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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cordell Maddox, Circuit Court Judge
Benjamin Culbertson, Circuit Court Judge

C/A No. 2021CP2601096
Appellate Case No. 2025-01317

John Gallman, ……………………………………………Appellant,

vs.

Waccamaw Publishers, Inc. and Christian Boschultz, ………Respondents.

INITIAL REPLY BRIEF OF APPELLANT

/s/Tucker S. Player
SCBar# 16217
Player Law Firm, LLC
512 Village Church Drive
Chapin, SC 29036
Tucker@playerlawfirm.com

Attorney for Appellant

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ARGUMENTS

I. THE LOWER COURT ERRED IN DISMISSING THE CONSPIRACY CLAIMS IN THE AMENDED COMPLAINT

In his initial brief, Appellant referenced the appeal as regarding the dismissal of the Second Amended Complaint despite a subsequent order directly dismissing the Second Amended Complaint. This was an error as the Order appealed is the one attached to the Notice of Appeal. However, the Order that was actually appealed is what caused the dismissal. That Order was pursuant to the original motion by Respondents pursuant to SCRCP 12(b)(6), not Rule 15. The order that was appealed is the order that denied Appellant the ability to file the Second Amended Complaint after the deadline had passed. Once Judge Culbertson ruled that the Second Amended Complaint was untimely, the second order was unavoidable. Respondents made no argument responding to Appellant's arguments on that order which was listed and attached to the Notice of Appeal. Therefore, the Order must be reversed and remanded.

II. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT

Respondent did not address Appellant's argument that he should have been allowed to conduct discovery before summary judgment

At the time of Respondents' motion for summary judgment, eleven defendants had yet to file an answer the Amended Complaint. Respondents call this argument "absurd" and points to the language in an order that stated Appellant must pursue Respondents independently. Yet, no new case number was issued, no new file was established, and there was no technical separation of Respondents from the main case in any meaningful way. In fact, the main case is now stayed in Common Pleas by operation of this appeal. If counsel seeks additional discovery, the analysis for the court is whether the request is made in good faith and whether counsel was dilatory in conducting discovery. The case below had only been pending for 16 months. The final orders concerning the initial pleadings were not resolved until just months before Respondents' motion for summary

judgment was filed. It seems fairly obvious that the depositions of the Respondents were necessary to prosecute the case. Under any standard, discovery was far from complete. As for an affidavit, South Carolina lawyers are always under oath and the pleadings filed with the lower court clearly stated Appellant was entitled to more time for discovery. The law in South Carolina is unambiguous on this point. Summary Judgment is inappropriate until Appellant is given a reasonable opportunity to conduct discovery.

Therefore, the order granting summary judgment must be reversed and remanded.

Respondent stated incorrectly that Appellant did not make a motion to amend the pleadings to conform with the evidence and made no argument as to how that motion should not have been granted

Appellant's Brief established the false statement by Amanda Loehr published by Respondents and how it was unambiguously false. In her statement, Loehr indicates a family court found Appellant to be an "unfit" father. This claim was conveyed to Respondents when Appellant answered the second interrogatories in December 2021. Respondents' brief does not really address this point. First, they misconstrue the statement as an opinion of Ms. Loehr which Appellant was required to disprove. It was not Loehr's opinion of Appellant, it was a statement of fact that, if Respondents actually possessed the family court file, they knew was false. Instead, Respondents make a inaccurate statement regarding the actions of counsel. Respondents state in their brief:

> Appellant argues in his brief that he moved to allow an amendment to his pleading adding the June 19, 2020 statement as part of his libel claim. Neither the record in this court or the court below contains any reference to a motion to amend his complaint to add the basis for a libel claim

Appellant directs this Court to pages 34 and 35 of the transcript of the hearing before Judge Maddox on the summary judgment motion, in which counsel for Appellant specifically said:

> But the key is what [Loehr](sic) said and what he directly quoted from Ms. [Loehr](sic) is false. And if he had reviewed the Family Court file, he knew

> it was false. And to the extent that they claim it's not included in the pleadings, we have a right to amend the pleadings to conform with the evidence. [emphasis added]

The Appellant did move to amend the pleadings as demonstrated above and the lower court erred in failing to grant the motion.

Respondent continues to ignore the actual language of *Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006) cited by Appellant throughout the entirety of the litigation

Despite Appellant's constant and repeated arguments that *Erickson* applies to this case, Respondents provided less than one page in their 35 page brief to counter this argument. Respondents simply argue it is inapplicable to this case because the plaintiff in *Erickson* was not a public figure. Appellant concedes that the plaintiff in *Erickson* was not a public figure, but the Court in *Erickson* did not differentiate between a private citizen and a public figure in the relevant portions cited by Appellant. The portions relied upon by Appellant are after the Court decided the plaintiff was not a public figure and state as follows:

> Whether evidence is sufficient to support a jury's finding of ***constitutional actual malice*** in a defamation action is a question of law. The trial court must make such a determination before submitting the issue to a jury. When the jury makes such a finding, the appellate court must independently examine the record to determine whether the evidence sufficiently supports a finding of actual malice. *Elder v. Gaffney Ledger, 341 S.C. 108, 113, 533 S.E.2d 899, 901-02 (2000)* (citing *Harte-Hanks Commun., Inc. v. Connaughton, 491 U.S. 657, 685-86, 109 S.Ct. 2678, 2694-95, 105 L.Ed.2d 562, 587 (1989)*. This review is necessary due to the "unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." *Harte-Hanks Commun., 491 U.S. at 686, 109 S.Ct. at 2695, 105 L.Ed.2d at 587*; accord *George v. Fabri, 345 S.C. 440, 456-57, 548 S.E.2d 868, 876 (2001)*.
>
> As we explained in <u>Elder</u>,
>
>> ***Actual malice is a subjective standard*** testing the publisher's good faith belief in the truth of his or her statements. The constitutional actual malice standard requires a public official

> to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. There must be evidence the defendant had a high degree of awareness of . . . probable falsity.
> Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. Actual malice may be present, however, where one fails to investigate and there are obvious reasons to doubt the veracity of the informant.

> *Elder, 341 S.C. at 114, 533 S.E.2d at 902* (citations,quotes, and emphasis omitted). "A subjective awareness of probable falsity can be shown if there are obvious reasons to doubt the veracity of the informant or accuracy of his report." *Anderson v. Augusta Chronicle, 365 S.C. 589, 596, 619 S.E.2d 428, 432 (2005)* (citing *Harte-Hanks Commun., 491 U.S. at 688, 109 S.Ct. at 2696, 105 L.Ed.2d at 589*). "The right of a free press is not absolute in a society that demands social responsibility and personal integrity. . . . In the interests of justice, we will not allow a publication to go so unchecked as to promote the tyrannical imposition of false and misleading information - the very concern our forefathers sought to eliminate in demanding the press be free." *Anderson, 365 S.C. at 599-600, 619 S.E.2d at 433* (Burnett, J., concurring). [***emphasis added***]

Respondents' motions and memorandums in the lower court, and their brief in this appeal, all argued that no proof was offered of actual malice. Nearly every conclusory paragraph in their brief states that Appellant offered "no proof" of actual malice. Yet, Appellant made the arguments to the lower court and spent nearly two full pages of explanation of how *Erickson* applies to this case in his initial brief. Yet, when confronted (again) with the language of *Erickson*, they simply say that the language discussing actual, subjective malice, is somehow inapplicable to their arguments concerning actual, subjective malice. *Erickson* was handed down after every precedent cited by Respondents. The rules of *stare decisis* require later opinions to take precedent over prior decisions of the Court. Respondents' arguments are simply without merit and require this Court

to reverse the grant of summary judgment and, more importantly, the award under the Frivolous Proceedings Act.

Respondents' arguments regarding the publication of mental heath records of an 11 year old child are without merit

It is difficult to discern what argument Respondents have put forth in response to Appellant's argument concerning the unlawful dissemination of the mental health records of an 11 year old girl. First, Respondents argue there is no "evidence" that Section 63-7-1990 was implicated. Second, Respondents argue that "there is no language in the code section relating to the dissemination of records in the investigation of child abuse." Finally, respondents argue that there is no criminal penalty in either statute cited by Appellant. All of these arguments are demonstrably false.

First, South Carolina Code Section 63-7-920 is in Title 63, Chapter 7, **Article 3**, Section 920. South Carolina Code Section 63-7-1990 is in Title 63, Chapter 7, **Article 3**, Section 1990. The first sentence of Section 63-7-1990:

> All reports made and information collected ***pursuant to this article*** maintained by the Department of Social Services and the Central Registry of Child Abuse and Neglect are confidential. A person who disseminates or permits the dissemination of these records and the information contained in these records except as authorized in this section, is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand five hundred dollars or imprisoned not more than one year, or both. [Emphasis added]

Thus, Respondents' claim that Section 63-7-1990 was not implicated is false and the claim that there are no criminal penalties for the dissemination is equally as false. Moreover, as quoted in Appellant's initial brief, SC Code Section 63-7-920 provides for both criminal penalties and a separate civil action for improperly disseminating the records. The only other argument made by Respondents is that a reporter has no responsibility to see if something was improperly filed in a court file. Maybe not, but every citizen in bound by the law whether they read it or not. Under

South Carolina law, ignorance of the law is no excuse. *S.C. Wildlife & Marine Res. Dep't v. Kunkle*, 287 S.C. 177, 336 S.E.2d 468 (1985). The prohibition of disseminating this information is found in Code of Laws for South Carolina, as well as the definition and purpose of the Child Resource Center from which the records were obtained. Unless this Court finds that the statute does not mean what it states plainly and unambiguously, all of the defendants violated the criminal law in South Carolina. Thus, Appellant asserts, as he has throughout this case, that such violations of that statute constitute evidence of malice sufficient to submit to a jury for trial. "When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning." *Turner v. Daniels*, 404 S.C. 430, 432, 746 S.E.2d 40, 41 (2013)

South Carolina has long recognized that violations of a statute should be considered as evidence of reckless disregard for the rights of others, requiring the submission of the issue of punitive damages to the jury. *Daniels v. Bernard, 270 S.C. 51, 240 S.E.2d 518 (1978)*; *Shearer v. DeShon, 240 S.C. 472, 126 S.E.2d 514 (1962)*. *Erickson* found that proof of a "reckless disregard for the truth" was sufficient to support a jury finding of malice. In this State, punitive damages must be proven by clear and convincing evidence, just like actual malice. While a violation of a statute does not constitute recklessness, willfulness, and wantonness *per se,* it does constitute evidence that the defendant acted recklessly, willfully, and wantonly. *Keel v. Seaboard Air Line Ry., 108 S.C. 390, 95 S.E. 64 (1918)*.

Respondents misconstrue the verbal statements of counsel at the hearing

Respondents make the argument that Appellant agreed to the application of the fair reporting privilege during the summary judgment hearing. Here is the relevant portion of the

transcript from the hearing in which Respondents declare Appellant conceded there was no liability on behalf of Respondents:

> *But for the purposes of the legal issue, I will-- I think what Jay cited in his memorandum and what he just quoted is a fair reporting privilege. I do not-- I will concede that privilege applies*. **However, that privilege does not apply if it is abused and that's what our claim is, that it was abused.**
>
> Page 32, line 3 through 9.

Respondent cited to the italicized to support his claim that Appellant's counsel conceded the issue of the fair reporting privilege at summary judgment. The very next sentence, which Respondents did not include in their citation, clearly shows there was no voluntary and intentional relinquishing of his right to oppose summary judgment on the grounds that the privilege was abused. Appellant did not concede that the fair-reporting privilege barred his claims. Counsel for Appellant made it clear that the fair reporting privilege was applicable if it was not abused, and that Appellant's arguments were that Respondents did actually abuse the privilege. All arguments to the contrary are simply without merit.

III. THE LOWER COURT ERRED IN GRANTING RELIEF PURSUANT TO THE SOUTH CAROLINA FRIVOLOUS PROCEEDINGS ACT

The primary arguments on this issue were thoroughly laid out in Appellant's initial brief. S.C. Code Ann. § 15-36-40 (2005). "Section 15-36-20 creates a presumption that a person taking part in the initiation or continuation of proceedings acted with a proper purpose 'if he reasonably believes in the existence of facts upon which his claim is based' and . . reasonably believes under the facts that his claim may be valid under existing or developing law." *Hanahan*, 326 S.C. at 156, 485 S.E.2d at 912 (quoting S.C. Code Ann. § 15-36-20(1)(Supp. 1995)). This applies to counsel as well. Not to beat a dead horse, but Appellant cannot be held to know that his legal arguments were frivolous when neither the opposing party nor the lower court ever distinguished or even

discussed *Erickson* in any way. It was never addressed by either the lower court or the opposing party. Now, on appeal, their only argument, contained in a single paragraph, is that *Erickson* does not apply. Yet, the precedent in *Erickson* was on actual, subjective malice, which is the standard in this case. It was issued after every precedent cited by Respondents in their motions and briefs in support of summary judgment. It clearly and unambiguously deals with the requirements for the claims brought by Appellant but was never discussed or distinguished by anyone. It is impossible to find these proceedings were frivolous without someone, *anyone*, explaining how *Erickson* does not apply to the facts of this case. Perhaps this Court will provide that guidance, but such a clarification does not retroactively apply to render the pleadings meritless or frivolous. Therefore, this Court must reverse the award of sanctions.

CONCLUSION

Appellant filed repeatedly filed memorandums with the lower court declaring that *Erickson* applied and allowed Appellant to survive summary judgment. Not once did the lower court or Respondents distinguish or explain how Erickson was not applicable. On appeal, Appellant made this a primary issue and Respondents submit a single paragraph of discussion as to why *Erickson* is inapplicable, despite the fact that it was issued subsequent to the cases cited for support by Respondents and unambiguously applies to the standard of actual subjective malice required to maintain an action for defamation for public figures. Appellant and his counsel are still baffled as to how *Erickson* has no application or how such application would prevent him from submitting his case to a jury. I remind the court that a finding of frivolous proceedings will result in a disciplinary sanction against an attorney who still believes he should be allowed to conduct discovery and bring these issues before a jury in Horry County. Therefore,

Appellant prays the orders of the lower court be reversed and this matter be remanded for further proceedings.

RESPECTFULLY SUBMITTED

/s/Tucker S. Player
Player Law Firm, LLC
Tucker@playerlawfirm.com
512 Village Church Drive
Chapin, South Carolina 29036
803-315-6300 (P)