THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Special Circuit Court Judge

Circuit Court Case No. 2010-CP-40-1249
S.C. Court of Appeals Case No. 2013-001581

James W. Trexler,

Appellant,

v.

The Associated Press; Barrington Broadcasting South Carolina Corp.; Raycom TV Broadcasting, Inc.; The Spartanburg Herald Journal, Inc.; and The Pacific & Southern Co., Inc.,

Respondents.

INITIAL BRIEF OF APPELLANT

William H. Johnson
Law Offices of William H. Johnson, LLC
411 North Brooks Street
Post Office Box 137
Manning, South Carolina 29102
(803) 435-0909 (telephone)
(803) 435-2858 (facsimile)
-and-
W. Westbrook Wills III
Attorney at Law
38 Broad Street
Suite 200
Charleston, SC 29401
(843) 805-6300 (telephone)

(843) 278- 9333 (facsimile)
-and-
Matthew D. Hamrick
Attorney at Law
Tidewater Executive Center
222 W. Coleman Blvd.
Mt. Pleasant, SC 29464
(843) 693-4700 (telephone)
(877) 524-5023 (facsimile)

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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2. The Trial Court Erred in Finding Appellant was a "Public Official" for Purposes of Defamation as a Matter of Law.

3. The Trial Court Erred in Finding Appellant was Required to Show Respondents Acted with "Actual Malice" in Publishing Allegedly Defamatory Statements about him, and that Appellant Failed to Make such a Showing.

4. The Trial Court Erred in Finding as a Matter of Law that Allegedly Defamatory Publications by Respondents were True or Substantially True, Providing Respondents with an Absolute Defense to Appellant's Defamation Claims.

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STATEMENT OF THE CASE

Appellant, James W. Trexler (referred to herein as "Appellant"), was formerly employed as an Executive Assistant III by the South Carolina Department of Agriculture. Respondents, The Associated Press; Barrington Broadcasting, Inc.; Pacific & Southern Company, Inc.; and Raycom TV Broadcasting, Inc. (collectively referred to herein as "Respondents") are media entities that deliver news through media channels including print, television, and the Internet.

This is a defamation case that arises out of numerous broadcasts and publications by Respondents concerning Appellant's alleged involvement in the mistreatment of certain horses. On February 27, 2008, and thereafter, each Respondent published through its respective media channels reports concerning Appellant's alleged involvement with the horses, including information the Respondents obtained from a February 28, 2008 publication by the Sheriff of Richland County (hereinafter referred to as "SRC") of an e-mail press release (hereinafter referred to as the "Press Release"). The SRC's Press Release purportedly provided the media official information concerning the arrest of Appellant and his mother and brother following a collaborative investigation of animal cruelty by the SRC and the Humane Society for the Prevention of Cruelty to Animals (hereinafter referred to as the "HSPCA"), and the Press Release mistakenly reported that Plaintiff had been charged with kidnapping.

Appellant alleges in this case that as a direct result of the publication of the Press Release by the SRC, and the repeated publication by the Respondents of allegedly false statements associating him with extreme animal cruelty both in South Carolina and Georgia, and accusing him of felony kidnapping, Appellant lost his job, salary, pension, retirement benefits, his ability to obtain like employment, and has suffered irreparable harm to his personal and professional reputation.

Appellant filed his original Complaint on February 23, 2010. (See Complaint). Appellant filed

his Amended Complaint on June 23, 2010. (See Amended Complaint). Respondents moved for summary judgment on August 11, 2011. (See Defendants' Notice of Motion and Motion for Summary Judgment; Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment; Defendants' Proposed Order Granting Summary Judgment). Appellant opposed the motion for summary judgment. (See Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment; Plaintiff's Amended Memorandum in Opposition to Defendant's Motion for Summary Judgment; Plaintiff's Proposed Order Denying Summary Judgment).

A hearing was held on January 19, 2012 before Honorable Joseph M. Strickland on Respondents' motion for summary judgment. (See Transcript of January 19, 2012 hearing). The trial court granted summary judgment in favor of the Respondents on October 30, 2012. (See Order of Honorable Joseph M. Strickland filed October 30, 2012 Granting Motion for Summary Judgment). Appellant received written notice of the filing of the Order granting summary judgment on November 12, 2012. On November 20, 2012 Appellant filed his Motion for Reconsideration. (See Plaintiff's Motion for Reconsideration; Plaintiff's Memorandum in Support of Motion for Reconsideration). A hearing was held on March 11, 2013 before Honorable Joseph M. Strickland on Respondents' motion for reconsideration. (See Transcript of March 11, 2013 hearing). The trial court denied Appellant's motion for reconsideration on April 30, 2013. (See Order of Honorable Joseph M. Strickland filed April 30, 2013 Denying Plaintiff's Motion for Reconsideration). Appellant received written notice of the entry of the order denying his motion for reconsideration on June 19, 2013. Appellant served his Notice of Appeal on July 18, 2013.

ARGUMENT

1. *The Trial Court Erred in Finding Appellant's Amended Complaint did not Relate Back to the Date of his Original Complaint and was Therefore Time-Barred by the Statute of Limitations .*

When Appellant filed his original Complaint on February 23, 2010, he was unaware of the precise legal identity of the media entities that published the allegedly defamatory statements at issue in this action. Therefore, Appellant named as defendants in his Complaint "all media companies that produced or reported on any event relating to Plaintiff in 2008, 2009, and 2010." (See Complaint). On June 23, 2010, prior to serving the Complaint, Appellant filed his Amended Complaint in which he more specifically named as defendants those parties to which he broadly referred in his original Complaint, to wit, the above-named Respondents. (See Amended Complaint). Appellant served Respondents the same day with the Amended Complaint. (See Affidavit of Personal Service for each Defendant filed on July 8, 2010).

Respondents claim Appellant's causes of action are barred by the statute of limitations because Respondents claim Plaintiff added them as parties more than two years after the publications which form the basis of Appellant's Complaint and Amended Complaint. The trial court erroneously found that the Amended Complaint did not relate back pursuant to Rule 15(c), SCRCP. First, Respondents are proper parties to the original action, and not "added" parties to Appellant's Amended Complaint, as Respondents suggest. However, even were Respondents somehow to qualify as different parties than those Appellant announced in his Complaint, Appellant properly substituted Respondents as proper parties in his Amended Complaint pursuant to Rule 15 (c), SCRCP.

Rule 15 (c), SCRCP provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.
>
> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, that action would have been brought against

him.

"A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing." S.C. Code Ann. § 15-3-20 (b) (2005); see also Rule 3(a)(2), SCRCP. Thus, the period of commencement of an action includes the 120 day service period.

The South Carolina Supreme Court in Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 442 S.E.2d 584 (1994) adopted a four-part test to aid in interpreting the requirements of Rule 15(c): 1) the basic claim must have arisen out of the conduct set forth in the original pleading; 2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defenses; 3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and 4) the second and third requirements must have been fulfilled within the prescribed limitations period. Id. at 214, 586.

Here, Appellant timely filed his original Complaint on February 23, 2010 naming as defendants all media companies that produced or reported on any event relating to Plaintiff in 2008, 2009, and 2010. On June 23, 2010, pursuant to Rule 4, SCRCP, Appellant filed his Amended Complaint more specifically identifying those media defendants he anticipated in his original Complaint. Each party defendant specifically named in his Amended Complaint was a media company that produced or reported on events relating to Plaintiff in 2008, 2009, and 2010. Appellant then served his Amended Summons and Amended Complaint on each of the Respondents within the original 120 days provided under Rule 3(a)(2), SCRCP for the service of his original Complaint.

Because Appellant's Amended Complaint did not change parties to the lawsuit, but rather simply defined them more accurately within the original commencement period, Appellant's Amended Complaint relates back to the filing of the original Complaint, and his causes of action with regard to the

Respondents were commenced within the statute of limitations.

Even if the Court determines Appellant's original Complaint too broadly identified the media defendants, Appellant properly and timely substituted the specific media companies as defendant parties in his Amended Complaint. In fact, in that alternative, Appellant's naming "all media defendants . . ." is analogous to naming a John Doe defendant in an action where a plaintiff knows a cause of action exists against one or more defendants the true identity of whom is yet unknown to the plaintiff. While this situation arises primarily in hit and run auto accident cases, the underlying legal tenants are the same for other civil actions. S.C. Code Ann. § 38-77-180 permits an injured person to file suit against an unknown driver, and specifically allows that party to instigate an action against the real tortfeasor if he discovers his real identity.

"The language of Rule 15(c) clearly speaks to a *change* in party, not the *addition* of a defendant to an already existing defendant." Jackson v. John Doe, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000) (citing Kraly v. Vannewkirk, 69 Ohio St. 3d 627, 635 N.E. 2d 323 (Ohio 1994)(determining that Ohio's Rule 15(c), which is similar to South Carolina's Rule 15(c), allows for relation back when a party is *substituted* but not when a party is added while retaining a party named in the original suit)).

In Jackson, the plaintiff filed her original complaint against an unknown driver pursuant to the statutory scheme established by state law. Nearly four and a half years later the court allowed Jackson to amend her complaint to add Milligan as a defendant. However, Jackson's amended complaint retained John Doe as a named party, and identified him as an unknown driver. The Jackson court recognized, "the addition of a party is not the same as a substitution or change of party." Id. That court, therefore, disallowed the relation back of Jackson's amended complaint with regard to the added party.

Here, if Appellant's Amended Complaint cannot be construed as naming the same parties as in his Complaint, then his Amended Complaint clearly substitutes, rather than adds, the specifically named

media defendants for the broader description of "all media companies . . . [.]"

Unlike in Jackson, Appellant did not add Respondents as new parties while also retaining as defendants "all media companies . . . [.]" Rather, Appellant replaced "all media companies . . ." with those presently named in the action, the more-specifically identified Respondents.

In the present case Appellant's amendment to his Complaint satisfies the four-part test announced in Hughes: 1) Appellant's basic claims against Respondents arose out of the conduct set forth in his original pleading; 2) each Respondent received notice of Appellant's claims and have answered them, have all engaged in discovery, and have, therefore, not been prejudiced in maintaining its defenses; 3) by virtue of the Appellant's serving each Respondent with the action, each naturally knew the action would have been brought against it but for the misnomer, 4) each Respondent received notice of Appellant's action against them within the 120 days provided by Rule 3(a)(2), SCRCP for the service of Appellant's original Complaint. As such, under Jackson Appellant properly substituted Respondents and his Amended Complaint legally relates back to the filing of his original Complaint.

2. *The Trial Court Erred in Finding Appellant was a "Public Official" for Purposes of Defamation as a Matter of Law.*

Respondents contend that Appellant was a public official and therefore that he was required to demonstrate that Respondents acted with "actual malice" in publishing allegedly defamatory statements about him. Appellant asserts that he is a private figure and is therefore not required to demonstrate Respondents acted with actual malice in publishing false statements about him.

For purposes of defamation, whether a person is a private figure or a public official is a question of law for the court. See Rosenblatt v. Baer, 383 U.S. 75, 87, 86 S.Ct. 669, 677, 15 L.E.d.2d 597, 606 (1966). However, this determination must be made on a case-by-case basis after careful examination of the facts and circumstances. Id. Of course, for purposes of summary judgment, the trial court must view those facts and circumstances, and all inferences that may be drawn therefrom, in the light most

favorable to the nonmoving party. Rule 56, SCRCP; Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991).

The United States Supreme Court, in New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686 (1964) established the rule that a public official must provide clear and convincing proof of "actual malice" to recover damages for defamatory falsehood relating to his or her official conduct. The Supreme Court further specified in Rosenblatt supra that a "public official" for purposes of the New York Times rules is not to be determined by state law standards. That is not to say, however, that South Carolina courts are required to turn a blind eye to its own definitions of "public official" when determining whether an individual meets the definition of a "public official" for purposes of defamation. The definition of a public officer appears more than once in the South Carolina Code. S.C. Code Ann. § 8-1-10 provides "public officers" are "all officers of the State that have heretofore been commissioned [. . .], members of various State boards, and other persons whose duties are defined by law." § 8-13-100 (27) defines a "public official" as being "an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for office." § 16-3-1040 defines a "public official" as "any elected or appointed official of the Unites States or of this State or of a county, municipality, or other political subdivision of this State."

Neither the U.S Supreme Court nor the Supreme Court of South Carolina has provided an all-encompassing definition of public official, "although it is clear the category **does not** include all public employees." Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 469, 629 S.E.2d 653, 666 (2006), see also Hutchinson v. Proxmire, 443 U.S. 111, 133-34, 99 S.Ct. 2675, 2687 (1979)(emphasis added).

The U.S. Supreme Court and South Carolina case law instructs that a public official is a person who, among the hierarchy of government employees, has or appears to the public to have "substantial responsibility for or control over the conduct of governmental affairs." Erickson, 368 S.C. 444 at 469

(2006); Holtzscheiter v. Thompson Newspapers, Inc., 332, S.C. 502, 520 n.4, 506 S.E.2d, 497, 507 n.4 (Toal, J. concurring) (quoting Rosenblatt, 383 U.S. at 85, 86 S.Ct. at 676). Importantly, for defamation purposes, a governmental employee's status as a public official must not be determined by that person's place on the totem pole but rather because of the public interest in a government employee's activity in a particular context." Id. Moreover, "[i]n considering the question of whether one is a public official, the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charge in controversy." Id.

The Supreme Court of South Carolina has held that a public officer is "one who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent." Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). Moreover, criteria the South Carolina Supreme Court has considered when distinguishing between public officers and public employees include "whether the position was created by the Legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond and oath are prescribed or required [and] whether the one occupying the position is a representative of the sovereign." State v. Chrenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980). South Carolina Code Ann. § 8-3-10 provides it "shall be unlawful for any person to assume the duties of any public office until he has taken the oath provided by the Constitution and been regularly commissioned by the Governor."

South Carolina courts have reviewed various types of public employees to determine whether they meet the definition of a "public official" for purposes of defamation. In South Carolina, police officers are deemed public officials in part because they are charged with the discretionary exercise of the sovereign power to enforce the laws of the South Carolina, their positions were created by the

Legislature, and their duties established by statute. See State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994). Furthermore, police officers are required to file a bond conditioned on the faithful performance of their duties and they must swear an oath before assuming their positions, and their duties are of great public concern. See S.C. Code Ann § 23-3-20; see also State v. Wannamaker, 213 S.C. 1, 48 S.E.2d 601 (1948). Because police officers are elected or appointed, they are public officials for the purpose of § 16-3-1040. State v. Carter, 324 S.C. 383, 478 S.E.2d 86 (Ct. App. 1996). "The greater the duty to the public at large, the more likely it is that the individual will be a public official." Thrift at 309, 356.

"Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about public work or business, is a mere employee." Sanders, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907).

Here, Appellant's job at the Department of Agriculture meets none of the criteria for qualifying as a public official set out by either statute or case law. Appellant was neither elected nor appointed to his position, obtaining his first job as a state employee over 27 years ago by filling out an application for employment. (Nov. 15th 2011 Trexler Aff. ¶ 11-12, Exhibit "Q" to Plaintiff's Proposed Order denying Summary Judgment). Appellant's employment at the Department of Agriculture was consistent with that of a state employee. (Id. at ¶ 12). Appellant's performance at the Department was regularly evaluated under the Employee Performance Management System ("EPMS") created by the Office of Human Resources of the Budget and Control Board (Id. at ¶ 9), while elected or appointed officials at the Department were not evaluated using that system. (Id. at ¶10). Appellant's job at the Department was neither created by the Legislature, nor were his duties defined by statute. In fact, in April and again in July of 2007, Commissioner Weathers, at his own discretion, unilaterally modified Appellant's job duties and responsibilities at the Department. (Hugh Weathers Aff. ¶ 6, Exhibit "R" to Plaintiff's

Proposed Order denying Summary Judgment; Weathers depo. 7:6 - 8:23, 21: 10-17, August 25, 2011, Exhibit "S" to Plaintiff's Proposed Order denying Summary Judgment). Appellant was not required to post any bond or swear an oath before taking his job at the Department. (Nov. 15th 2011 Trexler Aff. ¶12, Exhibit "Q" to Plaintiff's Proposed Order denying Summary Judgment). Appellant had no relation to or contact with the public in his job at the Department. (Id. at ¶ 8).

Appellant was essentially a staff accountant and information technology coordinator at the Department of Agriculture. His job performance was neither the subject of public scrutiny, nor was he vested with the power to exercise any part of sovereign power. (Nov. 15th 2011 Trexler Aff. ¶8, Exhibit "Q" to Plaintiff's Proposed Order denying Summary Judgment; Weathers depo. 11:25 – 12: 1-8, Exhibit "T" to Plaintiff's Proposed Order denying Summary Judgment). Also, in sharp contrast to public officials, Appellant had no independent decision-making authority to act on behalf of the Department in any way concerning the Department's overall functioning and purpose in state affairs. (Id.; Weathers depo. 11:25 – 12:8, August 25, 2011, Exhibit "T" to Plaintiff's Proposed Order denying Summary Judgment). In fact, Commissioner Weathers often referred to Appellant's responsibilities as "back office functions of the Agency." (Nov. 15th 2011 Trexler Aff. ¶ 6, Exhibit "Q" to Plaintiff's Proposed Order denying Summary Judgment). Appellant merely performed duties assigned to him by Commissioner Weathers.

The term "Assistant Commissioner of Agriculture" was Appellant's internal, informal title created not by the Legislature, but by Commissioner Weathers. (Nov. 15th 2011 Trexler Aff. ¶ 13, Exhibit "N" to Plaintiff's Proposed Order denying Summary Judgment; Nov. 9th 2010 Rivers Aff. ¶ 11, Exhibit "U" to Plaintiff's Proposed Order denying Summary Judgment[1]). Prior to 2007, no Assistant Commissioner of Agriculture existed in the history of the South Carolina Department of Agriculture

[1] The Affidavit of Georgette Rivers, Exhibit "U" was submitted by Respondents in support of their motion for summary judgment. However, the affidavit was not signed.

(Nov. 15th 2011 Trexler Aff. ¶ 13, Exhibit "Q" to Plaintiff's Proposed Order denying Summary Judgment). Likewise, nowhere does the South Carolina Code make any mention whatsoever of any Assistant Commissioner of Agriculture, much less define the duties of any such position.

Despite contradictions contained in the Affidavit[2], Commissioner Weathers swore that the statements therein were correct, truthful, and his own. However, he admitted to only having briefly looked over the affidavit before signing it, and did not write it himself. (Weathers depo. 29:10 – 30:1, August 25, 2011, Exhibit "V" to Plaintiff's Proposed Order denying Summary Judgment). As such, words in the affidavit such as "appointed," "authority," "directed," and "management of the agency" are not likely those of the Commissioner, but those of lawyers familiar with the critical language needed to semantically transform Appellant from an employee of a state agency into a full blown public official.

Commissioner Weathers testified Appellant's role at the Department of Agriculture was to advise the Commissioner with regard to the Department budget (Weathers depo. 20:15-18), keep an accounting of Department funds (Weathers depo. 9:6-7), and help the Commissioner accomplish the goals the Commissioner set for the Department (Weathers depo. 13:14-18, Exhibit "T" to Plaintiff's Proposed Order denying Summary Judgment). Commissioner Weathers further testified decision-making authority in the Department was his (Weathers depo. 11:25-12:8, Exhibit "T" to Plaintiff's Proposed Order denying Summary Judgment), and in making decisions he would take advice, as needed, from any staff member of the Department, and even his wife. (Id.). Commissioner Weathers also recognized Appellant's job required no real interaction with the Press. (Weathers depo. 21: 3-5, Exhibit "S" to Plaintiff's Proposed Order denying Summary Judgment). Commissioner Weathers's deposition testimony characterizes Appellant's job functions at the Department as those of a staff member as

[2] In paragraph 4 of Commissioner Weather's affidavit he claims to have appointed Appellant as Assistant Commissioner of Agriculture, while in paragraph 6 Commissioner Weathers states Appeallant was already Assistant Commissioner of Agriculture when he arrived at the Department.

opposed to the functions characteristic of a public official as defined by South Carolina law. Moreover, the Affidavit of Georgette Rivers, submitted in support of Respondents' motion for summary judgment actually supports Appellant's argument he was a mere employee of the Department of Agriculture.

The law designates whether a person is or is not a public official. That the Respondents, or affidavits they submit in support of their argument, merely state Appellant is a public figure does not automatically make it so. Because Appellant's position at the South Carolina Department of Agriculture did not meet the criteria to qualify him as a public official, the trial court should have denied Respondent's motion for summary judgment.

3. The Trial Court Erred in Finding Appellant was Required to Show Respondents Acted with "Actual Malice" in Publishing Allegedly Defamatory Statements about him, and that Appellant Failed to Make such a Showing.

Because Respondents contend that Appellant was a public official, they contend that he was required to demonstrate that Respondents acted with "actual malice" in publishing allegedly defamatory statements about him. Appellant asserts that he is a private figure and is therefore not required to demonstrate Respondents acted with actual malice in publishing false statements about him.

"A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him" Holtzscheiter v. Thompson Newspapers, Inc., 332 S.C. 502, 510, 506 S.E.2d 497, 502 (1998) (Holtzscheiter II) (quoting Lesesne v. Willingham, 83 F. Supp. 918, 921 (E.D.S.C. 1949)).

If the defamatory meaning of a statement is obvious on the face of the statement, the statement is defamatory *per se*. Id. Defamation is actionable *per se* if it involves "written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous . . ." Id. "If a defamation is actionable *per se*, then under common law principles the law presumes the

defendant acted with common law malice and that the plaintiff suffered general damages." Fleming v. Rose, 338 S.C. 524, 533 526 S.E.2d 732, 737 (Ct. App. 2000).

The United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686 (1964) established the rule that a "public official" must provide clear and convincing proof of "actual malice" to recover damages for defamatory falsehood relating to his or her official conduct. As discussed above, Appellant asserts that he was not a public official, but even if he were a public official summary judgment was not appropriate because the evidence presented to the trial court showed that there was a genuine issue of material fact regarding whether the Respondents acted with actual malice, because "'[w]here the defendant finds internal consistencies or apparently reliable information that contradicts its libelous assertions, but nevertheless publishes those statements anyway, the New York Times actual malice test can be met.'" Tomblin v. WCHS-TV8, 434 Fed. Appx. 205 (4th Cir. 2011) (quoting Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1090 (3d Cir. 1988) (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130, 161 n.23 (1967))).

Whether or not Appellant is a public official for purposes of defamation, the evidence shows that Respondents published or broadcast statements alleging that Appellant engaged in multiple acts of felony-class cruelty to animals, and that he was a kidnapper. Those statements were false and misleading, and constituted defamation which is actionable *per se*. Moreover, evidence exists Respondents were aware of information which contradicted information they received from officials when they published allegedly defamatory material concerning Appellant's alleged involvement with the mistreatment of horses. Specifically, evidence shows that Respondents had knowledge that Appellant claimed he did not own any horses or the land on which the horses were found. (See Exhibits "W", "X" to Plaintiff's Proposed Order denying Summary Judgment). Evidence also shows that Respondents were aware that Appellant's mother freely claimed ownership of all the horses and the

property on which the horses were found. (Id.). As such, the trial court should have held that sufficient evidence exists so as to create a genuine question of material fact with regard to whether Respondents published the statements with conscious disregard for Appellant's rights and the truth of the statements they published or broadcasted. Taking the facts, circumstances, and evidence in the light most favorable to the Appellant, the trial court should have denied the Respondents' motion for summary judgment.

4. The Trial Court Erred in Finding as a Matter of Law that Allegedly Defamatory Publications by Respondents were True or Substantially True, Providing Respondents with an Absolute Defense to Appellant's Defamation Claims.

Respondents contend that Appellant's Amended Complaint failed to state a cause of action for defamation because the statements they published concerning Appellant were substantially true and therefore not actionable as defamatory.

To establish a claim for defamation Appellant must prove "1) a false and defamatory claim was made; 2) the unprivileged statement was published to a third party; 3) the publisher was at fault; and 4) either the statement was actionable regardless of harm or the publication of the statement caused special harm." Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). Truth is an affirmative defense to a libel claim. Ross v. Columbia Newspapers, Inc. 266 S.C. 75, 221 S.E.2d 770 (1976).

Respondents claimed they were entitled to summary judgment because any statements they published concerning Appellant were substantially true in that they reported on Appellant's arrest and indictment on charges of felony animal abuse. Appellant contends Respondents published statements which were either totally false, or which misrepresented and distorted the truth such as to convey a false message.

On February 27, 2008, Appellant was arrested and charged with five counts of misdemeanor ill-treatment of animals. (See 5 arrest warrants for James Trexler attached as Exhibits "D.1-D.5" to

Plaintiff's Proposed Order denying Summary Judgment). On March 13, 2008, Appellant was indicted on 4 counts of felony mistreatment of animals. (See 4 indictments for James Trexler attached as Exhibits "E.1-E.4" to Plaintiff's Proposed Order denying Summary Judgment). On July 15, 2010, all charges against Appellant were dismissed. (See Dismissal of James Trexler attached as Exhibit "F" to Plaintiff's Proposed Order denying Summary Judgment).

Between February 27, 2008 and March 13, 2008, Respondents published articles and broadcasted statements indicating that Appellant had been charged with felony class mistreatment (See S.C. Code Ann. § 47-1-40 (B)) of dozens of animals in South Carolina and Georgia, and that he had been charged with kidnapping. (See Publications by The Associated Press (AP), Exhibit "G," to Plaintiff's Proposed Order denying Summary Judgment; publications by Barrington Broadcasting, Inc. (WACH), Exhibit "H," to Plaintiff's Proposed Order denying Summary Judgment; publications by Pacific & Southern Company, Inc. (WLTX), Exhibit "I," to Plaintiff's Proposed Order denying Summary Judgment; and publications by Raycom TV Broadcasting, Inc. (WIS), Exhibit "J" to Plaintiff's Proposed Order denying Summary Judgment). While it is true that Appellant was eventually charged with felony ill-treatment of animals, the evidence demonstrates that prior to March 13, 2008 Appellant faced misdemeanor ill-treatment charges. Furthermore, it is undisputed that all charges against Appellant related to only five horses in South Carolina, not dozens of horses both in South Carolina and Georgia. It is also undisputed that Appellant was never charged with kidnapping.

The trial court should have held, given the timing of Respondents' publications concerning Appellant, when viewed in the light most favorable to the Appellant, that a reasonable jury could find the subject publications concerning the level and severity of Appellant's involvement with ill-treated horses to be false, or at least substantially untrue. Furthermore, the trial court should have held that the question of whether statements published by Respondents could be construed in a particular context as

being substantially true was a genuine issue of material fact to be decided by a jury and not appropriately decided on summary judgment. Therefore, the trial court should not have granted summary judgment on the basis that the subject publications were substantially true.

5. *The Trial Court Erred in Finding as a Matter of Law that the Fair Report Privilege Applied to Defeat Appellant's Defamation Claim against Respondents where Appellant Presented Evidence Demonstrating Respondents Abused the Privilege.*

Respondents incorrectly assert that the allegedly defamatory publications concerning Appellant were protected communications under the fair reporting privilege. The fair reporting privilege "protects fair and accurate reports of 'judicial records and proceedings and other official acts, reports, and records." S.C. Jur. Libel and Slander §61 (1993), White v. Wilkerson, 328 S.C. 179, 186, 493 S.E.2d 345, 347 (1997). The privilege "extends only to reports of the content of the public record, and any matter added to the report by the publisher, which is defamatory of the person named in the public record, is not privileged." West v. Morehead, 2001 S.C. App. Lexis 263 (2001) (citing Jones v. Garner, 250 S.C. 479, 487, 158 S.E.2d 909, 913 (1968)). Furthermore, under a defense of fair report privilege, "one who publishes defamatory matter concerning another is not liable for the publication if 1) the matter is published upon an occasion that makes it [qualifiedly or] conditionally privileged, **and** the privilege is not abused." Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) (citing Restatement (Second) of Torts §593 (1977)(emphasis added)). "Where there is conflicting evidence, the question whether [a qualified] privilege has been abused is one for the jury." Swinton Creek, 334 S.C. at 485, 514 S.E2d at 134.

Respondents argue that any statements they published or broadcast concerning Appellant's level and degree of involvement with the ill-treatment of horses and charges of kidnapping were fair and accurate reports of the contents of the Press Release, which Respondents claim is a public record. Appellant asserts that the Press Release is not a public record and therefore the fair reporting privilege

does not apply to protect Respondents' publications. A public record includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics, prepared, used, in the possession of, or retained by a public body. S.C. Code Ann. § 30-4-20. Editorialized, e-mail communications containing statements of opinion do not qualify as a public record under the foregoing definition.

However, Appellant asserts that even if the Press Release were to qualify as a public record for purposes of the fair report privilege, Respondents are not entitled to its protection because 1) their publications concerning Appellant were not fair and accurate reports of the contents of the Press Release; and 2) Respondents' liberties in misrepresenting the facts to aggrandize Appellant's alleged involvement with horses here and in Georgia amounts to an abuse of the privilege. Appellant further argues that, if any, only Respondents' initial publications or broadcasts purporting to be fair and accurate republication of contents of the Press Release are subject to the fair reporting privilege. Any and all subsequent publications are not reports of a public record and are afforded no protection.

Appellant also asserts that even Respondents' initial publications based on the Press Release were not fair and accurate reports of the contents of that document, and Respondents are therefore not entitled to protection under the fair reporting privilege. Even a cursory reading of Press Release and Respondents' publications reveal Respondents' publications not only misstated facts but added information not contained in the Press Release. (See Press Release, Exhibit "A," to Plaintiff's Proposed Order denying Summary Judgment; publications by Respondents, Exhibits "G" through "J" to Proposed Order denying Summary Judgment). In addition to attributing the kidnapping charge to Appellant, the Press Release does seem to implicate Appellant in felony class abuse ("severe and barbaric treatment"), and implies Appellant was involved with 28 or more horses. Respondents' publications add to the information contained in the Press Release: The Respondents' publications implicate Appellant in felony

class abuse of "dozens of horses both here and in Georgia" (See Exhibit "K" to Plaintiff's Proposed Order denying Summary Judgment), "James Trexler is accused of mistreating dozens of horses" (See Exhibit "L" to Plaintiff's Proposed Order denying Summary Judgment; see also Adcox depo. 53: 20-25, December 9, 2001, Exhibit "M" to Plaintiff's Proposed Order denying Summary Judgment), "[t]hree people accused of starving horses to the point of near death" (See Exhibit " N" to Plaintiff's Proposed Order denying Summary Judgment; see also Jacoby depo. 68: 13 – 70: 9, December 9, 2011, Exhibit "O" to Plaintiff's Proposed Order denying Summary Judgment). A February 27, 2008 WXLT report immediately following the Press Release states "Weathers [Commissioner of Agriculture] says they will make more decisions regarding Trexler's future with the department after the investigation has complete. No charges have been filed, but 28 horses have been taken." (See Exhibit "P" to Plaintiff's Proposed Order denying Summary Judgment).

The trial court should have held, with all inferences in favor of Appellant, there was sufficient evidence to create a question of fact with regard to whether Respondents' publications were only based on the Press Release and, if so, whether they were fair and accurate reports of the content of that document.

Appellant provided to the trial court evidence of articles or broadcasts containing allegedly defamatory material for months after the SRC disseminated the Press Release and which contained allegedly defamatory statements not contained in the Press Release. (See, publications by Defendants, Exhibits "G" through "J" to Plaintiff's Proposed Order denying Summary Judgment). The trial court should have found that when viewed in the light most favorable to the Appellant, sufficient evidence existed as to whether Respondents abused the fair report privilege to allow a jury to decide the question. See Swinton Creek, 334 S.C. at 485, 514 S.E2d at 134 (citing 50 Am. Jur. 2d Libel and Slander § 276 (1995)) (question of whether privilege has been abused is one for jury). Therefore, the trial court should

have denied Respondents' motion for summary judgment based on the fair report privilege.

6. The Trial Court Erred in Failing to Consider the Evidence Appellant Submitted in Opposition to Respondents' Motion for Summary Judgment.

In its Order granting Respondents' motion for summary judgment, the trial court indicates Appellant failed to meet his burden under Rule 56, SCRCP because he "filed nothing with the court which identified specific facts in dispute relative to his libel claim, relying entirely on counsel's description of materials not before the court to argue questions of material fact existed." (Order of Honorable Joseph M. Strickland filed October 30, 2012 Granting Motion for Summary Judgment at p. 3). However, the trial court was mistaken, as Appellant submitted to the trial court over 150 pages of evidentiary materials including, inter alia, copies of published news articles, numerous deposition transcript excerpts, affidavits, and documents related to the prosecution of the Appellant and the dismissal of the prior criminal charges against him. The supporting evidence Appellant submitted demonstrates that genuine issues of material fact exist as to every element of and defense to his libel claim, including the level of falsity of the publications, the extent of Respondents' knowledge of the falsity of the publications, Respondents' degree of fault in publishing the articles at issue, and Respondents' continued publication the false and misleading material.

During the summary judgment hearing, counsel for Appellant made specific reference to articles published by each of the Respondents. Contemporaneously, counsel for Appellant asked the trial court's permission to pass up the articles as submissions of evidence demonstrating specific material facts in dispute with regard to his claims and Respondents' defenses thereto. However, instead of receiving the documents at the bench, the trial court indicated it would rather Appellant not pass the evidence up, and would take counsel's representations of the material. The transcript of the hearing reads, in pertinent part, as follows:

Mr. Wills: If the Court would not mind, I'd like to pass up some of the articles that have

been written to address my next point, which is that the articles are not fair and accurate reports of the public record, and that they actually mischaracterize, mislead, and are false

. . . .

The Court: Mr. Wills, I'll accept your representation.

Mr. Wills: Okay.

The Court: I'm sure that your position is supported. I'll accept your representation.

(Transcript of January 19, 2012 hearing on Defendants' Motion for Summary Judgment p. 29:21-30 and p. 31:8-11).

The trial court judge concluded the hearing by asking each side to submit proposed orders. This is a typically-used procedure whereby each party has an opportunity to set forth his respective arguments in the form of a proposed order. See e.g., Allen v. South Carolina Alcoholic Beverage Control Commission, 321 S.C. 188, 191, 467 S.E. 2d 450, 452 (Ct. App. 1996). Because the trial court declined to accept at the bench the numerous evidentiary documents counsel for Appellant attempted to submit as evidence, counsel for Appellant understood the trial court preferred he attach the supporting evidence as exhibits to the proposed order the trial court requested.

On February 1, 2012 Appellant submitted his proposed order to the trial court's office setting forth his factual and legal arguments, citations to authority, and attached as exhibits the supporting evidence he attempted to hand up at the summary judgment hearing. Appellant also served all parties with a copy of his proposed order and accompanying exhibits.

Over nine months after Appellant submitted his proposed order with the more than 150 pages of supporting evidence as exhibits thereto, the trial court finally issued its Order granting Respondents' motion for summary judgment. The trial court's Order stated "[p]laintiff made no submission in response to defendants' motion to demonstrate the existence of genuine issues of fact with respect to the

falsity of the publications, and his allegations alone are insufficient to overcome defendants' showing." (Order of Honorable Joseph M. Strickland filed October 30, 2012 Granting Motion for Summary Judgment at p. 8). The trial court further found in the Order, "[t]here can be no libel claim for the publication of reports that are true or substantially true, and plaintiff in responding to the motion failed to provide any support by affidavit or otherwise for his contention that false publications had been made." (Order of Honorable Joseph M. Strickland filed October 30, 2012 Granting Motion for Summary Judgment at p. 10).

On November 20, 2012 Plaintiff filed his motion for reconsideration reminding the trial court of the voluminous evidence he had submitted nearly a year earlier in defense of Respondents' motion for summary judgment, and asked the court to reconsider its grant of summary judgment based on the supporting documentation already in the court's possession. (See Plaintiff's Motion for Reconsideration). Again, at the hearing on Appellant's motion for reconsideration, counsel for Appellant reminded the trial court of the material submitted previously in opposition to Respondents' motion for summary judgment.

Because Appellant, in fact did submit evidence, affidavits, and deposition testimony demonstrating the existence of genuine issues of material fact with regard to each of Respondents' defenses and grounds for summary judgment, the trial court erred in granting summary judgment to Respondents without considering Appellant's submission of evidence. (See Transcript of March 11, 2013 hearing before Honorable Joseph M. Strickland).

7. *The Trial Court Erred in Applying the "Single Publication" Rule in Finding the Appellant's Defamation Claims are Barred by the Statute of Limitations where Respondents Continued to Publish Defamatory Content on the Internet.*

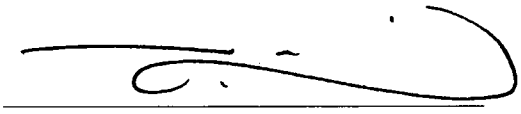
The trial court ruled that Appellant's Amended Complaint was filed after the two-year statute of limitations had expired. In addition to Appellant's arguments regarding the Amended Complaint's

relation back to the date of the original Complaint, discussed above, Appellant asserts that the trial court overlooked the continuously-published and republished news articles which were offered at the summary judgment hearing and were then attached as exhibits to Appellant's proposed order denying summary judgment. While the statue of limitations for libel begins to run from the date of the first publication, under South Carolina law material which remains on a website or is searchable on a website constitutes a republication and separate and distinct dissemination of that material. See Taub v. McClatchy Newspapers, Inc., 504 F. Supp. 2d 74 (D.S.C. 2007). In Taub the District Court of South Carolina pointed out that South Carolina, in light of Moosally v. W.W. Norton & Co., 358 S.C. 320, 594 S.E. 2d 878 (Ct. App. 2004), adheres to the continuing publication rule. In Taub a media company initially published defamatory content from the Associated Press on its website, and then moved the article to its online web archive, where it was no longer being actively pushed out to the public. However, the public could search for and find the article online. The Taub court found the "A.P. article continued to be published, or it was accessible through a search of the website up until the article was removed from the...website...." The Taub court held that under the continuing publication rule the archived article constituted a continuing publication. In the instant case each Respondent disseminated several continuing publications and republications of the defamatory articles at issue, all less than two years before Appellant filed his Complaint and also less than two years before Appellant filed his Amended Complaint.

CONCLUSION

For the reasons discussed herein, Appellant respectfully requests that the Court reverse the trial court's grant of summary judgment in favor of Respondents.

Respectfully submitted,



William H. Johnson
Law Offices of William H. Johnson, LLC
411 North Brooks Street
Post Office Box 137
Manning, South Carolina 29102
(803) 435-0909 (telephone)
(803) 435-2858 (facsimile)
-and-
W. Westbrook Wills III
Attorney at Law
38 Broad Street
Suite 200
Charleston, SC 29401
(843) 805-6300 (telephone)
(843) 278- 9333 (facsimile)
-and-
Matthew D. Hamrick
Attorney at Law
Tidewater Executive Center
222 W. Coleman Blvd.
Mt. Pleasant, SC 29464
(843) 693-4700 (telephone)
(877) 524-5023 (facsimile)

ATTORNEYS FOR APPELLANT

Other counsel of record:

Jay Bender
Baker, Ravenel & Bender LLP
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091 (telephone)
(803) 779-3423
ATTORNEYS FOR RESPONDENTS