is a counterfeit bill, which I assumed it was at the time, based on the information, that, you know, it might be a good person to send it to.

\* \* \*

Q All right. Well, when you sent the e-mail to Mr. Guerry, though, did you understand that he was going to forward it or disseminate it, if you will, amongst the members of CORTTF?

A Probably assumed he would.

Q I mean, did you intend that that be what he did?

A I don't know what my intention was. I think it was just a – Probably. Because, you know, why else would I send it to him because he had all the contacts so, yeah, I'd say that was my intention.

Deposition of Michael proctor, page 21, lines 8 thru 19; page 41, lines 12 thru 21. (Exhibit G)

Mr. Proctor's own testimony simply highlights the improper and unjustified manner in which he published the e-mail. If his privileged intent were simply to alert the Secret Service to Ms. Cantrell's counterfeiting activities, what need was there for him to also forward his accusations for distribution to all 66 members of CORTTF (Exhibit H), some of whom were located in distant places like Florida, Georgia and Virginia? Assuming *arguendo* the credibility of Mr. Proctor's stated reason for sending the e-mail – to stamp an *imprimatur* on his defamatory accusations by getting Douglas Guerry to pass them “all the way up to the Secret Service” – what possible justification was there for also spreading the accusations among American Express, Best Buy, Home Depot, Lowes, Old Navy, Publix, Wal-Mart and dozens of other CORTTF members besides the Secret Service?

Indeed, if Mr. Proctor's intent was to benignly relay concerns to the Secret Service, why not simply do as Belk's Michelle Barton did – pick up the telephone and call the Secret Service? (Exhibit I) In short, it is from the unnecessarily wide scope of the publication itself that a jury could reasonably infer abuse of the qualified privilege and actual malice in the form of an intent to harm

Ms. Cantrell.

Interestingly, Mr. Proctor revealed his thought process when he testified that he also sent the e-mail to CORTTF because he realized the futility of simply calling the authorities about the \$100 bill himself:

Q If you thought the bill was counterfeit, why didn't you contact law enforcement?

A Because we didn't have the bill and the lady was already gone. They can't do anything. I mean, you can make a police report maybe, but without the bill, they're probably not going to [do anything]. That's just wasting time.

Deposition of Michael Proctor, page 33, lines 6 thru 11. (Exhibit J)

In other words, because he knew that his personal report to law enforcement would have no impact on Ms. Cantrell – “just wasting time” to use his words – Mr. Proctor determined instead to have Mr. Guerry send a defamatory “Be On The Look Out” e-mail to all the members of CORTTF. Only that path would most likely lead to some consequence – and presumably not a happy one – for Ms. Cantrell. As Mr. Proctor saw it, the authorities would ignore his routine complaint and the criminal would escape unpunished. But a photograph and e-mail to CORTTF might be just the thing to make the counterfeiting woman with the Belk's bag have a bad day at the mall.

The clear and malicious intent of the e-mail was that numerous other retailers be able to identify Ms. Cantrell as a criminal and treat her as such. That intent is focused by viewing the e-mail through the prism of what it actually accomplished: Ms. Cantrell was stopped in the check out lane of another Target store where the e-mail was received. Later, she heard Miranda rights from a federal law enforcement officer who came to Belk because Ms. Cantrell's co-workers received the e-mail and confirmatory license tag information. These events were not some disconnected series of unlikely coincidences. The potential for harm was easily foreseeable. Mr. Proctor knew he had

not personally inspected the bill. He deliberately chose to disregard the possibility that a photocopy might not be an adequate substitute for the real item. He did not consult his superiors before taking action. He showed no regard for the fact that \$100 bills have been around since before 1974. Mr. Proctor may have been absolutely sure the photocopy of the 1974 series \$100 bill was counterfeit, but he was also absolutely wrong.

When Michelle Barton at Belk contacted Target after receiving the Proctor e-mail, Target actually sent additional information to her seeking to further implicate Ms. Cantrell in the alleged criminal activity. (Exhibit I) Counsel again poses a rhetorical question: Was Target somehow intending to *help* Ms. Cantrell when its loss prevention personnel provided Belk with a second photograph of her and a license tag number for her car? Such assistance lead directly to Ms. Cantrell being positively identified as a counterfeiter and subjected to a custodial interrogation conducted at her workplace by federal officers. Target claims it meant no harm, but it did not send out invitations to a tea party honoring Ms. Cantrell's status as a model citizen. It put a "WANTED" poster of her on the internet and helped people who saw the poster confirm her identity.

On this specific issue, Plaintiff's retained expert John Villines provided the following deposition testimony:

- Q You said that one of the areas where you've got an opinion in this case relates to what happened when Michelle Barton at Belk contacted the folks at Target seeking additional information about the original Proctor e-mail. Am I understanding that correctly?
- A That's correct, sir.
- Q And your opinion was that this would have been an opportunity for the folks at Target to make some sort of qualifying remark concerning the accusation in the e-mail?
- A Absolutely, make more than a qualifying remark; explain that the e-mail was sent without her permission or approval, explain that there is no evidence to substantiate the claims made in the e-mail. Very specific information needed

to have been communicated at that point.

Q And would Target's failure to have done that constitute a departure from recognized industry standards, in your opinion?

A Certainly it would be a departure from reasonable industry practices in my opinion; and I would take it a step further in that it would have been appropriate for Ms. Guerry to have refused to release any additional information about the suspect absent attempting to clarify whether there was any evidence to support the original allegation.

Deposition of John Villines, page 118, line 21 thru page 119, line 22. (Exhibit K)

As this Court recently held in Floyd v. WBTW, 2007 WL 4458924 (D.S.C. 2007), proof that statements were published in an improper and unjustified manner is sufficient evidence to submit the issue of malice to a jury. Moreover, malice may be proven by direct or circumstantial evidence. Hainer v. American Medical International, Inc., 328 S.C. 128, 492 S.E.2d 103 (S.C. 1997). Whether malice is the incentive for a publication is ordinarily for the jury to decide. Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001). Whether a publication went too far beyond what the occasion required, resulting in the loss of the qualified privilege, is also a question for the jury. Id.

Finally, it bears noting that, even to this day, Target itself has never issued a retraction or apologized to Ms. Cantrell for the unsubstantiated accusations in the Proctor e-mail:

Q So it's fair to say then that as we sit here today almost two years after this incident, you've never received an e-mail from anyone at Target acknowledging that Mr. Proctor's original e-mail was in error?

A No, sir.

Q And you've never received any e-mail from anyone at Target apologizing for the original Proctor e-mail?

A No, sir.

Deposition of Douglas Guerry, page 27, lines 17 thru 24. (Exhibit L)

Q And again, just so the record is clear, at no point in time did anyone from Target ever send an e-mail to CORTTF along the lines, well, in essence retracting Mr. Proctor's original e-mail?

A No, not to my knowledge.

- Q Did you ever consider doing that?  
A I'm not sure, I don't think so.

Deposition of Kristie Guerry, page 33, lines 9 thru 15. (Exhibit M)

When you harm someone and do not apologize, it is reasonable to infer you are not sorry. If you are not sorry when your conduct harms someone, it is likewise reasonable to infer you do not care that your conduct was harmful. Not caring whether your conduct harms someone just is conscious disregard for them. Target's attitude towards Ms. Cantrell is, "We are not sorry."

In Smith v. Smith, 194 S.C. 247, 9 S.E.2d 584 (1940)(applying North Carolina law and cited with approval in Murray v. Holnam, *supra*), the court held evidence that a defendant who broadly published a statement charging the plaintiff with commission of a crime and thereafter refused to correct his statement or apologize was sufficient to present a question for the jury as to whether there was actual malice entitling the plaintiff to recover punitive damages. That is precisely the posture in which Target currently stands before this Court: unrepentant and unashamed.

### **Conclusion**

Four seasoned loss prevention personnel have criticized the Proctor e-mail as being unprofessional, unreasonable, inappropriate and excessive. Target employees compounded the error of the original Proctor e-mail by providing additional information intended only to assist Belk in positively identifying Ms. Cantrell as someone engaged in serious criminal activity. To this day, despite acknowledging the Proctor e-mail should have been worded differently, despite being informed the \$100 bill was authentic, and despite knowing all of the adverse consequences the e-mail brought, Target has never retracted its accusations or apologized for making them.

Instead, Target comes before the Court with a motion saying there is no evidence – not even

a scintilla – that its loss prevention employees ever meant any harm to Rita Cantrell, so that Target should be completely immune from responsibility for the foreseeable consequences of its employees’ admittedly defamatory communications.

Under the facts and circumstances of this case, it is for the jury to weigh and decide whether Target was narrowly advancing a legitimate business interest within the closely circumscribed parameters of a qualified privilege when it engaged in conduct which has been criticized by every loss prevention professional to offer testimony in this case, including Target’s own current and former employees. The jury could reasonably find that Target exceeded the scope of any qualified privilege and likewise find the circumstances of this case show an intent to do harm to Ms. Cantrell.

Target’s motion for summary judgment should be denied.

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