THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. DeAndrea Gist Benjamin, Circuit Court Judge

Circuit Court Case No. 2010-CP-40-1343
S.C. Court of Appeals Case No. 2014-002032

James W. Trexler,

Appellant,

v.

Richland County and the Sheriff of Richland County in his Official Capacity, a/k/a Richland County Sheriff's Department

Respondents.

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SC Court of Appeals

INITIAL BRIEF OF APPELLANT

William H. Johnson
Law Offices of William H. Johnson, LLC
411 North Brooks Street
Post Office Box 137
Manning, South Carolina 29102
(803) 435-0909 (telephone)
(803) 435-2858 (facsimile)
-and-
W. Westbrook Wills III
Attorney at Law
PO Box 822
Folly Beach, SC 29439

(843) 805-6300 (telephone)
(866) 922- 8596 (facsimile)
-and-
Matthew D. Hamrick
Attorney at Law
Tidewater Executive Center
222 W. Coleman Blvd.
Mt. Pleasant, SC 29464
(843) 693-4700 (telephone)
(877) 524-5023 (facsimile)
ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in finding facts which are clearly erroneous, or which are contrary to or disputed by the evidence of Record.

2. Whether the trial court erred in granting summary judgment in favor of Respondents on Appellant's malicious prosecution claim where Appellant presented evidence sufficient to create a question of fact as to whether probable cause existed for his arrest.

3. Whether the trial court erred in finding probable cause for Appellant's arrest existed as a matter of law without considering the evidence of Record demonstrating a genuine issue of material fact as to its existence.

4. Whether the trial court erred in granting summary judgment in favor of Respondents on Appellant's defamation claim where it found Appellant was required to demonstrate Respondents' statements were made with "actual malice" thereby precluding Respondents' liability under the South Carolina Tort Claims Act.

STATEMENT OF THE CASE

This is a malicious prosecution case that arises out of the Sheriff of Richland County, in his official capacity a/k/a Richland County Sheriff's Department's ("Respondents" or "RCSD") participation in the instigation and continuation of Appellant's 2008 arrest and subsequent prosecution, over the course of two and a half years, on misdemeanor, followed by felony, charges of ill treatment to animals. This case

also involves defamation arising out of statements Respondents published to the media in connection with the arrest and prosecution of Appellant.

Appellant alleges that the Respondents partnered with the agents of the Humane Society for the Prevention of Cruelty to Animals ("HSPCA") in the malicious instigation and continuation of legal process against him without probable cause, and with actual or constructive knowledge Appellant was not involved with the activity and ownership upon which the charges against him were brought. Appellant further alleges Respondents defamed him by publishing a press release to the media falsely reporting that he had been charged with the kidnapping of an HSPCA cruelty investigator and implicating him in felony level animal cruelty of multiple horses in both South Carolina and Georgia. Appellant alleges that as a direct result of the malicious prosecution and defamation by the Respondents, he lost his job, salary, pension, retirement benefits, his ability to obtain like employment, and has suffered irreparable harm to his personal and professional reputation.

Appellant filed his original Complaint on February 26, 2010, and subsequently filed his Amended Complaint on June 23, 2010. On January 5, 2012, after obtaining leave of Court, Appellant filed his Second Amended Complaint in which he added his cause of action for malicious prosecution. Respondents moved for summary judgment on September 3, 2013, and filed their Memorandum of Law in Support of Motion for Summary Judgment. (See Defendants' Motion for Summary Judgment; Defendants' Memorandum In Support of Motion for Summary Judgment ("Memo. of Def.")). On October 20, 2013, Appellant filed his response Memorandum in Opposition to Respondents' Motion for Summary Judgment (Memo. of Pl.).

On January 27, 2014 the Honorable DeAndrea Gist Benjamin presided over the hearing on Respondents' Motion for Summary Judgment (See Hearing Transcript of January 27, 2014 ("Transcript")). Following the January 27, 2014 hearing, on February 4, 2014, counsel for Respondents sent Judge Benjamin an e-mail containing supplemental argumentation. (See E-Mail Supplemental Brief of Defendant ("Supp. Brief of Def.")). Also on February 4, 2014, counsel for Appellants objected to the additional briefing and requested that if the court were to consider Respondents' supplemental argumentation, that Appellant be allowed a chance to submit a supplemental brief in response. (See Plaintiff's Objection to Supplemental Brief of Defendants ("Pl.'s Object. to Supp. Brief"). On April 9, 2014, with permission from the court, Appellant filed his Supplemental Brief in Response to Motion for Summary Judgment (See Plaintiff's Supplemental Brief in Response to Motion for Summary Judgment ("Pl.'s Supp. Brief").

On May 15, 2014, Judge Benjamin entered a Form 4 Order granting Respondents' Motion for Summary Judgment. (See Form 4 Order). On May 15, 2014, Judge Benjamin requested that counsel for Respondents prepare a proposed order, which he submitted on June 26, 2014. On August 20, 2014, Judge Benjamin signed and entered the Order Granting Summary Judgment in Favor of Respondents (See Order). Appellant received written notice of the filing of the Order the same day. Appellant served his Notice of Appeal on September 18, 2014. (See Notice of Appeal).

STANDARD ON APPEAL

Summary judgment is appropriate if "there is no genuine issue as to any material fact." Rule 56(c), SCRCP. Summary judgment should be granted only where it is perfectly clear that no genuine issue of material fact exists and an inquiry into the facts is

not desirable to clarify application of the law. See Bates v. City of Columbia, 301 S.C. 320, 321, 391 S.E.2d 733, 733 (Ct. App. 1990) (citing Lattie v. SHS Enterprises, Inc., 300 S.C. 417, 389 S.E.2d 300 (1990)). In determining whether a triable issue of material fact exists, the court must construe all facts and inferences in the light most favorable to the non-movant. Wogan v. Kunze, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008).

In granting summary judgment, the trial court must conclude the moving party is entitled to a judgment as a matter of law. Rule 56, SCRCP; Wilson v. Moseley, 327 S.C. 144, 146, 488 S.E.2d 862, 863 (1997). As a conclusion of law, the appellate courts review the trial court's grant of summary judgment de novo. See Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) ("An appellate court reviews the granting of summary judgment under the same standard applied by the trial court."). In a de novo review, the appellate courts independently review the record to determine if summary judgment was proper. See Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2008).

ARGUMENT

1. *The Trial Court erred in finding facts which are clearly erroneous, or which are contrary to or disputed by the evidence of Record.*

When ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Anthony v. Padmar, Inc., 307 S.C. 503, 415 S.E.2d 828 (Ct.App.1992). It is not, however, the job of the trial court to find facts, but rather to find if a question of fact exists. "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony . . ." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5

(2006). Moreover, factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists. Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct.App.1986). (holding that the judge cannot consider factual statements of counsel in a motion for summary judgment).

The trial court throughout the Order[1] has made factual findings which either have no evidentiary support, or which are contrary to or disputed by the evidence, pleadings, and other materials of Record. By way of example, but without limitation,[2] The trial court's Order sets out as fact throughout that allegedly mistreated horses were found on Appellant's property. (See Order at 2, 3, 4, and 5). That fact is clearly contrary to the pleadings, affidavits, the evidence of Record, and undeniably disputed. The trial court also found as fact that Appellant's brother identified himself to officials as Appellant during an investigation prior to Appellant's arrest, and that an investigator for the HSPCA "provided a written statement that the man who (falsely) identified himself as 'James Trexler' (Plaintiff) blocked her in and physically would not let her leave." (See Order at p. 2). Again, this is a disputed fact that is flatly contradicted by the evidence of record as thoroughly discussed below. The statement provided by the HSPCA investigator contains no such information. (See Exhibit "I" to Memo of Pl.). Further the trial court found that an investigator for the HSPCA sought arrest warrants for Appellant of her own volition (See Order at p. 4), and that "Except for one RCSD deputy carrying

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[1] The trial court signed and entered the proposed order drafted by counsel for Respondents as it was submitted and without making one change.

[2] Because this Court reviews the trial court de novo, it will have the opportunity to assess for itself which of the trial court's findings of fact are not supported by or contrary to the evidence of Record, or are disputed by the evidence, pleadings, depositions, or other materials of Record.

out a ministerial duty (*i.e.* effectuating service of a duly authorized and facially valid arrest warrant on February 27, 2008), [Respondents'] employees were not involved in swearing out the warrant or prosecuting the matter." (See Order at p. 5). This is a clearly disputed fact and contrary to the evidence of record, as thoroughly discussed below. Additionally, the trial court found as fact that "[Appellant] has not alleged in his Complaint nor presented any evidence to show that the arrest warrant issued by Richland County Magistrate Harold Cuff was void, facially deficient, or not facially valid. (See Order at p. 6). Again, as discussed below, that assertion of fact is flatly contradicted by the pleadings, affidavits, and evidence of Record demonstrating Respondents and the HSPCA obtained the arrest warrants by lying to the Magistrate and providing false information in the affidavit attesting to probable cause.

It is telling that the trial court included such abundant finding of fact to support its rulings that probable cause existed as a matter of law, and that Appellant's defamation claim is barred by statute and fails as a matter of law. To permit such a finding of facts by the trial court which are not supported or disputed by the evidence does harm to the judicial process. To the extent the trial court based its grant of summary judgment on the inaccurate or disputed facts it finds in its Order, its ruling was in error. See Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005) (an abuse of discretion occurs when a ruling is based on an error of law or a factual conclusion that is without evidentiary support.).

2. *The Trial Court Erred in Granting Summary Judgment in Favor of Respondents on Appellant's Malicious Prosecution Claim Because Appellant Presented Evidence Sufficient to Establish or Create a Question of Material Fact as to Each Element of His Cause of Action.*

In granting summary judgment in favor of Respondents, the trial court held

Appellant failed to demonstrate Respondents instigated or continued judicial process against Appellant, and that probable cause for Appellant's arrest and prosecution was conclusively established by an arrest warrant issued by the Magistrate and the indictments against Appellant were true billed by the Grand Jury. (See Order at pp. 6-7). The trial court's ruling is based on disputed or unsupported facts, and ignores the evidence of Record and relevant law to the contrary.

To maintain an action for malicious prosecution, a plaintiff must demonstrate 1) the institution or continuation of original judicial proceedings, either civil or criminal; 2) by, or at the instance of, the defendant; 3) termination of such proceeding in plaintiff's favor; 4) malice in instituting such proceeding; 5) want of probable cause, and 6) resulting injury or damage. Parrott v. Plowden Motor Company, 246 S.C. 318, 321, 143S.E.2d 607, 608 (1965) (referencing 34 Am.Jur., Malicious Prosecution, Sec. 6, p. 706; Prosser v. Parsons, 141 S.E.2d 342 (1965); Gibson v. Brown, et al., 141 S.E.2d 653 (1965)).

First, without citing to any authority supporting the proposition, the trial court appears to have adopted as a legal conclusion Respondents' own unsupported argument that because Respondents did not personally swear out the arrest warrant for Appellant they cannot be found to have instituted the prosecution against him. (See Order at p. 5). In so holding, the trial court indicates in the Order that it relied on deposition testimony by Elizabeth Perry, an investigator with the HSPCA, that she was the sole affiant on each of the arrest warrants for Appellant and that "she sought these warrants on her own volition . . . ." (Order at p. 4). However, nowhere in the deposition testimony of Elizabeth Perry before the trial court (or anywhere else for that matter) did she testify she obtained the warrants on her own volition. (See Exhibit G to Memo of Pl.). Moreover, that Elizabeth Perry acted alone and of her own volition in swearing out warrants for

Appellant's arrest is clearly disputed in the pleadings and the evidence of record. (See Second Amended Complaint at paras. 29-38; see also Exhibits "D.1and D.2", "E," "F," "G," "M," "N," and "O" to Memo. of Pl.). In support of its ruling, the trial court further found any continued prosecution of Appellant after his arrest was by or at the instance of the offices of the Solicitor and Attorney General, and did not include Respondents. (Order at p. 7). There is no evidence in the record to support such a fact, and Appellant has submitted evidence demonstrating the contrary. (See Exhibits "D.1and D.2", "E," "F," "G," "M," "N," and "O" to Memo. of Pl.).

Nevertheless, under South Carolina law, Respondents may be found liable in an action for malicious prosecution where they were active participants in the instigation of process and prosecution of Appellant. See Gibson v. Brown, 245 S.C. 547, 559, 141 S.E.2d 653,654 (1965) ("[a]ll persons who participate in a malicious prosecution are jointly liable for the resulting injury, and joint liability for a malicious prosecution may exist without reference to the existence of any conspiracy.").

In Gibson, the South Carolina Supreme Court ruled a plaintiff's complaint stated a claim for malicious prosecution against a father and daughter where the complaint did not allege father swore out arrest warrants against the plaintiff, but rather alleged he advised, aided and abetted his daughter in prosecuting charges against the plaintiff. Id. at 548-9, 654. In so ruling, the Supreme Court noted that "[g]enerally, a mere passive knowledge of, acquiescence in, or consent to the acts of another, for which one is not otherwise responsible, is not sufficient to render the latter liable in an action for malicious prosecution; it must be shown that he was affirmatively active in instigating or participating in the prosecution." Id. at 550, 654 (citing 34 Am.Jur., Section 22, p. 715;

see 20 A.L.R. p. 1322). "One who does not swear out the warrant cannot be held liable in an action for malicious prosecution **unless** he had instituted a criminal action against plaintiff, or had caused one to be maintained **or had voluntarily aided or assisted in its prosecution.**" Id. at 550, 655 (citing Nance v. Gall, 187 Md. 656, 50 A.2d 120, 51 A.2d 535) (emphasis supplied).

Here, as in Gibson, Appellant pleaded, argued, and submitted ample evidence to demonstrate Respondents worked hand in hand with the HSPCA in a joint investigation of alleged mistreated horses, taking an active part in determining a course of action in the initial investigation, advising the HSPCA on obtaining search and arrest warrants, participating in the searches and seizure of the horses, evaluating the horses, bringing the charges against Plaintiff, and ultimately arresting him, and testifying before the Grand Jury with regard to the charges in the indictments. Appellant further alleged and presented evidence demonstrating Respondents' active participation in the joint investigation and prosecution with the HSPCA resulting in the solicitor increasing the charges against Appellant to multiple counts of felony cruelty to animals.

Perhaps the strongest evidence of Respondents' active participation in the initiation and continuation of judicial process against Appellant is their own admission set out in the very press release published by Respondents that forms the basis of Appellant's defamation claim. "Sherriff Leon Lott stated that investigators from the Sheriff's Department and the HSPCA will continue to work with the Solicitor's Office here and authorities in Georgia to make sure the Trexlers receive the punishment they deserve and are prosecuted to the fullest extent of the law." (See Exhibit M to Memo. of Pl.)

In light of the law as set out by the Supreme Court in Gibson, supra, the question before the trial court was whether any evidence exists to create a genuine question of material fact with regard to Respondents' level of involvement and participation in the instigation and continuation of judicial process against Appellant. The evidence clearly demonstrates such a question of fact.

Next, the trial court held Respondents were entitled to summary judgment because it found probable cause for Appellant's arrest and continued prosecution existed as a matter of law. (Order at p. 5). Relying on Kinton v. Mobile Home Industries, Inc., 262 S.E.2d 727 (1980), the trial court reasoned probable cause existed as a matter of law because a magistrate signed a warrant to arrest Appellant and the Grand Jury "true billed" the indictments against him creating "prima facie" evidence of probable cause which "serves to foreclose Plaintiff's malicious prosecution cause of action." (Order at p. 6). However the trial court seems to have overlooked the second half of the analysis as set out in Kinton and its progeny. While a true bill is "prima facie" evidence of probable cause it is not conclusive, and the presumption is rebuttable. See Law v. S. C. Dept. of Corrections, 365 S.C. 424, 629 S.E.2d 642 (2006).

In Law, the Court found probable cause existed as a matter of law where the indictments against plaintiff were true billed by the Grand Jury **and** where the underlying facts supported probable cause to instigate or pursue criminal charges. See id. at 437, 649 (emphasis added). The Law Court found the facts and circumstances underlying the instigation of proceedings against the Appellant did support the presumption of probable cause created by true-billed indictments by the Grand Jury, but only because they were the result of a thorough investigation, included the interviews of over forty witnesses, and

were based on actual knowledge of historical conspiracy. Id. at 437, 647.

Here, unlike in Law, Appellant submitted evidence demonstrating that Respondents and the HSPCA not only instigated proceedings against Appellant based on unreliable information from other individuals, but they did so without performing any independent investigation whatsoever as to whether Appellant actually owned any horses or owned the land on which allegedly mistreated horses were found. Unbelievably, the evidence of record also demonstrates the HSPCA, with the knowledge and participation of the Respondents, also obtained Appellant's arrest warrant by swearing as true in an affidavit to a Magistrate facts it did not know to be true, and in fact were false. Investigator Perry, swore to the Magistrate that probable cause existed for Appellant's arrest based on the fact that Appellant was the owner of the five subject horses. However, evidence before the trial court existed to show Perry, in fact, did not know, as she swore she did, that Appellant owned any of the horses he was accused of mistreating, nor did she have any reason to believe, when she swore out the warrant, that he was the owner. (addressed below).

In her deposition taken on January 17, 2012, counsel for Appellant asked Investigator Perry if she did any investigation before making the affidavit to obtain a warrant for Appellant's arrest to determine whether Appellant owned the horses. Investigator Perry responded "they [horses] were on his property so -- I mean --" (See Exhibit "G," to Memo. of Pl. at 108:3). When counsel for Appellant asked Investigator Perry if she represented Appellant as the owner of the horses based solely on the fact he allegedly owned the property, Investigator Perry indicated she thought that was not the only reason why, but she could not recall any other reasons. (Id. at 108:4-13).

Investigator Perry further admitted in her deposition she did no search of the ownership records of the subject horses to determine who owned them. (Id. at 111:22-23).

Counsel for Appellant also asked RCSD Investigator Wagner whether, to her knowledge, the HSPCA did any investigation into whether Appellant owned any horses before swearing an affidavit to obtain his arrest warrant. Investigator Wagner indicated she did not know of any investigation that was done by the HSPCA into whether Appellant actually owned the horses he was accused of abusing. (See Exhibit "G" to Memo of Pl. at 105:5-16). Investigator Wagner also indicated that Investigator Perry never communicated to her she had evidence Appellant owned the subject horses prior to attesting that probable cause existed to arrest Appellant. (Id. at 112:11-15). Furthermore, when Counsel for Appellant asked Investigator Perry if she did any investigation of property records to determine whether Appellant owned the property on which the subject horses were found and seized, Investigator Perry indicated that the HSPCA did not have the ability to do that kind of search. (See Exhibit "G" to Memo of Pl. at 111:17-20).

More troubling still is the evidence Appellant presented to the trial court that Elizabeth Perry actually lied in her affidavit to the Magistrate to obtain an arrest warrant. Investigator Perry's arrest warrant affidavit states that upon the RCSD and HSPCA's search of the property purportedly belonging to Appellant, no food or hay was found on the property. (See Exhibits "L.1 – L.5" to Memo of Pl.). However, she stated just the opposite in her January 17, 2012 deposition. When counsel for Appellant inquired as to whether during the search of the property purportedly belonging to Appellant she looked inside the garage, Investigator Perry state she did. When counsel for Appellant asked

what she saw there, Investigator Perry admitted she saw horse food. (See Exhibit "G" to Memo of Pl. at 113:7-14). RCSD Investigator Wagner was also present for, and participated in, the search of 412 Derby Ln., and was presumably aware of the horse food found in the garage. (See Exhibit "K" to Memo of Pl.).

RCSD Investigator Wagner, herself, admitted in her deposition that it would be improper for an affiant, in order to obtain an arrest warrant, to swear to a magistrate as true facts he or she knew were false. (See Exhibit "H" to Memo of Pl. at 111:11-14). The U.S Supreme Court was of the same opinion in Franks v. State of Delaware, 438 U.S 154, 98 S.Ct 2674 (1978). "The requirement that a warrant not issue but upon probable cause, supported by Oath or affirmation, would be reduced to a nullity if [an affiant] was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." Id. at 168, 2682. Nevertheless, despite first hand knowledge the arrest warrant for Appellant's arrest was based on false information, the RCSD made no objection to the warrant, and executed it by arresting Appellant. (See Exhibit "B" to Memo of Pl. at 169:17-170:10).

Unlike in Law, 365 S.C. 424 (2006) supra, Appellant submitted evidence to the trial court to indicate Respondents and HSPCA did little to no investigation as to whether Appellant owned the horses or the land the horses were on prior to arresting him. As such, sufficient evidence exists to rebut the presumption of probable cause and create a genuine question of material fact as to underlying facts supporting its existence.

Moreover, Appellant submitted evidence to the trial court supporting his assertion Respondents manipulated their own records in an attempt to "manufacture" probable

cause for his arrest, after the fact. Examination of the evolution of RCSD Investigator Wagner's Investigative Follow Up Report from two different time periods shows the reports were modified after Appellant's arrest to specifically implicate him, by name, as being involved with the mistreatment of the horses initially identified at the Zeigler Rd. property. (See Exhibits "D.1" and "D.2" to Memo of Pl.). Exhibit "D.1" is a copy of Wagner's Investigative Follow Up Report created on 2/22/2008 and containing date entries starting on 2/13/2008 and ending on 2/27/2008. Exhibit "D.2" is a copy of a continuation of the same report, created on 2/22/2008, but with date entries starting on 2/13/2008 and ending on 3/10/2008. Information in the header of the Exhibit "D.2" shows the report created on 2/28/2008, and was last modified by the creator on 4/07/2008, after Appellant was arrested and released on bond. The language of the reports in Exhibits "D.1" and "D.2" between 2/13/2008 and 2/27/2008 is identical with the exception of an inserted paragraph under the date entry of 2/19/2008 in Exhibit "D.2" that does not exist under that date entry in Exhibit "D.1." Specifically, the inserted paragraph reads:

> Michelle [Hart] told me the first time she went to investigate the property on Zeigler Rd. no one was around and the gate was locked so she posted the property. Then she received a call from a man who said he was James Trexler with the SC Department of Agriculture. He was very belligerent and told her he owned the horses and she could not go on his property to look at the horses. That is why she had to go on Lori Stokes' property to try to take pictures of the horses.

(See Exhibits "D.1" and "D.2" to Memo of Pl. under date entry 2/19/2008). Of note is the fact that the date entry 2/19/2008 precedes the creation of either of the report versions and was subsequent to Investigator Wagner's taking of Hart's formal written statement (Exhibit "I" to Memo of Pl.). Importantly, neither Michelle Hart's HSPCA cruelty report

from the same date entry, nor her official written statement made to Investigator Wagner on 2/19/2008 mention anything at all about Hart receiving a call from someone claiming to be Appellant of the S.C. Department of Agriculture. (See Exhibit "E" to Memo of Pl. under date entry 2/13/2008; see also Exhibit "I" to Memo of Pl.).

To withstand a motion for summary judgment in cases like this one that apply the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). In opposition to Respondents' Motion for Summary Judgment as to the malicious prosecution claim, Appellant submitted not merely a scintilla, but ample evidence to create a question of fact as to whether probable cause for his arrest was supported by the underlying facts and circumstances. The question of whether probable cause exists is ordinarily a jury question, although it may be decided as a matter of law when the evidence **yields but one conclusion**. Parrott, 246 S.C. at 323, 143 S.E.2d at 609 (emphasis added). Because the evidence submitted by the Appellant clearly demonstrates more than one conclusion, particularly taking the facts and inferences in the light most favorable to Appellant, a genuine question of material fact exists as to the existence of probable cause, and the trial court erred in granting summary judgment in favor of Respondents on that issue.

3. The Trial Court Erred in Granting Summary Judgment in Favor of Respondents on Appellant's Defamation Claim Where it Found Appellant was Required to Demonstrate Respondents Statements Were Made With "Actual Malice" Thereby Precluding Respondents Liability Under The South Carolina Tort Claims Act.

To establish a claim for defamation a plaintiff must prove "1) a false and defamatory claim was made; 2) the unprivileged statement was published to a third party;

3) the publisher was at fault; and 4) either the statement was actionable regardless of harm or the publication of the statement caused special harm." Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). "A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." Holtzscheiter v. Thompson Newspapers, Inc., 332 S.C. 502, 510, 506 S.E.2d 497, 502 (1998) (Holtzscheiter II) (quoting Lesesne v. Willingham, 83 F. Supp. 918, 921 (E.D.S.C. 1949)).

Defamation is actionable per se if it involves "written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous . . ." Id. "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). Common law actual malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, meaning with conscious indifference toward the plaintiff's rights. Padgett v. Sun News, 278 S.C. 26,292 S.E.2d 30 (1982). In defamation actions involving a "public official" or "public figure," the plaintiff must prove the statement was made with "actual malice," i.e., with either knowledge that it was false or reckless disregard for its truth. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

The trial court held Respondents were entitled to summary judgment as a matter of law because Appellant was a public official for purposes of defamation and therefore required to demonstrate Respondents acted with "actual malice" in publishing defamatory statements about him, and which precluded Respondents' liability as a government entity under S.C Code § 15-78-60(17). (See Order at p. 11). Implicit in its ruling is the trial court's determination that Appellant, in fact, was a public official. Despite the pleadings, affidavits and evidence Appellant submitted to the trial court demonstrating his employment status did not qualify him as a public official (See 2nd Amended Complaint, see also Exhibits "A" and "B" to Memo. of Pl.), the trial court appears to have held Appellant to be a public official based solely on the holding in a separate case with different facts in which the court found Appellant was a public official. (See Exhibit "J" to Memo. of Def.) While the trial court does not enunciate it in its Order, the trial court appears to have applied the "law of the case" doctrine, which Respondents argued applied here. (See Memo. of Def. at p. 11). The trial court does not indicate in its Order that it considered any other evidence or made any independent determination regarding Appellant's status as a public official. To the extent the trial court relied on the "law of the case" doctrine to conclude Appellant was a public official in the present case, it is in error, as Appellant appealed that ruling (see Exhibit "Q" to Memo. of Pl.) prior to the trial court issuing its ruling here. See Williamsburg Rural Water and Sewer Co., Inc. v. Williamsburg County Water and Sewer Authority, 593 S.E.2d 154, 357 S.C. 251 (S.C.App. 2003) (noting that a party in the case "did not appeal either of these findings; therefore, it is the law of this case"); Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000) (stating an unappealed ruling is the law of the case);

ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (unappealed ruling is law of the case); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.").

Based on its finding Appellant is a public official, the trial court held he must demonstrate Respondents made defamatory statements about him with "actual malice," the standard announced in New York Times v. Sullivan, 376 U.S. 254, 279 (1964). Then, relying on the ruling in Gause v. Doe, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994), the trial court determined pursuant to the South Carolina Tort Claims act a government agency is immune from liability arising from its employee's conduct "which constitutes… actual malice…[.]" SC Code § 15-78-60 (17) (See Order at p. 11).

Appellant recognizes the precedent set by the Gause case would seemingly preclude a defamed public official from bringing a defamation suit against a government entity under the Tort Claims Act because the public official must prove the government entity acted with "actual malice" in defaming him, which is a listed exception to the entity's waiver of immunity under S.C Code § 15-78-60(17). However, Appellant asserts that the Gause case was wrongly decided in this regard. Specifically, in deciding the case, the Gause court failed to recognize the important distinction between the term "actual malice" as used in Section 15-78-60 (17) and "actual malice," otherwise referred to as "constitutional malice," which is the standard set forth in New York Times v. Sullivan, 376 U.S. 254, 279 (1964) as a constitutional threshold for the degree of negligence required to prove defamation of a public official in function of the important constitutional right to free speech. In the defamation context, "actual malice" has the

following meaning: a defamatory statement is made with actual malice if it is made "with knowledge that it was false or with reckless disregard for whether it was false or not. New York Times v. Sullivan, 376 U.S. 254, 279 (1964). "Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968).

In contrast, common law "actual malice," or "actual malice" for purposes other than defamation, includes an element of intent to harm. "Constitutional actual malice required in defamation actions involving public officials is distinguishable from common law malice, which refers to feelings of ill-will, spite, or desire to injure." Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 581, 556 S.E.2d 732, 737-8 (2001)(citing Sanders v. Prince, 304 S.C. 236, 403 S.E.2d 640 (1991)).

The Sanders court recognized that important distinction, which it felt compelled to clarify in its opinion as follows:

> First, the trial judge's instructions on the definition of actual malice were erroneous because they included the definition of common law malice. In cases involving the defamation of a public official, the plaintiff must prove that the defendant acted with constitutional actual malice, that is, with knowledge that the statement was false or with reckless disregard of its falsity. New York Times v. Sullivan, 376 U.S. 254, 279–80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964). Instructions [on common law malice], which permit the jury to impose liability on the basis of the defendant's hatred, spite, ill will, or desire to injure are clearly impermissible. Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 281, 94 S.Ct. 2770, 2780, 41 L.Ed.2d 745, 760 (1974). "Ill will toward the plaintiff, or bad motives, are not elements of the New York Times standard." Id. Since the parties agreed to the charges given at the trial, we do not reverse on this basis. However, in order to facilitate the retrial of

> this case, we note that the trial judge must instruct the jury on constitutional actual malice as enunciated in New York Times, and must not instruct the jury on common law malice.

Furthermore, to interpret SC Code § 15-78-60 (17)'s "actual malice" to be the same as "constitutional malice" in the defamation context would lead to absurd results, as a governmental agency or state entity could never be held liable for its employee's defamation of a public official. "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). An appellate court will reject the interpretation of a statute that would lead to an absurd result the legislature could not have intended. Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008).

In any event, a genuine issue of material fact exists as to whether the Appellant was a public official, and therefore whether even the "constitutional actual malice" standard applies. If the Appellant was not a public official, he is only required to demonstrate common law malice, and there are, likewise, genuine issues of material fact as to whether Respondents were negligent or grossly negligent, in publishing defamatory statements about the Appellant.

Following Appellants arrest on February 27, 2008, Chris Cowan, RCSD Public Information Officer published the Press Release as described above. The Press Release falsely states that Appellant had been charged with kidnapping a HSPCA investigator, and also implicates him in the severe and barbaric treatment of over 28 horses, insinuates this abuse occurred both here and in Georgia, that he acted in concert with his mother and brother to commit these crimes against the horses, and that he along with his family have

proven time and again they have no business owning animals. (See Exhibit "M" to Memo. of Pl.).

Cowan admitted in his deposition that he drafted the Press Release from his hand-written notes he took while collecting the information from the investigators with the RCSD and the HSPCA for inclusion in the publication. (See Exhibit "R" to Memo of Pl. at 22:1-23:12, 88:11-17). Despite Cowan's testimony that he regularly takes copious notes when gathering information for press releases (see id. at 78:23-24), Appellants produced evidence of the two handwritten pages of notes Chris Cowan used to draft the Press Release (See Exhibit "S" to Memo. of Pl.). While the notes are chaotic and jumbled, their examination reveals they contain directly contradictory information regarding who allegedly kidnapped the HSPCA Investigator Hart. At the top of the first page of Chris Cowan's handwritten notes, he has written "James Trexler Blocked in HSPCA Investigator." (See id.). Then, half way down the very same page, under Terry Trexler, Cowan has indicated that individual has been charged with "1 count kidnapping, Blocking in Humane Society Inv, 2/13, evaluation, was Blocked in By Terry. [sic]" (Id.). Despite having direct access to view the Respondents own records and reports for cases, including the investigative reports on the subject case (See Exhibit "H" to Memo. of Pl. at 130:9-21), Chris Cowan indicates he did not verify or attempt to verify any information given to him by agents of the Respondents and the HSPCA on which he based the Press Release. (See Exhibit "R" to Memo of Pl. at 49:14-51:10). Considering Cowan based the Press Release on the notes he had and conversations with agents of different agencies, an important question of material fact exists as to whether Cowan acted with reckless disregard or with disregard for Appellant's rights in not taking the

time to verify two directly contradictory pieces of information in his own notes as to who was charged with kidnapping before publishing the Press Release to the media. Appellant submitted further evidence to the trial court that following publication, Cowan tried to sidestep responsibility for publishing the defamatory material regarding Appellant, and shift the blame to the HSPCA. In an e-mail Cowan believes he sent to the State Newspaper Cowan states,

> Since we have a great relationship I feel it is ok to say thanks for putting the hit in the eye squarely on me this morning's paper [sic.] – I realize I'm responsible for the news releases that go out from RCSD and you guys are worried about backlash from a possible attorney but the Humane Society told you guys yesterday that it was their bad information that caused the error . . . That's what a boxer would call a low blow – easily could have been written to reflect our making the correction and HSPCA being involved in the error.

(See Exhibit "T" to Memo of Pl.; see also Exhibit "R" to Memo of Pl. at 106:8-107:22).

Even if Appellant were to be considered a public official, the inquiry into whether the Respondents acted with constitutional actual malice in defaming him is a question of fact for the jury to weigh the circumstances and make a determination thereon.

Furthermore, as discussed above, Respondents claim S.C. Code § 15-78-60 (17) shields the RCSD from liability for defamation where its employee has acted with "actual malice." However, the defamatory statements against Appellant were not published to the media as the statements of an employee, but as the statements of the Respondents itself. Press Release states throughout that it is Sheriff Lott who is making the statement. In his deposition, when counsel for Appellant asked Sheriff Lott why the press releases are written to reflect that it is he who is reporting the information personally, Sheriff Lott explained it is written that way because "I am the Sheriff of the County and that this is a press release coming from the Sheriff's Department which I am the Sheriff of." (See

Exhibit "U" to Memo. of Pl. at 36:2-15). Sheriff Lott explained his name is meant to personify the Sheriff's Department as a whole. (See id.). Chris Cowan reiterated that fact in his deposition; "[y]our talking about a Release that's speaking on behalf of the Agency as a whole or on behalf of the Department as a whole. So a press release is a representation of the Agency, and the Sheriff is the head of the Agency." (See Exhibit "R" to Memo of Pl. at 94:3-18).

CONCLUSION

Because genuine issues of material fact exist with regard to Appellant defamation claim and the Appellant's status as a public official, the trial court erred in granting summary judgment in favor of Respondents on the basis they are immune from liability from Appellant's claim under the South Carolina Tort Claims Act.

Respectfully submitted,

William H. Johnson
Law Offices of William H. Johnson, LLC
411 North Brooks Street
Post Office Box 137
Manning, South Carolina 29102
(803) 435-0909 (telephone)
(803) 435-2858 (facsimile)
-and-
W. Westbrook Wills III
Attorney at Law
38 Broad Street
Suite 200
Charleston, SC 29401
(843) 805-6300 (telephone)
(843) 278- 9333 (facsimile)
-and-
Matthew D. Hamrick
Attorney at Law
Tidewater Executive Center
222 W. Coleman Blvd.

Mt. Pleasant, SC 29464
(843) 693-4700 (telephone)
(877) 524-5023 (facsimile)
ATTORNEYS FOR APPELLANT

Other counsel of record:

Robert D. Garfield
Davidson & Lindemann, P.A.
P.O. Box 8568
Columbia, SC 29202-8568
ATTORNEY FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2014-002032

James W. Trexler,

Appellant,

v.

Richland County and the Sheriff of Richland County, in his official Capacity, a/k/a Richland County Sheriff's Department,

Respondents.

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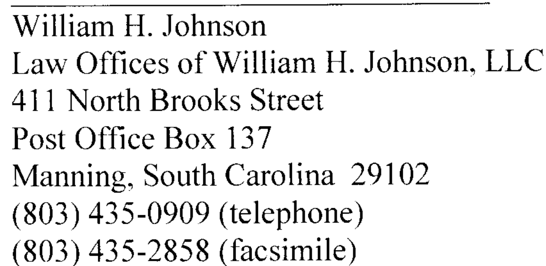
JAN 15 2015
SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the enclosed Appellant's Initial Brief and Appellant's Designation of Matter to be Included in the Record on Appeal upon the Respondents, by depositing a copy of each of them in the United States Mail, postage prepaid, on January 12, 2015, addressed to Respondents' attorney of record, Robert D. Garfield, Davidson & Lindemann, P.A., P.O. Box 8568, Columbia, SC 29202-8568.



William H. Johnson
Law Offices of William H. Johnson, LLC
411 North Brooks Street
Post Office Box 137
Manning, South Carolina 29102
(803) 435-0909 (telephone)
(803) 435-2858 (facsimile)
-and-
W. Westbrook Wills III
Attorney at Law

38 Broad Street
Suite 200
Charleston, SC 29401
(843) 805-6300 (telephone)
(843) 278- 9333 (facsimile)
-and-
Matthew D. Hamrick
Attorney at Law
Tidewater Executive Center
222 W. Coleman Blvd.
Mt. Pleasant, SC 29464
(843) 693-4700 (telephone)
(877) 524-5023 (facsimile)

ATTORNEYS FOR APPELLANT

Other counsel of record:

Robert D. Garfield
Davidson & Lindemann, P.A.
P.O. Box 8568
Columbia, SC 29202-8568

ATTORNEY FOR RESPONDENTS

THE LAW OFFICE OF

W. WESTBROOK WILLS III

W. WESTBROOK WILLS III
Admitted in Georgia & South Carolina

CIVIL TRIAL LAWYER
P.O. BOX 822
FOLLY BEACH, SC 29439

TELEPHONE: (843) 805-6300
FACSIMILE: (866) 922-8596
wwills@wwillslaw.com

January 12, 2015

VIA US MAIL
Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *James W. Trexler v. Richland County (2014-002032)*

Dear Ms. Kitchings:

Please find enclosed the Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal in the above-referenced case, along with a Proof of Service.

I have copied Robert D. Garfield, Esquire with copies this letter and its enclosures for service of the same upon the Respondents.

Thank you for your attention to this matter. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

W. Westbrook Wills III

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Enclosures (as stated)
cc: Robert D. Garfield, Esq. (w/ enclosures)

LAW OFFICE OF
W. Westbrook Wills III
CIVIL TRIAL LAWYER
PO BOX 288
FOLLY BEACH, S.C. 29439

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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