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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison Renee Lee, Circuit Court Judge

Case No. 2012-CP-40-4652
S.C. Appellate Tracking No. 2014-000663

RECEIVED

DEC 31 2014

SC Court of Appeals

James W. Trexler.....Appellant,

v.

The Humane Society for the Prevention of Cruelty
To Animals, and Wayne Brennessel, individually and
As Executive Director of the Humane Society for the
Prevention of Cruelty to Animals.....Respondents.

RESPONDENTS' RETURN TO APPELLANT'S MOTION TO STRIKE

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Respondents bring this Return to Appellant's Motion to Strike. Appellant asserts in his Motion that he objects to five items contained in Respondent's Designations of Matter for the Record on Appeal. Appellant further asserts that portions should be stricken from Respondents' Initial Brief because it "improperly includes and relies on assertions of disputed facts." *See* Appellant's Memorandum of Law in Support of Motion to Strike, p. 3. It is axiomatic that opposing briefs will include facts that are disputed. For the reasons stated below, Respondents respectfully request that the Court deny Appellant's Motion to Strike.

I. THE MATTER DESIGNATED BY RESPONDENTS TO BE INCLUDED IN THE RECORD ON APPEAL IS PROPERLY BEFORE THIS COURT.

Respondents assert that the Record filed by Appellant must contain "all material proposed to be included by any of the parties." Rule 210(g), SCACR. At this time of this filing, it remains unclear whether Appellant will proceed with filing the Record as designated by the parties. Appellant has filed a Motion to Strike objecting to the inclusion of five items designated by Respondents.

The five designated items to which the Appellant objects are as follows:

1. Deposition transcript of James Trexler from Civil Action No. 2010-CP-401249, taken September 14, 2011 (entirely).
2. Deposition of James Trexler from the underlying action, taken May 15, 2013; pp. 6, 10, 11, 18, 19, 69, 75, 76, 79, 80, 91, 114, 142, 143.
3. Deposition of Wayne Brennessel from September 30, 2013 (entirely).
4. Articles of Organization, Bates labeled HSPCA0473-HSPCA0474 (entirely).

5. Documentation related to ownership of various horses, Bates labeled HSPCA0518-HSPCA00534, HSPCA0539-HSPCA0540 (entirely).

Each of these items is addressed separately below.

**A. JAMES TREXLER DEPOSITION TRANSCRIPT FROM
C.A. NO. 2010-CP-40-1249**

Civil Action No. 2010-CP-40-1249 was a separate action filed by Appellant against various news media entities in the Circuit Court of Richland County. It arose out of the same facts and circumstances as the present case and was available to the trial court. In that case, The Honorable Joseph M. Strickland granted the news media Defendants' Motion for Summary Judgment by Order dated October 25, 2012. The Strickland Order quoted the cited deposition to which Appellant objects. In the case at hand, Judge Alison R. Lee granted Respondents' Motion for summary judgment and deferred to the relevant holding in Judge Strickland's Order. Judge Lee held that:

“The Court has held Plaintiff to be a public figure in a previous action arising out of the same facts and circumstances, and this Court defers to that ruling. See Order Granting Summary Judgment, *James W. Trexler v. The Associated Press, Barrington Broadcasting, Inc., and the Pacific & Southern Co., Inc.*, No. 2010-CP-40-1249 (Oct. 30, 2012)

Order of Feb. 10, 2014 at p. 4, attached as Exhibit A. Judge Strickland's citation of this deposition in his Order, which was Exhibit 4 to Defendant's Memorandum of Law in Support of Summary Judgment, makes plain that it was available to the Circuit Court. Our Constitution provides that South Carolina has one circuit court. S.C. CONST. Art. V, § 11. Therefore, this matter should be included in the Record on Appeal.

B. THE DEPOSITION OF JAMES TREXLER, MAY 15, 2013

Many of the pages to which Appellant objects were brought to the Trial Court's attention on pp. 9-10 of Defendant's Memorandum of Law in Support of Defendant's

Motion for Summary Judgment, which was filed with the Circuit Court on September 10, 2013, attached as Exhibit B. Specifically, pages 6, 75, 76, and 79 were cited in that brief. The remaining pages objected to by Appellant provide further context for the numerous deposition citations offered by Respondents as well as additional sustaining grounds. Therefore, this matter should be included in the Record on Appeal.

C. THE DEPOSITION OF WAYNE BRENNESEL, TAKEN SEPTEMBER 30, 2013

Appellant deposed Mr. Brennessel on September 30, 2013. The Trial Court's hearing of Defendant's Motion for Summary Judgment was conducted 24 days previously, on September 6, 2013. The very evident purpose for Plaintiff to take this deposition was to attempt to find additional evidence to support his position before the Trial Court. The fact that Brennessel's deposition did not support Plaintiff, however, provides an additional sustaining ground for the Defendants, most especially Mr. Brennessel. Nothing Plaintiff has presented has cast the slightest doubt on the Trial Court's holding that:

It is undisputed that the HSPCA is a 501(c)(3) tax exempt organization and Wayne Brennessel is its Executive Director. Plaintiff has alleged insufficient facts to support a charge that Brennessel's statement was made recklessly, willfully, or with gross negligence, and therefore, Brennessel should be dismissed from this action. For these reasons, Defendant's Motion for Summary Judgment as to defamation is **GRANTED**.

Exhibit A, p. 4. This deposition supports the Trial Court's finding regarding Mr. Brennessel. Therefore, this matter should be included in the Record on Appeal.

D. ARTICLES OF ORGANIZATION OF THE HSPCA

This designation supports the Trial Court's holding that the HSPCA is a 501(c)(3) tax exempt organization. Specifically, the Trial Court held that "[i]t is undisputed that the

HSPCA is a 501(c)(3) tax exempt organization....” See Exhibit A, p. 5. These documents merely show the 501(c)(3) status of the HSPCA.

E. DOCUMENTATION RELATED TO OWNERSHIP OF VARIOUS HORSES.

This designation is most particularly aimed at Appellant’s assertion he owned no horses. Appellant claims that there is no evidence in the record that he purchased a horse from Connie Dickman. This matter was, in fact, brought before the Court in Defendant’s Memorandum in Support of its motion for summary judgment. *See* Exhibit B, p. 3 citing a reference to Exhibit 3 to that Memorandum. That exhibit to the memorandum, in pertinent part, provides as follows:

with Sgt. Wright’s assistance they mapped out the scene and excavation was started. Nine (9) grave site [*sic*] were located and excavated removing the deepest leg bone for bone marrow testing. One grave contained the remains of 3 horses. Insect and plant samples were also taken from some of the sites for testing. During excavation, Connie Dickman from Indiana arrived stating that she had sold James Trexler a horse approx. 2.5 years ago. She stated that he bought the horse for \$10,000 but only paid her \$5,000. She stated that she has been trying to contact him for years without success. She stated that Terry Trexler is the one who accepted delivery of the horse. She described the horse to be a 20 yo grey stallion approx. 14.3 hands high. She stated that when he was last seen he was starting to show flea-bitten markings and that he has [*sic*] a growth/lump/callous on his left hock. Ms. Dickman provided paperwork including contract, registration papers and attempted coorespondence [*sic*] with the Trexler’s [*sic*]. Ms. Dickman stated that she can identify her horse and would like to take custody of him. Inv Perry made arrangements with Ms. Dickman for indentification [*sic*].

Exhibit B at p. 4 of its Exhibit 3. The documents designated by Respondents and Bates labeled HSPCA0518 - HSPCA00534 are the documents referred to above—the “paperwork including contract, registration papers, and attempted coorespondence [*sic*] with the Trexler’s [*sic*].” *Id.* Furthermore, in answering a question from Judge Lee inquiring about property and horse ownership, these documents were referenced by the

undersigned counsel for Respondents during the underlying hearing on Respondents' Motion for Summary Judgment:

[THE COURT]: So, is it your position or is it Mr. Trexler's position that he didn't own the property, or that he didn't own the horses that were on the property?

[MR. TYLER]: He, he claims both, Your Honor. What was... reasonable to the Humane Society at the time, based on their investigation and their, *particularly their investigation into ownership of horses* and... property ownership, that... he and his wife owned 412 Derby Lane. The plaintiff and his wife owned 412 Derby Lane and that there was a horse, Prose Cognac, who had been sold to James Trexler. Those documents for contract for sale and such have been produced to the other side with... the plaintiff's name on those. Plaintiff was deposed on those issues, and he claims that he... never owned the horse. But the Humane Society investigated. *They have documentation showing horse ownership*; they had documentation showing property ownership. Mr. Trexler admitted that he was paying property taxes and maintenance and such on the 412 property during the times of these investigations. And we have plenty of pictures of horses that were kept at 412 Derby Lane that have been produced to the other side. *I have them with me today if you're interested in reviewing them.* They just – they show, they show the malnourished horses and, *and offer proof of the Humane Society's investigation.*

9/6/2013 Hearing Transcript, p. 6-7, attached as Exhibit C (emphasis added). These documents were present in the courtroom on the day of the hearing and were made available to Judge Lee. Likewise, the documents designated by Respondents and Bates labeled HSPCA0539 - HSPCA0540 provide evidence of the ownership of two additional horses by James Trexler.

All of these documents were present in the courtroom and referenced by counsel for Respondents in the hearing before Judge Lee. Though Judge Lee chose not review the documents, counsel for Respondents referenced them, offered them, and preserved the right to present them before the South Carolina Court of Appeals.

Therefore, this matter should be included in the Record on Appeal.

II. THE ASSERTIONS OF FACT MADE BY RESPONDENTS, INCLUDING THOSE IN THE STATEMENT OF THE CASE, COMPLY WITH THE SCACR.

The Appellant's Motion seeks for the Court to "strike all factual assertions in Respondents' Initial Brief which are not supported by citation to matter properly to be included in the Record on Appeal." *See* Appellant's Memorandum of Law in Support of Motion to Strike, p. 6. It is not entirely clear to the undersigned what Appellant is attempting to do. However, it seems that this argument seeks for the Court to buy wholesale Appellant's Statement of the Case and reject Respondents' Statement of the Case.

The South Carolina Appellate Court Rules instructs as follows:

The brief of respondent shall conform to the requirements of Rule 208(b)(1)(A)-(E), except that *a statement of the issues or of the case need not be made unless the respondent is dissatisfied with the statement of the issues or of the case by appellant.* If a respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant's statement of the case.

SCACR 208(b)(2) (emphasis added). Respondents were dissatisfied with the statement of the case in Appellant's initial brief and therefore provided their own. Appellant's statement of the case presents allegations of defamation and malicious prosecution, while Respondents' statement of the case presents, *inter alia*, a summary of the information presented to the Trial Court.

One item to which the Appellant objects has to do with the terms of the plea agreement in which Appellant's brother pled no contest to charges of ill-treatment of animals, which led to charges pending against the Appellant being nolle prossed. Respondents have argued that the termination of criminal proceedings against Appellant do not satisfy the malicious prosecution element that the Appellant received a favorable

termination of the proceedings. Appellant claims that “there is absolutely no evidence (of Record or otherwise) to support that false statement, and the trial court made no such finding in its Order.” *See* Appellant’s Memorandum of Law in Support of Motion to Strike, p. 4.

Contrary to Appellant’s assertions, the Trial Court found as follows:

On March 13, 2008, Plaintiff, Terry Trexler, and Hazelene Trexler were indicted on five counts of ill treatment of animals. The South Carolina Attorney General entered a deal with Terry Trexler where he would plead no contest to ill treatment of animals, and he, Hazelene Trexler, and the Plaintiff would relinquish all ownership interest in the seized horses. On July 15, 2010, this Court nolle prossed the charges against the Plaintiff.”

Exhibit A, p. 1-2. Judge Lee’s Order clearly includes reference to a plea agreement involving the Trexler family and Respondents described a portion of that order in their Initial Brief. The Rules allow for Respondents to include a “description of such orders, judgments, decisions and proceedings of the lower court... that may have affected the appeal, or may throw light upon the questions involved in the appeal.” SCACR 208(b)(1)(C).

Another extract of Respondents’ brief to which Appellant objects is that Respondents “dedicate an entire paragraph to providing an overview of dubious accuracy regarding civil actions commenced by Appellant’s mother and brother and subsequently dismissed.” *See* Appellant’s Memorandum of Law in Support of Motion to Strike, p. 5. As noted above, the rules allow for the undersigned to describe proceedings of the lower court that may have affected the appeal, or may throw light upon the questions involved in the appeal. *Id.* At the very heart of Appellant’s defamation claim is what happened with proceedings against him and his family. Certainly a description of similar actions

filed by his family which were dismissed by stipulation fits within the parameters of Rule 208.

The other points to which the Appellant objects are related to the existence of horse ownership records, the deposition testimony of Respondent Wayne Brennessel, and the deposition testimony of Appellant. All of those items are addressed *supra*.

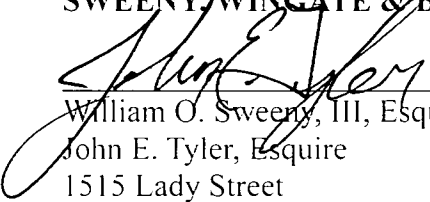
Therefore, the assertions of fact made by Respondents comply with the governing rules.

CONCLUSION

For the reasons stated above, Appellant's motion to strike should be denied.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



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Columbia, South Carolina

December 31, 2014

CERTIFICATE OF SERVICE

I, the undersigned secretary of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for Respondents, do hereby certify that I have served a copy of the foregoing Return in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

W. Westbrook Wills, III, Esquire
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Attorney for Plaintiff James W. Trexler

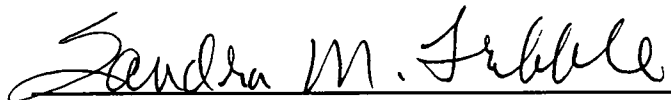
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Sandra M. Tribble

Columbia, South Carolina
December 31, 2014



SWEENEY WINGATE & BARROW P.A.
December 31, 2014

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VIA HAND DELIVERY

V. Claire Allen
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SC Court of Appeals

RE: James W. Trexler v. The Humane Society
Civil Action No.: 2012-CP-40-4652
Our File: 1395-8358

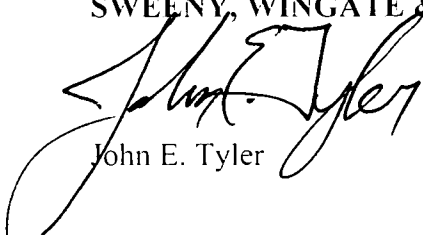
Dear Ms. Allen:

Enclosed please find the original and seven copies of Respondent's Return to Appellant's Motion to Strike in the above-referenced case. Please file the original and six of the copies and return one stamped copy to our courier.

Should you have any questions or concerns regarding this matter, please do not hesitate to contact me.

Respectfully,

SWEENEY, WINGATE & BARROW, P.A.


John E. Tyler

JET/smt

Enclosure

CC: William H. Johnson, Esquire
W. Westbrook Wills, III, Esquire
Matthew D. Hamrick, Esquire
Roopal Ruparelia, Esquire