THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Presiding Judge

Case No. 2013-000826

William R. Ferrara ..... Appellant

v.

Michael E. Hunt, Sheriff of Aiken County;
and Charles Cain in his individual capacity
as Deputy Sheriff ..... Defendants

Of whom Michael E. Hunt is the ..... Respondent.

REPLY BRIEF OF APPELLANT

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I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE PROBABLE CAUSE ISSUE WAS NOT FULLY LITIGATED; THEREFORE ISSUE PRECLUSION DID NOT APPLY.

The doctrine of collateral estoppel, or issue preclusion, serves to prevent a party from re-litigating in a subsequent action an issue actually and necessarily litigated and determined in a prior action. *Shelton v. Oscar Mayer Foods Corp.,* 325 S.C. 248, 251, 481 S.E.2d 706, 707 (1997). Respondents assert that "Judge Gergel's probable cause finding is entitled to preclusive effect based upon the doctrine of collateral estoppels." (Respondent Hunt's Initial Brief). However, the issue of probable cause was not fully litigated in district court. Therefore, the Appellant was not precluded from litigating the issue in state court.

The concept of probable cause is not static. For example, the analysis for probable cause is different for criminal and civil proceedings. Circuit Judge Lumbard emphasized in his concurrence in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 2 Cir., 456 F.2d 1339, 1348 (1972) that the reasonable man standard to be applied in tort actions against governmental agents differs from the definition of probable cause applied in criminal proceedings.

In addition, the analysis of probable cause includes more than an objective standard. The 6th and 7th Circuits agree that determination of probable cause is not as simple as the Respondent asserts. In *Darrah v. City of Oak Park,* 255 F.3d 301, 311 (6th Cir. 2001), the court held that a finding of probable cause in a prior criminal proceeding does not bar a plaintiff in a subsequent civil action from maintaining a claim for malicious prosecution under Michigan law where the claim is based on a police officer's

supplying false information to establish probable cause. An analysis must also include an examination of the officer's state of mind, and whether he had a good faith belief that his conduct was lawful. Therefore, the issue to be litigated is not whether probable cause exists, but the integrity of that evidence. *Id.; see also Hinchman v. Moore,* 312 F.3d 198, 204 (6th Cir. 2002) (finding that summary judgment was inappropriate where the "facts as related by [the plaintiff,] which we must accept for the purposes of reviewing the grant of summary judgment against her[,] do not establish probable cause to arrest and prosecute her," and she was not precluded from raising the probable cause issued at a §1983 hearing). The 7th Circuit decided similarly in *Bailey v. Andrews*, 811 F.2d 366 (7th Cir. 1987), stating that if the determination of probably cause evaluated the "sufficiency, but not the integrity, of the evidence," then a defendant is *not* collaterally estopped from bringing a §1983 action which challenges the *integrity* of the evidence.

The 2nd Circuit has reasoned that an appropriate showing of probable cause is composed of two elements: "To prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. *Brubaker v. King*, 505 F.2d 534, 537 (7th Cir. 1974). In that case, the Respondent was claiming that since the issue of probable cause had been decided in a state court, the Appellant was precluded from litigating the issue in federal court. The court stated that:

> the test of probable cause in criminal proceedings is not the test to be applied in actions for damages, we find that a state court determination that there was probable cause to arrest made in the course of a criminal prosecution is not collateral estoppel in a

> subsequent action for damages under § 1983 or the Fourth Amendment since the issues involved are not identical. Collateral estoppel operates only if the 'very fact or point now in issue' was determined in prior litigation.

Id. at 537-38 (internal citations omitted). The *Brubaker* court held that "the question is not whether there was, in fact, probable cause for the arrest, but whether the defendant officers had a reasonable, good faith belief that probable cause existed." The court stated that it was necessary for "the federal district court ... independently to review the facts to determine whether defendants had proved that their actions were undertaken in good faith with a reasonable belief in their constitutional validity." *Id.* at 538.

In the federal case, Judge Gergel did not conduct such an analysis. Instead, he focused solely on whether the actions of the officer were reasonable according to an objective standard. Judge Early failed to conduct his own analysis of probable cause in the state court, choosing simply to quote the findings of the district court. This was in error.

Mr. Ferrara did not have an opportunity to fully litigate the issue in federal court. He expected to be able to litigate the complete issue in state court. However, in Judge Early's order, there was no analysis on whether the officers undertook the arrest in good faith with a reasonable belief in their constitutional validity. Since the issue was not fully litigated in the federal court, he is not precluded from raising the issue in state court.

II. THE ABUSE OF PRIVILEGE ISSUE IS APPROPRIATELY BEFORE THIS COURT, AND THE COURT ERRED IN FINDING THAT THE RESPONDENTS HAD IMMUNITY.

Respondent is mistaken in his belief that the abuse of qualified privilege is being raised for the first time on appeal. In the Memorandum in Opposition to Summary Judgment, the Appellant stated:

> The violation of a legitimate court order of expungement amounts to contempt of court and is part of Defendant Hunt's ongoing harm to Mr. Ferrara. This violation of a court order is certainly a transgression of a bright line rule and Defendant Hunt is liable for this transgression. For this reason, in addition to the previously mentioned reasons, Defendant Hunt is not entitled to qualified immunity and his Motion for Summary Judgment must be denied in this regard.

(R. p. 1095). Therefore, this is not the first time this issue has been raised and it is appropriately before this court.

"Under the law of defamation,... certain communications give rise to qualified privileges, including the privilege to publish *fair and substantially accurate* reports of judicial and other governmental proceedings without incurring liability." *West v. Morehead,* 296 S.C. 1, 6, 720 S.E.2d 495, 498 (Ct. App. 2011) (emphasis added). The elements of a cause of action for defamation include: (1) a false and defamatory statement concerning another, (2) an unprivileged publication to a third party, (3) fault on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Boone v. Sunbelt Newspapers, Inc.,* 347 S.C. 571, 580, 556 S.E.2d 732, 737 (Ct. App. 2001).

The Respondents contend that they had a qualified privilege to post false statements about the Appellant on the internet. They also state that in order to show whether this privilege was exceeded, the Appellant is required to show "express or actual malice" on the part of the Respondents. (Brief of Respondent Hunt, p. 13). However, S.C. Code Ann. § 15-78-60(17) states that a "governmental entity is not liable for a loss resulting from ... employee conduct outside the scope of his official duties or which constitutes actual fraud, *actual malice*, intent to harm, or a crime involving moral

turpitude...." The Respondents then assume that because the statute includes actual malice, they have qualified immunity for the defamation loss as well.

However, the privilege does not include defamation. Our courts have held that '[a] qualified privilege does not prevent liability for defamation where the statement is made with actual malice." *Murray v. Holman, Inc.,* 344 S.C. 129, 142, 542 S.E.2d 743, 750 (S.C. Ct. App. 2001), *citing Eubanks v. Smith,* 292 S.C. 57, 354 S.E.2d 898 (1987). When the privilege is qualified ... the plaintiff may recover if he shows that it was actuated by malice. *Bell v. Bank of Abbeville,* 208 S.C. 490, 493, 38 S.E.2d 641, 642 (1946). In *Bell,* the court also stated that summary judgment would be inappropriate in such a case:

> On the face of the amended complaint, the alleged defamatory statements appear to have been made upon a privileged occasion. But whether or not the privilege was exceeded is an issue to be met upon the trial of the case, in which the burden will be upon the plaintiff to show express or actual malice. This question cannot be decided upon a demurrer to the complaint. The defendant cannot get the benefit of the defense of qualified privilege without setting it up as an affirmative defense.

Id. at 493-94, 38 S.E.2d at 642-43.

Under the affirmative defense of qualified 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 conditionally privileged, and (2) the privilege is not abused." *Swinton Creek Nursery v. Edisto Farm Credit, ACA,* 334 S.C. 469, 514 S.E.2d 126, 134 (S.C. 1999). "The privilege may be lost ... by the manner of its exercise." *Murray v. Holman, Inc.,* 344 S.C. 129, 542 S.E.2d 743, 749 (S.C. App. 2001). The person invoking the privilege must not exceed the scope of the occasion, engage in any unnecessary defamation, or act with actual malice. *Id.*

"The effect of the qualified privilege defense is to cast upon the plaintiffs the burden of proving malice in fact on the part of the defendant." *Austin v. Torrington Co.*, 810 F.2d 416, 423-24 (4th Cir. 1987). Therefore, even though "actual malice" is listed as an exception to liability, our courts have stated that when this malice is part of a defamation analysis the exception does not apply.

The Appellant is not barred from recovering under his defamation cause of action. The court erred in granting summary judgment to the defendants. Under *Bell*, whether or not the privilege was exceeded was a question of fact and could not be decided on demurrur. Therefore, this court should remand this case for trial.

III. THE TRIAL COURT ERRED IN CONCLUDING THAT THE EXPUNGEMENT ORDER WAS NOT VIOLATED AND THAT NO RELIEF WAS AVAILABLE UNDER THE STATUTE.

The trial court erred in denying relief due to the Respondents' violation of the expungement order. The order clearly states: "IT IS ORDERED that all records relating to such arrest and subsequent discharge pursuant to the above-reference section be dismissed, expunged, and *immediately* destroyed and that *no evidence of such records pertaining to such charge shall be retained* by any municipal, county or state agency...." (R. p. 33). The trial court erred in stating that "[t]he facts precipitating the criminal charges against Plaintiff are the primary focus of his claim for defamation." (R. p. 7). The primary focus of Appellant's claim is the *false* information, not the factual information, which was published for more than two and a half years on the sheriff's website after the sheriff was ordered to remove all evidence from his possession. The information posted on the website included conclusory statements of absolute guilt, not allegation or facts precipitating arrest. (R. pp. 1151-1152).

The trial court was also in error by concluding the Respondents' conduct was not intentional. The court stated that "the remedial portion of the expungement statute only applies to intentional conduct." *Id.* However, [c]riminal intent can arise from actions or *failure to act*. It may arise from negligence, recklessness or indifference to duty or consequences therefore." *McKnight v. State*, 378 S.C. 33, 47, 661 S.E.2d 354, 361 (2008) (emphasis added, internal citations omitted). The court fails to explain how the inaction of the sheriff's department for over two years would not be considered "intentional." The sheriff's office failure to follow the court's order and take down the slanderous material for more than two years after receiving the Order exhibits indifference, recklessness, or negligence in duty. Under the South Carolina Supreme Court's definition, this inaction is indicative of intent.

The court also held that there was no private action under S.C. Code Ann. § 17-1-40. Where not expressly provided, a private right of action may be created by implication if the legislation was enacted for the benefit of the private party. *Citizens for Lee County, Inc. v. Lee County,* 308 S.C. 23, 28, 416 S.E.2d 641, 645 (1992). If the overall purpose of the statute is to aid society and the public in general, the statute is not enacted for the special benefit of a private party. *Adkins v. South Carolina Dept. of Corr.,* 360 S.C. 413, 419, 602 S.E.2d 51, 54 (2004). *Dema v. Tenet Physician Servs.-Hilton Head, Inc.,* 383 S.C. 115, 121-22, 678 S.E.2d 430, 433 (2009). The General Assembly has recently expanded Section 17-1-40 to include the following:

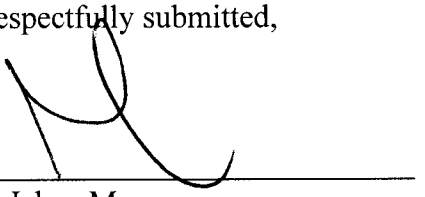
> If a charge enumerated in subsection (C) is discharged, proceedings against the person are dismissed, or the person is found not guilty of the charge, *the charge must be removed from any Internet-based public record no later than thirty days from the disposition date.*

S.C. Code Ann. § 17-1-40 (D) (emphasis added). Clearly, the legislature has an interest in making sure *personal* information is not disseminated to the public. The only person who would be harmed by such disclosure is the individual whose charges are being published. It is logical to infer that this creates a private right of action, since the implication is that this portion of the act was intended to benefit a private party. However, at the very least, violation of the statute should be considered evidence of malicious prosecution and defamation. Therefore, the Appellant followed the proper procedure to seek relief.

CONCLUSION

Based on the foregoing, this court should reverse the May 16, 2013 Order of Judge Early granting summary judgment to the Respondents and remand this case to be heard by a jury in the Aiken County Court of Common Pleas.

Respectfully submitted,



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PROOF OF SERVICE

I, Lynn G. Ivey, am employee of Moore Taylor Law Firm, PA, certify that I have served the Reply Brief of Appellant, by United States mail, in an envelope with sufficient postage affixed thereto, upon all counsel of record on November 6, 2014.

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