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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Special Circuit Court Judge

Circuit Court Case No. 2010-CP-40-1249
S.C. Court of Appeals Case No. 2013-001581

James W. Trexler,

Appellant,

v.

The Associated Press;
Barrington Broadcasting
South Carolina Corp.;
Raycom TV Broadcasting,
Inc.; The Spartanburg Herald
Journal, Inc.; and The Pacific
& Southern Co., Inc.,

Respondents.

MOTION TO SUPPLEMENT RECORD

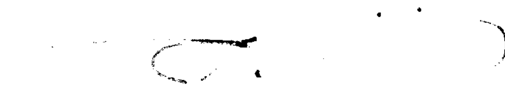
Appellant hereby moves pursuant to Rule 212(b), SCACR to supplement the record in the above-captioned case as follows:

During oral argument the Court asked Appellant's counsel to cite a case for the proposition that an Amended Summons and Complaint may be served before or contemporaneously with the original Summons and Complaint. Appellant's counsel was asked another question by the Court before being able to cite Mims ex re. Mims v. Babcock Center, Inc., 399 S.C. 341, 732 S.E.2d 395 (2012), which states: "Rule 15(a), SCRCP does allow the filing and service of an amended complaint without leave of court, even if the original complaint has not been served [. . .]." Id. at 347, 398.

Also, it has come to the attention of Appellant's counsel that pages 664 through 845 of the Record on Appeal contain Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment from the related case currently on appeal in this Court captioned *James W. Trexler v. Richland County and the Sheriff of Richland County, in his Official Capacity, a/k/a Richland County Sheriff's Department*; Appellate Case No. 2014-002032. This was inadvertently included in the Record on Appeal in place of Plaintiff's Amended Response to Defendant's Motion for Summary Judgment in from this case. A copy of Plaintiff's Amended Response to Defendant's Motion for Summary Judgment (with exhibits) is attached hereto as Exhibit "A."

For the foregoing reasons, Appellant respectfully moves for an Order allowing the record to be supplemented to include Appellant's citation of Mims ex re. Mims v. Babcock Center, Inc., 399 S.C. 341, 732 S.E.2d 395 (2012) at oral argument for the above-quoted proposition, and to have the above-described pages of the Record on Appeal replaced with the Plaintiff's Amended Response to Defendant's Motion for Summary Judgment by way of an Appendix to the Record on Appeal pursuant to Rule 212(b), SCACR.

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
Law Office of W. Westbrook Wills III
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

Other counsel of record:

Jay Bender
Baker, Ravenel & Bender LLP
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091 (telephone)
(803) 779-3423
ATTORNEYS FOR RESPONDENTS

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND James W. Trexler Plaintiff, -vs- The Associated Press, Barrington Broadcasting, Inc., a South Carolina Corp.; Pacific & Southern Company, Inc.; and Raycom TV Broadcasting, Inc. Defendants.	IN THE COURT OF COMMON PLEAS OF THE FIFTH JUDICIAL CIRCUIT Case No.: 2010-CP-40-1249 PLAINTIFF'S AMENDED RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff James W. Trexler ("Plaintiff") pursuant to Rule 56 (e), SCRCP, and responds to the Associated Press, Barrington Broadcasting, Inc., Pacific & Southern Company, Inc., and Raycom TV Broadcasting, Inc.'s (collectively "Defendants") Motion for Summary Judgment as follows:

INTRODUCTION

This is a defamation case that arises out of numerous broadcasts and publications by Defendants containing false and misleading statements concerning the Plaintiff's alleged involvement with malnourished horses. The Defendants are

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broadcast and cooperative media companies that deliver news through media channels including television and Internet. On February 27, 2008, and thereafter, each Defendant published through its respective media channels false information concerning Plaintiff's involvement with the horses, including information they obtained from the February 28, 2008 publication by the Sheriff of Richland County ("SRC") of an e-mail press release (the "Press Release"). The SRC Press Release, attached hereto as Exhibit "A," purportedly provided the media official information concerning the arrest of Plaintiff and his mother and brother following a collaborative investigation of animal cruelty by the SRC and the Humane Society for the Prevention of Cruelty to Animals ("HSPCA"), and mistakenly reported that Plaintiff had been charged with kidnapping.

Plaintiff alleges that as a direct result of the publication of the Press Release by the SRC, and repeated publication by Defendants of false statements associating him with extreme animal cruelty both in South Carolina and Georgia, and accusing him of felony kidnapping, Plaintiff lost his job, salary, pension, retirement benefits, his ability to obtain like employment, and has suffered irreparable harm to his personal and professional reputation.

Plaintiff filed his original Complaint on February 23, 2010. Plaintiff filed his Amended Complaint on June 23, 2010. On March 15, 2011, Defendants moved for summary judgment based, *inter alia,* on privilege under the Fair

Reporting Act. The Court granted summary judgment as to Defendants McClatchy[1] based on the fair reporting privilege, but denied summary judgment as to the media Defendants in the present case with leave to renew if discovery revealed no publications not subject to the fair report privileged. (Judge Barber's March 28, 2011 Order attached as Exhibit "B"). On August 10, 2011, the above-named Defendants filed their second motion for summary judgment citing as grounds, *inter alia,* 1) Plaintiff's Amended Complaint is barred by the statute of limitations, 2) Plaintiff's cause of action for outrage fails to state a claim for relief, and 3) Plaintiff's defamation claim fails to state a claim because he cannot establish Defendants acted with constitutional malice in publishing false statements about him.

On August 10, 2011, the above-named Defendants filed a second motion for summary judgment asserting with regard to Plaintiff's defamation claim only that Plaintiff cannot establish Defendants acted with actual malice in publishing false or misleading statements about him. Defendants' second motion for summary judgment did not include as a ground the fair report privilege. The day before the hearing of Defendant' summary judgment motion, Defendants submitted to Plaintiff their memorandum in which they argue the fair report privilege as a ground for summary judgment. At the December 15, 2011 hearing, Plaintiff

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[1] Defendant McClatchy was named in an associated suit, civil action number 2010-CP-40-1343 which has been consolidated with the present action for discovery and trial.

brought that fact to the Court's attention. The Court decided to reschedule the hearing of Defendants' motion to allow Plaintiff time to properly address the unexpected additional ground.

Defendants' motion is without merit as to those causes of action Plaintiff has not voluntarily dismissed,[2] and for the reasons discussed below this Court should deny Defendants' motion with regard to the remaining claims.

ARGUMENT AND CITATION OF AUTHORITY

I. Summary Judgment

Summary Judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In evaluating a motion for summary judgment, the Court "is to liberally construe the record in favor of the nonmoving party and give the non moving party the benefit of all favorable inferences that might reasonably be drawn therefrom." Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991). Because summary judgment is a drastic remedy, the Court should invoke it cautiously "so that no person will be improperly deprived of a trial of the disputed factual issues." Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410

[2] Plaintiff intends to voluntarily dismiss his cause of action for common law negligence, civil conspiracy, and outrage against these Defendants.

S.E.2d 537, 543 (1991)(quoting Watson v. Southern Ry. Co. 470 F. Supp. 483, 486 (D.S.C. 1975)). "When ruling on a motion for summary judgment . . . in a defamation action, the court must review the evidence using the same substantive evidentiary standard of proof the jury is required to use in a particular case. George v. Fabri, 345 S.C. 440, 451-54, 548 S.E.2d 868, 874-75 (2001). In determining whether any triable issue of fact exists, the Court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Rule 56(c), SCRCP. When considering a motion for summary judgment based on the pleadings, the Court should be mindful of Rule 8(f), SCRCP, which provides that all pleadings shall be so construed as to do substantial justice to all parties.

II. Plaintiff's claims against Defendants are not barred by the statute of limitations because Plaintiff sufficiently identified Defendants in his timely filed original Complaint, and Plaintiff served Defendants with his Amended Complaint within the time allowed by law.

When Plaintiff filed his original Complaint on February 23, 2010, he was unaware of the precise legal identity those media defendants that published the allegedly defamatory statements at issue in this action. Therefore, Plaintiff named as defendants in his Complaint "all media companies that produced or reported on any event relating to Plaintiff in 2008, 2009, and 2010." On June 23, 2010, prior to serving the Complaint, Plaintiff filed his Amended Complaint in which he more specifically named as defendants those parties to which he broadly referred in his

original Complaint, to wit, the above-named Defendants. Plaintiff served Defendants the same day with the Amended Complaint. (See Affidavit of Personal Service for each Defendant filed on July 8, 2010).

Defendants claim Plaintiff's causes of action are barred by the statute of limitations because Defendants claim Plaintiff added them as parties more than two years after the publications which form the basis of Plaintiff's Complaint and Amended Complaint. Defendants have either ignored or misapprehended Rule 15(c). First, Defendants are proper parties to the original action, and not "added" parties to Plaintiff's Amended Complaint, as Defendants suggest. However, even were Defendants somehow to qualify as different parties than those Plaintiff announced in his Complaint, Plaintiff properly substituted Defendants as proper parties in his Amended Complaint pursuant to Rule 15 (c), SCRCP.

Rule 15 (c), SCRCP provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.
>
> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the

> identity of the proper party, that action would have been brought against him.

"A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing." S.C. Code Ann. § 15-3-20 (b) (2005). Rule 3 (b) thus provides that the period of commencement of an action includes the 120 day service period.

The South Carolina Supreme Court in Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 442 S.E.2d 584 (1994) adopted a four-part test to aid in interpreting the requirements of Rule 15(c): 1) the basic claim must have arisen out of the conduct set forth in the original pleading; 2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defenses; 3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and 4) the second and third requirements must have been fulfilled within the prescribed limitations period. Id. at 214, 586.

Here, Plaintiff timely filed his original Complaint on February 23, 2010 naming as defendants all media companies that produced or reported on any event relating to Plaintiff in 2008, 2009, and 2010. On June 23, 2010, pursuant to Rule 4, SCRCP, Plaintiff filed his Amended Complaint more specifically identifying those media defendants he anticipated in his original Complaint. Each party Plaintiff specifically named in his Amended Complaint was a media company that

produced or reported on events relating to Plaintiff in 2008, 2009, and 2010. Plaintiff then served his Amended Summons and Amended Complaint on each of those Defendants within the original 120 days provided under SCRCP, Rule 3(a)(2) for the service of his original Complaint.

Because Plaintiff's Amended Complaint did not change parties to the lawsuit but more accurately defined them within the original commencement period, Plaintiff's Amended Complaint relates back to the filing of the original Complaint, and his causes of actions with regard to those Defendants are within the statute of limitations.

Even if the Court determines Plaintiff's original Complaint too broadly identified the media defendants, Plaintiff properly and timely substituted the specific media companies as parties in his Amended Complaint. In fact, in that alternative, Plaintiff's naming "all media defendants . . ." is analogous to naming a John Doe defendant in an action where a plaintiff knows a cause of action exists against one or more defendants the true identity of whom is yet unknown to the plaintiff. While this situation arises primarily in hit and run auto accident cases, the underlying legal tenants are the same for other civil actions. S.C. Code Ann. § 38-77-180 permits an injured person to file suit against an unknown driver, and specifically allows that party to instigate an action against the real tortfeasor if he discovers his real identity.

"The language of Rule 15(c) clearly speaks to a *change* in party, not the *addition* of a defendant to an already existing defendant." Jackson v. John Doe, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000)(referencing Kraly v. Vannewkirk, 69 Ohio St. 3d 627, 635 N.E. 2d 323 (Ohio 1994)(determining that Ohio's Rule 15(c), which is similar to our Rule 15(c), allows for relation back when a party is *substituted* but not when a party is added while retaining a party named in the original suit)).

In Jackson, the plaintiff filed her original complaint against an unknown driver pursuant to the statutory scheme established by state law. Nearly four and a half years later the court allowed Jackson to amend her complaint to add Milligan as a defendant. However, Jackson's amended complaint retained John Doe as a named party, and identified him as an unknown driver. The Jackson court recognized, "the addition of a party is not the same as a substitution or change of party." Id. That court, therefore, disallowed the relation back of Jackson's amended complaint with regard to the added party.

Here, if Plaintiff's Amended Complaint cannot be construed as naming the same parties as in his Complaint, then his Amended Complaint clearly substitutes, rather than adds, the specifically named media defendants for the broader description of "all media companies . . .".

Unlike in Jackson, Plaintiff did not add Defendants as new parties while also

retaining as defendants "all media companies . . .". Rather, Plaintiff has replaced "all media companies . . ." with those presently named in the action.

In the present case Plaintiff's amendment to his Complaint satisfies the four-part test announced in Hughes: 1) Plaintiff's basic claims against Defendants arose out of the conduct set forth in his original pleading; 2) each Defendant received notice of Plaintiff's claims and have answered them, have all engaged in discovery, and have, therefore, not been prejudiced in maintaining its defenses; 3) by virtue of the Plaintiff serving each Defendant the with the action, each naturally knew the action would have been brought against it but for the misnomer, 4) each Defendant received notice of Plaintiff's action against them within the 120 days provided by Rule 3(a)(2), SCRCP for the service of Plaintiff's original Complaint. As such, under Jackson Plaintiff properly substituted Defendants and his Amended Complaint legally relates back to the filing of his original Complaint.

III. Statements concerning Plaintiff as published by Defendants were totally false or misleading.

Publications by each Defendant, either in print, on the Internet, or by broadcast were, including that Plaintiff was accused of starving dozens of horses, that he was involved with similar charges of horse abuse in Georgia, that he was the overseer of the properties on which horses were found, and that he was a kidnapper were all false. On February 27, 2008, Plaintiff was arrested and charged with five counts of misdemeanor ill-treatment of animals. On March 13, 2008,

Plaintiff was indicted on 4 counts of felony mistreatment of animals. On July 15, 2010, all charges against Plaintiff were dismissed. Between February 27, 2008 and March 13, 2008, Defendants published articles saying that Plaintiff was charged with felony mistreatment of dozens of animals in South Carolina and Georgia, all of which was false. Prior to March 13, 2008 Plaintiff had not been charged with any felony, and the misdemeanor he was charged with prior to March 13, 2008 only related to five horses in South Carolina, not dozens of horses in South Carolina and Georgia.

IV. The defamatory statements concerning Plaintiff as published by Defendants are not protected under the fair report privilege because Defendants' publications were not fair and accurate reports of a public record.

As a preliminary matter, Plaintiff emphasizes to the Court that these Defendants have been denied summary judgment once already on their claim of qualified privilege under the fair report privilege regarding defamatory statements concerning Plaintiff they published. While the Court did grant Defendants leave to renew on that ground should discovery reveal no unprivileged publications, that has not been the case. Each defamatory publication made by Defendants subsequent to their initial publications reporting on the Press Release did not report on the contents of a public record or judicial proceeding, and therefore is not entitled to the protection of the fair report privilege. The publications by each Defendant of defamatory statements concerning Plaintiff subsequent to reporting

on the content contained in the Press Release was obtained through other sources, the primary source being the HSPCA, which is a private, cause based organization with a social and political agenda.

Under a defense of fair report 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 [qualifiedly or] conditionally privileged, **and**, the privilege is not abused." Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) (citing Restatement (Second) of Torts §593 (1977) (emphasis added). Furthermore, the privilege "extends only to reports of the content of the public record, and any matter added to the report by the publisher, which is defamatory of the person named in the public record, is not privileged." West v. Morehead, 2001 S.C. App. Lexis 263 (2001) (citing Jones v. Garner, 250 S.C. 479, 487, 158 S.E.2d 909, 913 (1968). "Where there is conflicting evidence, the question whether [a qualified] privilege has been abused is one for the jury." Swinton Creek, 334 S.C. at 485, 514 S.E2d at 134.

Defendants claim that reports they published stating Plaintiff engaged in severe and barbaric treatment of horses, and kidnapping were based on the Press Release put out by the Richland County Sheriff's Department, which Defendants claim is a public record. However, the Press Release is not a public record. A public record includes all books, papers, maps, photographs, cards, tapes,

recordings, or other documentary materials regardless of physical form or characteristics, prepared, used, in the possession of, or retained by a public body. S.C. Code Ann. § 30-4-20. Editorialized, e-mail communications containing statements of opinion do not qualify as a public record under the foregoing definition.

Even were the Court to determine the Press Release does qualify as a public record for purposes of the fair report privilege, Defendants are not entitled to the protection of that privilege because 1) their publications concerning Plaintiff were not fair and accurate reports of the contents of the Press Release, and 2) Defendants' liberties in manipulating the facts to magnify Plaintiff's apparent involvement with horses here and in Georgia amounts to an abuse of the privilege.

III. Plaintiff's cause of action for defamation sufficiently states a claim against Defendants because Plaintiff is a private figure and need only demonstrate Defendants acted with common law malice.

Throughout their motion for summary judgment, Defendants unequivocally refer to Plaintiff as a public official and, indeed, base their motion for summary judgment on defamation law as it pertains to public officials. Specifically, Defendants submit they are entitled to a judgment as a matter of law because they claim Plaintiff cannot demonstrate the constitutional malice public officials are required to show to maintain a cause of action for defamation. However, Plaintiff is a private figure and must only demonstrate Defendants acted with common law

malice in publishing false statements about him.

For the purposes of defamation, whether a person is a private figure or a public official is a question of law for the court. See Rosenblatt v. Baer, 383 U.S. 75, 87, 86 S.Ct. 669, 677, 15 L.E.d.2d 597, 606 (1966). This determination must be made on a case-by-case basis after careful examination of the facts and circumstances. Id. Of course, for purposes of summary judgment, the Court must view those facts and circumstances and all inferences that may be drawn therefrom in the light most favorable to the nonmoving party. Rule 56, SCRCP, Estes, 304 S.C. 120 at 121, 403 S.E.2d 157 at 158 (Ct. App. 1991).

The United States Supreme Court, in New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686 (1964) established the rule that a public official must provide clear and convincing proof of "actual malice" to recover damages for defamatory falsehood relating to his or her official conduct. As discussed below, Plaintiff was not a public official, but even if he were the Defendants would still be liable in this case because "'Where the defendant finds internal consistencies or apparently reliable information that contradicts its libelous assertions, but nevertheless publishes those statements anyway, the New York Times actual malice test can be met.'" *Tomblin v. WCHS-TV8,* 434 Fed. Appx. 205 (4th Cir. 2011) (quoting *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1090 (3d Cir. 1988) (citing *Curtis Publ'g Co. v. Butts,* 388 U.S. 130, 161 n.23 (1967))).

The Supreme Court, in Rosenblatt provided guidance on who qualifies as a "public official," and indicates that a "public official" for purposes of the New York Times rules is not to be determined by state law standards. That is not to say, however, that the Court is required to turn a blind eye on a state's own definitions of "public official" when determining whether an individual has substantial enough involvement in government to meet the definition of a "public official" for purposes of constitutional defamation law. The definition of a public officer appears more than once in the South Carolina Code. S.C. Code Ann. § 8-1-10 provides "public officers" are "all officers of the State that have heretofore been commissioned [. . .], members of various State boards, and other persons whose duties are defined by law." § 8-13-100 (27) defines a "public official" as being "an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for office." § 16-3-1040 defines a "public official" as "any elected or appointed official of the Unites States or of this State or of a county, municipality, or other political subdivision of this State."

Neither the U.S Supreme Court nor the Supreme Court of South Carolina has provided an all-encompassing definition of public official, "although it is clear the category **does not** include all public employees." Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 469, 629 S.E.2d 653, 666 (2006), see also Hutchinson v. Proxmire, 443 U.S. 111, 133-34, 99 S.Ct. 2675, 2687

(1979)(emphasis added).

The U.S. Supreme Court and South Carolina case law instructs that a public official is a person who, among the hierarchy of government employees, has or appears to the public to have "substantial responsibility for or control over the conduct of governmental affairs." Erickson, 368 S.C. 444 at 469 (2006); Holtzscheiter v. Thompson Newspapers, Inc., 332, S.C. 502, 520 n.4, 506 S.E.2d, 497, 507 n.4 (Toal, J. concurring) (quoting Rosenblatt, 383 U.S. at 85, 86 S.Ct. at 676). Importantly, for defamation purposes, a governmental employee's status as a public official must not be determined by that person's place on the totem pole but rather because of the public interest in a government employee's activity in a particular context." Id. Moreover, "[i]n considering the question of whether one is a public official, the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charge in controversy." Id.

The Supreme Court of South Carolina has held that a public officer is "one who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent." Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). Moreover, the criteria the Supreme Court has considered when distinguishing between public officers and

public employees include "whether the position was created by the Legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond and oath are prescribed or required [and] whether the one occupying the position is a representative of the sovereign." State v. Chrenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980). South Carolina Code Ann. § 8-3-10 provides it "shall be unlawful for any person to assume the duties of any public office until he has taken the oath provided by the Constitution and been regularly commissioned by the Governor."

In South Carolina, police officers are deemed public officials in part because they are charged with the discretionary exercise of the sovereign power to enforce the laws of the South Carolina, their positions were created by the Legislature, and their duties established by statute. See State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994). Furthermore, police officers are required to file a bond conditioned on the faithful performance of their duties and they must swear an oath before assuming their positions, and their duties are of great public concern. See S.C. Code Ann § 23-3-20; see also State v. Wannamaker, 213 S.C. 1, 48 S.E.2d 601 (1948). Because police officers are elected or appointed, they are public officials for the purpose of § 16-3-1040. State v. Carter, 324 S.C. 383, 478 S.E.2d 86 (Ct. App. 1996). "The greater the duty to the public at large, the more likely it is that the individual will be a public official." Thrift at 309, 356.

"Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about public work or business, is a mere employee." Sanders, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907).

Here, Plaintiff job at the Department of Agriculture meets none of the criteria for qualifying as a public official set out by either statute or case law. Plaintiff was neither elected nor appointed to his position, obtaining his first job as a state employee 27 years ago by filling out an application for employment. (Id. at ¶ 11-12). Plaintiff's employment at the Department was consistent with that of a state employee. (Nov. 15th 2011 Trexler Aff. ¶ 12). Plaintiff's performance at the Department was regularly evaluated under the Employee Performance Management System ("EPMS") created by the Office of Human Resources of the Budget and Control Board (Id. at ¶ 9), while elected or appointed officials at the Department were not evaluated using that system. (Id. at ¶10).

Plaintiff's job at the Department was neither created by the Legislature, nor were his duties defined by statute. In fact, in April and again in July of 2007, Commissioner Weathers, at his own discretion, unilaterally modified Plaintiff's job duties and responsibilities at the Department. (Hugh Weathers Aff. ¶ 6; Weathers depo. 7:6 - 8:23, 21: 10-17, August 25, 2011). Plaintiff was never required to post

any bond or swear an oath before taking his job at the Department. (Nov. 15th 2011 Trexler Aff. ¶12). Plaintiff had no relation to or contact with the public in his job at the Department. (Id. at ¶ 8).

Plaintiff was essentially a staff accountant and Information Technology coordinator. His job performance was neither the subject of public scrutiny, nor was he vested with the power to exercise any part of sovereign power. Also, in sharp contrast to public officials, Plaintiff had no independent decisions making authority to act on behalf of the Department in any way concerning the Department's overall functioning and purpose in state affairs. (Weathers depo. 11:25 – 12:8, August 25, 2011). In fact, Commissioner Weather's often referred Plaintiff's responsibilities as "back office functions of the Agency." (Nov. 15th 2011 Trexler Aff. ¶ 6.). Plaintiff merely performed duties assigned to him by Commissioner Weathers.

Assistant Commissioner of Agriculture was Plaintiff's internal, informal title created not by the Legislature, but by Commissioner Weathers. (Nov. 15th 2011 Trexler Aff. ¶ 13; Nov. 9th 2010 Rivers Aff. ¶ 11). Prior to 2007, no Assistant Commissioner of Agriculture existed in the history of the South Carolina Department of Agriculture. (Nov. 15th 2011 Trexler Aff. ¶ 13). Likewise, nowhere does the South Carolina Code make any mention whatsoever of any Assistant Commissioner of Agriculture, much less define the duties of any such position.

In support of their motion for summary judgment, Defendants have submitted the Affidavit of Commissioner Hugh Weathers. Despite glaring contradictions contained in the Affidavit[3], Commissioner Weathers has sworn the statements therein to be correct, truthful, and his own. However, he admits to only having briefly looked over the affidavit before signing it, and did not write it himself. (Weathers depo. 29:10 – 30:1, August 25, 2011). As such, words in the affidavit such as "appointed," "authority," "directed," and "management of the agency" are not those of the Commissioner, but those of lawyers familiar with the critical language needed to semantically transform Plaintiff from an employee of a state agency into a full blown public official.

Commissioner Weathers testified Plaintiff's role at the Department of Agriculture was to advise the Commissioner with regard to the Department budget (Weathers depo. 20:15-18), keep an accounting of Department funds (Weathers depo. 9:6-7), and help the Commissioner accomplish the goals the Commissioner set for the Department (Weathers depo. 13:14-18). Commissioner Weathers further testified decision-making authority in the Department was his (Weathers depo. 11:25-12:8), and in making decisions he would take advice, as needed, from any staff member of the Department, and even his wife. (Id.). Commissioner

[3] In paragraph 4 of Commissioner Weather's affidavit he claims to have appointed Plaintiff as Assistant Commissioner of Agriculture while in paragraph 6 Commissioner Weathers states Plaintiff was already Assistant Commissioner of Agriculture when he arrived at the Department.

Weathers also recognized Plaintiff job required no real interaction with the Press. (Weathers depo. 21: 3-5). Commissioner Weathers's deposition testimony certainly characterizes Plaintiff's job functions at the Department as those of a staff member as opposed to the functions and characteristics of a public official as defined by South Carolina law. Moreover, the Affidavit of Georgette Rivers, submitted in support of Defendants' motion for summary judgment actually supports Plaintiff's argument he was a mere employee of the Department of Agriculture.

The law designates whether a person is or is not a public official. That Defendants, or affidavits they submit in support of their motion, merely state Plaintiff is a public figure does not make it so.

IV. Plaintiff's defamation claim states a cause of action because Plaintiff is a private figure and is only required to demonstrate the media Defendants acted with common law malice in publishing defamatory statements concerning Plaintiff.

To establish a claim for defamation 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, 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)).

If the defamatory meaning of a statement is obvious on the face of the statement, the statement is defamatory *per se*. Id. 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).

As discussed above, Plaintiff is a private figure for defamation purposes. The statements concerning the Plaintiff published or broadcasted by Defendants alleged Plaintiff engaged in multiple acts of felony cruelty to animals and that he was a kidnapper. Those statements were false and or misleading, and constituted defamation which is actionable *per se*. Moreover, Defendants were aware that despite reports from officials claiming Plaintiff was involved with the subject horses, Plaintiff's mother freely claimed ownership of all horses and the property on which the horses were found. Defendants were also aware before publishing

defamatory statements concerning Plaintiff's involvement with horses that Plaintiff claimed he did not own any horses or the property on which any horse was found, or have anything to do with the horses. As such, sufficient evidence exists so as to create a genuine question of fact with regard to whether Defendants published the statements with conscious disregard for Plaintiff's rights and the truth of the statements they published or broadcasted.

For the foregoing reasons and in taking the facts and circumstances in the light most favorable to Plaintiff, this Court should deny Defendants' motion for summary judgment, and find that Plaintiff is a public official for purposes of the defamation at issue in this lawsuit.

Respectfully submitted,

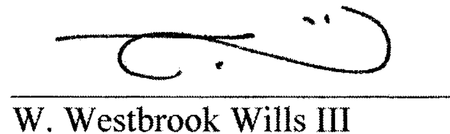
W. Westbrook Wills III
Austin, Fowler & Wills, LLP
38 Broad St., Suite 200
Charleston, SC. 29401
(843) 805-6300 – tel
William H. Johnson
Law Office of William H. Johnson
411 North Brooks Street
Manning, South Carolina 29102
(803) 435-0909 – tel
Attorneys For Plaintiff

Dated: January 19, 2011
CHARLESTON, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON
	)	PLEAS OF THE FIFTH JUDICIAL
COUNTY OF RICHLAND	)	CIRCUIT
	)	
	)	Case No.: 2010-CP-40-1249
James W. Trexler	)	
	)	
Plaintiff,	)	
	)	CERTIFICATE OF SERVICE
-vs-	)	
	)	
The Associated Press, Barrington Broadcasting, Inc., a South Carolina Corp.; Pacific & Southern Company, Inc.; and Raycom TV Broadcasting, Inc.	)	
	)	
Defendants.	)	
	)	

I certify that on this date a copy of the foregoing *Plaintiff's Amended Response to Defendants' Motion For Summary Judgment* was served on each party or counsel of record e-mail and by handing a copy at the January 19, 2011 hearing on Defendants' Motion for Summary Judgment.

Dated: January 19, 2012.



W. Westbrook Wills III

PLAINTIFF'S EXHIBIT
2 12-9-11
2 Jacoby

Cowan, Chris

From: Davis, Kathy [illegible]
Sent: Thursday, February 28, 2008 [illegible] AM
To: Cowan, Chris
Subject: RE: those responsible for severe neglect/injury to horses, in custody

[illegible] with the Humane Society is emailing saying Terry Trexler, not James Trexler, is charged with kidnapping. She says Terry claimed to be James when that investigator was on the property. Can you confirm?

-----Original Message-----
From: Cowan, Chris [illegible]
Sent: Wednesday, February 27, 2008 [illegible] PM
To: [illegible]
Subject: those responsible for severe neglect/injury to horses, in custody

Richland County Sheriff's Department

LEON LOTT
Sheriff

Richland County Sheriff Leon Lott announced that at approximately 8:00 PM tonight the Richland County Sheriff's Departments Fugitive Task Force apprehended Hazelene E. Trexler (DOB 7-12-37), Terry A. Trexler (DOB 7-16-63) and James Trexler (DOB 1-14-60) at 412 Derby Lane in Hopkins.

Richland County Sheriff Leon Lott stated the Sheriff's Department and HSPCA continue to investigate the severe and barbaric treatment of 28 horses that were in the custody of and suppose to have been cared for by the Trexlers; even as the trio were being arrested in Hopkins tonight, investigators and veterinarians care for the horses that sustained injuries ranging from malnutrition to inflictions that being left untreated cause lameness to halters growing into the faces of the horses.

Sheriff Leon Lott added that this case is disturbing because these horses are helpless to the hands of their owners and the Trexlers have proven time and again that they have no business owning any animals. Sheriff Leon Lott stated that investigators from the Sheriff's Department and the HSPCA will continue to work with the Solicitors 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. Sheriff Leon Lott stated that the Trexlers have been transported to Alvin S. Glen Detention Center where they await a bond hearing.

Charges:

- Hazelene E. Trexler
  28 counts of ill treatment of animals
- Terry A. Trexler
  23 counts of ill treatment of animals
- James Trexler
  5 counts of ill treatment of animals
  1 count of kidnapping (stems from an incident where J. Trexler held a HSPCA investigator against her will/refused to allow the investigator to leave a barn on 2/13 during an evaluation of the horses)

[illegible]

2/29/2008

DLSCN 26/07/10

"A"

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND)

James W. Trexler,) Civil Action No.: 2010-CP-40-1249
)
Plaintiff,)
)
v.) ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
)
The Associated Press, Barrington Broadcasting South Carolina Corp., Raycom TV Broadcasting, Inc. , and the Pacific & Southern Co., Inc.,)
)
Defendants.)

RICHLAND COUNTY
FILED
2011 MAR 30 AM 9:22
JEANETTE W. McBRIDE
C.C.P. & G.S.

Defendants moved for summary judgment as to plaintiff's amended complaint which asserts causes of action for libel, civil conspiracy, intentional infliction of emotional distress and negligence. Defendants supported their motion for summary judgment with the affidavit of Chris Cowan, a Captain in the Richland County Sheriff's Department whose affidavit states that on February 27, 2008 he disseminated a press release on behalf of the Richland County Sheriff's Department reporting that plaintiff had been arrested for kidnapping and five counts of ill treatment of animals. Defendants also provided plaintiff's responses to admissions wherein plaintiff admitted that the publications by defendants concerning were fair and accurate reports of the press release disseminated by the Sheriff's Department.

"B"

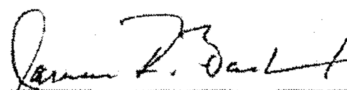
SCANNED

A hearing was held in open court on March 16, 2011 at which time the parties appeared through counsel. At the hearing, plaintiff asserted, the admission notwithstanding, that there were, or may be publications that are not protected by the "Fair Report" privilege.

The court finds that counsel's assertion demonstrates the existence of a genuine issue of material fact, and denies defendants' motions with leave to renew if discovery reveals no unprivileged publications.

Based on the foregoing, IT IS HEREBY ORDERED that defendants' motions for summary judgment be, and the same hereby are denied with leave to renew if justified by additional discovery.

AND IT IS SO ORDERED.



James R. Barber, III
Circuit Court Judge

Columbia, South Carolina

March 28, 2011

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Special Circuit Court Judge

Circuit Court Case No. 2010-CP-40-1249
S.C. Court of Appeals Case No. 2013-001581

James W. Trexler,

Appellant,

v.

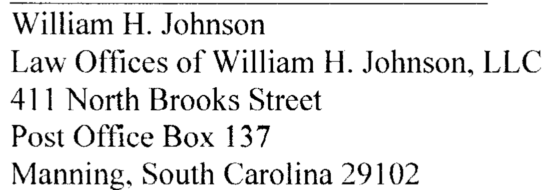
The Associated Press;
Barrington Broadcasting
South Carolina Corp.;
Raycom TV Broadcasting,
Inc.; The Spartanburg Herald
Journal, Inc.; and The Pacific
& Southern Co., Inc.,

Respondents.

PROOF OF SERVICE

I certify that I have served the enclosed Appellant's *Motion to Supplement the Record* upon the Respondents, by depositing a copy of each of them in the United States Mail, postage prepaid, on February 23, 2015, addressed to Respondents' attorney of record, Jay Bender, Baker, Ravenel & Bender LLP, Post Office Box 8057, Columbia, South Carolina 29202.

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
Law Office of W. Westbrook Wills III
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

Other counsel of record:

Jay Bender
Baker, Ravenel & Bender LLP
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091 (telephone)
(803) 779-3423
ATTORNEYS 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

February 23, 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. The Associated Press, et al. (Case No. 2013-001581)

Dear Ms. Kitchings:

Please find enclosed the Appellant's Motion to Supplement Record in the above-referenced case, along with a Proof of Service and the $25.00 filing fee.

I have copied Jay Bender, 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.

Very truly yours,

W. Westbrook Wills III

Enclosures (as stated)
cc: Jay Bender, Esq. (w/ enclosures)

RECEIVED
FEB 26 2015
SC Court of Appeals

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

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FEB 26 2015
SC Court of Appeals

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