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.

REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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APPELLANT' S REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents object to Appellant's assertion in the Statement of the Case of his Initial Brief that Appellant filed his original complaint in this matter on February 23, 2010 because Respondents claim the assertion is contested, and improper under Rule 208(b)(1), SCRCR. (Init. Br. Of Resp. p. 2). The filing date of the original Complaint is a matter of record, and not contested. Immediately after, Respondents violate the very rule forming the basis of their objection in arguing Appellant's original complaint identifies none of the Respondents. (*Id.*). Whether Appellant identified Respondents in

his original Complaint is a contested matter of central importance in this appeal.[1] However, it is undisputed that Respondents, and each of them, is a media company that produced or reported on events related to the Plaintiffs in 2008, 2009, and 2010.

Respondents also assert in their Statement of the Case that Appellant in responding to their motion for summary judgment, Appellant only relied on his own affidavit addressing his status as a public official. (Init. Br. of Resp. p. 2-3). Respondents' assertion is untrue, and is also a contested matter of central importance to this appeal, as will be discussed in detail below.

APPELLANT'S REPLY TO RESPONDENTS' 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.

Respondents maintain Appellant's Amended Complaint does not relate back to the original Complaint because they argue 1) Appellant did not name Respondents as defendants in his original Complaint, and 2) Appellant had no knowledge of his original Complaint. (Init. Br. of Resp. p. 4-6).

First, Respondents submit Appellant failed to follow Rule 10(a)(1), SCRCP in naming as defendants to his original Complaint "All Media Companies . . . ," without including the designation "whose true name is unknown." (Init. Br. of Resp. p. 4). However, Appellant substantially complied with Rule 10(a)(1), SCRCP in both substance and spirit. Rule 10(a)(1) allows a Plaintiff to name a party, the identity of whom is not specifically known, if the Plaintiff designates the party as such. Rule 10(a)(1) also

1 Appellant's original Complaint, filed on February 23, 2010 named as defendants, inter alia, "All Media Companies that Produced or Reported on Any Event Related to the Plaintiffs in 2008, 2009, and 2010. (¶6 Complaint. Filed February 23, 2010).

provides that when the Plaintiff discovers the true name of the defendant, the pleadings **must** be amended accordingly. (*emphasis added*). Implicit in naming "All Media Companies The Produced or Reported on Any Event Relating to the Plaintiffs in 2008, 2009, and 2010" is the clear understanding that Appellant was unaware of the "true" identity of each media company that reported on him during the designated years. In accordance with Rule 10(a)(1), when Appellant discovered the true names of the defendants designated in the original Complaint as "All Media Companies . . . ," he amended it to name them specifically and correctly prior to serving it. Thereafter, Appellant effected proper service on those media companies of his Amended Complaint within the time period allowed for serving the original Complaint. Because Appellant amended his Complaint prior to serving it, using the exact words called for under Rule 10 (a)(1), "whose true name is unknown," would have been without effect.

It is worth note that Plaintiff was *pro se* at the time his original Complaint was filed, and while lack of familiarity with legal proceedings is not an acceptable excuse and the court will hold a layman to the same standard as an attorney, see Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct.App.2001), Rule 8(f), SCRCP provides all pleadings shall be liberally construed so as to do substantial justice to all parties.

Relying on Appellant's deposition testimony, Respondents argue Appellant could not have misidentified or been unaware of the true name of the media defendants because he had no knowledge of the initiation of the lawsuit by the original Complaint. (Init. Br. of Resp. p. 4). Respondents' assertion is untrue, and due to Appellant's misunderstanding of a confounding question asked him in deposition and that Appellant understood as referring to lawsuits Appellant's brother filed prior to the filing of the

original Complaint in this matter. (See Trexler depo. 207:22 – 210:6).

Whether or not Appellant recalled the original Complaint, or was confused by the deposition questions, it is undisputable that Appellant's name appeared on the caption of the original Complaint and that Appellant signed that pleading. (See Complaint). The Amended Complaint bears the same case number as the original Complaint, as does every subsequent pleading and other document filed in this case. (See Amended Complaint). Quite simply, it is self-evident that Appellant's signature on the face of the original Complaint demonstrates his knowledge of the pleading.[2]

Second, Respondents argue Appellant's causes of action are barred by the statute of limitations because Respondents claim Appellant added them as parties more than two years after the publications which form the basis of the original Complaint and Amended Complaint. Appellant submits Rule 15(c), SCRCP aptly applies to allow the allegations of Appellant's Amended Complaint to relate back to the filing date of the original Complaint, which preceded the running of the statute of limitations. In his Initial Brief, Appellant analyzed the applicability of Rule 15(c) to facts in this matter under the four-part test set out by the South Carolina Supreme Court in Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 442 S.E.2d 584 (1994). (Init. Br. of App. p. 10). Other than a perfunctory attempt to factually distinguish the Hughes case from ours, Respondents do little to address Appellant's legal analysis of Rule 15(c). Instead, Respondents fall back on their argument that Appellant was unaware of the original Complaint, and therefore he could not have misnamed or misidentified the Respondents, leaving the Hughes factors unsatisfied. Respondents' proposition fails for the reasons discussed above.

[2] Respondents have never raised even the slightest question about whether Appellant signed the original Complaint, and that issue is therefore not before this Court.

The Hughes case marked South Carolina's departure from the U.S. Supreme Court's interpretation of Federal Rule 15(c) set out in Shiavone v. Fortune, 477 U.S. 21, 25 (1986). In Shiavone, the plaintiff filed a complaint within the state statute of limitations period, naming Fortune as defendant. When the plaintiff discovered Fortune was not a separate legal entity, and could not be sued, it amended the complaint after the running of the statute of limitations, but within the 120-day period allowed for service by Rule 4, FRCP. Id. at 27-28. The U.S. Supreme Court affirmed dismissal of the action because it determined Federal Rule 15 (c) required the plaintiff to meet the notice requirement of commencing the action within the "prescribed limitations period." Id. at 29. The Hughes court approved the Rule 15(c) four-prong analysis set out in Shivavone. However, that court declined to follow the Supreme Court's interpretation of "within the period provided by law for commencing the action" because it found that rule to be inconsistent with the liberal pleading practices secured by Rule 8(f), SCRCP. The Hughes court pointed out that Congress amended Federal Rule 15(c) to include Rule 4's additional time period for service of pleading in the time period allowed for defendant to receive notice of the claim. See Frances T. Barnes, Court Liberally Applies Rules of Civil Procedure to Case of Misnamed Defendant, 47 S.C.L. Rev. 102, 106 (1994). The Hughes court held that the defendant received actual notice of plaintiff's claim within the period allowed by law for the service of the suit under Rule 3(b), SCRCP. Hughes, at 586. Because the Hughes court found the "period allowed by law" included a reasonable time for service, it held plaintiff's amended complaint correcting defendant's name related back to the date of the original complaint which was filed within the statute of limitations, and the court reversed the lower court's dismissal of the action. Id. at 586.

The Hughes court's interpretation of Rule 15(c) allows the plaintiff to correct a mistake in the complaint without prejudice to the defendant, providing the same notice period for properly named and misnamed defendants. See Barnes, supra, at 110.

Here, is no different than in Hughes. Appellant amended his complaint and served it on each Respondent within the time period allowed for the service of the original Complaint. (See Aff. of Personal Service). Appellant's Amended Complaint relates back to the date of filing of the original Complaint, and his claims are not barred by the statute of limitations.

2. *The Trial Court Erred in Finding all But Four of Appellant's Libel Claims Were Time Barred by The Applicable Statute of Limitations or Based on Publications Subsequent to Appellant's Amended Complaint.*

Appellant asserts Respondents published via newspaper, broadcast, and Internet defamatory material about him in early 2008, and which defamatory material Respondents continued to publish for months thereafter. (See Amended Complaint). As discussed above, Respondents argue Appellant's Amended Complaint does not relate back to the filing of the original Complaint under Rule 15(c), SCRCP, and therefore all libel claims prior to filing the Amended Complaint are barred by the statute of limitations. Respondents also argue any alleged libel occurring subsequent to the filing of Appellant's Amended Complaint are not before this Court, as they could not have been anticipated in Appellant's pleadings. (Init. Br. of Resp. p. 7). To the contrary, allegedly defamatory publications by Respondents, both prior and subsequent to the filing of Appellant's Amended Complaint, are not barred by the statute of limitations because they constitute, in each instance, a new or continuing publication of the same defamatory content.

As thoroughly discussed in Appellant's Initial Brief, South Carolina adheres to the "continuing publication rule." See Taub v. McClatchy Newspapers, Inc., 504 F. Supp. 2d 74 (D.S.C. 2007), (Init. Br. of App. p. 25-26). The Taub court clearly enunciated that while the statue of limitations for libel begins to run from the date of the first publication, under South Carolina law, material which republished, remains on a website, or even which is searchable on a website constitutes a republication and a separate and distinct dissemination of that material. Taub at 79. Importantly, the Taub court based its holding on South Carolina rather than Federal law. Id. (citing Moosally v. W.W. Norton & Co., 358 S.C. 320, 594 S.E.2d 878 (S.C. Ct. App. 2004)).

Respondents avoid addressing Taub altogether. Instead, they attempt to redirect the Court's attention away from applicable South Carolina law, and to the law other jurisdictions that follow a "single publication" rule. (See Init. Br. of Resp. p. 8-9). Interestingly, the vast majority of the foreign cases cited by Respondents, including Firth v. State of New York, 98 N.Y.2d 365, 747 N.Y.S.2d 69, 775 N.E.2d 463 (2002), which it characterizes as the seminal case on the application of the single publication rule to Internet publications, were decided when the Internet itself was in an infantile stage.

Without addressing Taub directly, Respondents strike at its foundation by suggesting Moosally concerns South Carolina's "door closing" statute and "is not authority for a rejection of the single publication rule in the context of application of the statute of limitations in a libel action." (Init. Br. of Resp. p. 10). However, the Tuab court itself stated as follows:

> Although Moosally involved personal jurisdiction and South Carolina's door-closing statute, the court's determination that the check-out process and procedure constitutes a separate and distinct dissemination of the books which is, in actuality, a republication, as well as the court's finding

> that the dissemination of the book in South Carolina is a continuing libel in each and every instance, seems to imply that South Carolina, or at least the South Carolina Court of Appeals, adheres to the continuing publication rule. (internal citations omitted).

Taub at 79. In light of the South Carolina law announced in Taub and Moosally, the trial court erred in finding Appellant's claims, both prior and subsequent to the filing of his Amended Complaint, were barred by the statute of limitations based on the single publication rule.

3. 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 argue summary judgment based on the fair report privilege is appropriate because 1) they submit any defamatory publications about Appellant they published were fair and accurate reports of a public record (see Sherriff's Press Release), and 2) Appellant presented no evidence at the summary judgment hearing to refute the privilege. (Init. Br. of Resp. p. 11). Respondents suggest in their Initial Brief that because the content of publications they disseminated included some information obtained from a public record, the fair report privilege acts to insulate them from liability as to the entirety of the content they published. Respondent's argument fails to account for the second step in the analysis, that the privilege not be abused. See Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469,484,514 S.E.2d 126, 134 (1999) (one who publishes defamatory matter concerning another is not liable for the publication if the matter is published upon an occasion that makes it qualifiedly or conditionally privileged, and the privilege is not abused).

Appellant maintains that an editorialized, self-serving e-mail published by a state entity is not a public record. (See Init. Br. of App. p. 21). "Public record"

notwithstanding, Appellant submits Respondents' publications concerning Appellant are not privileged because they do not simply report on the contents of the alleged public record. Rather, the subject publications change and add to the content of the public record so as to implicate Appellant in far more serious and widespread criminal activity than that contained in the "public record." The fair report 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. Gamer, 250 S.C. 479, 487, 158 S.E.2d 909,913 (1968)).

Importantly, "[w]here 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.E.2d at 134. At the hearing on Respondents' Motion for Summary Judgment, counsel for Appellant argued Respondents had abused the fair report privilege by publishing defamatory content regarding Appellant, which totally changed the scope, nature, and severity of the information contained in the "public record." (See Transcript of Jan. 19 hearing before Hon. Joseph Strickland). To demonstrate to the court that a material issue of fact existed with regard to whether Respondents abused the privilege, counsel for Appellant read into the record excerpts from various articles published by Respondents. (Id.). When counsel for Appellant attempted to hand the articles up to the judge for entry into the record, the judge indicated he would accept counsel's representation. (Id.), (Init. Br. of App. p. 23-24). Because the trial court indicated it would take Appellant's counsel on his representation with regard to counsel's presentation of evidence which, when considered in the light most favorable to Appellant,

created an issue of fact with regard to Respondents' abuse of the fair report privilege, the court erred in granting Respondents summary judgment on that ground.

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 argue summary judgment was appropriate because Appellant cannot prove publications by Respondents were false. Respondents seem to confuse the idea of falsity with their assertion of "privilege" above when they assert their publications implicating Appellant in brutal acts of savagery against a multitude of horses in two states were somehow true because Appellant was arrested and charged with four counts of misdemeanor neglect of animals. Respondents attempt to point to felony indictments in the Record to show Appellant was indeed charged with felony level abuse of animals. (Init. Br. of Resp. p.13). However, the felony indictments of Appellant, on which Respondents rely, occurred long after Respondents first publication of material defaming Appellant. (See Indictments). At the time Respondents first published the defamatory content regarding Appellant, that content was false, or substantially untrue. Furthermore, at no time was Appellant ever charged with mistreatment of any animal outside of South Carolina.

Respondents again attempt to argue that Appellant failed to come forward with any evidence to demonstrate publications by the Respondents were false, as required under Rule 56(e), SCRCP. (Init. Br. of Resp. p.14). As Appellant has discussed above and in his Initial Brief, Appellant came forward at the summary judgment hearing with evidence to create a genuine issue of fact with regard to the falsity of Respondents' publications concerning Appellant. Not only did the trial judge indicate he would accept

counsel for Appellant's representation regarding the content of the publications as counsel read it into the record, Appellant also submitted over 150 pages of evidence supporting his position. Appellant submitted evidence of falsity sufficient to create a fact issue for the jury. (See Init. Br. of App. p. 24), (see also Plaintiff's proposed Order Denying Summary Judgment). As such, the trial court erred in granting Respondents summary judgment on the ground Respondents' publications, and all of them, were true or substantially true.

5. *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.*

Respondents argue Appellant is a "public official" and therefore required to demonstrate by clear and convincing evidence that Respondents acted with "actual malice" in publishing defamatory material regarding him. (Init. Br. of Resp. p. 15-16). Appellant has addressed the issue of "public official" in his Initial Brief. (See Init. Br. of App. p. 10-16). Again, however, Respondents argue Appellant made no effort at the summary judgment stage to offer evidence Respondents acted with either actual or common law malice in publishing defamatory material concerning Appellant. For the reasons discussed above and in his Initial Brief, Appellant disputes it failed to present sufficient evidence to create a genuine question of fact.

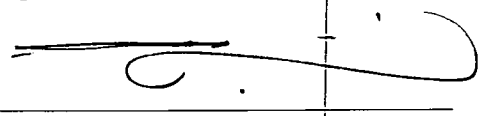
Respondents argue Appellant is similarly unable to demonstrate common law malice applicable to private figures. (Init. Br. of Resp. p. 18). In support of that proposition Respondents point to deposition testimony of Appellant in which Appellant could not identify anyone associated with Respondents' organizations who might bear ill-will against him. (Id.). However, as amply briefed in Appellant's Initial Brief, ill-will is

not the measure for common law malice in the context of libel when such libel constitutes defamation per se. "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).

CONCLUSION

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

Respectfully submitted,



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DESIGNATION OF ADDITIONAL MATTER TO BE INCLUDED IN RECORD ON APPEAL

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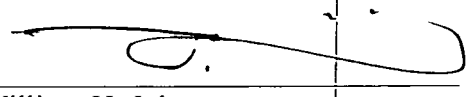
Appellant designates the following additional matter to be included in the Record on Appeal:

Affidavits of personal service upon all Defendants, filed July 8, 2010

The undersigned attorney for Appellant hereby certifies that this Designation contains no matter which is irrelevant to the appeal.

Respectfully submitted,



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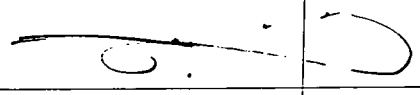
PROOF OF SERVICE

I certify that I have served Appellant's Initial Reply Brief and Designation of Additional Matter to be Included in Record on Appeal upon The Associated Press; Barrington Broadcasting South Carolina Corp.; Raycom TV Broadcasting, Inc.; The Spartanburg Herald Journal, Inc.; and The Pacific & Southern Co., Inc., by depositing a copy of each of these documents in the United States Mail, postage prepaid, on December 16, 2013, addressed to their attorneys of record, Jay Bender, Baker, Ravenel & Bender LLP, Post Office Box 8057, Columbia, South Carolina 29202.



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