THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2010-CP-40-1343

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.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is a malicious prosecution and defamation case. The Appellant James Trexler, a former Assistant Commissioner of Agriculture for the State of South Carolina, brought suit against the Richland County Sheriff and Richland County alleging claims for malicious prosecution and defamation arising from his arrest on February 27, 2008, and his ultimate prosecution on animal cruelty charges.

In addition to the present lawsuit, James Trexler also brought separate suits against the Humane Society for the Prevention of Cruelty to Animals (HSPCA) and against a number of media outlets including the Associated Press. The action against the HSPCA includes similar allegations of malicious prosecution and defamation. Summary judgment was entered in that case by Circuit Judge Alison Renee Lee, and that ruling is currently on appeal to this Court. *See,* Civil Action Number 2012-CP-40-4652, pending as Appellate Case Number 2014-000663. The action against the Associated Press and others was also decided against Trexler on a summary judgment motion. The order issued by Special Circuit Court Judge Joseph M. Strickland is also currently on appeal to this Court. *See*, Civil Action Number 2010-CP-40-1249, pending as Appellate Case Number 2013-001581. (R. 205-220). The *Associated Press* case and the present case were, in fact, consolidated by Order filed March 1, 2011. (R. 1).

In the present case, the Respondents Richland County Sheriff and Richland County moved for summary judgment on all claims. (R. 125-127). A hearing was held before Circuit Court Judge DeAndrea Benjamin on January 27, 2014. During that hearing, counsel for the Appellant Trexler agreed to the dismissal of Richland County. (R. 79).[1] Thereafter, by Order filed August 20, 2014, Judge Benjamin granted summary judgment to the Respondents, thereby dismissing Trexler's Second Amended Complaint with prejudice. (R. 6-16).

No Rule 59(e) motion was filed. Instead, the Appellant Trexler filed the present appeal to this Court.

[1] Based upon the voluntary dismissal of Richland County as a defendant, the County is improperly identified as a Respondent to this appeal.

STATEMENT OF FACTS

On February 13, 2008, Michelle Hart, an investigator with the Humane Society for the Prevention of Cruelty to Animals (HSPCA) was investigating a complaint about several neglected horses in poor condition on Zeigler Road South in lower Richland County. (R. 150). At that time, Hart was on an adjoining property (with permission from the owner) in an attempt to take pictures of the horses on the adjacent location. (R. 150). At some point during Hart's investigation, a man and an older woman arrived on the other property and started yelling and cursing at her. The older woman physically stood between Hart and the horses, waved her hands in the air, and shouted profanities. These individuals, later identified as Terry Trexler and Hazelene Trexler, accused Hart of trespassing and insisted on confiscating her camera. (R. 150). Terry is the Appellant's brother, and Hazelene is the Appellant's mother.

Hart tried to explain that she was an investigator with the HSPCA and that she was on the neighboring property with the owner's consent. (R. 150). Due to the Trexlers' attempts to hinder her efforts, Hart believed that she would be unable to keep taking pictures and decided to leave. (R. 150). As Hart was walking through the pasture toward her vehicle, Terry Trexler pulled his truck behind Hart's vehicle and proceeded to block her from moving. He advised her that: "You ain't goin'

anywhere!" and further indicated that he had called the police and the police had told him to keep her there. (R. 150).

Richland County Sheriff's Department (RCSD) Deputy Charley Simpson was called out to the scene by Hazelene Trexler. Ms. Trexler was extremely loud and uncooperative and continually insisted that she wanted a warrant immediately obtained for trespassing. Meanwhile, Hart communicated to Deputy Simpson the aforementioned events and further indicated that Ms. Trexler had earlier used profanities with respect to her and was essentially out of control. (R. 169-170).

Deputy Simpson also met with male subject later learned to be Terry Trexler. Upon inquiry, the man falsely identified himself as "James Trexler" which is the Appellant's name. He claimed that he did not have any form of identification, but provided the false name and a date of birth to the deputy. At some point after leaving the scene, Deputy Simpson cross-referenced that information with state DMV and national criminal databases whereupon it was revealed that the given name was not on file for the given birthdate. Instead, the deputy positively identified the male as Terry Trexler and further uncovered that Terry Trexler was wanted by the Sumter County Sheriff's Department on fraudulent check and cruelty to animals charges. (R. 169-170).

Between the dates of February 19 and February 22, 2008, HSPCA officials including Michelle Hart and RCSD Investigator Holly Wagner held a meeting to

discuss obtaining a search warrant to evaluate the subject horses on the Zeigler Road property. At that time, Hart provided a written statement that the man who falsely identified himself as "James Trexler" blocked her in and physically would not let her leave. (R. 150, 153, 158).

On February 26, 2008, pursuant to a search warrant, the HSPCA seized 23 horses and seven dogs from Hazelene and Terry Trexler's property on Zeigler Road. After discovering additional information, the HSPCA learned that Hazelene and Terry were wanted for 61 counts on animal cruelty in Jefferson County, Georgia. The HSPCA further believed that there were additional horses on another property belonging to the Trexler family. (R. 178). These horses were in poor condition and held in a barn. This led the HSPCA to develop the Appellant James Trexler as a suspect. In an executed affidavit, Michelle Hart swore to the issuing magistrate that "James Trexler is the brother of Terry Trexler and the son of Hazelene Trexler and the person said to be living at 412 Derby Lane." (R. 178). At the time, James Trexler's driver's license showed 412 Derby Lane as his residence address. (R. 181).

On that same date, February 26, 2008, the HSPCA executed a search warrant at the 412 Derby Lane property. (R. 178). Located were one horse in a pasture and four additional horses in stalls in the barn. These horses were standing in mud soaked with urine and feces. One of the horses was in an emaciated state with

protruding ribs and hipbones, and the others showed signs of undernourishment. At that time, all horses were taken into custody by the HSPCA. (R. 159).

On February 27, 2008, the HSPCA obtained arrest warrants against all three Trexlers (Hazelene, Terry, and James) for ill treatment of these horses, which has been seized and were in the custody of the HSPCA. Sometime during the early evening hours, these warrants were served and all three were arrested, transported to the detention center, and then respectively booked and incarcerated. James Trexler was charged with five counts of Ill Treatment of Animals. His mother and brother were also charged with multiple offenses, including a charge of kidnapping for Terry Trexler. (R. 159, 184-190, 232-236).

RCSD Captain Chris Cowan, who was Senior Public Information Coordinator, disseminated a press release regarding the Trexler arrests. This release was sent by him to various statewide media outlets. The press release erroneously stated that James Trexler had been charged with kidnapping. (R. 192-194).

At the time of these events, James Trexler was a veteran employee of the South Carolina Department of Agriculture, working at that time as an Assistant Commissioner for Administration. Following the arrests, *The State* newspaper published a headline on its front page stating: "Assistant Ag Chief Faces Kidnap Charge." Following the headline, *The State* published an article in which it was reported as a fact that James Trexler had been charged with kidnapping as a result of

an incident involving the horses. (R. 196-197). The erroneous portion of the press release was later retracted by Cowan and disseminated accordingly. (R. 199-200).

Shortly thereafter, the charges against James Trexler were presented to the Richland County Grand Jury, and on March 13, 2008, four true bill indictments were returned . (R. 238-250). Trexler was indicted for "Ill Treatment of Animals" in violation of Section 47-1-40(B).

In May 2008, the prosecution of the animal cruelty cases against James Trexler and his family members was transferred to the South Carolina Attorney General. (R. 258-259). The charges against James Trexler were later dismissed in July 2010, by the Attorney General's Office.

ARGUMENTS

I. The Circuit Court was correct in granting summary judgment on the malicious prosecution claim.

The Appellant James Trexler (hereinafter referred to as "Trexler") argues on appeal that Judge DeAndrea Benjamin erred in granting summary judgment on his malicious prosecution claim. Judge Benjamin concluded that there was prima facie evidence of probable cause for Trexler's arrest and prosecution shown based upon four true bill indictments returned by the Richland County Grand Jury. (R. 11). Judge Benjamin further pointed to the continued prosecution of Trexler by the Fifth Circuit Solicitor's Office and later the South Carolina Attorney General for a period of 29 months as supporting a showing that probable cause existed for Trexler's arrest and prosecution. (R. 12).

The elements of malicious prosecution under South Carolina law are: "(1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Broyhill v. Resolution Management Consultants, Inc.*, 401 S.C. 466, 736 S.E.2d 867, 870-71 (Ct. App. 2012). "An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a

preponderance of the evidence, including malice and lack of probable cause." *Pallares v. Seinar*, 407 S.C. 359, 756 S.E.2d 128, 131 (2014).

In a recent decision where the South Carolina Supreme Court upheld the grant of summary judgment in a malicious prosecution claim, the Court explained that "[a] party must show the opponent lacked probable cause as to each cause of action asserted to prevail on a claim of malicious prosecution; thus, the existence of probable cause as to any one is sufficient to defeat a malicious prosecution claim." *Pallares*, 756 S.E.2d at 132. "Whether probable cause exists is ordinarily a jury question, but it may be decided as a matter of law when the evidence yields only one conclusion." *Id.*

The Supreme Court further held that probable cause in the context of a malicious prosecution claim, "does not turn upon the plaintiff's guilt or innocence, but rather upon whether the facts within the prosecutor's knowledge would lead a reasonable person to believe the plaintiff was guilty of the crimes charged." *Pallares*, 756 S.E.2d at 131. Importantly, "[t]he issue is not what the actual facts were, but what the prosecuting party honestly believed them to be." *Id.*

In addition, the Supreme Court has explained that "South Carolina has long embraced the rule that a true bill of indictment is prima facie evidence of probable cause in an action for malicious prosecution." *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 629 S.E.2d 642, 649 (2006). *See also*, *Kinton v. Mobile*

Home Industries, 274 S.C. 179, 262 S.E.2d 727 (1980); *Whitner v. Duke Power Co.*, 277 S.C. 397, 288 S.E.2d 389 (1982). The United States District Court has similarly explained "[w]here the Grand Jury has returned a true bill upon the charge made, such finding amounts to a judicial recognition that probable cause does exist and infers prima facie probable cause for the prosecution." *White v. Coleman*, 277 F. Supp. 292, 297 (D.S.C. 1967).

In the present case, the charges against James Trexler were presented to the Richland County Grand Jury, and on March 13, 2008, four true bill indictments were returned . (R. 238-250). Trexler was indicted for "Ill Treatment of Animals" in violation of Section 47-1-40(B), which provides as follows:

> A person who tortures, torments, needlessly mutilates, cruelly kills, or inflicts excessive or repeated unnecessary pain or suffering upon an animal or by omission or commission causes these acts to be done, is guilty of a felony and, upon conviction, must be punished by imprisonment of not less than one hundred eighty days and not to exceed five years and by a fine of five thousand dollars.

S.C. Code Ann. § 47-1-40(B). Thus, the undisputed fact that Trexler was indicted by the Grand Jury on the charges is prima facie evidence that probable cause existed for his arrest and prosecution.

Importantly, the burden of proof is on Trexler to show the *lack* of probable cause in a malicious prosecution action. The burden is not on the Richland County Sheriff to prove the existence of probable cause. The true bill indictments, which

provide prima facie proof of probable cause, foreclose Trexler's malicious prosecution claim consistent with *Law*, *Kinton,* and the long line of South Carolina cases so holding.

Trexler focuses in his brief on attacking the decision of Judge Benjamin on various points that are not necessary or material to the affirmance of her summary judgment ruling. For instance, any technical errors in the warrant affidavits which were sworn by an HSPCA investigator, not by a Richland County deputy, do not negate the existence of probable cause as determined by the Grand Jury. The true bill indictments nonetheless bar the malicious prosecution claim.

Moreover, as the Supreme Court explains in *Pallares*, "[t]he issue is not what the actual facts were, but what the prosecuting party honestly believed them to be." *Pallares*, 756 S.E.2d at 131. The record shows that the horses seized from 412 Derby Lane were malnourished – that is not disputed.[2] James Trexler is critical of the investigation that was conducted and claims that probable cause was lacking because there was insufficient evidence developed to show that he owned the horses in question or that he owned the 412 Derby Lane property at the time of the seizure. Ownership of the horses, however, is immaterial. The offense of Ill Treatment of Animals, as codified by Section 47-1-40(B), is not limited to the

[2] Trexler may dispute whether there was horse food on the premises, but the presence of food does not refute the physical condition of the horses that were seized.

owner of the maltreated animal. The statute does not include ownership as an element of the offense. Thus, the absence of evidence that Trexler owned the horses at issue does not negate the existence of probable cause.

Furthermore, the record demonstrates that there was sufficient evidence to lead a reasonable person to believe that James Trexler resided at or exercised some control over the 412 Derby Lane property. Trexler's own driver's license showed 412 Derby Lane as his residence. (R. 181).[3] Moreover, Trexler was actually arrested while present at the property. (R. 159). Therefore, there was sufficient evidence that would lead a reasonable person to conclude that Trexler resided at or otherwise exercised some control over the 412 Derby Lane property where the malnourished horses were observed and seized. Therefore, whether Trexler actually owned the horses and property was not material to a determination of probable cause. Instead, there was sufficient evidence to allow for a reasonable person to conclude that James Trexler bore responsibility for inflicting "excessive or repeated unnecessary pain or suffering upon an animal" which may be committed "by omission or commission."

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[3] Under South Carolina law, a driver's license as issued by the Department of Motor Vehicles (DMV) is required to show the licensee's "residence address." S.C. Code Ann. § 56-1-140. In addition, state law requires a licensee to notify the DMV within ten days of any change in the residence address. S.C. Code Ann. § 56-1-230. Therefore, it is reasonable to rely on the address on a person's driver's license and in DMV records as a reliable statement of the address of his/her residence. Therefore, in the present case, it was reasonable to conclude that 412 Derby Lane was James Trexler's residence in February 2008. (R. 181).

See, S.C. Code Ann. § 47-1-40(B). Those were the facts as honestly believed by the HSPCA investigator who swore the arrest warrants.

In sum, Judge Benjamin correctly ruled that "the evidence does not support a cause of action for malicious prosecution." (R. 12). The Appellant Trexler has quite simply failed to show a lack of probable cause. In contrast, the record contains the undisputed evidence that the Richland County Grand Jury returned four true bill indictments against Trexler, and the prosecutorial authority, based on the information available, continued to prosecute Trexler for 29 months. Trexler has simply failed to rebut the prima facie evidence, particularly in light of evidence that does link Trexler to the 412 Derby Lane property where malnourished horses were seized by the HSPCA. As the Supreme Court did in *Pallares*, this Court is respectfully requested to affirm the summary judgment on the malicious prosecution claim.

II. The Circuit Court was correct in granting summary judgment on the defamation claim.

The Appellant Trexler also contends on appeal that Judge Benjamin erred in granting summary judgment on his defamation claim. Judge Benjamin concluded that the Richland County Sheriff is entitled to absolute sovereign immunity under

Section 15-78-60(17) in accordance with this Court's precedent in *Gause v. Doe*, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994).

Section 15-78-60(17) provides that a governmental entity is not liable for a loss resulting from "employee conduct outside the scope of his official duties or which constitutes actual fraud, *actual malice, intent to harm,* or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60(17). (Emphasis added). Concluding that Trexler is a "public official" for purposes of a defamation action, Judge Benjamin agreed that Trexler was required to prove that the Sheriff's employee's conduct constituted actual malice in order to prevail on his defamation claim against the Sheriff. Because "actual malice" was an element of his proof, Judge Benjamin concluded that the Sheriff is necessarily immune under Section 15-78-60(17) for the alleged defamation. (R. 16).

In challenging that ruling, Trexler appears to make three arguments: (1) Trexler contests Judge Benjamin's conclusion that he is a "public official" for purposes of a defamation claim; (2) Trexler disputes that the reference to "actual malice" in Section 15-78-60(17) includes "constitutional actual malice"; and (3) Trexler argues that the existence of "constitutional actual malice" is a question of fact for the jury to determine. Trexler's position on each issue lacks merit.

A. Trexler as "Public Official"

The South Carolina Supreme Court has held that "to prove fault in a defamation action, a plaintiff who is a public official or public figure must prove by clear and convincing evidence that the defendant acted with actual malice in publishing a false and defamatory statement about the plaintiff." *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653, 665 (2006). Actual malice requires proof that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 629 S.E.2d at 666, *citing New York Times Co. v. Sullivan*, 376 U.S. 256, 279-280 (1964). As the State Supreme Court has cautioned, "[a]ctual malice under the *New York Times* standard should not be confused with the concept of common law malice as an evil intent or a motive arising from spite or ill will." *Erickson,* 629 S.E.2d at 666. *See also*, *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991).

The State Supreme Court has explained that "an important initial step in analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure." *Erickson,* 629 S.E.2d at 666. Importantly, "[t]his determination is a matter of law which must be decided by the court, on a case by case basis after a careful examination of the facts and circumstances." *Id.*

Thus, a determination as to whether James Trexler is a public official is an issue of law for the court to determine. The State Supreme Court has instructed 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,* 629 S.E.2d at 666, *citing Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). "In 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 charges in controversy." *Id.* In applying this standard, there is no reasonable dispute that Trexler, as an Assistant Commissioner of Agriculture for the State of South Carolina, is a public official for defamation purposes. Consequently, Judge Benjamin did not err in treating Trexler as a public official in adjudicating the immunity defense to his defamation claim. As a matter of law, that ruling was correct.

In addition, the summary judgment record includes an order issued by Judge Joseph M. Strickland in the consolidated case of *Trexler v. Associated Press*, Civil Action 2010-CP-40-1249, holding as a matter of law that Trexler was a public official for purposes of his defamation action. (R. 205-220). The *Associated Press* case involves defamation claims by Trexler arising from the publication of the very same press release at issue in the case at bar. Judge Strickland specifically found:

> It seems clear beyond doubt that plaintiff is a public official in the context of this litigation. He acknowledged in his letter of resignation, filed by defendants in support of their motion, that he was an Assistant Commissioner of Agriculture, and that he helped to lead the agency. Plaintiff testified in his deposition, and the Commissioner of Agriculture testified in his deposition, that plaintiff was the department's liaison with the General Assembly, the State Budget and Control Board and the Board of Trustees of the University of South Carolina as project manager for the relocation of the State Farmer's Market.
>
> Plaintiff sought to minimize the significance of his title as Assistant Commissioner, but the title, acknowledge [sic] by plaintiff in his resignation letter signified to those with whom plaintiff came in contact that he had responsibility for the operation of a state agency. Plaintiff himself acknowledged in his deposition that he had an important position in the agency, saying, "I went there as legislative liaison and I ran the agency." Had plaintiff's title been "head bookkeeper" or something similarly limited, he might be considered a private figure for some cases, but in the context of publications concerning his arrest and indictment for mistreatment of horses, public interest in his activity in this particular context, apart from his title, makes him a public official.

(R. 217-218).[4]

Trexler argues that Judge Benjamin erred in relying on Judge Strickland's ruling. While Judge Benjamin does not specifically reference Judge Strickland's order in her decision, even if she did rely on the prior judicial decision, that is not

[4] Judge Strickland's Order is on appeal to this Court, and a decision is currently pending. Oral argument was held on February 11, 2015. *See*, Appellate Case Number 2013-001581.

reversible error. Trexler argues that Judge Benjamin erred in treating the prior ruling as the "law of the case." There is no suggestion that Judge Benjamin relied on the "law of the case" doctrine. Nonetheless, it is important to note that the *Associated Press* case and the present case had been consolidated by Order filed March 1, 2011. (R. 1).

Nonetheless, to the extent that Judge Benjamin relied on the prior order in the companion case, that is entirely proper under the doctrine of collateral estoppel.[5] South Carolina law provides that "[c]ollateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. South Carolina Department of Transportation*, 385 S.C. 550, 684 S.E.2d 779, 782 (Ct. App. 2009). The elements for issue preclusion are (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Argoe v. Three Rivers*

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[5] Even if Judge Benjamin did not expressly cite the preclusive effect of Judge Strickland's order as a basis for concluding that Trexler is a public official for defamation purposes, this Court may certainly treat collateral estoppel as an additional sustaining ground on this issue of law. In the case of *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* *See also*, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

Behavioral Health, LLC, 392 S.C. 462, 710 S.E.2d 67, 72 (2011). Each of those elements has been demonstrated in the case at bar. Trexler is a plaintiff in both of the consolidated actions.[6] Moreover, the identity of the subject matter is the same. Both cases involve defamation claims arising from the publication of the same press release. Finally, the issue litigated is the same in both cases – whether Trexler is a public official for purposes of defamation.

Therefore, Trexler is precluded as a matter of law from taking a legal position inconsistent with Judge Strickland's conclusion that Trexler is a public official, thereby requiring proof of actual malice under the *New York Times* standard in order to prevail on his defamation claims, not only against the media defendants but also against the Richland County Sheriff. *See*, *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281, 285 (2003) ("[c]ollateral estoppel prevents a party from litigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action").[7]

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[6] Mutuality of all parties is no longer required. Instead, only the party against whom estoppel is asserted must have been a party to the prior action. *Snavely v. Amisub of South Carolina, Inc.*, 379 S.C. 386, 665 S.E.2d 222, 228 (Ct. App. 2008).

[7] The doctrine of collateral estoppel applies "when an issue has been actually litigated and determined by a valid and final judgment." *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224, 226 (2008). There is no South Carolina case determining whether a circuit court decision on appeal is deemed a "final judgment" for purposes of collateral estoppel. This issue will likely be moot because it is anticipated that this Court will issue a ruling in the *Associated Press* case before Trexler's appeal in the present case will be decided. In that event, if Judge Strickland's ruling that Trexler is a public official is upheld on appeal in that case, there will be no question that that ruling is entitled to issue preclusion in the present case. However, the Richland County Sheriff submits nonetheless that South Carolina will follow the federal rule and

B. Sovereign Immunity under Section 15-78-60(17)

In *Gause v. Doe*, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994), this Court examined whether the South Carolina Tort Claims Act barred the plaintiff's defamation cause of action against the Myrtle Beach Police Department. The parties did not dispute that the plaintiff, as a police officer, was a "public official" for purposes of his defamation action.[8] This Court explained that "[i]n a case involving defamation of a public official, the plaintiff must prove the defendant acted with actual malice." 451 S.E.2d at 409. Citing Section 15-78-60(17), this Court also recognized that the Tort Claims Act "clearly excludes a governmental entity's liability for an individual's loss stemming from a state employee's conduct that constitutes actual malice." *Id.* Based thereon, this Court "agree[d] with the trial court that the SCTCA bars Gause's slander claim against the MBPD because

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the rule followed by most state courts nationwide. "Under the federal view, the pendency of an appeal does not prevent application of the collateral estoppel doctrine unless the appeal involves a full trial de novo." *Ruyle v. Continental Oil Co.*, 44 F.3d 837, 846 (10th Cir. 1994). "The majority of state courts follow the federal rule." *Id.* In addition, the federal rule is consistent with the *Restatement (Second) of Judgments*, which provides that "a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo." *Restatement (Second) of Judgments*, § 13, cmt. f. The South Carolina courts have closely followed the *Restatement (Second) of Judgments* in adopting rules pertaining to issue preclusion in subsequent litigation. *See*, *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984); *South Carolina Property and Casualty Ins. Guaranty Association v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991). Therefore, the pendency of an appeal in the *Associated Press* case would not have prevented Judge Benjamin from relying on Judge Strickland's order in concluding that Trexler is a public official.

[8] This Court recognized that there was controlling authority in this State providing that a police officer is a "public official" for purposes of defamation.

Gause must prove the MBPD employee's conduct constituted actual malice in order to recover on this claim." *Id.*

As Judge Benjamin correctly concluded, the case at bar requires the same result. As a public official, James Trexler is required to prove actual malice in order to prevail on his defamation claim. However, pursuant to Section 15-78-60(17), the Sheriff enjoys absolute sovereign immunity for any employee conduct constituting actual malice. Thus, Trexler's defamation claim against the Sheriff is barred.

Recognizing that *Gause* bars his defamation claim, Trexler argues that *Gause* was "wrongly decided" because the reference to "actual malice" in Section 15-78-60(17) refers to common law actual malice and not to constitutional actual malice which is the *New York Times* standard. *See*, Appellant's Brief, p. 21. Trexler cites no case law or other authority in support of his position. In fact, a decision of the South Carolina Supreme Court in *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991), is directly at odds with Trexler's reading of "actual malice" as that term is used in the Tort Claims Act. *Sanders* was a defamation suit brought by two school board members against a third school board member. Applying the *New York Times* standard, the Supreme Court explained that the controlling standard was constitutional actual malice as opposed to common law malice. The Court further recognized that the term "actual malice" as contained in the Tort

Claims Act includes constitutional actual malice. 403 S.E.2d at 643. In *Sanders*, the Supreme Court was applying "actual malice" as contained in Section 15-78-70(b), which provides as follows:

> Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, *actual malice*, intent to harm, or a crime involving moral turpitude.

S.C. Code Ann. § 15-78-70(b). (Emphasis added). This is the same language as contained in Section 15-78-60(17), and thus shows that "actual malice" as used in the Tort Claims Act is inclusive of constitutional actual malice.

Sanders also rejects another argument made by Trexler. He insists that "to interpret S.C. 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." *See*, Appellant's Brief, p. 23. However, Trexler does not explain how this is an "absurd" result. As the Supreme Court has recognized, "[t]he Tort Claims Act is a *limited* waiver of governmental immunity." *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688, 690 (1995). (Emphasis added). Thus, there are exceptions to the waiver of sovereign immunity. One such exception is that governmental entities cannot be liable for their employee's defamation of public officials. That does not mean that a public

official has no remedy for defamation if constitutional actual malice is shown. Instead, as the *Sanders* case clearly demonstrates, the defamation action must be asserted against the employee individually. The Supreme Court, in fact, explained in *Sanders* that "the clear language of the South Carolina Tort Claims Act provides that Prince may be sued individually" and that "subsection (b) unequivocally states that when an employee's conduct constitutes actual malice, he is not entitled to immunity from suit and liability." 403 S.E.2d at 643. Consequently, while the entity enjoys absolute sovereign immunity, the employee does not. Therefore, a public official is not precluded from pursuing his defamation claim, but the claim must be pursued directly against the employee. In the present case, Trexler never sued Chris Cowan individually.

In sum, Judge Benjamin was correct that the Richland County Sheriff cannot be liable for an employee's defamatory conduct where such conduct constitutes actual malice. That ruling should be affirmed.

C. "Constitutional Actual Malice" as Question of Fact

As a final issue, Trexler argues at length that "constitutional actual malice" is a question of fact for the jury to decide. That issue was not raised by the Richland County Sheriff in its summary judgment motion nor addressed by Judge Benjamin in her order. Because the Richland County Sheriff is entitled to absolute

sovereign immunity under Section 15-78-60(17) and this Court's precedent in *Gause*, it is not necessary to even reach this issue.[9]

[9] To reiterate, the Appellant Trexler conceded at oral argument that Richland County is not a proper Defendant and should be dismissed. (R. 79). Further, Trexler does not dispute that on appeal. Therefore, it is undisputed that Richland County should be dismissed by consent and it not properly a Respondent in this appeal.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Richland County Sheriff respectfully requests that this Court affirm the order of Circuit Court Judge DeAndrea Benjamin granting summary judgment to the Respondent on the malicious prosecution and defamation claims.

Respectfully submitted,

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The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of the **Brief of Respondents** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 12th day of June 2015:

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