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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas Carmen

Mullens, Circuit Court Judge

Appeal No. 2023-000227  
Case No. 2020-CP-10-01315

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Caine Henry,

Appellant,

v.

Medical University of South Carolina,  
Medical University of South Carolina  
Department of Public Safety, and Kevin  
Kerley,

Respondents.

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Appellant Initial Brief

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North Charleston, South Carolina  
March 24th, 2023

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT BECAUSE IT WAS PREMATURE DUE TO APPELLANT NOT HAVING A FULL AND FAIR OPPORTUNITY TO COMPLETE DISCOVERY
2. WHETHER THE CIRCUIT COURT ERRED IN CONCLUDING THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT

## STATEMENT OF THE CASE

03/11/20	Caine Henry (Appellant) brought this action alleging defamation, intentional infliction of emotional distress, civil conspiracy, and negligence against MUSC, MUSC Public Safety and Chief Kevin Kerley (Respondents).
06/22/21	Respondent's Motion to Dismiss was denied.
07/15/21	Appellant Subpoenaed Respondents witness SLED Captain Prodan and any potential evidence.
10/27/21	The court denied Appellant's Motion to Compel Subpoena to SLED. The subpoena needed to be issued from Richland County not Charleston County.
11/05/21	Appellant subpoenaed SLED via Richland County.
05/31/22	Respondents filed for Motion for Summary Judgement.
07/05/22	Appellant filed a Motion to Compel SLED Subpoena in Richland County.
10/27/22	Respondents Motion for Summary Judgement hearing was held in person. Judge Mullens requests proposed Orders from both parties.
01/03/23	Respondents Motion for Summary Judgement was granted.
01/11/23	Appellant filed for a Motion to Reconsider.
01/17/23	Court denied Motion to Reconsider.
02/07/23	Appellant served the Notice of Appeal on Respondents.
As of Present Day	The Appellants, Richland County Motion to Compel Subpoena SLED remains pending.

On 10/27/2021 the first discovery SLED Motion to Compel was denied due to jurisdiction even though SLED is a statewide agency [Order MTC SLED 1 Charleston Denied]. Nonetheless on 11/05/2021 the Appellant submitted a second court issued subpoena this time in Richland County [MTC SLED 2 Richland Ex B p1,2]. SLED did not appear for discovery at the location

provided in the subpoena. Respondents on 05/31/2022 motioned for Summary Judgment. After non-compliance with the Nov 2021 discovery SLED subpoena, Appellant filed a second discovery Motion to Compel SLED this time in Richland County on 07/05/2022 [MTC SLED 2 Richland p1,2]. The MFSJ was scheduled for 10/27/22. A notice from the courts indicated Memos and Briefs were due a week before the hearing by 10/19/22 per Judge Mullens Law Clerk [MFSJ email notice]. Along with Appellants MFSJ Brief he submitted the following evidence exhibits:

“Plaintiff submits the following summary judgment evidence in opposition to Defendant’s Motion for Summary Judgment:  
(1) the Affidavit of Tristen Watts and NCPD Body Cam Transcript (Ex. A)  
(2) the DEFENDANTS’ ANSWERS TO PLAINTIFF’S REQUEST FOR INTERROGATORIES (Ex. B)  
(3) the Affidavit of Tristen Watts and MUSC Chief Kerley / Caine Henry Audio Recording Transcript (Ex. C)  
(4) SLED MTC (Ex. D)  
(5) MUSC FOIA Requests (Ex. E)  
(6) NCPD Body Cam (Ex. F1 & F2)  
(7)MUSC Chief Kerley / Caine Henry Audio Recording (Ex. G)” [Pl. MFSJ Brief].

The Appellant raised the issue of the pending discovery MTC of SLED and requested the MFSJ be denied. [Transcript MFSJ p. 18:17 – 18:19]. The MFSJ hearing concluded with The Honorable Judge Mullens requesting proposed Orders from both the [Appellant] and the opposing attorney. The Appellant indicated in his proposed Order that a continuance to address outstanding discovery was a request for the Judge to rule on: “With outstanding discovery which goes to the heart of the claims and multiple disputed facts argued in court, Summary Judgment is inappropriate at this time” [Pl. Proposed Order p. 3]. The Court granted [Respondents] Motion for Summary Judgment and the court said the following:

1. “Based on the record and undisputed material facts, the [Respondents’] Motion for Summary Judgment is hereby GRANTED.”
2. “Here, the [Appellant] has had the opportunity to engage in discovery but presents no specific evidence that any individual associated with the [Respondents] made defamatory statements and/or libelous statements about the [Appellant].”
3. “In [Appellants] Complaint and in discovery, he has failed to allege and establish a conspiracy for the purpose of harming the [Appellant] or any alleged acts in furtherance of the alleged conspiracy on the part of the [Respondents]”
4. “In addition, even if it were assumed the Defendants had made any statements to SLED about the emails received or the conducting of a welfare check, such statements made by law enforcement in such context are, by their very definition, qualifiedly privileged.” [Order Granting MFSJ].

## STANDARD OF REVIEW

Summary Judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 329-330, 673 S.E.2d 801 (2009). "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Id.* Additionally, in South Carolina, summary judgment should not be granted until the non-moving party has had a full and fair opportunity to complete discovery. *See BPS, Inc. v. Worthy*, 362 S.C. 319, 329-330, 608 S.E.2d 155 (Ct. App. 2005). Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. AT & T*, 306 S.C. 101, 410 S.E.2d 537 (1991). “In general, if the pleadings and the evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, even if no opposing evidentiary matter is presented.” *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Carolina Alliance*, *supra*.” *Murray v. Holnam, Inc.*, 344 S.C. 129 (S.C. Ct. App. 2001). “An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. *Brockbank*, *supra*; *Wells v. City of*

Lynchburg, [331 S.C. 296](#), [501 S.E.2d 746](#) (Ct.App. 1998).” *Murray v. Holnam, Inc.*, 344 S.C. 129, 138 (S.C. Ct. App. 2001)

## FACTS

I Caine Henry (Appellant) sent some trauma revealing emails to the Medical University of South Carolina (MUSC) and to the South Carolina Law Enforcement Division (SLED) regarding the post traumatic symptoms I experienced from whistleblowing and arrest by MUSC. The emails were sent in March 2019. [Def. MFSJ Memo Ex. A p.10-14]. SLED Captain Michael Prodan had a phone call with Captain John Plitsch of MUSC. [Def. Answers to Pl. Interrogatories p.6,7] A welfare check was conducted March 15, 2019. On March 29, 2019, I had an in-person discussion with MUSC Police Chief Kevin Kerley which I recorded. After discussing issues with Chief Kerley I realized there were many disputed facts regarding the welfare check. Chief Kerley quoted to me, that I told North Charleston Police that I was trying to scare MUSC into a grievance hearing [Transcript Kerley Henry 1 p.3,4]. Chief Kerley also stated I was at home laughing about what I had done. *Id.* Knowing these alleged facts to be false I ordered the Body Cam footage of the welfare check from the North Charleston Police Department (NCPD) to discern fact from fiction. The following facts were realized after viewing and transcribing the Body Cam footage:

(SLED Captain Prodan ordered a welfare check on me on 03/15/2019. Captain Prodan contacted the Charleston Mental Health Mobile Crisis Unit to conduct the welfare check. North Charleston Police were called. Cami and Lisa with Charleston Mental Health were told not to call the Appellant. It was a “surprise”. North Charleston Officer Darius Rivers arrives at the scene down the street from my home. Officer Rivers informs Cami and her partner Lisa that I was going to “shoot anyone that came to my door including law enforcement”. This was according to NCPD call notes and a discussion with Officer Rivers supervisor. Officer Rivers waited for back-up. Cami and Officer Rivers concluded

this was a not a good idea from management. Lisa tells unknown caller “This person has threatened to shoot any officer on scene”. Officer Rivers tells Officer 2 that “he’s threatened to shoot any law enforcement officer or anybody on scene” Officer 2: “might not be a good idea to stand out here if he’s threatened to shoot people, so we got to move”) [Transcript of NCPD Body Cam 2:14 – 4:8]

The Body Cam footage provided important information about the welfare check that contradicted some of the allegations made by Chief Kerley. However, it's important to remember that situations like this can be complex and nuanced, and there may be additional information. This deadly situation luckily ended without fatal harm. I never indicated I wanted to harm anyone or shoot anyone that came to my home [Def. MFSJ Memo Ex. A p.10-14].

SLED has objected to two subpoenas [MTC SLED 1 Charleston Ex. C p.1; MTC SLED 2 Richland Ex. C P.1]. There is reason to believe that there is additional information that would support Appellants claims, and that this information is in the possession of SLED. [Def. Answers to Pl. Interrogatories p. 1]. The additional information would probably prompt an amended complaint. An amended complaint would allow Appellant to update the court on the new information and provide additional details to support Appellant claims. I have been prevented from getting facts from SLED and Captain Prodan a witness to the Respondents for quite some time now. The surprising facts here suggest this was a swatting attempt disguised as a welfare check [Pl. Sum & Comp p. 3]. I feel frustrated and want to see accountability for any misconduct or abuse of power by law enforcement agencies. It's important for law enforcement to operate with integrity and to be held accountable when they fail to do so.

## ARGUMENT

### 1. THE CIRCUIT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT BECAUSE IT WAS PREMATURE DUE TO APPELLANT NOT HAVING A FULL AND FAIR OPPORTUNITY TO COMPLETE DISCOVERY.

At the time of and prior to MFSJ there was a pending Discovery MTC: [MTC SLED 2 Richland]. As of present day, the Discovery MTC is still awaiting a hearing. In *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2003), The South Carolina Supreme Court rejected Dawkins' "argument that summary judgment was premature because they did not have a full and fair opportunity for discovery." A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact. *Id.* The Appellant addressed both time and additional relevant evidence in his MFSJ Brief:

“[Appellant] subpoenaed SLED on 07/15/2021 for information related to the agent’s pending testimony. SLED did not comply with subpoena. [Appellant] filed a Motion to Compel SLED for subpoena information crucial to the [Appellants] claims in Charleston County on 8/11/2021. Then a MTC was filed in SLED’s home county Richland. The MTC was filed on 7/5/2022 in Richland County and is still pending a hearing (SLED MTC (Ex. D))” [Pl. MFSJ Brief p.3].

The Appellants MFSJ Brief exhibit further elaborates on additional relevant evidence that would have come from further discovery.

“[Appellant] believes that information contained in this phone call and other information in SLED’s possession are likely relevant to [Appellant’s] claims and or the defenses in this case and at least are discoverable. [Appellant's] case revolves around the communications between SLED and MUSC” [Pl. MFSJ Brief Ex D p. 1].

In order to argue that summary judgment is premature due to insufficient discovery, a party must provide a good reason why the time allowed for discovery was insufficient under the specific circumstances of the case and why further discovery would uncover additional relevant evidence that would create a genuine issue of material fact. The South Carolina Supreme Court has held that such arguments are fact-specific and depend on the individual circumstances of each case.

Discovery plays a critical role in our legal system, allowing parties to gather and exchange relevant information that can assist in the resolution of a case. It is through discovery that parties can uncover crucial facts and evidence that may not have been previously known, and it is essential to ensuring a fair and just outcome.

The pending subpoenas and motions to compel are crucial in obtaining the necessary information related to SLED's testimony and evidence. Without this information, it may be difficult to uncover the truth and ensure justice is served. The court will ultimately decide whether further discovery is necessary and relevant to this case.

It goes without saying that the pandemic has impacted the way Courts and parties have adjudicated matters and has affected timing. Had there been no pandemic surely Appellants discovery Motion to Compel would have been heard timely and prior to the hearing for MFSJ.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be inappropriately deprived of a trial of the disputed factual issues. *Baughman v. AT & T*, 306 S.C. 101, 410 S.E.2d 537 (1991). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Appellant was not dilatory in seeking discovery on issue of causation but was reasonably diligent as evident by the two subpoena's and two Motions to compel. *Id.* Appellant has demonstrated a likelihood that further discovery will uncover additional evidence relevant to the issues and that Appellant is not merely engaged in a "fishing expedition." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). The Appellant has been diligently seeking SLED discovery since 07/15/2021, MFSJ was premature due to an outstanding discovery MTC and thus was not full and fair discovery.

Based on the arguments presented, the Appellant is asserting that summary judgment was prematurely granted in their case due to the lack of a full and fair opportunity to complete discovery. The Appellant has filed two court-issued subpoenas and two Motions to Compel for urgent and crucial information related to SLED's pending testimony, communication, and evidence. The Appellant argues that further discovery is desirable to clarify the application of the law and that summary judgment is a drastic remedy that should not be granted until the opposing party has had a full and fair opportunity to complete discovery. The Appellant contends that he was reasonably diligent in seeking discovery on the issue of causation and that further discovery will likely uncover additional relevant evidence.

## 2. THE CIRCUIT COURT ERRED IN CONCLUDING THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT

MUSC and SLED had a phone call regarding the appellant then someone informed the North Charleston Police that appellant would shoot anyone that came to his home. “The [Appellant] contended the North Charleston Police Department was also contacted and allegedly falsely and “maliciously” told that [Appellant] was armed and threatening to shoot anyone that came to the door or a public official. Comp. ¶10.” [Pl. Comp] ; [Def. MFSJ Memo p.2]

The court concluded that SLED and MUSC Public Safety communications are privileged: “In addition, even if it were assumed the Defendants had made any statements to SLED about the emails received or the conducting of a welfare check, such statements made by law enforcement in such context are, by their very definition, qualifiedly privileged.” [Order Granting MFSJ]. A fact is material if its truth or falsity affects whether the plaintiff wins or loses the case. There is at least one material fact here born in the Appellants Complaint which remains disputed: with or without malice.

“A qualified privilege does not prevent liability for defamation where the statement is made with actual malice. Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987). See also Bell, supra (in defamation action, if defendant proves qualified privilege, plaintiff may not recover unless he overcomes privilege by proving actual malice).” Murray v. Holnam, Inc., 344 S.C. 129 (S.C. Ct. App. 2001)

The privilege is abused and lost, leaving the speaker unprotected, when either of following situations occur: "(1) a statement [is] made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement [is] made in reckless

disregard of the victim's rights." *Fountain v. First Reliance Bank*, 398 S.C. 434 (S.C. 2012). If the statement was true, that I said I would shoot anyone on scene then this would be in the scope of law enforcement duties and interests. Was there a clear threat from the Appellant that he would "shoot anyone on scene"? [Transcript of NCPD Body Cam 3:41; 4:1] The meaning is plain and simple: he will shoot anyone on scene. That is reckless, false and malicious. We must hold law enforcement to higher standards when it comes to life and death matters if there is to be public trust. The respondents have not presented or produced any statement that the Appellant made that resembles he'd shoot anyone on scene. If you're a third-party Officer as was the NCPD in this situation is your gun loaded and ready to deal with the potential active shooter that another law enforcement agency has warned you about? Law enforcement must operate without recklessness and malice and when infractions occur, they must be examined for root causes.

(“Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded. *Fulton v. Atlantic Coast Line R. Co.*, [220 S.C. 287](#), [67 S.E.2d 425](#) (1951); 53 C.J.S. *Libel and Slander* § 79 (1987). To prove actual malice, the plaintiff must show that the defendant was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious disregard for plaintiffs rights. *Holtzscheiter, supra.*”) *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469 (S.C. 1999).

A welfare check without the (he'll shoot anyone on scene) part would have been fit and proper and rightfully considered qualified privileged. It's clear from all the Respondent's incident reports of the Appellant in the past 13 years that the ill will from past circumstances again played

out here. Prior to blowing the whistle on “armchair safety checks” of suicidal patients the Appellant had numerous awards and achievements including a nomination for Employee of the year at MUSC [Pl. MUSC Acknowledgments]. Since whistleblowing the MUSC Police have generated several ill-will and embellished incident reports appearing to tarnish the appellants reputation effectively leaving the whistleblowing matter moot [Pl. MUSC Incident Reports]. For decades the police had little accountability. The public wants an honest and fair police force. We must take malice motives and actions out of policing. Someone here was malicious. Further discovery will likely shed some light on the bad apple(s).

Malice unlocks privileged communications. The court erred ruling the communication to be privileged in its Order granting MFSJ. The Appellant and the public want fair transparency in life and death encounters with law enforcement. Qualified privilege is not an absolute shield of immunity as it has evolved to be for law enforcement. The transcripts are pretty black and white. Here law enforcement painted a scenario where the appellant would likely be killed and forgotten as so many others have been. Malice is an issue of material fact and qualified privileged communications cannot coexist with malice.

The Appellant is disputing a court's ruling that SLED and MUSC Public Safety communications are privileged regarding a welfare check that was conducted on the Appellant. The Appellant claims that there is a material fact that remains disputed, which is whether or not the statement made by law enforcement that the Appellant would shoot anyone on scene was made with malice. The Appellant argues that law enforcement must operate without recklessness and malice, and that malice unlocks privileged communications. The Appellant asserts that the ill will from past circumstances played out in the communication, and that malice must be taken out of policing.

## CONCLUSION

It is concerning that SLED did not comply with a discovery subpoena, and the threat of shooting anyone on the scene is unacceptable. It is appropriate for a judge or jury to decide whether the communication to the third-party NCPD was made with or without malice. It is understandable that the appellant desires a reversal of the MFSJ in order for the pending discovery Motion to Compel to continue.

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