THE STATE OF SOUTH CAROLINA
In The 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,

v.

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.

FINAL BRIEF OF APPELLANT

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2. The trial court erred in finding probable cause for Appellant's arrest existed as a matter of law based on facts unknown to Respondents until after the commencement of the present litigation, and which facts are flatly contradicted by the evidence presented by Appellant.

3. The trial court erred in finding as a matter of law that allegedly defamatory publications by Respondents were true or substantially true, providing Respondents with an absolute defense to Appellant's defamation claims.

4. The trial court erred in finding Appellant was a "public official" for purposes of defamation as a matter of law based solely on an appealed ruling in a separate case.

5. The trial court erred in finding Appellant was required to show Respondents acted with "actual malice" in publishing allegedly defamatory statements about him, and that Appellant failed to make such a showing.

6. The trial court erred in finding Appellant provided no evidence to support a finding Respondents' defamatory statement was made with knowledge of its falsity or reckless disregard for the truth.

7. The trial court erred in granting summary judgment in favor of Respondent Brennessel on Appellant's defamation claim based on its finding that Appellant alleged insufficient facts to support a claim that Respondent Brennessel's defamatory statement was made recklessly, willfully, or with gross negligence.

STATEMENT OF THE CASE

This is a malicious prosecution that arises out of the Humane Society for the Prevention of Cruelty to Animals' ("HSPCA") participation in the instigation and continuation of Appellant's 2008 arrest and subsequent prosecution over the course of two and a half years on misdemeanor followed by felony charges of ill treatment to animals. This case also involves defamation arising out of statements Wayne Brennessel, Executive Director of the Human Society for the Prevention of Cruelty to Animals ("Brennessel") made to the media regarding the final disposition of the misdemeanor and felony charges of ill treatment of animals against Appellant.

Appellant alleges that the HSPCA partnered with the Richland County Sheriff's Department in the malicious instigation and continuation of legal process against him without probable cause, and with actual or constructive knowledge Appellant was not involved with the activity and ownership upon which the charges against him were brought. Appellant further alleges Respondents defamed him by reporting to the media he pleaded "no contest" to the charges despite having actual knowledge the charges against Appellant were dismissed, suggesting Appellant's guilt rather than announcing his innocence. Appellant alleges that as a direct result of malicious prosecution and defamation by the Respondents, he lost his job, salary, pension, retirement benefits, his ability to obtain like employment, and has suffered irreparable harm to his personal and professional reputation.

Appellant filed his Complaint on July 5, 2012. (See R. pp. 11-25). Respondents moved for summary judgment on July 18, 2013, and filed their Memorandum of Law in Support of Defendants' Motion for Summary Judgment on September 6, 2013 (See R. pp. 83-85; R. pp. 86-139). Also on September 6, 2013, Appellant filed his response Memorandum in Opposition to Respondents' Motion for Summary Judgment, followed by a copy of the Memorandum in Opposition with one of the exhibits corrected, with leave of the trial court, on September 11, 2013. (See R. pp. 140-166; R. pp. 167-194).

On September 6, 2013, the Honorable Alison Renee Lee presided over the hearing on Respondents' Motion for Summary Judgment (See R. pp. 46-82). On February 10, 2014, Judge Lee entered an Order (dated February 5, 2014) granting Respondents' Motion for Summary Judgment. (See R. pp. 3-8). Appellant received written notice of the filing of the Order granting summary judgment on February 26, 2014. Appellant served his Notice of Appeal on March 28, 2014. On July 22, 2014 Appellant requested an extension of time to submit his initial brief and designation of matter to be included in the record on appeal, which the Court of Appeals granted by its August 1, 2014 Order (See Appellant's Motion for Extension of Time; Order Granting Extension).

STANDARD OF REVIEW

The Court may independently review the record to determine if summary judgment was proper If the Appellant, as the non-movant, carries the burden of proof by the preponderance of the evidence, he can defeat summary judgment by pointing to a mere scintilla of evidence in his favor. See Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2008).

This is the same standard announced by the trial court in its February 5, 2014 Order: "[s]ummary judgment is appropriate if 'there is no genuine issue as to any material fact.' Rule 56(c), SCRCP. In determining whether a triable issue of material fact exists, the Court must construe all facts and inferences in the light most favorable to the non-movant. Wogan v. Kunze, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008). '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**.' Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011) (emphasis added)."

ARGUMENT

I 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 Question of Fact as to Whether Probable Cause Existed For His Arrest and The Trial Court's Based its Ruling on Inaccurate or Incomplete Facts For Which There is no Evidentiary Support in the Record

Respondents argue Appellant cannot establish each element required to maintain his claim for malicious prosecution because Respondents assert that probable cause for Appellant's arrest existed as a matter of law. (See R. p. 92) Appellant maintains Respondents instigated and continued criminal proceedings against him without probable cause, and that summary judgment is inappropriate because sufficient evidence exists to demonstrate a genuine issue of material fact on that issue. (See R. pp. 173-178).

To maintain an action for malicious prosecution, a plaintiff must demonstrate 1) the institution or continuation of original judicial proceedings, either civil or criminal; 2) by, or at the instance of, the defendant; 3) termination of such proceeding in plaintiff's favor; 4) malice in instituting such proceeding; 5) want of probable cause, and 6) resulting injury or damage. Parrott v. Plowden Motor Company, 246 S.C. 318, 321, 143S.E.2d 607, 608

(1965) (referencing 34 Am.Jur., Malicious Prosecution, Sec. 6, p. 706; Prosser v. Parsons, 141 S.E.2d 342 (1965); Gibson v. Brown, et al., 141 S.E.2d 653 (1965)).

"Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious [person], under the circumstances, to believe likewise." Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990). In an action for malicious prosecution, a plaintiff must demonstrate the prosecution was instituted maliciously, and without probable cause. Id.; accord Margolis v. Telech, 239 S.C. 232, 122 S.E.2d 417 (1961) However, malice may be inferred from a want of probable cause. Brown v. Bailey, 215 S.C. 175, 184, 54 S.E.2d 769,773 (1949). As the court in Baker v. Hornick, 57 S.C. 213, 35 S.E. 524, 529 (1900) intuitively recognized, "where a person instituted a prosecution against another without probable cause, it is difficult to conceive of any other motive but a malicious one for bringing the prosecution."

Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person. Moreover, malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. Law v S C. Dep't of Corrections, 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006) (citing Margolis, 239 S.C. 232, 238, 122 S.E.2d 417, 420 (1961)).

Importantly, "[p]robable cause is determined as of the time of the arrest, based on facts and circumstances—objectively measured—known to the arresting officer" Jackson v. City of Abbeville, 623 S.E.2d 656, 659, 366 S.C. 662, 667 (S.C.App. 2005), and "[o]nly those facts and circumstances which were or should have been known to the prosecutor at

the time he instituted the prosecution should be considered." Parrott, 246 S.C. 318 at 322, 609 (citing Bailey supra at 175,773). A court may decide probable cause exists as a matter of law **only** when the evidence yields but one conclusion. Parrott supra at 323, 609. To that effect, the Hornick court recognized that "[n]o man should with impunity set the criminal law in motion against another, and deprive him of his liberty, even for a brief period, upon slight suspicion or mere conjecture that he has committed the offense charged." See Hornick, 57 S.C. 213, 35 S.E. 524, 526. "Nor is it sufficient that the prosecutor should believe in the guilt of the accused. **Mere belief is not sufficient to justify a criminal prosecution**, because there must be reasonable or probable grounds for that belief." Id. (emphasis supplied).

Here, Respondents argue probable cause existed as a matter of law because the Grand Jury "true billed" the indictments against Plaintiff, creating "prima facie" evidence of probable cause[1] and that Appellant has not refuted the presumption. (See R. p. 93). Appellant argues "true billed" indictments only create a rebuttable presumption of probable cause, and the rule set down in Law is that probable cause exists as a matter of law only where 1) the indictments against plaintiff are true billed by the Grand Jury **and** 2) where the underlying facts support probable cause to instigate or pursue criminal charges. (See R. p. 175).

In fact, the Law court found the facts and circumstances underlying the instigation of proceedings against the appellant supported the presumption of probable cause created by true-billed indictments because the proceedings against appellant were subsequent to,

[1] For this proposition, Respondents rely on Law v. S. Carolina Dept. of Corrections, 365 S.C. 424, 629 S.E.2d 642 (2006).

and the result of, a thorough investigation, included the interviews of over forty witnesses, and was based on actual knowledge of historical conspiracy Law at 437, 647.

Here, Appellant submitted evidence to show the HSPCA not only instigated proceedings against Appellant based on unreliable information from other individuals, without performing any independent investigation whatsoever, but it also obtained Appellant's arrest warrant by swearing as true in an affidavit to a Magistrate facts the HSPCA did not know to be true. Elizabeth Perry, Cruelty Investigator for the HSPCA, swore to the Magistrate that probable cause existed for Appellant's arrest because Appellant was the owner of the five subject horses, which was not true. Appellant submitted evidence to show Elizabeth Perry, in fact, did not know, as she swore she did, that Appellant owned any of the horses he was accused of mistreating, nor did she have any reason to believe that he owned any of the horses when she swore that fact to the Magistrate in order to obtain the arrest warrant

As evidence of the foregoing, Appellant submitted deposition testimony of Elizabeth Perry taken on January 17, 2012, in which counsel for Appellant asked Ms. Perry if she did any investigation into whether Appellant owned the horses before making the affidavit for his arrest warrant. Ms. Perry responded "they [horses] were on his property so -- I mean --" (R. p. 184, l. 3). When counsel for Appellant asked Ms. Perry if she represented to the Magistrate that Appellant was the owner of the horses based solely on the fact he allegedly owned the property, Ms. Perry indicated that was not the only reason why, but she could not recall any other reasons. (R. p. 184, ll. 4-13). In a separate case against the Richland County Sherriff's Department ("RCSD") for malicious prosecution based on the same operative facts (case number 2010-CP-40-1343), counsel for Appellant

took the deposition of RCSD Investigator Holly Wagner who worked hand in hand with Elizabeth Perry and the HSPCA in the investigation and prosecution of Appellant. Counsel for Appellant asked Investigator Wagner whether to her knowledge the HSPCA did any investigation into whether Appellant owned any horses before swearing an affidavit to obtain his arrest warrant. Investigator Wagner indicated to her knowledge, she did not know of any investigation that was done by the HSPCA into whether Appellant owned the horses he was accused of abusing. (R. p. 186, ll. 5-16). Investigator Wagner also indicated that Elizabeth Perry never communicated to her she had evidence Appellant owned the subject horses prior to attesting that probable cause existed to arrest him on that basis. (R. p. 188, ll. 11-15).

When Counsel for Appellant asked Ms. Perry if she did any investigation into whether Appellant owned the property on which the subject horses were found and seized, Ms. Perry indicated that the HSPCA did not have the ability to do that kind of search. (R. p. 190, ll. 17-20). Ms. Perry also admitted she did no search of the ownership records of the subject horses to determine who owned them. (R. p. 190, ll. 22-23).

More troubling still is the evidence Appellant submitted that Elizabeth Perry lied about facts in her affidavit to obtain Appellant's arrest warrant. Ms. Perry's affidavit states that probable cause for Appellant's arrest existed because upon the HSPCA's search of the property purportedly belonging to Appellant, no food or hay whatsoever was found on the property. (R. p. 103). However, she stated just the opposite in her January 17, 2012 deposition. When counsel for Appellant inquired as to whether during the search of the property purportedly belonging to Appellant she looked inside the garage, Ms. Perry stated she did. When counsel for Appellant asked what she saw when she looked in the garage,

Ms. Perry admitted she saw horse food. (R. p. 166, ll. 7-14).

RCSD Investigator Wagner admitted in her deposition that in her opinion it would be improper for an affiant, in order to obtain an arrest warrant, to swear to a judge as true facts he or she knew were false. (R p. 164, ll. 11-14). Nevertheless, Appellant has submitted evidence that the HSPCA did just that.

In granting summary judgment in favor of Respondents on the malicious prosecution claim, the trial court found probable cause existed as a matter of law based on evidence that two years prior to the incident, Appellant owned the property where the five subject horses were later stabled, a fact, the court reasoned, that would excite the belief in a reasonable mind acting on the facts within their knowledge that [Appellant] was the owner of the horses. (R p. 7).

The trial court's Order states that Respondents contend the statements in the arrest warrant affidavit were supported by property ownership records indicating [Appellant] owned the 412 Derby Lane property where the horses were found, and therefore, the inference can be made that Plaintiff owned the horses." (R. p. 6). The trial court also states on its own that "[a]lthough [Appellant] contends he had transferred ownership interest [in the property] to his mother and his brother two years prior, he was still paying for the utilities and taxes at the time of the underlying events." (R. p. 6).

First, that the HSPCA's affidavit was supported by property ownership records is flatly contradicted by evidence to the contrary submitted by Appellant. (R. p. 190, ll. 17-20). Furthermore, on summary judgment, the "court must construe all facts and inferences in the light most favorable to the non-movant." Wogan v. Kunze, 379 S.C. 581, 585, 666 S.E 2d 901, 903 (2008) Here the trial court appears to construe the inferences in favor of

Respondents, in error. Second, Respondents only became aware during the course of the present litigation, and not before, that Appellant had still been paying taxes and utility bills for the property at the time of the underlying events. No evidence of record supports that finding of fact by the trial court, and it is flatly contradicted by evidence Appellant has submitted. (R. p. 190, ll. 17-20). Of course, "[o]nly those facts and circumstances which were or should have been known to the prosecutor at the time he instituted the prosecution should be considered." Parrott, 246 S.C. 318 at 322, 609 (citing Bailey supra at 175,773). Nevertheless, an abuse of discretion occurs when, like here, a ruling is based on an error of law or a factual conclusion that is without evidentiary support. See Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005).

Next, the trial court states as fact that "[i]n the affidavits Elizabeth Perry submitted to obtain arrest warrants for [Appellant], the basis of the arrest warrants was that Plaintiff owned the five horses on the 412 Derby Lane property." (R. p. 6). However, that is only partially correct, as the basis of the arrest warrants also included Elizabeth Perry's sworn attestation that no food was found on the property. (R. p. 103).

To the extent the trial court based its grant of summary judgment on the inaccurate or incomplete facts it states in its Order, despite their nonconformity with the evidence of records, its ruling was in error. See Fields, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005).

To withstand a motion for summary judgment in cases like this one that apply the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). In opposition to Respondents' Motion for Summary Judgment as to the malicious prosecution claim, Appellant submitted not merely a scintilla, but ample

evidence to create a question of fact as to whether probable cause was supported by the underlying facts and circumstances. The question of whether probable cause exists is ordinarily a jury question, although it may be decided as a matter of law when the evidence **yields but one conclusion**. Parrott, 246 S.C. at 323, 143 S.E.2d at 609 (emphasis added). Because the evidence submitted by the Appellant clearly demonstrates more than one conclusion, particularly taking the facts and inferences in the light most favorable to Appellant, a genuine question of material fact exists as to the existence of probable cause, and the trial court erred in granting summary judgment in favor of Respondents on that issue.

2 *The Trial Court Erred in Finding The Allegedly Defamatory Publication by Respondents Was True or Substantially True Entitling Respondents to a Judgment as a Matter of Law on Appellant's Defamation Claim Based on Ross*

To establish a claim for defamation Plaintiff must prove "1) a false and defamatory claim was made, 2) the unprivileged statement was published to a third party, 3) the publisher was at fault; and 4) either the statement was actionable regardless of harm or the publication of the statement caused special harm." Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). "A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." Holtzscheiter v. Thompson Newspapers, Inc., 332 S.C. 502, 510, 506 S.E.2d 497, 502 (1998) (Holtzscheiter II) (quoting Lesesne v. Willingham, 83 F. Supp. 918, 921 (E.D.S.C 1949)).

"[T]o prevail in a defamation action, a plaintiff must establish that the defendant's statement referred to some ascertainable person, and that the plaintiff was the person to

whom the statement referred. Burns v Gardner, 328 S.C. 608, 493 S.E.2d356 (S.C. Ct.App.1997). Surrounding circumstances, however, may reasonably imply the identity of an individual not otherwise immediately ascertainable from the face of the allegedly defamatory statement. Neeley v. Winn–Dixie Greenville, Inc., 255 S.C 301, 178 S.E.2d 662, 665 (1971) (In a defamation action, the challenged statement must "be such that persons reading or hearing it will, in the light of surrounding circumstances, be able to understand that it refers to the person complaining, and it must have been so understood by at least one other person.") (quotation omitted). Furthermore, "a motion for summary judgment should be granted only if the court determines the publication is incapable of any reasonable construction which will render the words defamatory." Adams v. Daily Telegraph Printing Co., 292 S.C. 273, 279, 356 S.E.2d 118, 122 (Ct. App. 1986) (emphasis added).

The truth of the matter published is a complete defense to an action for defamation, 50 Am.Jur.(2d) Libel and Slander § 179 (1970). Furthermore, "we have held that a sufficient defense is made out where the evidence establishes that the statement was substantially true." Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976) (citing Dauterman v State-Record Co., 249 S.C. 512, 154 S E 2d 919 (1967)).

The trial court granted summary judgment in favor of Respondents stating "[b]ased upon the Ross case, this Court finds that the statement was substantially true, as a strict adherence to legal terminology is not required." (R. p. 7). The trial court additionally notes that Appellant's brother, Terry Trexler, (one out of the three Trexlers who were charged with the crimes) did plead no contest, and that the statement does not specifically

reference Plaintiff.[2] The trial court misapplied the law as set out in the Ross case, which actually supports Appellant's position.

In Ross a media defendant published an article stating the plaintiff had been charged in connection with shooting his wife followed by a second article with a headline that stated the wife was dead, even though the text of the article reported she was in serious condition and that no formal charges had yet been filed against the plaintiff. The evidence in the Ross case showed that while the plaintiff was held in connection with the shooting, and would ultimately be charged, his formal charges would depend on whether his wife lived or died. The Ross court held that apart from the headline which indicated the wife had died, the remainder of the articles contained no true falsities, even though there were some technical inaccuracies regarding the legal terminology which were incapable of conveying false meaning. See Ross, at 80, 773. In so holding, that court stated, "[i]n the instant case, the evidence is susceptible of no reasonable inference other than that plaintiff was arrested and charged with assault and battery with intent to kill, by the police." Id. The court also noted that "to require such a strict adherence to legal terminology from the news media, we think, would be unreasonable." Id.

In contrast, here, Respondents published a statement regarding the disposition of the charges against "the Trexlers," implying that Appellant, as one of the Trexlers against whom charges were brought, owned the horses, gave the horses up, and pleaded no contest to the charges. (See R. p. 26, R. p. 116). Rather than substantially true, as was the case with the publication in Ross, as concerns the Appellant here, the statement was totally false,

[2] Despite being in the courtroom for the disposition of the charges against the Trexlers when the charges were dismissed against Appellant and his mother, Respondent Brennessel reported to the media that the Trexlers pleaded no contest to the charges (See R pp 57, 75)

and as concerns the Trexlers as a group, the statement was mostly false. Evidence in this case submitted by both parties demonstrates that Appellant did not own any of the horses at issue, and therefore could not, and did not, give them up as reported. Nor did Appellant plead "no contest" to the charges, which were dismissed (nol prossed) against him on the merits. (See R. p. 32). Unlike in Ross, the statement in question was not "true" but for strict legal terminology. Here, Respondents' statement was totally false as to the Appellant because he never owned any of the horses, **and** because he did not plead "no contest," a legal term that means the polar opposite of the nol prosse dismissal obtained by Appellant. This is the inverse of Ross.

The Trial Court erred in basing its ruling on the Ross case, but it also erred in granting summary judgment in light of the surrounding circumstances that reasonably imply the identity of the Appellant even where he is not specifically and individually named. See Neeley supra, 255 S.C. 301, 178 S.E.2d 662, 665 (1971). At the very least, when construing all facts and inferences in favor of Appellant, a question of fact for the jury exists as to whether, in light of the surrounding circumstances, Respondents' statement could reasonably be understood to apply to Appellant. A fact question also exists as to whether the statement was capable on any level of associating Appellant with the ownership and forfeiture of the horses and pleading "no contest" to the charges, which itself arguably conveys the idea of guilt without admission. See Adams v. Daily Telegraph Printing Co 292 S.C. 273, 279, 356 S.E.2d 118, 122 (Ct. App. 1986)("a motion for summary judgment should be granted only if the court determines the publication is **incapable of any reasonable construction which will render the words defamatory**."(emphasis added).

3 The Trial Court Erred in Finding Appellant was a "Public Official" For Purposes of Defamation as a Matter of Law Based Solely on an Appealed Ruling in a Separate Case

Respondents asserted, and the trial court held, that Appellant was a "public official" for purposes of defamation, and therefore required to demonstrate the Respondents made defamatory statements about him with "actual malice," the standard announced in New York Times v. Sullivan, 376 U.S. 254, 279 (1964).

In the defamation context, "actual malice" has the following meaning: a defamatory statement is made with actual malice if it is made "with knowledge that it was false or with reckless disregard for whether it was false or not. New York Times v. Sullivan, 376 U.S. 254, 279 (1964). "Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968).

In contrast, common law "actual malice," or "actual malice" for purposes other than defamation, includes an element of intent to harm. "Constitutional actual malice required in defamation actions involving public officials is distinguishable from common law malice, which refers to feelings of ill-will, spite, or desire to injure." Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 581, 556 S.E.2d 732, 737-8 (2001) (citing Sanders v. Prince, 304 S.C. 236, 403 S.E.2d 640 (1991)).

The trial court found Appellant was a "public official" (and therefore held to the heightened standard of proving Respondents' statement was made with "constitutional actual malice") based solely on an appealed ruling in a separate case **with separate facts.**

(See R. p. 7) ("The Court has held Plaintiff to be a public official in a previous action arising out of the same facts and circumstances, and this Court defers to that ruling. *See* Order Granting Summary Judgment, James W. Trexler v. The Associated Press, Barrington Broadcasting S C. Corp , Raycom TV Broadcasting, Inc., The Spartanburg Herald Journal, Inc., and the Pacific & Southern Co., Inc., No. 2010-CP-40-1249 (Oct. 30, 2012)"). Further, the trial court found Appellant submitted no evidence to support a finding that Respondents made the statement with knowledge that it was false or with reckless disregard for the truth. (See R. p. 7). This finding is in error.

First, it is an undisputed fact that Respondent Brennessel was present in the courtroom when the nolle pros dismissal of Appellant's charges was announced. (See R. pp. 57, 75). Armed with first hand, direct knowledge of the truth, Brennessel published a statement concerning Appellant which was false. Even under the heightened standard required for public officials to prove defamation, a legitimate question of fact exists as to whether Respondents made the statement with "knowledge it was false," or whether they recklessly or even consciously disregarded the truth.

Second, it was error to find Appellant to be a public official and held him to the "constitutional actual malice" standard based on the ruling in another case, because that ruling was (and still is) on appeal to this Court when the trial court entered the Order. (See Appellant's Notice of Appeal and Appellant's Final Brief and Final Reply Brief in pending Court of Appeals Case No. 2013-001581). The basis of the trial court's ruling presumably is the doctrine of "law of the case" although not expressly stated. (See R. p. 7) (stating that Appellant was "a public official in a previous action arising out of the same facts and circumstances..."). Initially, it is important to note that the facts and circumstances

pertaining to the defamation claim of Respondents in this case and Defendants in the other case are completely different. There, Appellant was employed by the South Carolina Department of Agriculture when the Defendants made statements that he was accused of kidnapping and abusing horses. Here, Appellant had not worked in a state or public office for over two years when Respondents published a statement regarding the disposition of criminal charges against him. A question of fact therefore exists, even if Appellant were found be a public official before by virtue of his employment with the Department of Agriculture, as to whether he was still, after he no longer was employed there.

However, that notwithstanding, the doctrine of "law of the case" does not apply here because Judge Strickland's Order finding Appellant was a public official was (and still is) on appeal and therefore was not the law of the case. See Williamsburg Rural Water and Sewer Co., Inc. v. Williamsburg County Water and Sewer Authority, 593 S.E.2d 154, 357 S.C. 251 (S.C.App. 2003) (noting that a party in the case "did not appeal either of these findings; therefore, it is the law of this case"); Charleston Lumber Co. v. Miller Housing Corp., 338 S C. 171, 525 S.E.2d 869 (2000) (stating an unappealed ruling is the law of the case); ML-Lee Acquisition Fund, L P v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (unappealed ruling is law of the case), Buckner v Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance."). Therefore, the issue of whether Appellant was a "public official" for the purposes of defamation remains an issue requiring a ruling in this case. The trial court erred in finding Appellant was a public official without considering the applicable law as they apply to the facts in this specific case, which, of course, must be

construed in favor of Appellant. (See Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005)).

4 *The Trial Court Erred in Granting Summary Judgment in Favor of Respondent Brennessel on Appellant's Defamation Claim Based on Its Finding The Appellant Alleged Insufficient Facts to Support a Charge That Respondent Brennessel's Defamatory Statement was Made Recklessly, Willfully, or With Gross Negligence.*

The trial court held that Respondent Brennessel is entitled to summary judgment as a matter of law on Appellant's defamation claim because it found Appellant failed to allege facts sufficient to demonstrate Brennessel's statement concerning Appellant was made recklessly, willfully, or with gross negligence. (See R. p 8). As a basis for its finding, the trial court held that under S C. Code Ann § 33-56-180, South Carolina mandates that a judgment against an employee of a charitable organization[3] may not be returned unless a specific finding is made that the employee acted in a reckless, willful, or grossly negligent manner. (See id.). The trial court's finding that Appellant failed to present sufficient facts to show that Brennessel's statement was made recklessly, willfully, or with gross negligence, was erroneous.

Appellant has most certainly alleged facts sufficient to create a question of fact as to whether Brennessel acted with conscious or reckless disregard for the truth. (See R. p. 24, paragraphs 76-80) ("At the time of the publication, Defendants had actual knowledge the statements were false, or acted with reckless disregard toward the truth or falsity of the statements," and "Defendants defamed Plaintiff with actual malice or extreme recklessness . ").

Also, as discussed above, it is undisputed that Brennessel had first hand knowledge

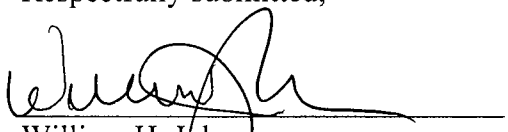
[3] It is not disputed that the HSPCA is a charitable organization as defined by South Carolina law

of the truth because he was personally present at the proceeding in which the dismissal of Appellant's charges were announced, and he nevertheless published a statement afterwards implicating Appellant of pleading "no contest," which was totally false. It is for a jury to decide whether the statement could reasonably be understood, in light of the surrounding circumstances, to refer to Appellant, and the trial court erred in granting summary judgment in favor of Brennessel based on the foregoing.

CONCLUSION

For the foregoing reasons Appellant respectfully requests this Court reverse the trial court's Order granting summary judgment

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The 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,

v.

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final 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 **Final 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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