STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2014-002725

Clark D. Thomas.....Appellant

Vs.

Evening Post Publishing Co., Inc. d/b/a The Post and Courier,
Glenn Smith, Officially.....Respondents

INITIAL BRIEF OF RESPONDENTS

Columbia, South Carolina

July 13, 2015

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER

STATEMENT OF ISSUES ON APPEAL

I. WAS THE TRIAL COURT CORRECT IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON GROUNDS THAT THE NEWS REPORT OF SEPTEMBER 23, 2012 WAS PRIVILEGED UNDER THE "FAIR REPORT" PRIVILEGE AS THE FAIR AND ACCURATE REPORT OF OFFICIAL RECORDS AND PROCEEDINGS?

II. WAS THE TRIAL COURT CORRECT IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON GROUNDS THAT APPELLANT HAD FAILED TO MEET HIS BURDEN OF PROVING THE FALSITY OF THE SEPTEMBER 23, 2012 NEWS REPORT?

III. DOES THE COURT HAVE BEFORE IT AN APPEAL FROM AN ORDER DENYING APPELLANT'S MOTION FOR CONTINUANCE OR DISMISSAL?

IV. DOES THE COURT HAVE BEFORE IT AN APPEAL FROM ANY FINDING BY THE TRIAL COURT THAT APPELLANT IS LIBEL-PROOF?

STATEMENT OF THE CASE

Appellant initiated an action against respondents with the filing of a summons and complaint on September 17, 2013 seeking to assert libel claims for publications on June 9, 2006, March 1, 2007 and July 12, 2008. Respondents moved for judgment on the pleadings on grounds that the libel claims were barred by the applicable statute of limitations. Thereafter, appellant moved for the filing of an amended complaint and respondents consented. The amended complaint, dated November 7, 2013, sought to assert a libel claim for a publication dated September 23, 2012. (Am. Compl. ¶¶ 6, 7). Appellant also sought to assert a claim for intentional infliction of emotional distress based on the September 23, 2012 publication. (Am. Compl. ¶ 40)

Following discovery, respondents moved for summary judgment on grounds that the publication complained of was privileged as a fair and accurate account of judicial records and proceedings; the news report was true or substantially true; and that appellant's reputation, based on his criminal history, could not be diminished further by the publication complained of in the amended complaint. Respondents supported their motion with pleadings, answers to interrogatories, admissions, the transcript of record in the Family Court proceeding Clark D. Thomas v. Rachel M. Crowley, and the affidavit of Glenn Smith. Appellant filed no affidavits addressing the matters raised in respondents' motion, but did file 14 affidavits stating that appellant was not a violent person, each captioned in the criminal prosecution State of South Carolina vs. Clark David Thomas. Appellant moved for a continuance or a dismissal, but these motions were denied.

A hearing was held in Charleston on October 29, 2014 on respondents' motion for summary judgment. Thereafter, on October 31, 2014, respondents' motion for summary

judgment was granted as to the libel claim on grounds that the news report complained of was privileged, and as to the claim for intentional infliction of emotional distress on grounds that the facts alleged for this claim were those alleged for the libel claim thereby precluding the intentional infliction of emotional distress claim.[1]

Appellant's motion for reconsideration was denied and thereafter appellant filed a notice of appeal. (Notice of Appeal). The notice filed with the Court of Appeals omitted the order from which the appeal was taken, but appellant forwarded the October 31, 2014 order granting summary judgment for attachment to the notice of appeal. (Letter of Dec. 29, 2014 to Clerk with Oct. 31, 2014 Order). No notice of appeal was filed or served with respect to any order denying plaintiff's motion for continuance or dismissal.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON GROUNDS THAT THE NEWS REPORT OF SEPTEMBER 23, 2012 WAS PRIVILEGED UNDER THE "FAIR REPORT" PRIVILEGE AS THE FAIR AND ACCURATE REPORT OF OFFICIAL RECORDS AND PROCEEDINGS.

The "fair report" privilege has long been recognized in South Carolina law to protect from defamation claims the fair and substantially accurate reports of official proceedings and records. *See Oliveros v. Henderson,* 116 S.C. 77, 106 S.E. 855 (1921). The application of the privilege is to be determined by the trial court as a matter of law, *see Swinton Creek Nursery v. Edisto Farm Credit, ACA,* 334 S.C. 469, 514 S.E.2d 126 (1999); *id.*, and, when applied, the privilege insulates from libel claims those who publish the contents official records and statements, even when those statements and records contain false information, *White v.*

[1] Appellant's statement of issues on appeal does not include a challenge to the trial court's decision with respect to the intentional infliction of emotional distress claim, and his brief makes no specific argument or cites any authority regarding the ruling on the intentional infliction of emotional distress claim. Under these circumstances, the intentional infliction of emotional distress claim is not before the court. *Allen v. Pinnacle Healthcare Systems, LLC,* 394 S.C. 268, 715 S.E.2d 362 (Ct. App. 2011).

Wilkerson, 328 S.C. 179, 186, 493 S.E.2d 345, 348 (1997). Smith's affidavit states clearly and unequivocally that the content of the news report of September 23, 2012 came either from his review of public records, information provided by a public spokesperson or his personal observations at the divorce trial. Appellant might not like the contents of the public record or the trial proceedings being reported on and may believe them to be false, but respondents are protected from liability, and are entitled to a judgment as a matter of law absent a showing by appellant that the privilege did not apply or was abused. Appellant made no such showing.[2]

The September 23, 2012 news report complained of by appellant, (Am. Compl. Ex. 163), was an account by respondent Glenn Smith (Smith) of plaintiff's *pro se* representation in his divorce action against his wife, and the contents of records relating to the divorce and the criminal acts by appellant directed at his wife that led to appellant's felony conviction and incarceration.

In his affidavit in support of the motion for summary judgment Smith provides a point-by-point foundation for the statements in the news report complained of by appellant. (Smith Aff.). Smith stated that the facts he reported about the events leading to appellant's criminal conviction were taken from a police "incident report" prepared by the North Charleston Police Department dated June 5, 2006. (Smith Aff. Ex. A, ¶¶ 9-13). Respondents requested that appellant admit that the police report was a genuine copy of an incident report prepared by the

[2] Appellant contends that his Amended Complaint (Am. Compl.) was verified, that an affidavit he filed with his motion for judicial notice (Mot. for Judicial Notice), and his demand for retraction satisfy the requirement of S.C. R. Civ. P. 56(e) that an adverse party responding to a properly supported motion for summary judgment demonstrate by affidavit or otherwise the existence of specific facts showing that there is a genuine issue for trial. (Appellant's Br. 12–15). This argument is unavailing as the Amended Complaint does not appear to be verified in conformity with S.C. R. Civ. P. 11(c), if at all, and the affidavit accompanying the motion for judicial notice does not conform to the requirements of S.C. R. Civ. P. 56(e). While a verified complaint conforming to the requirements of S.C. R. Civ. P. 56(e) will be treated as the equivalent of an affidavit, the Supreme Court of South Carolina noted that few pleadings, even if verified, would meet the requirements of the rule. *Dawkins v. Fields,* 354 S.C. 58, 580 S.E.2d 433 (2003). Nothing submitted by plaintiff in opposition to the supported motion identified by affidavit or otherwise specifies genuine issues of material fact.

North Charleston Police Department. (Def.'s Req. for Admis. Ex. A, ¶ 1). Respondents' Requests for Admission were served on May 19, 2014, and appellant did not respond. The request was deemed admitted by operation of S.C. R. Civ. P. 36(a) (a "matter is admitted unless, within 30 days after service . . . the party to whom the request is directed serves . . . a written answer or objection . . . .") and the trial court could accept that the police report as genuine.[3] The narrative in the police report recounts the circumstances of appellant's arrest for criminal domestic violence of a high and aggravated nature against his wife. (Police Report). Appellant complains that the news report inaccurately and falsely reported the circumstances leading to his arrest, (Am. Compl. ¶¶ 19-22), but Smith stated in his affidavit that his reporting was based on the police report, (Smith Aff. ¶¶ 9–13). Appellant filed nothing to challenge the accuracy of Smith's reporting of the contents of the police report.

Smith's affidavit stated that items in the news report concerning the divorce trial were either his observations from attending the trial (Smith Aff. ¶¶ 5–6) or supported by trial testimony. (Smith Aff. ¶¶ 7–8, 14–24). Appellant filed nothing to challenge the accuracy of Smith's report of the trial.

Smith noted in his affidavit that appellant alleged the cost reported for his *pro se* divorce representation was false. (Smith Aff. ¶ 16). However, Smith said the information regarding the costs associated with appellant's divorce activities was provided by a "spokesperson for the South Carolina Department of Corrections . . . ." *Id.* Appellant filed nothing to challenge the accuracy of the report of the costs of his divorce to the State of South Carolina.

Appellant complained that the headline on the news report was a statement of opinion to mean that appellant's efforts in family court warranted the unfavorable rulings. (Am. Compl. ¶

[3] In his motion to alter or amend the grant of summary judgment appellant acknowledged that he did not respond to respondents' requests for admission, and that all requests, except the one relating to whether he was also known as Thomas Wayne Poore, were confirmed as true. (Motion to Alter or Amend p. 5)

33). Smith stated in his affidavit that he did not write the headline, (Smith Aff. ¶ 25), but regardless of who wrote the headline, appellant filed nothing in support of his allegation. Notwithstanding plaintiff's failure to respond in accordance with the requirements of S.C. R. Civ. P. 56 to respondents' supported motion for summary judgment, there is no such thing as a false opinion, *see Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997 (1974), and no liability will attach without the publication of a false statement of fact. *Id.*

In the case of *White v. Wilkerson,* 328 S.C. 179, 493 S.E.2d 345 (1997), attorneys sued the mayor of the City of Cayce and a radio station which had broadcast remarks by the mayor on a radio show that the attorneys received $60,000 of a $65,000 settlement payment made by the City to resolve a police brutality suit. The statement by the mayor was false. The trial judge dismissed the libel claim against the radio station on grounds that the broadcast of the mayor's remarks was privileged under the "fair report" privilege. The Supreme Court of South Carolina affirmed the dismissal of the claim against the station, holding:

> Appellants argue the trial judge erred in finding WMHK was protected by a qualified privilege because WMHK exceeded any privilege it may have had. The "fair report" privilege protects fair and accurate reports of "judicial records and proceedings and other official acts, reports, and records." S.C. Jur. *Libel and Slander* § 61 (1993) (footnote omitted). *See also Jones v. Garner,* 250 S.C. 479, 158 S.E.2d 909 (1968).

White, 328 S.C. at 186, 493 S.E.2d at 348.

The rationale for the recognition of a fair report privilege is to protect those who would bring information to the public about the operations of their governmental agencies and of matters of public interest. *See* Robert D. Sack, *Sack on Defamation: Libel, Slander and Related Problems* (1st ed. 1980). The privilege is a conditional or qualified privilege which will be lost if the publication or publications were motivated by "actual malice." *See Jones v. Garner,* 250

S.C. 479, 158 S.E.2d 909 (1968). The term "actual malice" has two meanings dependent upon whether a defendant in a libel case is raising a constitutional defense or a common law privilege defense. *See Sanders v. Prince,* 304 S.C. 236, 403 S.E.2d 640 (1991). The Supreme Court of South Carolina noted the distinction between the two types of malice, stating:

> In cases involving the defamation of a public official, the plaintiff must prove that the defendant acted with constitutional actual malice, that is, with knowledge that the statement was false or with reckless disregard of its falsity. *New York Times v. Sullivan,* 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964). "Instructions [on common law malice], which permit the jury to impose liability on the basis of the defendant's hatred, spite, ill will, or desire to injure are clearly impermissible." *Old Dominion Branch No. 496 v. Austin,* 418 U.S. 264, 281, 94 S.Ct. 2770, 280, 41 L.Ed. 2d 745, 760 (1974). "Ill will toward the plaintiff, or bad motives are not elements of the *New York Times Standard." Id.*

Sanders, 304 S.C. at 239-40, 403 S.E.2d at 643.

While common law malice is not an element of constitutional actual malice in the *New York Times* line of cases, it is a plaintiff's burden to prove common law malice to defeat the common law fair report privilege. The meaning of malice in the common law sense was established by the Supreme Court of South Carolina:

> Actual malice means that the defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious indifference toward plaintiff's rights. *See: Rogers v. Florence Printing Co.,* 233 S.C. 567, 106 S.E.2d 257.

Jones, 250 S.C. at 488, 158 S.E.2d at 914.

The grant of summary judgment was appropriate because in response to respondents' properly supported motion for summary judgment, appellant made no showing that the

publications were motivated by common law malice, *i.e.* hatred, ill will or spite directed at appellant such as would overcome the "fair report" privilege. S.C. R. Civ. P. 56(e). None of the affidavits filed by appellant supported the allegations of the Amended Complaint or demonstrated the existence of genuine issues of material fact regarding either the inapplicability of the "fair report" privilege or a publication exceeding the bounds of the privilege.

II. THE TRIAL COURT WAS CORRECT IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON GROUNDS THAT APPELLANT HAD FAILED TO MEET HIS BURDEN OF PROVING THE FALSITY OF THE SEPTEMBER 23, 2012 NEWS REPORT.

If the publication of the September 23, 2012 news report was not privileged, respondents would nevertheless have no liability unless appellant could prove the falsity of any defamatory facts published of and concerning him in the report. The first element of a libel claim is the publication of a false and defamatory statement of and concerning another. *Holtzscheiter v. Thomson Newspapers, Inc.,* 332 S.C. 502, 506 S.E.2d 497, 506 (1998) (Toal, J., concurring). Historically a defamatory statement was presumed to be false, and a defendant could avoid liability by proving the truth of the publication. This allocation of burden of proof has been shifted by the decision of the Supreme Court of the United States in *Philadelphia Newspapers v. Hepps,* 475 U.S. 767, 106 S.Ct. 1558 (1986). In cases involving a publication relating to a matter of public interest, a plaintiff must prove the falsity of the publication. *Id.* The news report complained of by appellant related to the operation of the Family Court system and the novelty of *pro se* representation by an inmate convicted of a violent felony against the defendant in a divorce action. It is beyond question that the function of the court system in this unusual circumstance was a matter of public interest, such as would require appellant to prove the falsity of the publication. *See Parker v. Evening Post Pub. Co.,* 317 S.C. 236, 452 S.E.2d 640, *cert. denied,* 516 U.S.1172, 116 S.Ct. 1263 (1994). *See also Doe v. Berkeley Publishers, Inc.,* 329

S.C. 412, 496 S.E.2d 636, *cert. denied*, 524 U.S. 963, 119 S.Ct. 406 (1998). Appellant offered no proof by affidavit or otherwise that any unprivileged publication was false. Appellant failed to meet his burden of proof on the issue of falsity, leading to the conclusion that summary judgment in favor of respondents was appropriate. *Baughman v. Amer. Tel. and Tel. Co.,* 306 S.C. 101, 410 S.E.2d 537 (1991).

III. THE COURT DOES NOT HAVE BEFORE IT AN APPEAL FROM AN ORDER DENYING APPELLANT'S MOTION FOR CONTINUANCE OR DISMISSAL.

In his brief appellant argues that the trial court erred in denying his motion for continuance or dismissal. (Appellant's Br. pp. 9–11). The Notice of Appeal states that the appeal is from the order granting summary judgment dated October 31, 2014 and filed November 4, 2014 and the order denying appellant's motion to alter or amend filed December 1, 2014. (Notice of App.). Appellant did not attach to the Notice of Appeal any order for which he sought review. Rule 203(d)(1)(B)(ii), SCACR, requires that "[a] copy of the order(s) . . . to be challenged on appeal if they have been reduced to writing" be attached to the Notice of Appeal. The same day that the Notice of Appeal was dated, appellant transmitted to the Clerk of the Court of Appeals a letter requesting that the order granting summary judgment be attached to the Notice of Appeal "whereas it was inadvertently left out." (Letter of Dec. 29, 2014 to Kitchings). Significantly, appellant did not attach any order regarding a continuance or dismissal; therefore, those questions are not before the court.

The Supreme Court of South Carolina has said the failure to follow procedural requirements may deprive a court of appellate jurisdiction:

> The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of "appellate" jurisdiction over the case....

Great Games, Inc. v. S.C. Dept. of Revenue, 339 S.C. 79, 82 n.5, 529 S.E.2d 6, 7 n.5 (2000).

Appellate jurisdiction in the circuit court was found to be limited where an appellant amended the notice of appeal to limit the issues on appeal to orders of October and December 2004. Appellant there "failed to appeal the April 2004 order . . ." and the Supreme Court of South Carolina held that the circuit court had no appellate jurisdiction over the April 2004 order. *Ulmer v. Ulmer,* 369 S.C. 486, 491, 632 S.E.2d 858, 861 (2006). The Notice of Appeal in the within-captioned matter stated that the appeal was as to two orders relating to the grant of summary judgment. Appellant transmitted to the court only one order to be attached to the Notice of Appeal. This court lacks appellate jurisdiction over any order relating to continuance or voluntary dismissal. Had orders other than the October 31, 2014 order been attached to the Notice of Appeal, the absence of a reference to those orders in the Notice of Appeal could have been excused as a clerical error which would not affect the court's appellate jurisdiction, but appellant supplied the court with only one order for review. Under these circumstances, the requirements of Rule 203(d)(1)(B)(ii), SCACR, have not been met with respect to any order other than the October 31, 2014 order. Consideration of matters other than those raised with respect to that order would be improper.

Even if the issue of continuance were before the court, appellant has shown no basis for a reversal of the denial of a continuance. It has long been the rule in South Carolina that a motion for continuance is addressed to the sound discretion of the trial judge and will not be set aside unless there is a showing of an abuse of discretion. *See Trotter v. Trane Coil Facility,* 393 S.C. 637, 714 S.E.2d 289 (2011); *Williams v. Bordon's, Inc.,* 274 S.C. 275, 262 S.E.2d 881 (1980). Abuse of discretion in this context occurs when the ruling is based on an error of law or is without evidentiary support. *See Trotter*, 393 S.C. at 645, 262 S.E.2d at 293; *Sundown Operating Co. v. Intedge Indus., Inc.,* 383 S.C. 601, 606-07, 681 S.E.2d 885, 888 (2009). Further, the party

whose motion for continuance has been denied must demonstrate that the denial resulted in prejudice to that party. Appellant here made no showing that there was an abuse of discretion or that he was prejudiced by the denial of his motion.

Additionally, notwithstanding appellant's failure to provide notice of an appeal from any order denying his motion for voluntary dismissal, dismissal was not appropriate under S.C. R. Civ. P. 41 where respondents were prepared to go forward with the argument on their motion for summary judgment. Furthermore, because the applicable statute of limitations had run by the time appellant made his motion, respondents would be prejudiced if appellant were allowed to dismiss his case and then renew it after the statute of limitations had run. Since the public policy in libel cases is to have a shortened limitation period of two years, S.C. Code Ann. §15-3-550(1) (1976), allowing appellant to resume his action after the limitation period had expired would be contrary to the public policy reflected in the statute. The combination of legal prejudice to respondents and the public policy in favor of a shortened limitation period for libel claims supports a denial of appellant's motion for dismissal. *See Nelson v. QHG of South Carolina, Inc.,* 354 S.C. 290, 580 S.E.2d 171 (Ct. App. 2003).

IV. THIS COURT DOES NOT HAVE BEFORE IT AN APPEAL FROM ANY FINDING BY THE TRIAL COURT THAT PLAINTIFF IS LIBEL-PROOF

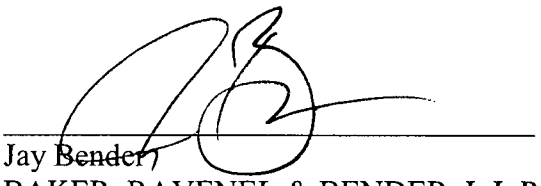
Appellant argues in his brief that the trial court erred "when failing to remand for review of the novel issue of being libel-proof . . . ." (App. Br. 17). The trial court did not rule on the libel-proof issue, and the order granting summary judgment is silent on the point. (Order of Circuit Ct., Oct. 31, 2014). It has long been the law in South Carolina that, "[A] person who is not affected by a particular ground of objection may not present it." *Ex parte Rowley,* 200 S.C. 174, 20 S.E. 383, 387 (1942) (quoting 53 C.J. 82). *See also Burden v. Woodside Cotton Mills,* 104 S.C. 435, 89 S.E. 474, 476 (1916) ("Ordinarily only the party aggrieved or injured by errors

or irregularities in the trial can complain of them."). Had the trial court ruled that appellant was libel-proof, appellant would have had a ground for appeal, but, in the absence of any ruling on the issue, appellant is not aggrieved, and cannot complain.

CONCLUSION

For the reasons stated herein, and upon the authorities presented, the decision of the trial court granting summary judgment to respondents should be affirmed.

Respectfully submitted,



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PROOF OF SERVICE

I, Teresa K. Todd, Legal Assistant to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Respondents' Designation of Matter to be Included in the Record on Appeal and Initial Brief of Respondents by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

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July 13, 2015