

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

Court of Appeals No. 2013-001581
Civil Case No. 2010-CP-40- 1249

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.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. WAS THE COURT BELOW CORRECT IN FINDING THAT THE ALLEGATIONS IN APPELLANT'S PURPORTED AMENDED COMPLAINT DID NOT RELATE BACK TO AN EARLIER FILED COMPLAINT WHICH DID NOT NAME RESPONDENTS AS DEFENDANTS AND OF WHICH APPELLANT TESTIFIED HE HAD NO KNOWLEDGE?

II. WAS THE COURT BELOW CORRECT IN FINDING THAT ALL BUT FOUR OF APPELLANT'S LIBEL CLAIMS WERE EITHER BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS OR BASED ON PUBLICATIONS SUBSEQUENT TO THE DATE OF APPELLANT'S PURPORTED AMENDED COMPLAINT?

III. WAS THE COURT BELOW CORRECT IN RULING THAT PUBLICATIONS REPORTING THAT APPELLANT HAD BEEN CHARGED WITH KIDNAPPING WERE PRIVILEGED REPORTS OF THE CONTENTS OF AN OFFICIAL RECORD OF THE RICHLAND COUNTY SHERIFF'S DEPARTMENT?

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V. WAS THE COURT BELOW CORRECT IN RULING THAT APPELLANT FAILED TO DEMONSTRATE THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT WITH RESPECT TO THE ELEMENTS OF HIS LIBEL CLAIMS FOR WHICH HE HAD THE BURDEN OF PROOF?

STATEMENT OF THE CASE

Respondents object to Appellant's assertion in his Statement of the Case that "Appellant filed his original Complaint on February 23, 2010," (Br. of App. p. 5) on grounds that this assertion is contested and its inclusion in the Statement is inconsistent with the provisions of Rule 208(b)(1), SCACR which provides "The statement shall not contain contested matters...." Respondents were first identified as defendants in an action initiated by Appellant with the filing of an "Amended Summons" and "Amended Complaint" on June 23, 2010. The "Amended Complaint" purported to amend the allegations of a Complaint filed on February 23, 2010 having as plaintiffs Hazelene E. Trexler, Terry A. Trexler and James W. Trexler. This Complaint identified none of Respondents as among the thirteen individually named defendants or defendants identified collectively as "ALL MEDIA COMPANIES THAT PRODUCED OR REPORTED ON ANY EVENT RELATING TO THE PLAINTIFFS IN 2008, 2009 AND 2010." This Complaint did not indicate, as allowed by Rule 10(a)(1), SCRCF, that allegations were being made with respect to unknown parties, and in the allegations relating to defamation identified the cause of action as one for "DEFAMATION, SLANDER AND LIBEL." This Complaint in its entirety alleged with respect to the attempted defamation claim, "In late February 2008 and numerous times before and thereafter, Plaintiffs [sic] defamed the Plaintiffs." (R. pp. 27-31) The Complaint filed February 23, 2010 was not served on any of Respondents.

Respondents answered the allegations of the purported Amended Complaint, engaged in discovery and moved for summary judgment supporting their motion with pleadings, Answers to Interrogatories, affidavits of Chris Cowan, Hugh E. Weathers and Georgette Rivers and Appellant's deposition transcript. (R. pp. 160-391) Appellant's response to the motion was an affidavit addressing only his status as a public official. (R. pp. 1046-48) Following the hearing

on the motion for summary judgment Appellant submitted with his proposed order denying the motion material which his counsel characterized as evidence “creating a direct and substantial issue of material fact.” (R. p. 140 line 14 to p. 141 line 7) Summary judgment was granted for Respondents by order filed October 30, 2012. (R. pp. 1-16) Appellant moved for reconsideration of the grant of summary judgment pursuant to Rule 59(e), SCRCPP. This motion was denied by order filed April 30, 2013 (R. pp. 17-24) and the within appeal was initiated.

ARGUMENT

- I. THE COURT BELOW WAS CORRECT IN FINDING THAT THE ALLEGATIONS IN APPELLANT’S PURPORTED AMENDED COMPLAINT DID NOT RELATE BACK TO AN EARLIER FILED COMPLAINT WHICH DID NOT NAME RESPONDENTS AS DEFENDANTS AND OF WHICH APPELLANT TESTIFIED HE HAD NO KNOWLEDGE.

Appellant’s contention is that his “Amended Complaint” was merely an effort to identify unknown defendants who had been identified collectively as “ALL MEDIA COMPANIES” in the Complaint filed February 23, 2010. This contention is unsupportable for two reasons: First, the naming of “ALL MEDIA COMPANIES” does not satisfy the requirements of Rule 10(a)(1), SCRCP for identifying unknown parties, and second because Appellant testified in his deposition that he had no knowledge of the action initiated by the Complaint filed February 23, 2010 which did not include Respondents by name as defendants. (R. p. 367 line 22 – p. 370 line 2) Asked about a suit filed against Frank Fusco, the Commissioner of Agriculture, the attorney for the Commissioner of Agriculture, and other defendants named in the February 23, 2010 Complaint, Appellant answered:

Whoever filed that must’ve included me. I have no knowledge of that. Must’ve taken as a class action suit or something. I don’t know, but I’m not aware of that, no sir.

(R. p. 369 line 1 – p. 370 line 2)

Rule 10(a)(1), SCRCP allows a pleading to indicate that the true identity of an adverse party is unknown by providing:

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

Rule 10(a)(1), SCRCP.

The Complaint filed February 23, 2010 made no reference to “unknown parties,” and Appellant’s repeated references to “his original Complaint” (Br. of App. pp. 8-10) is disingenuous at best and a fabrication at worst. There is no reasonable construction of Appellant’s deposition testimony that he knew nothing about the action commenced on February 23, 2010 against *inter alia* “ALL MEDIA COMPANIES” that would allow the February 23, 2010 Complaint to be Appellant’s Complaint.

Appellant seeks to rely on *Hughes v. Water World Water Slide, Inc.*, 314 S.C. 211, 442 S.E.2d 584 (1994) to argue that the Amended Complaint merely sought to correct a misnomer of defendants in the February 23, 2010 Complaint (Br. of App. p. 8), but it cannot be possible for Appellant to have misnamed any defendant in an action he knew nothing about. *Hughes* involved a suit initiated against a corporation with the corporation being identified in the action by the trade name used by the corporation, the pleadings were served upon the president of the corporation and concerned an incident which had taken place when the president of the corporate defendant was present on the premises. None of the factors in *Hughes* is present in the within action.

Rule 10(a)(1), SCRCF which allows the designation of unknown parties by any name is similar in purpose to the judicial interpretation of Rule 10(a) FRCiv.P. allowing a “John Doe” appellation if a plaintiff has been unable to ascertain the correct identity of a defendant. The Doe designation will not be allowed if the plaintiff’s ignorance of the true identity of a defendant is the result of “willful neglect or lack of reasonable inquiry.” 2 Moore’s Federal Practice 3d §10.02(d)(i). In the within action Appellant cannot argue that he was ignorant of the true identity of defendants for purposes of the February 23, 2010 Complaint when he was ignorant of the action itself. The court below was correct in ruling that the allegations of the Amended

Complaint did not relate back to the allegations of the February 23, 2010 Complaint because plaintiff's own testimony established that there was no misnomer by him of defendants and the allegations of the February 23, 2010 Complaint did not conform to the requirements for identifying unknown defendants.

II. THE COURT BELOW WAS CORRECT IN FINDING THAT ALL BUT FOUR OF APPELLANT'S LIBEL CLAIMS WERE EITHER BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS OR BASED ON PUBLICATIONS SUBSEQUENT TO THE DATE OF APPELLANT'S PURPORTED AMENDED COMPLAINT

The time for bringing a libel action in South Carolina is two years from the date of publication of the material which is the basis of the action. S.C. Code Ann. §15-3-550 (Rev. 2005). Appellant's "Amended" Complaint was filed June 23, 2010, and, because the allegations of this document cannot be read to "relate back" to the February 23, 2010 Complaint of which Appellant had no knowledge, Appellant's libel claims were barred as to all publications prior to June 22, 2008. Asked in interrogatories to identify by date and publisher those publications contended by Appellant to be defamatory, Appellant listed fifty-nine publications made by Respondents between February 26, 2008 and March 21, 2008. These fifty-nine publications are barred by application of the statute of limitations. (R. pp. 1076-1083) Appellant also identified two publications made after June 23, 2010. (R. p. 1083) Four publications, two, on August 14, 2008 and January 22, 2009, by Respondent The Associated Press, one on December 15, 2008 by Respondent the Pacific & Southern Co., Inc. and one on July 13, 2009 by Respondent Barrington Broadcasting were within the statutory period and not barred. (R. pp. 1082-83) The propriety of summary judgment with respect to these four unbarred publications will be discussed fully below.

The two publications made subsequent to June 23, 2010 were not before the court below as the rights of the parties are determined as of the date of the commencement of an action, *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 213 S.E.2d 726 (1975), and leave of the court must be sought to file supplemental pleadings. *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999). Appellant did not move to supplement the allegations made on June 23, 2010.

The court below was correct in concluding that the fifty-nine publications made between February 26, 2008 and March 21, 2008 were barred by the statute of limitations for libel actions in South Carolina. The legal and policy issues influencing the court's decision are whether South Carolina will follow the "single publication" rule for libel actions whether a publication is broadcast, printed or on the Internet. Turning first to the policy question, it is clear that South Carolina favors a shorter limitation period for libel than for other torts. The limitation period for defamation established by Section 15-3-550(1) of the South Carolina Code of laws is two years. In contrast to this truncated period in which a defamation action must be brought, other actions must be commenced within three years of accrual, S.C. Code Ann. §15-3-530 (Rev. 2005), and in some actions, the limitation period is extended by application of the "discovery" rule, e.g., *Santee Portland Cement Co. v. Daniel Int'l. Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989); *overruled on other grounds Atlas Food Sys. & Servs. v. Crane Nat'l. Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995) and S.C. Code Ann. §§15-3-530(5) and 15-3-535 (Rev. 2005). Significantly, the shortened durational limitation applicable to libel actions is maintained as the South Carolina Court of Appeals held in *Jones v. City of Folly Beach*, 326 S.C. 360, 483 S.E.2d 770, 775 (Ct. App. 1997), because "South Carolina has not adopted the discovery rule in libel and slander cases."

A majority of jurisdictions follow the "single publication" rule with respect to defamation claims and this rule provides "that if only one work is involved, its distribution constitutes but a single publication on the date of the first publication of the work." Restatement (Second) of Torts §577A (1977). The Appellate Division of the Superior Court of New Jersey analyzed the application of the single publication rule and found it to be consistent with modern practices of mass communications:

The decisions developing the single publication rule suggest the following reasons for its development: To prevent the constant tolling of the statute of limitations, and thereby support the legislative determination for a short period of limitation for libel, [citations omitted]; convenience to the parties and courts in consolidating into one action all the damage to plaintiff. [citations omitted].

Barres v. Holt, Rinehart and Winston, Inc., 131 N.J. Super. 371, 330 A.2d 38, 43 (1974).

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

The seminal case on the application of the single publication rule to Internet publications is *Firth v. State of New York*, 98 N.Y.2d 365, 747 N.Y.S.2d 69, 775 N.E.2d 463 (2002). The plaintiff in *Firth* brought a defamation action based on a website publication and argued that as a consequence of the publication remaining available continually on the Internet each day resulted in a new publication thereby continually tolling the statute of limitations.. In rejecting this proposition the New York Court of Appeals noted that the policy behind a statute of limitations would be negated and the open and robust dissemination of ideas and information over the Internet would be inhibited if mere presence on the Internet constituted a daily republication. As the United States District Court of Minnesota noted just last year, “Every court to consider the issue [of the application of the single publication rule to Internet publications] after *Firth* has

¹ The New Jersey Superior Court surveyed the application of the single publication rule to Internet publications and cited the following as applying the single publication rule: *Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87, 89-90 (2d. Cir. 2003); *Lane v. Strang Communications Co.*, 297 F.Supp.2d 897, 899-900 (N.D. Miss. 2003); *Mitan v. Davis*, 243 F.Supp.2d 719, 721-724, (W.D. Ky. 2003); *Simon v. Ariz. Bd of Regents*, 28 Media Law Rptr. 1240, 1245-1246 (Ariz. Sup. Ct. 1999); *Traditional Cat Ass’n., Inc. v. Gilbreath*, 118 Cal.App. 4th. 392, 13 Cal. Rptr. 3d 353, 355, 358-363 (2004); *McCandliss v. Cox Enter., Inc.*, 265 Ga. App. 377, 593 S.E.2d 856, 858 (2004), *reconsid. denied* (February 2, 2004), *cert. denied* (May 24, 2004); *Abate v. Me. Antique Digest* 2004 WL 293903, 1-2 (Mass. Sup.Ct. January 26, 2004); *E.B. v. Liberation Publ/nss, Inc.*, 7 A.D. 3d 566, 777 N.Y.S.2d 133, 134 (2004).

followed suit.” *Shepard v. THEHUFFINGTONPOST.COM, INC.*, 2012 WL 5584615, 40 Media L. Rep. 2605 (D. Minn. 2012). In support of its assertion that all other courts applying the single publication rule in the context of Internet publications had followed *Firth* the Minnesota District Court cited in addition to the authorities cited by the New Jersey court in *Barres, In re Philadelphia Newspapers, LLC*, 690 F.3d 161 (3rd Cir. 2012); *Oja v. Army Corps of Eng’rs*, 440 F.3d 1122 (9th Cir. 2006); *Churchill v. State*, 378 N.J. Super. 471, 876 A.2d 311 (2005); *Traditional Cat Ass’n. v. Gilbreath*, 118 Cal.App 4th 392, 13 Cal.Rptr.3d 353 (2004).

The decision of the South Carolina Court of Appeals in *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 594 S.E.2d 878 (Ct. App. 2004) interpreting South Carolina’s “door closing” statute, S.C. Code Ann. §15-5-150 (1977), 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. The reference to “continuing publication...in South Carolina upon each sale and upon each dissemination” of a book refers to events taking place in South Carolina for purposes of determining where a cause of action arises rather than when it arises. The court below correctly applied the single publication rule to effectuate South Carolina’s two year statute of limitations governing defamation actions.

III. THE COURT BELOW WAS CORRECT IN RULING THAT PUBLICATIONS REPORTING APPELLANT HAD BEEN CHARGED WITH KIDNAPPING WERE THE PRIVILEGED REPORTS OF THE CONTENTS OF AN OFFICIAL RECORD OF THE RICHLAND COUNTY SHERIFF'S DEPARTMENT.

Appellant argues in his brief that the news reports that appellant had been charged with kidnapping were not privileged because these reports were based on a press release disseminated by the Richland County Sheriff's Department. (Br. of App. pp. 20-23) The press release upon which the news reports of the kidnapping charge were based was submitted to the court below along with the affidavit of Chris Cowan in support of Respondents' motion for summary judgment. (R. pp. 1072-1074) The Cowan affidavit and the press release stated that Appellant was charged with "5 counts of ill treatment of animals" and 1 count of kidnapping." Rule 56(c), SCRPC allows a party against whom a motion for summary judgment is made to submit affidavits in opposition to the motion provided that the affidavits are filed not less than two days in advance of a hearing on the motion. As discussed above, the only affidavit filed by Appellant in advance of the hearing addressed his status as a public official, and not the contents of the news reports. (R. pp. 1046-48) Rule 56(e), SCRPC provides that the court "may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Appellant neither sought nor obtained leave of the court to supplement his affidavit, and did not direct the court's attention to any deposition, answers to interrogatories or further affidavits which would disclose the existence of a genuine issue of material fact with respect to the privilege claimed by Respondents for the news reports that Appellant had been arrested for kidnapping.

Appellant argues that the press release is not a public record; therefore, the fair report privilege does not attach. (Br. of App. pp. 20-21) Even the most cursory reading of the South Carolina Freedom of Information Act definition of "public record" demonstrates the

speciousness of Appellant's claim. Under the statutory definition a "public record" includes all papers or other documentary materials regardless of physical form or characteristics prepared or used by a public body. S.C. Code Ann. §30-4-20(c) (Rev. 2007). As the Cowan affidavit indicates without challenge, the press release was prepared by the Richland County Sheriff's Department and disseminated by the Department. (R. pp. 1072-73 ¶¶ 4-6) As this court held in *Burton v. York Sheriff Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), a sheriff's department is a public body as defined by the South Carolina Freedom of Information Act; therefore, a document prepared and used by a sheriff's department, such as a press release, is a public record as a matter of law.

Application of the fair report privilege is not dependent upon the method of transmission of public or official information. The fair report privilege was held to insulate a radio station from libel liability when a public official, speaking on the air, made false and defamatory statements about a lawyer who had initiated several civil actions against the official's city. *White v. Wilkerson*, 328 S.C. 179, 493 S.E.2d 345 (1997). Accordingly, the court below was correct in ruling that no genuine issue of material fact existed with respect to the application of the fair report privilege to news reports that relied on erroneous information in the sheriff's department press release stating that Appellant had been charged with kidnapping, and Respondents were entitled to judgment in their favor as a matter of law.

IV. THE COURT BELOW WAS CORRECT IN RULING THAT APPELLANT COULD NOT PROVE THE FALSITY OF PUBLICATIONS REPORTING THAT HE HAD BEEN ARRESTED AND CHARGED WITH ABUSING HORSES WHEN APPELLANT HAD BEEN ARRESTED AND SUBSEQUENTLY INDICTED FOR ABUSING HORSES.

The first requirement of a libel claim is proof of publication of false statements of fact. In his purported Amended Complaint Appellant alleged with respect to defamation that Respondents had published “false and defamatory statements...including statements...that authorities had removed horses from the plaintiff, that the plaintiff’s horses were starved, and other false and misleading statements.” (R. p.35 ¶ 18) It is clear from Appellant’s own allegations that horses were seized due to “alleged charges of mistreatment of animals,” and, notwithstanding Appellant’s assertion that he had no ownership interest in the horses, “the Richland County Sheriff’s Department charged the Plaintiff as if he were an owner.” (R. p. 35 ¶¶ 14, 15) These allegations alone should establish the truth of the publications, but moving beyond his allegations Appellant acknowledges in his brief that he was arrested and charged with ill treatment of animals and indicted on four counts of felony mistreatment of animals. (Br. of App. pp. 18, 19). Respondents submitted arrest warrants and indictments to the court below in support of establishing the truth or substantial truth of their publications, and these materials were not disputed below or in this court. Clearly, news reports that Appellant had been charged with mistreatment of horses could not be proven by Appellant to be false because he had been arrested and so charged. While Appellant in his brief acknowledges that it “is true that Appellant was eventually charged with felony ill-treatment of animals,” he seeks to argue that the charges “related to only five horses in South Carolina, not dozens of horses both in South Carolina and Georgia.” (Br. of App. p. 19) Here again Appellant misstates the record from the court below. Respondents submitted to the court below eight True Bills indicting Appellant for “Ill Treatment

of Animals” with respect to forty-nine horses and one True Bill indicting Appellant for “Criminal Conspiracy” with respect to the ill treatment of animals between October 1, 2007 and March 3, 2008. (R. pp. 1093-1110) Appellant’s attempts to minimize the criminal charges against him to support his argument “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 substantially untrue” was rejected by the court below and should be rejected by this court. Plaintiff’s burden at the summary judgment stage required him to come forward with counter affidavits, depositions or answers to interrogatories to “set forth specific facts showing that there is a genuine issue for trial.” Rule 56(e), SCRPC. This rule states clearly that “an adverse party may not rest upon the mere allegations...of his pleading,” *Id.*, but such was Appellant’s strategy below and in this court. Nothing before this court or the court below establishes that Respondents’ publications were false.

Respondents were entitled to judgment in their favor as a matter of law. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1976) (private figure libel plaintiff required to prove falsity of publication when publication concerns a matter of public interest); *Parker v. Evening Post Pub. Co., Inc.*, 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994), *cert. denied* 516 U.S. 1172 (1996) (truth or substantial truth is absolute defense to libel claim). It is irrelevant to the truthfulness of the publications that the charges against Appellant were subsequently dropped as the news reports reflected the state of affairs at time of publication, and liability cannot be imposed for libel because the situation subsequently changed. *Padgett v. Sun News*, 278 S.C. 26, 292 S.E.2d 30 (1980).

V. THE COURT BELOW WAS CORRECT IN RULING THAT APPELLANT FAILED TO DEMONSTRATE THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT WITH RESPECT TO THE ELEMENTS OF HIS LIBEL CLAIMS FOR WHICH HE HAD THE BURDEN OF PROOF.

At common law libel was a strict liability tort with an accompanying presumption of fault on the part of a defendant, but the law of libel has undergone wholesale revision since 1964 when the Supreme Court of the United States first incorporated First and Fourteenth Amendment protections for publishers. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). These constitutional protections require a libel plaintiff to prove fault on the part of a defendant, and the common law presumption no longer exists. As then Associate Justice Jean H. Toal explained in a comprehensive review of the changed landscape of libel law, “The degree of fault a plaintiff must establish depends upon his status as a public or private figure.” *Holtzscheiter v. Thomson Newspapers, Inc.*, [*Holtzscheiter II*], 332 S.C. 502, 506 S.E.2d 497, 507 (1998) (Toal, J., concurring). A public figure or public official plaintiff bringing a libel action based on a publication related to a matter of public interest and published by a media defendant must prove not only the falsity of the publication, but that the publisher acted with “actual” or “constitutional” malice. *New York Times Co. v. Sullivan*, *supra*; *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000). To meet this burden a public plaintiff must prove that the defendant published false statements of fact of and concerning the plaintiff knowing the statements to be false or having reckless disregard for potential falsity. *Id.* And, as the Supreme Court of South Carolina emphasized, “reckless disregard” requires clear and convincing proof that the publisher in fact entertained serious doubt about the accuracy of the publication at the time of publication. *Elder*, *supra*.

Respondents believe that the record established as a matter of law that an Assistant Commissioner of Agriculture for the State of South Carolina, one of only three to have this title

in the South Carolina Department of Agriculture, is a public official for libel purposes. (R. p. 1058 ¶¶ 4-6, R. p. 1065 ¶ 11) Appellant, as he did with respect to the criminal charges against him, seeks to minimize his standing in the Department of Agriculture to support his argument that he is a private figure plaintiff for purposes of this litigation, stating, “Appellant was essentially a staff accountant and information technology coordinator at the Department of Agriculture.” (Br. of App. p. 14) The Commissioner of Agriculture characterized Appellant’s position as being in the “top tier of career, as distinguished from elected, managers of the agency.” (R. p. 1058 ¶ 5) At the time of his resignation from the Department of Agriculture Appellant believed himself to be a leader within the agency stating in his resignation letter, “First let me begin by saying thank you to Commissioner Weathers who gave me this opportunity to help lead this agency as Assistant Commissioner of Agriculture.” (R. p. 1061) Appellant’s status as a public or private plaintiff is a matter of law to be determined as the threshold step of evaluating the efficacy of Appellant’s claim. *Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 629 S.E.2d 653 (2006). One is a public official if one “has or appears to the public to have ‘substantial responsibility for or control over the conduct of governmental affairs.’” *Erickson, supra*, 629 S.E.2d at 666 quoting *Holtzscheiter II*, 506 S.E.2d at 507 n.4 (Toal, J., concurring) quoting *Rosenblatt v. Baer*, 383 U.S. 75 (1996)).

As a public official, Appellant is required to prove by clear and convincing evidence that Respondents acted with actual or constitutional malice. The question of whether there is sufficient evidence to establish actual malice is a question of law, and, as the Supreme Court of South Carolina held in *McClain v. Arnold*, 275 S.C. 124, 270 S.E.2d 124, 125 (1980), the appropriate setting for that finding to be made is on a motion for summary judgment:

The presence or absence of actual malice is a constitutional issue and “where a publication is protected by the *New York Times*

immunity rule, summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection in the proper case.” *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 864-865 (5th Cir. 1970). Unless the trial court finds, based on pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice, it should grant summary judgment for the defendant. *Wasserman v. Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir. 1970) (Wright, J., concurring).

To overcome Respondents’ motion for summary judgment Appellant was obligated to demonstrate that he could prove constitutional or actual malice by clear and convincing evidence as the Supreme Court of South Carolina held in *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868, 875 (2001):

[I]t is implicit in *McClain* that the appropriate inquiry at summary judgment on the issue of actual malice relates to what the plaintiff must prove at trial. *See McClain*, 275 S.C. at 284, 270 S.E.2d at 125 (“Unless the trial court finds...that the plaintiff *can prove* actual malice, it should grant summary judgment for the defendant”) (emphasis added [by court]). Thus, we hold that the appropriate standard at the summary judgment phase on the issue of constitutional actual malice is the clear and convincing standard.

Appellant made no effort to demonstrate he could prove actual malice, and before this court asserts that “Respondents had knowledge that Appellant claimed he did not own any horses or the land on which the horses were found” to attempt to satisfy his burden of proof. (Br. of App. p. 17) While it was true that Appellant claimed he owned neither horses nor land, his own allegations demonstrate that his claim was disregarded by the Richland County Sheriff’s Department, (R. p. 35 ¶¶ 13-16) and unsupported in arrest warrants and indictments before the court below. (R. pp. 1088-1110) A criminal defendant’s protestation of innocence is neither unusual nor sufficient to establish that Respondents entertained serious doubts about the accuracy of their publications. *Elder, supra*.

Even if Appellant were a private figure plaintiff, his obligation at the summary judgment stage was to demonstrate that he could prove the requisite level of fault on the part of Respondents. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Baughman v. American Tel. & Tel.*, 306 S.C. 101, 410 S.E.2d 537 (1991). In South Carolina a private figure libel plaintiff must prove that the publication of false and defamatory statements was occasioned by the publisher's common law malice directed toward the plaintiff. *Erickson, supra*. Asked in his deposition if he could identify any journalist or any person in Respondents' organizations who might bear ill will toward him, Appellant answered "No," (R. p. 388 line 11 to p. 389 line 24) and did not identify any witness in his responses to Respondents' Interrogatories who would provide such evidence. (R. p. 1075-76 ¶¶ 1 and 5).

A party resisting a motion for summary judgment in a libel case may not rely on allegations in pleadings, but must come forward with evidence to demonstrate that the burden of proof can be met. As discussed above, Appellant cannot prove the falsity of the publications, and, as discussed in this section, did not supply the court below with any material that would demonstrate that he could prove fault on the part of respondents. For these reasons Appellant has failed to satisfy his burden at the summary judgment stage regardless of his status as a public or private plaintiff; therefore, summary judgment for Respondents was appropriate.

CONCLUSION

Appellant who was arrested and indicted for ill treatment of horses has alleged that Respondents defamed him by publishing news reports which described his arrest and indictment. These news reports were accurate and supported by public records with the exception of news reports which relied on a misidentification of Appellant by the Richland County Sheriff's Department as the Trexler brother who had been arrested for kidnapping. (R. p. 35 ¶ 16) These news reports, based on a public record, were privileged.

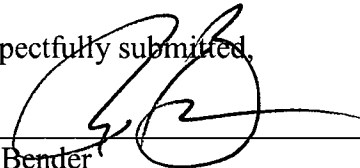
Appellant claims in the within appeal that the allegations of his purported Amended Complaint should relate back to a complaint filed on February 23, 2010 notwithstanding his testimony that he knew nothing about that Complaint and none of Respondents was named as a defendant therein. The court below properly and correctly ruled that the amendments of the purported Amended Complaint did not relate back and that Appellant's claims with respect to the bulk of the publications were barred by the two-year statute of limitations for libel actions. Several of the publications identified as the basis for Appellant's suit were made after the Appellant initiated his suit against Respondents; therefore, they were not encompassed within the action.

Respondents have demonstrated that Appellant was a public official for purposes of this action, and the court below correctly ruled as a matter of law that a person occupying the public position occupied by Appellant and having the duties that Appellant had within an agency of the State of South Carolina was a public official who would be required to prove that Respondents acted with actual or constitutional malice in publishing the news reports of which he complains. But, even if Appellant's assertion that he is a private figure plaintiff is accepted by this court, Appellant has nevertheless failed to demonstrate that he can prove that Respondents acted with

common law malice toward him in publishing their news reports of his arrest and matters related to the arrest.

For the reasons and upon the authorities stated herein, the grant of summary judgment to Respondents was correct as a matter of law, and should be affirmed by this court.

Respectfully submitted,



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February 3, 2014

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

Court of Appeals No. 2013-001581
Civil Case No. 2010-CP-40- 1249

James W. Trexler.....Appellant

v.

The Associated Press, Barrington Broadcasting South Carolina Corp.,
Raycom TV Broadcasting, Inc. and The Pacific & Southern Co.,
Inc.....Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),
SCACR.

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PROOF OF SERVICE

I, Teresa K. Todd, Legal Assistant to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with a Respondents' Final Brief by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

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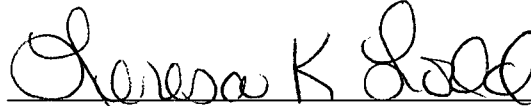
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A handwritten signature in black ink, appearing to read "Teresa K. Todd", written over a horizontal line.

Teresa K. Todd

February 4, 2014