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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Special Circuit Court Judge

Circuit Court Case No. 2010-CP-40-1249
S.C. Court of Appeals Case No. 2013-001581
Unpublished Opinion No. 2015-UP-201, filed April 15, 2015

James W. Trexler,

Petitioner,

v.

The Associated Press;
Barrington Broadcasting
South Carolina Corp.;
Raycom TV Broadcasting,
Inc.; The Spartanburg Herald
Journal, Inc.; and The Pacific
& Southern Co., Inc.,

Respondents.

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the circuit court's grant of summary judgment in favor of Respondents where the Record contains sufficient evidence to create a genuine question of fact regarding the falsity of Respondents' publications.

STATEMENT OF THE CASE

Petitioner James W. Trexler (referred to herein as "Petitioner") was formerly employed as an Executive Assistant III with the South Carolina Department of Agriculture. Respondents the Associated Press; Barrington Broadcasting, Inc.; Pacific & Southern Company, Inc.; and Raycom TV Broadcasting, Inc. (collectively referred to herein as "Respondents") are media entities that deliver news and information through media channels including print, television, and the Internet.

In this defamation case, Petitioner alleges that beginning on February 28, 2008, and for months and years thereafter, Respondents published, through their respective media channels, false and misleading information concerning his arrest and charges against him for alleged mistreatment of horses, including information Respondents obtained from a February 27, 2008 e-mail press release issued by the Sheriff of Richland County ("SRC") (the "Press Release"). The Press Release purportedly provided the media with official information concerning the arrest of Petitioner, his mother and his brother, and charges against them for varying degrees of mistreatment of animals. The Press Release also reported that Petitioner had been charged with kidnapping a Humane Society investigator.

Petitioner alleges that as a direct result of Respondents' initial and continuous publication and broadcast of false or misleading content associating him with extreme animal cruelty of dozens of horses in both South Carolina and Georgia, and accusing him

of felony kidnapping, Petitioner lost his job, salary, pension, retirement benefits, his ability to obtain like employment, and suffered irreparable harm to his personal and professional reputation.¹

Petitioner filed his original Complaint on February 23, 2010. (R. pp. 27-31 [App. pp. 117-121]). Prior to serving the original Complaint, Petitioner filed his Amended Complaint and served it on Respondents on June 23, 2010. (R. pp. 33-40 [App. pp. 123-130]). Respondents moved for summary judgment on August 11, 2011. (R. 451-478 [App. pp. 541-568]; R. pp. 479-501 [App. pp. 583-596]; R. pp. 488-502 [App. pp. 583-596]). Petitioner opposed the motion for summary judgment. (App. pp. 1217-1240); R. pp. 846-1028 [App. pp. 946-1128]).

On January 19, 2012, the Honorable Joseph M. Strickland heard oral argument on Respondents' Motion for Summary Judgment. (R. pp. 69-134 [App. pp. 159-224]). At the conclusion of the hearing, Judge Strickland requested counsel for both sides each submit a proposed order (granting or denying summary judgment). (See R. p. 131 [App. pp. 221]). On October 30, 2012, Judge Strickland granted summary judgment in favor of Respondents. Judge Strickland held the applicable two-year statute of limitations barred Petitioner's claims with respect to all publications prior to June 22, 2008. (R. pp. 6-7 [App. pp. 96-97]).

As basis for granting summary judgment on issues beyond that of the statute of limitations, Judge Strickland found Petitioner failed to submit any evidence at all to demonstrate Respondents' publications contained information about were false (R. pp. 8-9 [App. pp. 98-99]), were not fair reports of a public record (R. p. 12 [App. p. 102]), or

¹ The trial court held, and the Court of Appeals affirmed that the statute of limitations barred action on all publication by Respondents prior to June 22, 2008, which included Respondents' initial publications that Petitioner was charged with kidnapping.

that Respondents published statements regarding Petitioner with knowledge of their probable falsity (R. pp. 14-15 [App. pp. 104-105]).

Petitioner received written notice of the filing of the Order granting summary judgment on November 12, 2012. On November 20, 2012 Petitioner filed his Motion for Reconsideration. (R. pp. 1029-1031 [App. pp. 1129-1131]; R. pp. 1032-1045 [App. pp. 1132-1145]). On March 11, 2013 Judge Strickland heard oral argument on Petitioner's Motion for Reconsideration. (R. pp. 135-159 [App. pp. 225-249]), and thereafter denied Petitioner's Motion for Reconsideration on April 30, 2013. (R. pp. 17-26 [App. pp. 107-114]). Petitioner received written notice of the entry of the order denying his motion for reconsideration on June 19, 2013. Petitioner served his Notice of Appeal on July 18, 2013.

On April 15, 2015, after full briefing by the parties and oral argument, the Court of Appeals filed its unpublished opinion No. 2015-UP-201 affirming the circuit court's grant of summary judgment in favor of Respondents ("Order Affirming")(App. pp. 1248-1253). On April 27, 2015, Petitioner filed his Petition for Rehearing, which the Court of Appeals denied on May 21, 2015 (App. pp. 1254-1267). On June 22, 2015 Petitioner filed his Petition for Certiorari with the Supreme Court. On April 15, 2016, the Supreme Court issued its Order granting certiorari as to the above-stated "Question Presented" only, which Petitioner addresses below.

ARGUMENT

I. The Court of Appeals erred in affirming the circuit court's grant of summary judgment in favor of Respondents where sufficient evidence exists in the Record to create a genuine issue of fact as to the falsity of Respondents' publications.

A. Summary Judgment Standard

Summary judgment is proper when it is clear there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56 (c), SCRPC, Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E. 2d 301 (Ct. App. 1999). Summary judgment should not be granted unless plain, palpable, and undisputable facts exist upon which reasonable minds cannot differ. Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993). To determine whether an issue of fact exists, the court must view the evidence and all its inferences in a light most favorable to the nonmoving party. Loester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 443 S.E.2d 392 (1994). When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRPC, Peterson v. West Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999).

“The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.” McNair v. Rainsford, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998) (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991); Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990)). “All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party.” Hall v. Fedor, 349 S.C. 169, 173, 561 S.E.2d 654, 656 (Ct. App. 2002) (citing Young v. South Carolina Dep't of Corr., 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999)). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Redwend Ltd. P'ship v.

Edwards, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003); Glasscock, Inc. v. United States Fid. & Guar. Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001); Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000); see also Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom).

Furthermore, a trial court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review. Bowen v. Lee Process Systems Co., 342 S.C. 232, 237-8, 536 S.E.2d 86 (2000). Such an order must include those facts which the circuit court finds relevant, determinative of the issues and undisputed. Id. (citing Fayette County National Bank v. Lilly, 199 W. Va. 349, S.E.2d 232, 237 (W. Va. 1997)).

B. The Respondents Failed to Prove that their Publications were Substantially True, and the Petitioner Showed that there were Genuine Issues of Material Fact regarding whether the Publications were False

To establish a claim for defamation Appellant 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). Truth is an affirmative defense to a libel claim. Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 221 S.E.2d 770 (1976). "The truth of the matter published is, of course, a complete defense to an action based on defamation. . . . and, we have held that a sufficient defense is made out where

the evidence establishes that a statement was substantially true." Id.

Historically, under the common law, a defamatory communication was presumed to be false. See Beckham v. Sun News, 289 S.C. 28, 344 S.E.2d 603 (1986). However, truth could be asserted as an affirmative defense. See Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 221 S.E.2d 770 (1976). The Supreme Court's holding in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69, 106 S.Ct. 1558, 1559, 89 L.Ed.2d 783, 787 (1986), modified the common law rule: "[A]t least where a newspaper publishes speech of public concern, a private figure plaintiff cannot recover damages without also showing that the statements at issue are false."

Whether a communication is reasonably capable of conveying a defamatory meaning is a question of law for the trial court to determine. Id. Importantly, however, a motion for summary judgment should be granted only if the court determines the communication is incapable of any reasonable construction which will render the words defamatory. Adams v. Daily Telegraph Printing Co., 292 S.C. 273, 356 S.E.2d 118 (Ct. App. 1986), aff'd as modified, 295 S.C. 218, 367 S.E.2d 702 (1988). It is enough "if the words used to express the charge are such, in the sense in which they would naturally be understood, as to convey to the minds of those to whom they are addressed ... the impression that the plaintiff has [done wrong]. It is only necessary that the words should ... be capable of the offensive meaning attributed to them." Flowers v. Price, 192 S.C. 373, 377, 6 S.E.2d 750, 751 (1940) (per curiam). "[A]ll of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have." Jones v. Garner, 250 S.C. 479, 485, 158 S.E.2d 909, 912 (1968) (citation omitted).

In the present matter, the circuit court found, and the Court of Appeals affirmed, that the subject publications by Respondents were “substantially true,” providing Respondents an absolute defense to Petitioner’s defamation claims. (App. p. 1252). The Court of Appeals found that, despite Petitioner’s contention he submitted proof that Respondents published articles and broadcasted statements falsely indicating he had been charged with felony class mistreatment of dozens of horses in South Carolina and Georgia, Respondents “negated [Petitioner’s] claims of falsity by presenting evidence to the circuit court, in the form of arrest warrants and indictments, that [Petitioner] was **eventually** charged with felony mistreatment of dozens of animals.” (*Id.*)(emphasis supplied). Based on those warrants and indictments the Court of Appeals concluded the newspaper reports were substantially true at the time of publication. (*Id.*).² This was in error. The Respondents published multiple publications after June 22, 2008 that falsely implied that Petitioner had been charged with dozens of felony charges regarding horses in South Carolina and Georgia, when in fact Petitioner at the time of these publications had only been charged with four felony counts related only to horses in South Carolina. (R. p. 892-898, 906-907, 921, 948-950 [App. p. 992-998, 1006-1007, 1021, 1048-1050]). Petitioner provided the above-cited publications to the circuit court, and these were just several examples of such publications; Petitioner has many more examples of such false publications, but only provided the above-cited examples because even just these publications sufficiently showed that there were genuine issues of material fact regarding whether the publications were substantially true or false.

First, the Court of Appeals cites to Ross v. Columbia Newspapers, Inc. 266 S.C.

² In light of its determination that the statute of limitations barred Petitioner’s defamation claim on all publications by Respondents prior to June 22, 2008, the circuit court concluded, incorrectly, that only one publication by WLTX on December 15, 2008 survived.

75, 80, 221 S.E.2d 770, 772 (1976) for the proposition that “a sufficient defense is made out where the evidence establishes that a statement was substantially true.” (Order Affirming at p. 4). The Court of Appeals next cites to Haulbrooks v. Overton, 295 S.C 380, 383, 368 S.E.2d 676, 678 (Ct. App. 1998) for the proposition that “[t]he truth of the matter is a complete defense to an action based on defamation and evidence establishing [a] statement is substantially true is a sufficient defense.” While those cases provide correct statements of the law, the circumstances in both Ross and Haulbrooks are clearly distinguishable from those in the present appeal, and those cases actually support Petitioner’s position.

In Ross, the court found that a newspaper report containing a defamatory falsehood in the headline which was rendered meaningless by the correct facts in the body of the article, negating the headline mistake, was substantially true and therefore, not actionable as defamation. In Haulbrooks, the defendant submitted evidence to the court demonstrating the substantial truth of the allegedly defamatory statements at the time the statements were published, thereby establishing a complete defense to the plaintiff’s defamation claims.

Here, Petitioner has submitted evidence in the form of newspaper and web articles, and broadcast transcripts demonstrating that the subject publications by Respondents are substantially false as to Petitioner. Unlike in Ross the falsity is not a mistake that is negated or clarified by the content of the publication or the circumstances which were the subject of the publications. Nor have Respondents, here, presented any evidence to demonstrate the subject publications were true or “substantially true” at the time they published them.

The Court of Appeals, nevertheless, found Respondents publications “were substantially true at the time of publication,” (see Order Affirming at p. 4), and that Respondents negated any falsity in the publications by presenting evidence in the form of indictments and arrest warrants, that Petitioner was eventually charged with felony level mistreatment of animals. Id. However, the arrest warrants Respondents submitted clearly show Petitioner was arrested and charged with 4 felony counts of neglect as opposed to dozens of counts of felony level animal abuse.³ (See R. pp. 426, 420, 430, 433, 436). The subject publications of Respondents implicating Petitioner in felony level horse abuse of dozens of horses both here and in Georgia were not true, or even substantially true, at the time they were made, nor were they rendered “substantially true” because Appellant was later indicted on multiple felony counts of ill treatment of animals.

The Court of Appeals relies on Padgett v. Sun News, 278 S.C. 26, 31, 292 S.E.2d 30, 33 (1982) for the proposition that “a newspaper’s publication of contents of a summons charging respondents with a certain crime, despite subsequent filing of complaint which omitted this crime, did not negate the accuracy of the newspaper’s publication.” (See Order Affirming at p. 5.). However, the circumstances in Padgett are distinguishable from those in the present appeal. Here, the opposite occurred. Respondents’ publications attributed activity to and charges against Petitioner which had no basis in fact and were false at the time Respondents published them. That Respondents continued to publish the subject statements concerning Petitioner until such time as he was eventually indicted on as many felony charges in October of 2009 does not negate the falsity of the publications prior to that time. Nor does the fact that he was

³ Originally, Petitioner had only been charge with 5 counts of misdemeanor neglect during the time period in which Respondents’ publications implicated him in dozens of felony class abuse charges.

indicted at all in South Carolina make true or substantially true that he owned any horses that were starved to death, that he owned or managed any land on which horses were found starved to death, or that he was facing multiple similar charges of horse abuse in Georgia. Substantial truth must be proven as to each individual statement and not as to the content of a publication as a whole. See Castine v. Castine, 743 S.E.2d 93, 403 S.C. 259 (2013). Because the evidence of Record creates a genuine question of fact as to the falsity of Respondents' publications, and the evidence Respondents submitted to show substantial truth does not serve to negate the falsity of their publications, that issue should have been left to the determination of a jury.

CONCLUSION

Both the circuit court and the Court of Appeals ignored the summary judgment standard of Rule 56, SCRCP, because Petitioner clearly made a showing through relevant evidence that genuine issues of material facts exist as to the falsity of Respondents' publications, several even after June 22, 2008. For the reasons set out above and for those set out in Petitioner's briefs to the circuit court and to the Court of Appeals, which are incorporated here by reference, Petitioner respectfully requests this Court reverse and remand the case for trial.



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PROOF OF SERVICE OF PETITIONER'S BRIEF

I certify that I have served Appellant's Petition for Writ of Certiorari upon The Associated Press; Barrington Broadcasting South Carolina Corp.; Raycom TV Broadcasting, Inc.; The Spartanburg Herald Journal, Inc.; and The Pacific & Southern Co., Inc., by depositing a copy of each of these documents in the United States Mail, postage prepaid, on May 16, 2016, addressed to their attorneys of record, Jay Bender, Baker, Ravenel & Bender LLP, Post Office Box 8057, Columbia, South Carolina 29202.



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