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.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant hereby petitions the Court for a rehearing in the above-captioned appeal stating particularly the following points Appellant believes the Court overlooked or misapprehended:

1) As to the circuit court's grant of summary judgment based on the statute of limitations, Appellant believes the Court overlooked or misunderstood the issues raised by Appellant on appeal regarding a) relation back of Appellant's amended complaint under Rule 15 b), SCRCP, b) Appellant's Motion to

Supplement the Record with relevant authority regarding Rule 15(c) supporting Appellant's position, c) South Carolina's adherence to the continuous publication rule as it affects the statute of limitations on Appellant's defamation claims.

2) As to the circuit court's grant of summary judgment based on its finding Appellant failed to present evidence sufficient to support his claims, Appellant believes the Court overlooked or misunderstood the substantial evidence Appellant submitted to the trial court in its de novo review and the importance of that evidence in creating a genuine issue of material fact as to each of the issues before the Court.

3) As to the circuit court's grant of summary judgment based on its finding Respondents statements regarding Appellant in the publications at issue in the appeal were protected by the "fair report" privilege, Appellant believes the Court overlooked the evidence submitted by Appellant to show that Respondents abused any privilege because their publications a) were not fair and accurate reports of a public record because they added defamatory content about Appellant not existing in the public record, b) additional publications made by each Respondent in the months and years following their report on the public record at issue are not afforded protection under the "fair report" privilege, and c) the Court did not take into consideration the law as set out in *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999), that where conflicting evidence exists on the abuse of a qualified privilege, the question is for the jury.

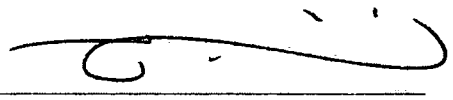
4) As to the circuit court's grant of summary judgment based on its finding that publications by Respondents at issue in the appeal were true or substantially true, Appellant believes the Court overlooked or misunderstood the evidence he submitted to show that a) as to Appellant, statements published by Respondents, at the time they were published, were false, and not substantially true, b) that Respondents published defamatory statements regarding Appellant that were never true, or substantially true, and c) the Court misapplies *Padgett v. Sun News*, 278 S.C. 26, 292 S.E.2d 30 (1982) to support its finding that because Appellant was ultimately charged with felony level mistreatment of animals, damaging publications by Respondents to that effect, before the fact, qualified them as "substantially true."

5) As to the circuit court's determination that Appellant is a "public official" for purposes of defamation, Appellant submits that notwithstanding the propriety of the Court's decision not to rule on that issue, the practical effect is that the circuit court's ruling (wrongly decided in Appellant view) becomes the law of the case in two other associated actions presently before this Court without the due process right of review.

For the reasons above, and those more thoroughly discussed in the accompanying Memorandum in Support of Petition for Rehearing, Appellant respectfully requests this Court grant a rehearing of Appellant's appeal on the points indicated herein, and reconsider its affirmation of the circuit court's order granting summary judgment in light thereof.

[Signature on following page]

Respectfully submitted,



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APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

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Appellant James W. Trexler, by and through undersigned counsel, submits this Memorandum in Support of Petition for Rehearing showing this Court as follows:

INTRODUCTION

Appellant has taken this appeal from the circuit court's order granting summary judgment in favor of Respondents on his defamation action against them. As the Record on Appeal demonstrates, Judge Strickland presided at the January 19, 2012 summary judgment hearing and considered argument and evidence on the multiple complex factual and legal issues at play in Respondents' motion. (See R. pp. 69-133). At the conclusion of the hearing, and without providing any indication of how he was going to rule on Respondents' motion, Judge Strickland requested counsel for both sides each submit a proposed order (granting or denying summary judgment). (See R. p. 131). Then, over 9 months after the hearing, Judge Strickland granted Respondents summary judgment by signing and entering Respondents proposed order exactly as it was drafted and submitted by Respondents' counsel. (R. pp. 1-16). Of course, Judge Strickland's order, drafted entirely by counsel for Respondents, granted summary judgment in Respondents' favor

as to every possible issue before the court, notwithstanding Judge Strickland's threshold and dispositive determination Appellant's defamation claims were barred by the statute of limitations. (See R. pp. 6-7). As a basis for granting summary judgment on issues beyond that of the statute of limitations, the order Judge Strickland entered found Appellant failed to submit any evidence at all that Respondents' publications were false (R. pp. 8, 9), that the publications were not fair reports of a public record (R. p. 12), or that Respondents published statements regarding Appellant with knowledge of their probable falsity (R. pp. 14-15). Furthermore, Judge Strickland specifically found Appellant was a "public official" for the purposes of defamation and therefore, under the law as set out in New York Times v. Sullivan, 376 U.S. 254 (1964), was required to prove, but failed to do so, that Respondents acted with constitutional malice in publishing allegedly defamatory content regarding Appellant. (See R. pp. 13-14). On April 15, 2015, this Court filed its unpublished opinion No. 2015-UP-201 affirming the circuit court's grant of summary judgment in favor of Respondents ("Order Affirming").

I. In affirming the circuit court's grant of summary judgment in favor of Respondents based on the statute of limitations, the Court either overlooked or misunderstood issues Appellant raised on appeal as to that issue.

A. Rule 15 (c), Relation back of Appellant's Amended Complaint

On appeal, Appellant argued the circuit court erred in granting summary judgment in favor of Respondents based on the statute of limitations because his Amended Complaint, naming Respondents specifically, related back to the original timely filing of his original Complaint under Rule 15 (c), SCRCP. At oral argument, the Court questioned counsel for Appellant about the application of Rule 15(c) where

Appellant had purportedly served his Amended Complaint upon Respondents within the time prescribed by law, but did not serve them with a copy of the original Complaint. In response, Counsel for Appellant directed the Court's attention to the case 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.[1] Despite Appellant's briefing, oral argument, and motion to supplement the record with relevant authority on the issue of relation back under Rule 15 (c), the Court does not address the issue in its Order affirming summary judgment, while it appears to have affirmed the circuit court's ruling on the statute of limitations.

B. South Carolina's adherence to the "continuing publication" rule.

On appeal, and in the circuit court, Appellant has maintained and presented evidence to demonstrate that his claims are not barred by the statute of limitations because the allegedly defamatory publications by Respondents continued to be published by them for months and years after their original publication. Appellant cited to Taub v. McClatchy Newspapers, Inc., 504 F. Supp. 2d 74 (D.S.C. 2007) for the proposition that subsequent publication by Respondents reset the statute of limitations clock for his defamation claim against them. In affirming the circuit court's grant of summary judgment on the statute of limitations issue, the Court appears to have overlooked the "continuing publication" rule as recognized in Taub and Appellant's argument and evidence that Respondents continued to publish, or allow to be published, defamatory material concerning Appellant, long after their initial publication.

[1] Counsel for Appellant filed a motion to supplement the record in which he included the citation and case, which motion to supplement the Court never responded before issuing its ruling.

II. In affirming the circuit court's grant of summary judgment the Court appears to have overlooked Appellant argument that he submitted sufficient evidence to create a question of material fact for purposes of summary judgment.

On appeal, Appellant argues he submitted evidence to the circuit court that, when viewed in the light most favorable to the Appellant, was sufficient to create a genuine issue of material fact as to each issue. The circuit court granted summary judgment in favor of Respondents, in part, because it found Appellant failed to come forth with any evidence, at all, to support its argument. Appellant argued to this Court that the circuit court, in fact, failed to consider the ample evidence he submitted in support of his position. In its Order Affirming the circuit court's grant of summary judgment in favor of Respondents, the Court states that Appellant argued on appeal that "the circuit court failed to consider the evidence in the light most favorable to [Appellant]." (Order Affirming at p. 2). However, Appellant's argument on appeal is not that the circuit court failed to view the evidence submitted in the light most favorable to him, but rather that the circuit court failed to consider Appellant's evidence at all, and ruled Appellant had submitted no evidence. Of course, on summary judgment, any evidence or inferences drawn therefrom, viewed in the light most favorable to non-moving party. Rule 56(c), SCRCP.

The Court does not address Appellant's argument that the circuit court granted summary judgment in favor of Respondents without considering the evidence Appellant submitted and Appellant's argument that such evidence is sufficient to create a question of fact for the jury both with regard to the falsity of the subject publications and whether Respondents abused the "fair report" privilege they assert shields them from liability.

III. In affirming the circuit court's grant of summary judgment in favor of Respondents based on the "fair report" privilege, the Court overlooked evidence Respondents abused the privilege.

The Court affirmed the trial court's grant of summary judgment finding Respondents' publications were fair reports of a public record and therefore qualifiedly privileged, shielding Respondents from liability for the subject publications. (See Order Affirming at pp. 3-4).

First, the Court appears to have overlooked evidence Appellant submitted of Respondents' allegedly defamatory publications which either did not report on the content of a public record or which added defamatory content to the report of the public record. Second, Appellant submits the court should have considered evidence he submitted to demonstrate that Respondents abused any privilege they may have enjoyed by publishing articles which were not fair and accurate reports of the subject public record, and that Respondents also added to their publications substantial defamatory statements concerning Appellant which were not derived from public record.

The Court itself, in its Order Affirming, cites to Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469,484,514 S.E.2d126, 134 (1999). 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)). "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. Appellant contends the

evidence he submitted demonstrating Respondents abused the qualified "fair report" privilege, if one even existed, should have created a question for the jury.

IV. In affirming the circuit court's grant of summary judgment in favor of of Respondents on the issue of falsity, the Court overlooked evidence Appellant submitted and misunderstands the chronology of Respondents' publications.

The circuit court found, and this Court affirmed, that the subject publications by Respondents were "substantially true" and provides Respondents an absolute defense to Appellant's defamation claim. First, the Court cites to Ross v. Columbia Newspapers, Inc. 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976) for the proposition that " a sufficient defense is made out where the evidence establishes that a statement was substantially true." (Order Affirming at p. 4). The Court next cites to Haulbrooks v. Overton, 295 S.C 380, 383, 368 S.E.2d 676, 678 (Ct. App. 1998) for the proposition that "[t]he truth of the matter is a complete defense to an action based on defamation and evidence establishing [a] statement is substantially true is a sufficient defense." However, the facts in both Ross and Haulbrooks are clearly distinguishable from the facts in the present appeal, and those cases actually support Appellant's position.

In Ross, the court found that a newspaper report containing a mistake in the headline which was rendered meaningless by the true facts in the body of the article negating the headline mistake, was substantially true and therefore, not defamatory. In Haulbrooks, the defendant submitted evidence to the court demonstrating the substantial truth of the allegedly defamatory statements at the time the statements were published.

Here, Appellant has submitted evidence that the subject publications by Respondents are totally false as to Appellant, and unlike in Ross the falsity is not a mistake that is negated or clarified by the content of the publication or the

circumstances which were the subject of the publications. Nor have Respondents, here, presented any evidence to demonstrate the subject publications were true or "substantially true" at the time they published them.

The Court, nevertheless, found Respondents publications "were substantially true at the time of publication," (see Order Affirming at p. 4), and that Respondents negated any falsity in the publications by presenting evidence in the form of indictments and arrest warrants, that Trexler was eventually charged with felony level mistreatment of animals. Id. However, the arrest warrants Respondents submitted clearly show Appellant was arrested and charged with 5 counts of misdemeanor neglect as opposed to dozens of counts of felony level animal abuse. (See R. pp. 426, 420, 430, 433, 436). The subject publications of Respondents implicating Appellant in felony level horse abuse of dozens of horses both here and in Georgia were not true, or even substantially true, at the time they were made, nor were they rendered "substantially true" because Appellant was later indicted on multiple felony counts of ill treatment of animals.

The Court relies on Padgett v. Sun News, 278 S.C. 26, 31, 292 S.E.2d 30, 33 (1982) for the proposition that "a newspaper's publication of contents of a summons charging respondents with a certain crime, despite subsequent filing of complaint which omitted this crime, did not negate the accuracy of the newspaper's publication. (See Order Affirming at p. 5.). However, the circumstances in Padgett are distinguishable from those in the present appeal. Here, the opposite occurred. Respondents' publications attributed activity to and charges against Appellant which had no basis in fact, and were false, at the time Respondents published them. That Respondents continued to publish the subject statements concerning Appellant until such time as he was, eventually, indicted on felony charges does not negate the falsity

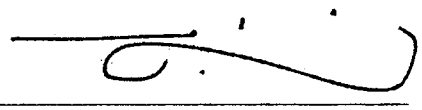
of the publications prior to that time.

V. The Court declined to make a ruling on the issue of Appellant's status as a "public official" for purposes of defamation.

Because the Court found it was able to affirm the circuit court's grant of summary judgment in favor of Respondents on other dispositive issues, it declined to address the issue of whether Judge Strickland erred in finding Appellant was a "public official" for purposes of defamation. (See Order Affirming at p. 5). Appellant submits that, notwithstanding the propriety of the Court's decision not to rule on that issue, the practical effect is that the circuit court's ruling (wrongly decided in Appellant view) becomes the law of the case in two other associated actions presently before this Court without the due process right of review.

Based on the foregoing, Appellant respectfully requests this Court grant a rehearing of Appellant's appeal on the points indicated herein, and reconsider its affirmation of the circuit court's order granting summary judgment in light thereof.

Respectfully submitted,



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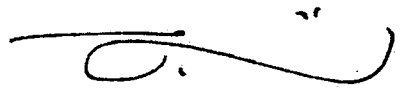
PROOF OF SERVICE

I certify that I have served the enclosed Appellant's *Petition for Rehearing* and *Memorandum in Support of Petition for Rehearing* upon the Respondents, by depositing a copy of each of them in the United States Mail, postage prepaid, on April 27, 2015, addressed to Respondents' attorney of record, Jay Bender, Baker, Ravenel & Bender LLP, Post Office Box 8057, Columbia, South Carolina 29202.

Respectfully submitted,



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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 Petition for Rehearing and Memorandum in Support of Petition for Rehearing 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)