THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Circuit Court Case No 2012-CP-40-04652
S C. Court of Appeals Case No. 2014-000663

James W. Trexler,

Appellant,

The Humane Society for the Prevention of Cruelty to Animals, and Wayne Brennessel, individually and as Executive Director of the Humane Society for the Prevention of Cruelty to Animals,

Respondents.

REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY AND OBJECTIONS TO RESPONDENTS' STATEMENT OF THE ISSUES ON APPEAL

Separately from Appellant, Respondents, in their Initial Brief, announce three issues they believe are properly before the Court:

I. Whether the trial court erred in granting Respondents' Motion for Summary Judgment as to Appellant's claim for Malicious Prosecution;

II. Whether the trial court erred in granting Respondents' Motion for Summary Judgment as to Appellant's claim for Defamation; and

III. Whether the trial court erred in holding that S.C. Code Ann. § 33-56-180 shields Respondent Brennessel from judgment.

(Init. Br of Resp. at 1).

Issues I and II, as stated by Respondents, comport on a broad scale with Issues 1-6 as set out in Appellant's Statement of Issues on Appeal (Compare Br. of App. at 4). Appellant, however, objects to Issue III as set out in Respondents' Statement of Issues on Appeal, 1) because it is not an accurate statement (the trial court, in fact, did not hold § 33-56-180 shields Respondent Brennessel from judgment) (see R. p. 8), and 2) because the Issue III, as stated, fails to set out the true question before this Court

As to the first reason, the trial court did not hold, as Respondents suggest, that S C. Code Ann. §33-56-180 shields Respondent Brennessel ("Brennessel") from judgment. Rather, the trial court found that under §33-56-180, "a judgment against an employee of charitable organization may not be returned unless a specific finding is made that the employee acted in a reckless, willful, or grossly negligent manner," and that "Plaintiff [Appellant] alleged insufficient facts to support a charge that Brennessel's statement was made recklessly, willfully, or with gross negligence, and therefore, Brennessel should be dismissed from this action." (See id.)

As to the second reason, Appellant asserts the true question on appeal regarding the application of §33-56-180 to provide Brennessel qualified immunity is not whether Brennessel qualifies for protection from liability under §33-56-180, but whether **any** evidence exists in the record to raise a question of fact as to whether Brennessel made the subject statements willfully, recklessly, or with **knowledge of the falsity** when he published false statements about the Appellant.

Also as to the §33-56-180 issue, Appellant submits the trial court further erred by granting summary judgment in favor of Brennessel based not on a failure of evidence to support the claim, but on the trial court's finding Appellant failed to plead sufficient facts to support Appellant's claim. (See id. at 5). The trial court's conclusion is not supported by the Record, (see R. pp. 19-20, paragraphs 47-50; R. p. 24, paragraphs 74-80), and totally disregards the ample evidence of record Appellant submitted to support those facts and allegations he pleaded with regard to Brennessel's actions.

APPELLANT'S REPLY AND OBJECTIONS TO RESPONDENTS' STATEMENT OF THE CASE

Appellant objects to Respondents' Statement of the Case, in its entirety, as totally improper and in contravention of the South Carolina Rules of Appellate Procedure ("SCACR")

While SCACR, Rule 208(a)(2) requires an initial brief from both the appellant and the respondent to an appeal, Rule 208(c) provides that the respondent need not include a separate Statement of the Case "unless the respondent is dissatisfied with the statement of the issues or of the case by appellant."[1] A respondent electing to include a separate

[1] Under SCACR, Rule 208(b)(1)(C), an appellant shall include, in its initial brief, under appropriate heading, a Statement of the Case containing the date of the commencement of the action or matter, the nature of the action or matter, the nature of the defense or of the response, the action of the court, jury, master, or

Statement of the Case in its Initial Brief must do so in conformity with the same rules and requirements applicable to appellants under Rule 208(b)(1)(C). SCACR, Rule 208(b)(2)("The brief of respondent shall conform to the requirements of Rule 208(b)(1)(A)-(E)"). For appellants and respondents alike, SCACR, Rule 208(b)(1)(C) requires that a Statement of the Case provide, *inter alia,* important procedural history and dates (see fn.1), but the Rule specifically proscribes the inclusion of any contested issues or facts. ("The statement **shall not** contain contested matters").

Here, despite the clear mandate of Rule 208(b)(1)(C), Respondents' Statement of the Case is comprised almost entirely of contested facts and matters, (see Init. Br. of Resp. pp 1-5), and many of which substantially misrepresent the true facts of Record, or are simply false.[2] By way of example, but without limitation[3], Respondents represent as unequivocal fact in their Initial Brief that "the Attorney General of South Carolina consummated a deal with the Appellant, his mother, and brother, where Terry Trexler pled no contest to ill-treatment of animals, the family relinquished all ownership interest in the horses that were seized, and the criminal action against Appellant and Appellants' mother were *nolle prossed.*" (Init. Br. of Resp. at 2). There is absolutely no evidence (of Record or otherwise) to support that false statement, and the trial court made no such finding in its Order (See R. pp. 6-7).

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administrative tribunal, the date(s) of trial or hearing, the mode of trial, the amount involved on appeal, the date and nature of the order, judgment or decision appealed from, the date of the service of the notice of appeal, the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal

[2] It appears as if Respondents' have confused "Statement of the Case" with "Statement of Facts"

[3] Because Appellant believes Respondents' assertions of facts in its Initial Brief are improper and should be stricken anyway, Appellant will illustrate the point with only a few examples rather than painstakingly addressing each of Respondents' factual transgressions

Respondents also help themselves to material outside the Record to bolster the factual assertions they insubordinately include in their Initial Brief. For instance, Respondents cite multiple times to the deposition testimony of Brennessel. (See Init. Br. of Resp. at 14-15). However, Brennessel's deposition testimony was neither offered to nor considered by the trial court, and is not part of the Record. (See generally R. pp. 86-139)(absence of excerpts from deposition of Brennessel) (see also Appellant's Objections to Respondents' Designation of the Record on Appeal, below).

Because the contested facts and matters Respondents improperly assert in their Statement of the Case are not supported by the evidence of record, it is not surprising that, in addition to other non-conformities, Respondents have consistently failed to include citations to matter which may be properly included in the Record on Appeal, as required under SCACR, Rule 208(b)(4) Respondents' improper and inaccurate factual assertions shed no light on any of the true issues in this appeal, and serve no purpose other than clearly revealing the material questions of fact that exist as to each issue before this Court.

APPELLANT'S REPLY TO RESPONDENTS' ARGUMENT

I. Malicious Prosecution

Appellant contends the trial court erred in granting summary judgment in favor of Respondents on Appellant's malicious prosecution claim because Appellant presented evidence sufficient to create a fact question as to whether probable cause existed for his arrest and prosecution Appellant also maintains the trial court erroneously based its findings on inaccurate or incomplete facts for which there was no evidentiary support in the Record. (See Init. Br. of App at 7).

On appeal, Respondents argue, for the first time, that the trial court properly granted summary judgment in their favor on Appellant's malicious prosecution claim because A) Appellant **failed to establish** that Respondents lacked probable cause to initiate judicial process leading to Appellant's arrest. (Init. Br. of Resp. at 6)(emphasis supplied); B) Appellant **failed to establish** that termination of the charges against him were in his favor (Init. Br. of Resp at 10); and C) Appellant **failed to establish** that Respondents' were motivated by malice in instituting judicial process and prosecuting him. (Init. Br. of Resp. at 11) Respondents seem to have abandoned the only argument they made to the trial court as to this issue, that probable cause for Appellant's arrest and prosecution existed as a matter of law.[4] Now, Respondents go outside the Record to attempt to squeeze into this appeal modified versions of the facts to support their new position on the issue.

Both the trial court's ruling and Respondents' new arguments with regard to Appellant's malicious prosecution claim fail to take into account the standard on summary judgment, even as it is stated by the trial court itself in its Order: "In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence " (R. p. 5). To withstand summary judgment Appellant was not required to "establish" (prove) definitively his positions, but only to put forth some ("mere scintilla") evidence material to the issue in support of his claim The Record is clear that Appellant met that burden by submitting such evidence Respondents' Initial, Brief, however, fails to even address the critical and compelling evidence Appellant submitted to the trial court on each issue, which

[4] Despite ample authority cited by Appellant that probable cause is question for the jury, Respondents' sole argument in the trial court against Appellant's malicious prosecution claim was that probable cause to commence judicial process, arrest, and prosecute Appellant existed, as a matter, because a Grand Jury "true-billed" the indictments against Appellant (See R pp 92-95)

evidence **is** a part of the Record and properly before this Court. Respondents' argument to this Court fails to address the real issues on appeal; they never once argue that Appellant did not submit evidence to support his claims, nor do they ever even address the ample evidence Appellant submitted, which is of Record here.

Appellant will not rehash here the legal analysis and authority supporting his position, as he has already presented it in his Initial Brief.

II. Defamation

Respondents in their Initial Brief argue A) Respondents' statements regarding Appellant were substantially true, and B) that there is no evidence to show Brennessel was at fault. Again, Appellant has thoroughly presented the legal analysis and citations to relevant authority on the defamation issues in his Initial Brief, and will not rehash them all here. However, Appellant object to Respondents' improper inclusion into its defamation argument, here on appeal, of facts and issues which 1) were never raised in the trial court below, and 2) draw on facts not in the Record. For instance, Respondents argue, here for the first time, that the Respondents' statements were substantially true because they now claim the charges against Appellant, which formed the basis of the Respondents' statements, were dropped because of some plea agreement the solicitor made with Appellants' brother. First, that assertion is false. Second, Respondents have never argued it until now. Third, there is absolutely no evidence in the Record to support it. Fourth, it does not form any part of the trial court's Order and was not, even by implication, a basis for its ruling. (See generally R. pp. 86-193; see R. p. 8).

Here again, instead of addressing the evidence of Record Appellant submitted to the trial court at the summary judgment stage in support of his properly pleaded claims,

which they fail to do, Respondents seem to be intent on creating evidence that does not exist and is certainly not in the Record to support their argument to this Court.

III S.C. Code Ann. §33-56-180

Appellant has discussed this above and presented legal analysis and citations to relevant authority on this issue in his Initial Brief and will stand on that.

APPELLANTS' REPLY AND OBJECTIONS TO RESPONDENTS' DESIGNATION OF MATTERS TO BE INCLUDED THE RECORD ON APPEAL

Initially, Appellant objects to Respondents' designation of all materials which were not presented as evidence to the trial court and which the trial court could not have considered in ruling on Appellant's causes of action, from which this appeal is taken. Specifically, Appellant objects to the inclusion of the following:

1. Deposition transcript of James Trexler from Civil Action No. 2010-CP-40-1249, taken September 14, 2011 (entirely).

2. Deposition of James Trexler from the underlying action, taken May 15, 2013: pp 6,10,11,18,19, 69, 75, 76, 79, 80, 91, 114, 142, 143.

3. Deposition of Wayne Brennessel from September 30, 2013 (entirely).

4. Articles of Organization, Bates labeled HSPCA0473 – HSPCA0474 (entirely)

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

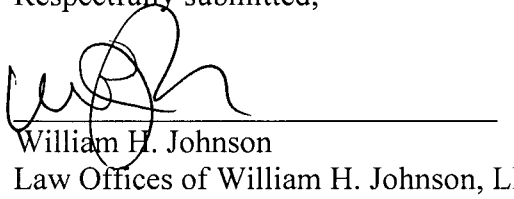
None of the above materials were presented in the trial court and made part of the Record, and therefore the trial court could not have relied on them in making the rulings from which the present appeal is taken. They should not be designated as matter to be included in the Record on Appeal. (See SCRAP, Rule 209(b) ("Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]. A party shall

not include any matter in his Designation which is not relevant to the appeal"); (see also SCRAP, Rule 210(c) ("The Record shall not, however, include matter which was not presented to the lower court or tribunal.")).

CONCLUSION

For the reasons above and those presented in Appellant's Initial Brief, Appellant respectfully requests this Court reverse the trial court's Order granting summary judgment.

Respectfully submitted,



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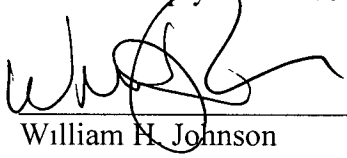
CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I, Jennifer E. Harrington, Legal Assistant to William H. Johnson, an employee of The Law Offices of William H. Johnson, LLC, attorneys for Appellant, James W. Trexler, does hereby certify that I have, on the date indicated below, served counsel below with the **Reply Brief of Appellant**, by depositing a copy of same in the United States Mail, postage pre-paid, and return address clearly indicated on said envelope, to counsel at the following address:

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