

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

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JAN 14 2016

C/A No.: 2015-CP-32-00179

SC Court of Appeals

Joseph W. Owens,

Plaintiff,

v.

Temus C. Miles, Jr., B.J. Unthank, L.
Dale Harley, Boyd J. Jones, Tommy G.
Parler, Eric L. Fowler, Dennis Tyndall,
Ashley S. Hunter and McKay Public
Affairs, LLC,

Defendants.

**ORDER GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

This matter came before the Court on October 27, 2015, concerning the Motion for Summary Judgement of Defendants Temus C. Miles, Jr., B.J. Unthank, L. Dale Harley, Boyd J. Jones, Tommy G. Parler, Eric L. Fowler ("the Council Defendants"), and Police Chief Dennis Tyndall ("Chief Tyndall"); (collectively herein, "Defendants"), pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, on grounds that the Plaintiff has failed to raise a genuine issue of fact in support of his claims and that Defendants are entitled to judgment as a matter of law.

Following a hearing on this matter, a review of all arguments and pleadings submitted, including all exhibits, deposition transcripts and hearing transcripts made a part of the record, this Court GRANTS the Motion for Summary Judgment of the Council Defendants and Chief Tyndall and DISMISSES this lawsuit with prejudice against these Defendants.

PLAINTIFF'S CLAIMS

Plaintiff is the former mayor of West Columbia. The Council Defendants are current or former members of the West Columbia City Council. Defendant Tyndall is the Chief of Police for the City of West Columbia. Plaintiff brought claims for defamation and defamation *per se*

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against the Defendants pertaining to events occurring principally during 2014 and relating to the business of the City of West Columbia, the 2015 elections for mayor and city council positions, and the issuance of a report ("the Bolchoz Report") produced by a consultant retained by the Council. The specific allegations of the Plaintiff are as follows:

- That the Council Defendants (with the support of Defendant Tyndall) "caused [the Bolchoz Report] to be commissioned and released to the public at large that accused Plaintiff of impropriety, unfitness in his office, criminal conduct, and/or that impeached Plaintiff's honesty and integrity and exposed him to public hatred, contempt," *et cetera*. (Plaintiff's Amended Complaint, ¶¶ 34 and 42).
- That the Defendants published and re-published the conclusions of the Report, both before and after the issuance of the Report. (Plaintiff's Amended Complaint, ¶¶ 35 and 43).
- That the publications were false and were made with knowledge of their falsity and/or a reckless disregard for the truth, and that the actions of the Defendants involved actual fraud, actual malice, and an intent to harm. (Plaintiff's Amended Complaint, ¶¶ 36 and 44).

FINDING OF FACTS

In the light most favorable to the non-movant, this Court finds the record in this case to show that, at all times relevant to this Order, Plaintiff was the Mayor of the City of West Columbia. The Council Defendants are all members of the City Council for the City of West Columbia, and Defendant Tyndall is the Chief of the West Columbia Police Department. The Court finds that the foregoing parties are "public figures" as that term is defined under South Carolina law, and further, that the City Council of West Columbia is a legislative body as that term is defined under South Carolina law. Additional defendants to this action are McKay Public Affairs, LLC and Ashley Hunter, the senior vice president for that legislative advocacy and political consulting firm. The position of Defendants Ashley Hunter and McKay Public Affairs, LLC in this litigation is not addressed in this Order.

During 2014, tensions arose between the mayor, the city council, and the police chief regarding a number of administrative and personnel issues. Council meetings became heated and energetic political discourse ensued. Various meeting minutes of Council meetings produced during discovery indicated that some council members were concerned that the mayor was making personnel, spending, and administrative decisions directly while bypassing the intended roles of city administrator and the council. The mayor, in turn, characterized these concerns as posturing and part of "a political power play."

In a series of council meetings (all attended by the mayor as a voting member of the council) between March 17, 2014, and May 19, 2014, the council approved a vote to restructure city council meetings so as to provide that meetings would be chaired by any council member named by vote of the council. Previous custom was that council meetings were chaired by the mayor. In addition, the council voted to retain local attorney Robert Bolchoz to conduct what the council called a "procedural audit." Essentially, Bolchoz's contract called for him to conduct a review of the administrative measures being used by the city in order to award contracts, make purchases, handle personnel decisions, and provide services to residents. Over a period of several months, Bolchoz reviewed a large collection of materials including audiotapes, videotapes, incident reports, purchase orders, reports, position descriptions, policies, memoranda, and various other documents. In addition, he interviewed more than thirty employees of the City of West Columbia. After completing this review, Bolchoz produced a written report of his findings ("the Bolchoz Report"). The Bolchoz Report concluded that that the city's administrative policies and procedures were consistent with general practice and appropriately defined for a municipality of West Columbia's size; however, the Report found that the mayor had systematically used his position to circumvent established procedures to "establish a system

of patronage well beyond that which the average citizen, taxpayer, or voter would expect." The

Report noted further instances where it appeared that the Plaintiff had compelled city staff to provide services on non-city properties, usurped authority of other city officials with regards to personnel decisions and the procurement process, allowed access to secure areas of the public safety complex by unauthorized persons, and arguably violated the Freedom of Information Act.

The Report included exhibits and supporting materials used by Bolchoz in reaching his conclusions.

Upon completion, Bolchoz issued his report to the mayor and the members of city council. Bolchoz marked the Report as confidential based on attorney-client privilege.

Approximately a week after the Report was issued, at the regularly-scheduled city council meeting of August 5, 2014, two West Columbia residents asked to be recognized and allowed to speak. These gentlemen spoke at some length, indicating their support for Mayor Owens and taking issue with the decision to retain Robert Bolchoz to perform a procedural audit. (Indeed, although the report had not yet been made public, the comments of these two gentlemen indicated considerable familiarity with the conclusions of the report, as well as certain prior discussions held during the executive sessions of council meetings.) During these remarks,

Plaintiff interjected himself into the discussion and began discussing the contents of the Bolchoz Report in open session. After the Plaintiff mentioned the Report, the Council took a vote to determine whether the Bolchoz Report should be made a public document. The motion to make the document public passed. Since then, discovery has revealed that the Plaintiff had already published the document by sending the entire report to unprivileged third parties prior to its release to the public. The Plaintiff's lawsuit followed.

CONCLUSIONS OF LAW

1. I find that summary judgment is appropriate because the Plaintiff, a public figure, has failed to demonstrate by clear and convincing evidence that the alleged defamatory statement (the Bolchoz Report) was published with knowledge of its falsity or with reckless disregard for its truth. See George v. Fabri, 345 S.C. 440, 454, 548 S.E.2d 868, 875 (2001) (“[W]e hold that the appropriate standard at the summary judgment phase on the issue of constitutional actual malice is the clear and convincing standard.”).

As the United States Supreme Court has explained, the “actual malice” rule “protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official’s fitness for office is relevant.” Garrison v. Louisiana, 379 U.S. 64, 77, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964).

Underpinning the actual malice standard is the United States’ “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964).

The Plaintiff admitted during his deposition that the defamatory statements about which he complains are all contained in the Bolchoz Report. The undisputed evidence before this Court demonstrates that Robert Bolchoz wrote this report after a majority of city council members voted to retain Mr. Bolchoz as outside counsel to conduct a procedural audit of West Columbia’s city government. Mr. Bolchoz interviewed dozens of employees and reviewed a large collection of materials before producing his report. The Plaintiff has had the opportunity to depose Mr. Bolchoz, and there is no evidence, much less clear and convincing evidence, that Mr. Bolchoz

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conspired with the Defendants to write a false report or that the Defendants had knowledge that anything in the Bolchoz report was false.¹ Elder v. Gaffney Ledger, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000). Rather, at most, the Plaintiff has presented some evidence, through his own deposition testimony, demonstrating that the Defendants may have harbored ill will towards him. Such evidence is not enough to survive summary judgment. Harte-Hanks Comm'ns, Inc. v. Connaughton, 491 U.S. 657, 666, 109 S.Ct. 2768, 2685, 105 L.Ed.2d 562 (1989) (“[A]ctual malice standard is not satisfied merely through a showing of ill will or ‘malice’ in the ordinary sense of the term.”).

I recognize that the parties have not completed discovery and that the Plaintiff asks that I deny summary judgment to allow him to continue deposing members of City Council. However, based on the pleadings, the deposition testimony of the Plaintiff, and the undisputed facts concerning the circumstances of how the allegedly defamatory report was created, I find that additional discovery would be of no use except to unnecessarily delay this matter.

2. As an independent ground for granting summary judgment in favor of the Council Defendants, I find that the Council Defendants are immune from suit. In South Carolina, absolute immunity “does not depend on the rigid requirement of a strictly legislative or judicial proceeding; its limits are fixed rather by considerations of public policy.” Corbin v. Washington Fire and Marine Ins. Co., 278 F.Supp. 393, 396 (D.S.C.) aff'd, 398 F.2d 543 (4th Cir. 1968). Although members of a city council may not enjoy absolute immunity in every respect, under the circumstances of this lawsuit, absolute immunity applies because council members are being sued for voting “yes” during a council meeting to allow an already authorized audit to be made public. The audit was considered confidential because of an attorney-client privilege that the

¹ This Order does not make findings of the veracity of the Bolchoz Report.

Plaintiff had already waived when he shared the Report with third parties. Under those circumstances, the Council Defendants are immune. See Richardson v. McGill, 273 S.C. 142, 255 S.E.2d 341 (1979).

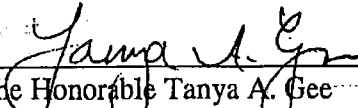
3. As an independent ground for granting summary judgment in favor of Defendant Tyndall, I find that the Plaintiff has failed to provide a scintilla of evidence that Defendant Tyndall made or published a defamatory statement against Plaintiff as he took no part in publishing the Bolchoz Report.

CONCLUSION

For the reasons stated above, this Court GRANTS the Motion for Summary Judgment of the Council Defendants and Chief Tyndall and DISMISSES the lawsuit with prejudice as against those Defendants.

IT IS SO ORDERED.

December 1, 2015
Columbia, South Carolina



The Honorable Tanya A. Gee
At-Large Circuit Court, Seat 9

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF LEXINGTON
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2015CP3200170

Joseph W Owens

Temus C Miles Jr
 L Dale Harley
 Tommy G Parler
 Dennis Tyndall
 McKay Public Affairs
 LLC

B J Unthank
 Boyd J Jones
 Eric L Fowler
 Ashley S Hunter

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy; Other: _____
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

12/17/2015

Date

For Clerk of Court Office Use Only

This judgment was entered on _____, and a copy mailed first class or placed in the appropriate attorney's box on **December 17, 2015**, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/kpk

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
