

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
James W. Trexler,)
)
Plaintiff,)
)
v.)
)
The Associated Press, Barrington)
Broadcasting South Carolina Corp.,)
Raycom TV Broadcasting, Inc. The)
Spartanburg Herald Journal, Inc. and the)
Pacific & Southern Co., Inc.,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-40-1249

ORDER DENYING MOTION FOR
RECONSIDERATION

RECEIVED

JUL 19 2013

SC Court of Appeals

CLERK OF COURT
80-114-0000
P11-08

This matter came before the court on plaintiff's motion for reconsideration pursuant to Rule 59(e), SCRPC. Notwithstanding the requirement of Rule 7(b), SCRPC, that motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought," plaintiff's notice made only the most general of statements:

This motion is based upon the pleadings and memoranda filed in this case, Plaintiff's proposed order denying Defendants' Motion for Summary Judgment, with exhibits, the transcript of the January 19, 2012 hearing on Defendants' Motion for Summary Judgment, Rules of Court, Plaintiff's Memorandum of Law supporting this Motion to be submitted before or at a hearing of this Motion, and other such matters as may be properly presented to the Court.

Plaintiff's Notice of Motion and Motion for Reconsideration.

A hearing was held in open court on March 11, 2013 at which time the parties appeared through counsel. At the hearing, plaintiff argued that the court had erred in finding that the bulk of the publications complained of by plaintiff were barred by the statute of limitations and that the court erred in not recalling evidence submitted by plaintiff in opposition to defendants'

motion for summary judgment, stating in his Memorandum in Support of Motion for Reconsideration:

The Court granted summary judgment to the defendants because apparently the Court mistakenly did not recall that Plaintiff had submitted 150 pages of evidence, including *inter alia*, copies of published news articles, numerous deposition transcript excerpts, affidavits and documents related to the prosecution of the Plaintiff and the dismissal of the prior criminal charges against him.

In support of their motion for summary judgment on the statute of limitations issue, defendants submitted plaintiff's deposition testimony wherein plaintiff testified that he had no knowledge of a civil action initiated in his name, as well as the names of his brother and mother against thirteen named defendants and "ALL MEDIA COMPANIES THAT REPRODUCED OR REPORTED ON ANY EVENT RELATING TO THE PLAINTIFFS IN 2008, 2009, AND 2010." The action so captioned had docket number 2010-CP-40-1249 and was filed on February 23, 2010. Plaintiff contends that his amended summons brought solely in his name and against none of the defendants named in the action filed February 23, 2010 was an effort to identify parties who were unknown at the time of the initial filing, thereby permitting the allegations of the amended complaint to relate back to the February 23, 2010 filing in order to avoid the bar of the statute of limitations. Plaintiff argued that it was not necessary to use the "magic words" contained in Rule 10(a)(1), SCRPC, to indicate that the defendants named in the June 23, 2010 amended summons and amended complaint were identical to the unspecified "ALL MEDIA COMPANY" defendants in the caption of the February 23, 2010 filing.

The South Carolina Rules of Civil Procedure do not require "magic words" to identify parties, but Rule 10 does require a caption on a summons and complaint to "include the names of all parties." Rule 10(a)(1) further provides with respect to unknown parties a procedure for designating those parties:

(1) *Unknown Parties*. When a party does not know the name of an adverse party, he may state that fact in the pleadings and designate such adverse party by any name and the words "whose true name is unknown" and when his true name is discovered, the pleadings may be amended accordingly.

Of course, nothing in the February 23, 2010 caption indicated that there were unknown parties, and no allegation in the complaint makes any reference to actions by unknown parties. With respect to the defamation claim, the initial complaint alleged "in late February 2008, and numerous times before and thereafter, plaintiffs [sic] defamed the plaintiffs."

Since the plaintiff's unequivocal testimony was that he knew nothing of the February 23, 2010 action, the June 23, 2010 summons and complaint were not properly identified as "Amended," but commenced a new action. If the June 23 filing was not a new action, at a minimum it added entirely new defendants, and as a consequence, the allegations do not relate back so as to toll the statute of limitations. *Gause v. Smithers*, 384 S.C. 130, 681 S.E.2d 607 (Ct.App., 2009); *Jackson v. Doe*, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000). It seems obvious that plaintiff's summons and complaint of June 23, 2010 could not be supplying the names of unknown parties as allowed in Rule 10(a)(1), SCRPC in connection with the February 23, 2010 action, because plaintiff's unchallenged testimony was that he did not file the February 23, 2010 action and had no knowledge of it.

Further, with respect to the statute of limitations, plaintiff argued that the inclusion of published articles on defendants' websites resulted in a continuous publication thereby precluding the application of the "single publication" rule for determining the date of publication from which the South Carolina statute of limitations in libel actions, S.C. Code Ann. §15-3-550(1), (rev. 2005) commences to run. The South Carolina Court of Appeals in *Jones v. City of Folly Beach*, 326 S.C. 360, 483 S.E.2d 770 (Ct. App. 1997) held that a defamation claim accrues and the limitation period commences, upon publication. Plaintiff argued that South Carolina will

not follow the majority view that the continued existence of a published work does not constitute continuous republication. In support of his argument, plaintiff cited a United States District Court case, *Taub v. McClatchey Newspapers, Inc.*, 504 F.Sup.2d 74 (D.S.C. 2007) for the proposition that South Carolina law would not apply the single publication rule. The single publication rule applicable to libel claims provides "that if only one work is involved, its distribution constitutes but a single publication on the date of the first publication of the work." Restatement (Second) of Torts §577 A (1977). The District Court said it could not determine if South Carolina would adhere to the single publication rule for work posted on the Internet. In reaching this conclusion, the District Court relied not on a statute of limitations case, but on a door-closing case which *in dictum* suggested that each time a book containing allegedly defamatory material was checked out of a library, there was a new republication of the work. *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 594 S.E.2d 878 (Ct.App. 2004). In relying on *Moosally*, the District Court questioned the decision stating:

The court does have some issues with the South Carolina Court of Appeals' determination that each distribution of a library book constitutes a separate libel. As a practical matter, the determination seems to render futile South Carolina's statute of limitations for defamation claims.....

Taub, Supra, 504 F.Sup.2d 74, 80 n.6.

This court is not bound by the District Court's forecast of South Carolina law, nor is it bound in this action by the Court of Appeals' discussion with reference to this state's door-closing statute. Had the Court of Appeals been dealing with a statute of limitations issue in *Moosally, Supra*, this court would be bound, but that decision does not address the limitation on a libel action, and nothing suggests a policy basis to render the state's statute of limitations a nullity..

This court concludes that considering the important public policy considerations underlying statutes of limitation, *Anonymous Taxpayer v. S.C. Dept. of Revenue*, 377 S.C. 425, 661 S.E.2d 73 (2008), citing *Moates v. Bobb*, 322 S.C. 172, 470 S.E.2d 402 (Cl.App. 1996), and the rejection of the “discovery rule” with respect to statutes of limitation in libel cases, *Jones v. City of Folly Beach*, *supra*, together with the General Assembly’s choice to make the limitations period for defamation two years rather than the three years for most other torts, when presented with the question of the application of the single publication rule with respect to publications posted on the Internet, South Carolina will follow the single publication rule. The Appellate Division of the Superior Court of New Jersey analyzed the application of the single publication rule generally, finding it to be consistent with modern practices of mass communications:

The single publication rule prevents the constant tolling of the statute of limitations, effectuating express legislative policy in favor of a short statute of limitations period for defamation. It also allows ease of management whereby all the damages suffered by a plaintiff are consolidated in a single case, thereby preventing potential harassment of defendants through a multiplicity of suits. *Id.* [*Barres v. Holt, Rhinehart & Winston, Inc.*, 131 N.J. Super. 371, 330 A.2d 38 (Law Div. 1974)], accord *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777, 104 S.Ct. 1473, 1480, 70 L.Ed.2d 790, 799 (1984); *Gregorie v. G.P. Putnam’s Sons*, 298 N.Y. 119, 81 N.E.2d 45, 47-49 (1948); *Restatement (Second) of Torts* §577A. Finally, the single publication rule is more consistent with modern practices of mass production and wide-spread distribution of printed information than the multiple publication rule. *Barres, supra*, 131 N.J. Super. at 380-381, 330 A.2d 38 (citing, *Gregorie, supra*, 81 N.E.2d at 46-47).

The New Jersey court also considered the application of the single versus multiple publication rule with respect to Internet publications and noted “other jurisdictions are almost unanimous in holding that the single publication rule should be applied to Internet publications,” citing *Firth v. State*, 98 N.Y.2d 365, 747 N.Y.S.2d 69, 775 N.E.2d 463 (2002).¹

¹ The New Jersey Superior Court surveyed the application of the single publication rule to Internet publications and cited the following as applying the single publication rule: *Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87, 89-90 (2d. Cir. 2003); *Lane v. Strang Communications Co.*, 297 F.Sup.2d 897, 899-900 (N.D. Miss. 2003); *Mian v. Davis*, 243 F.Sup.2d 719, 721-724, (W.D. Ky. 2003); *Simon v. Ariz. BD of*

Accordingly, this court concludes that South Carolina's statute of limitations bars plaintiff's libel claims for publications prior to June 22, 2008. S.C. Code Ann. §15-3-550(1)(Rev. 2005). Only three publications identified by plaintiff as the basis for his claim were made subsequent to June 22, 2008. One of those publications was made on December 15, 2008 and two on February 1, 2011. The February 1, 2011 publications are not encompassed within the allegations of the amended complaint as the allegations in a complaint must relate to facts existing at the time of the filing of the complaint and not those occurring subsequently. 71 C.J.S. Pleading §327.

Plaintiff is in error when he asserts that this court did not recall that he had submitted more than 150 pages of material in opposition to defendants' motion for summary judgment. The only material submitted by plaintiff in response to defendants' motion in advance of the hearing that was held on January 19, 2012 was an affidavit addressing the question of whether the plaintiff was a private figure or public official libel plaintiff. Rule 56, SCRPC, requires a response by affidavit to a properly supported motion for summary judgment and specifies that the affidavits are to be made on personal knowledge, set forth facts as would be admissible in evidence and demonstrate that the affiant is competent to testify to the matters stated in the affidavit. Opposing affidavits are to be filed not later than two days prior to the hearing. Nothing offered by the plaintiff at the hearing satisfied the requirements of Rule 56. At the hearing, plaintiff's counsel offered copies of the publications complained of and other materials which plaintiff's attorney represented demonstrated that the coverage of plaintiff overstated the charges against him. Without reviewing the documents offered by plaintiff, the court accepted

Regents, 28 Media Law Rptr. 1240, 1245-1246 (Ariz. Sup. Ct. 1999); *Traditional Cat Ass'n., Inc. v. Gilbreath*, 118 Cal.App. 4th 392, 13 Cal. Rptr. 3d 353, 355, 358-363 (2004); *McCandliss v. Cox Enter., Inc.*, 265 Ga. App. 377, 593 S.E.2d 856, 858 (2004), *reconsid. denied* (February 2, 2004), *cert. denied* (May 24, 2004); *Abate v. Me. Antique Digest* 2004 WL 293903, 1-2 (Mass. Sup.Ct. January 26, 2004); *E.B. v. Liberation Publ'nss, Inc.*, 7 A.D. 3d 566, 777 N.Y.S.2d 133, 134 (2004).

counsel's representation. Even with the acceptance of plaintiff's representation, there is nothing in the record to indicate that the reports were false. The entirety of plaintiff's allegations regarding defamation were that defendants published statements that "plaintiff had been charged with kidnapping, and that authorities had removed horses from him that had been abused." Amended Complaint ¶25. Material submitted in support of defendants' motion established conclusively that plaintiff was arrested and ultimately indicted on charges that he had abused horses. It is irrelevant to the truth of the publication that the criminal charges against plaintiff were subsequently dismissed. *See, Padgett v. Sun News*, 278 S.C. 26, 292 S.E.2d 30 (1982).

And, as demonstrated by plaintiff's deposition testimony submitted by defendants in support of their motion, reports that plaintiff had been arrested and charged with mistreatment of horses were true. Nothing submitted by plaintiff in response to defendants' supported motion altered the fact that the news reports of plaintiff's arrest and indictments were true or substantially true. Truth or substantial truth is an absolute defense to a libel claim. *Parker v. Evening Post Pub. Co., Inc.*, 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994), *cert. denied* 516 U.S. 1172 (1996).

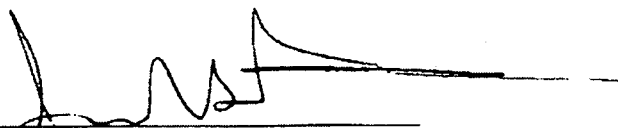
As noted in the order granting summary judgment, the report on the kidnapping charge was false, but privileged as the report of the contents of an official record. Plaintiff's motion did not address the court's ruling on this point. With respect to the only publication not barred by the statute of limitations, the publication on December 15, 2008, by WLTX-TV, operated by defendant Pacific & Southern Company, Inc., plaintiff offered no evidence to demonstrate that a genuine issue of fact existed with respect to either the falsity of the publication or fault on the part of the publisher. Plaintiff was obligated to prove the falsity of the publication,

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), and fault on the party of the publisher leading to the publication of a false statement of fact.. *Gertz v. Robert Welch, Inc.*, 418 US 323 (1974); *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006). Plaintiff in response to defendants' motion for summary judgment failed to demonstrate the existence of a genuine issue of material fact as to either element of his libel claim..

This court has carefully considered plaintiff's motion for reconsideration, and even relying on the characterization by plaintiff's counsel of the material submitted in opposition to the motion, concludes that no grounds exist to alter or amend its order granting summary judgment to defendants.

Based on the foregoing, plaintiff's motion for reconsideration is hereby denied.

AND IT IS SO ORDERED.



JOSEPH M. STRICKLAND
SPECIAL CIRCUIT COURT JUDGE
SITTING BY DESIGNATION OF THE
CHIEF JUSTICE

Columbia, South Carolina

April 29, 2013