THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2008- CP-31-192

Patricia Rhodes Johnson .....Appellant,

vs.

Robert E. Lee Academy, Inc., Jennifer Hostler, Marc Quigley, Moore, Beauston & Woodham, LLP, Moore, Kirkland & Beauston, LLP, and City of Bishopville.....Defendants.

of which

Moore, Beauston & Woodham, LLP is the .....Respondent.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. MBW HAS FAILED TO SHOW ANY BASIS ON WHICH THE SUMMARY JUDGMENT MAY BE AFFIRMED

In her Initial Brief, Plaintiff-Appellant Patricia Rhodes Johnson argued that the Circuit Court erroneously entered summary judgment on the negligence claim for Defendant-Respondent Moore, Beauston & Woodham, LLP (hereinafter "MBW") on grounds that an accounting firm owed a duty only to its clients. Ms. Johnson contended that MBW owed her two distinct duties of care that arose from two distinct voluntary undertakings of its employee Quigley:

a. Quigley's conduct in voluntarily agreeing to meet with the City of Bishopville police to explain and provide the results of his audit and, at the meeting, recklessly proving law enforcement with false information that proximately caused Ms. Johnson's arrest for breach of trust; and

b. Quigley's conduct in voluntarily attempting to correct his error after he discovered it, but in failing to exercise reasonable care to timely inform the City of Bishopville police of his error, and thereby proximately causing Ms. Johnson's arrest for breach of trust.

With respect to the initial false report Quigley recklessly made to the police, Ms. Johnson acknowledged that there was probably *a privilege* that shielded citizens from liability for mere negligence in making reports to the police. Viewing the evidence in the light most favorable to Ms. Johnson, however, Ms. Johnson pointed out that the jury could find that Quigley acted recklessly in making the false report to the police and,

therefore, that no privilege would attach to his conduct.[1] With respect to Quigley's conduct in failing to exercise reasonable care *to correct his false report*, no privilege would attach and, therefore, MBW's liability would turn on ordinary negligence principles. Based on the foregoing two duties and the respective reckless and negligent conduct of Quigley, Ms. Johnson contended she was entitled to present her case to the jury. MBW predictably argues that summary judgment was properly entered on both claims. As will be seen however, MBW has failed to make a credible argument on either point.

A. MBW has failed to show that the Circuit Court properly entered summary judgment on Ms. Johnson's claim that Quigley recklessly made a false report to the police.

In the Initial Brief of Respondent Moore, Beauston & Woodham, LLP, MBW continues to insist that the Circuit Court properly entered summary judgment because accountants in most situations only owe a duty of care only to their clients. This assertion, however, is obviously wrong given the summary judgment evidence in this case. Ms. Johnson did not rely on MBW's status *as an accounting firm* to create the requisite duty of care, but relied on Quigley's voluntary reckless conduct in erroneously reporting to the police. As pointed out in the Appellant's Initial Brief, while there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken. Hendricks v. Clemson University, 353 S.C. 449, 457, 578 S.E.2d 711 (2003)("[w]here an act is voluntarily undertaken, ... the actor assumes

[1] Ms. Johnson also pointed out that MBW had not raised privilege as a defense below and, therefore, waived this defense on appeal. MBW in its brief has not contested that it waived privilege as a defense and again has waived this issue.

the duty to use due care"); Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). "The question of whether such a duty arises in a given case may depend on the existence of particular facts." Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813 (1997). MBW cites no South Carolina, or other authority, holding, or even implying that this rule does not apply to accountants. Moreover, there is certainly no policy reason why accountants should be excluded from the voluntary assumption of duty rule. Absent authority, or at least a compelling policy argument as to why accountants as a group should be excluded from this rule, Ms. Johnson respectfully submits that accountants should be treated the same as anyone else when they voluntarily assume a duty - viz., whether such a duty arises in a given case depends on the particular facts in that case.

MBW alternatively contends that South Carolina does not recognize a cause of action in negligence for recklessly making false reports to the police but only a cause of action for malicious prosecution. This argument, however, was not made before the Circuit Court and, hence, the Circuit Court never ruled on this argument. As a matter of law, MBW has waived this argument.

The argument is also substantively meritless. MBW cites no South Carolina authority for this proposition and the well-established general cause of action for negligence must be deemed to apply to this situation. MBW fares no better with its reliance on a single Florida decision - Pokorny v. First Federal Sav. & Loan Ass'n, 382 So.2d 678 (Fla. 1980) – to establish this point. There the Florida Supreme Court held that there is no cause of action for negligently swearing out an arrest warrant. Mere negligence, the court explained, is insufficient for liability:

> Florida courts have never recognized a separate tort for "negligently" swearing out a warrant for arrest. Such cases may be brought only in the form of civil suits for malicious prosecution. ...A plaintiff contending that he had been improperly arrested as the result of negligence in swearing out a warrant must bear the burden of establishing malice and want of probable cause. Mere negligence alone is insufficient.
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> 382 So.2d at 683.

With respect to Ms. Johnson's claim that MBW *initially* gave false information to the police, MBW ignores that Quigley was not merely negligent but - for summary judgment purposes - was reckless. As pointed out in the Appellant's Initial Brief, Quigley represented that the $9100.00 deposit was missing *without bothering to look at either the bank statement or the deposit receipt* both of which clearly showed that the deposit had been made. Even worse, he represented to the police that he had made an audit of the missing money so the police took his representation as being conclusive. Pokorny thus is obviously distinguishable. Indeed, the ruling on negligently swearing out an arrest warrant was part of the court's actual holding that a private citizen who makes *an honest good faith mistake* in reporting an incident to the police cannot be held liable in tort:

> We hold that under Florida law a private citizen may not be held liable in tort where he neither actually detained another nor instigated the other's arrest by law enforcement officers. If the private citizen makes an honest, good faith mistake in reporting an incident, the mere fact that his communication to an officer may have caused the victim's arrest does not make him liable when he did not in fact request any detention. See 14 Fla.Jur. False Imprisonment § 5 (1957).
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> 382 So.2d at 684.

Where- as in the instant case – the citizen has been reckless, he has not simply made an "honest good faith mistake"[2] and the *Pokorny* rationale would not apply.

With respect to Ms. Johnson's second negligence claim that MBW after providing false information and then discovering its falsity voluntarily tried to correct Quigley's first report but did so negligently, MBW utterly fails to address this claim at all in arguing that Ms. Johnson must prove the elements of malicious prosecution to recover. Pokorny does not even remotely address whether tort liability may be imposed when a citizen after making false report negligently attempts to correct it. Moreover, while there are sound policy reasons for insulating citizens from tort liability for making negligent false reports to the police, there are certainly no policy reasons continuing this immunity when the citizen realizes his mistake but then affirmatively fails to exercise reasonable care to correct it.

No doubt anticipating that the foregoing arguments are meritless, MBW also contends that the voluntary assumption of duty rule applies only where the defendant is intending to benefit the plaintiff. If the defendant is intending to hurt the plaintiff, MBW contends, no duty of care arises and that the defendant can do what he pleases. This argument is absurd on its face and, in fact, MBW has it exactly backward. There are compelling public policies in favor of shielding defendants from civil liability for

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[2] MBW's repeated characterization of Quigley's conduct as being merely an honest, good faith mistake that he promptly corrected thus is meritless on summary judgment. The evidence must be viewed in the light most favorable to Ms. Johnson, not MBW. Quigley's failure to review the deposit receipt and the bank statement – while at the same time representing that he had conducted an audit – could easily be found by the jury to be reckless or grossly negligent conduct.

ordinary negligence when they voluntarily attempt *to benefit* someone. Obviously, the law wants to encourage this kind of conduct. Thus, in some contexts, the Good Samaritan law protects a defendant when he voluntarily assumes a duty to benefit the plaintiff, unless he acted with gross negligence, or engaged in willful and wanton misconduct:

> Any person, who in good faith gratuitously renders emergency care at the scene of an accident or emergency to the victim thereof, shall not be liable for any civil damages for any personal injury as a result of any act or omission by such person in rendering the emergency care or as a result of any act or failure to act to provide or arrange for further medical treatment or care for the injured person, except acts or omissions amounting to gross negligence or wilful or wanton misconduct.
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> S.C. Code Ann. § 15-1-310.

But there is no reason or policy to shield a person from civil liability when he voluntarily acts *to hurt* someone. In any event, the South Carolina Supreme Court has not limited the voluntary assumption of duty rule to benefit cases but has repeatedly stated the rule broadly without regard to whether the defendant acted to benefit or hurt the plaintiff. Hendricks v. Clemson University, 353 S.C. 449, 457, 578 S.E.2d 711 (2003)("[w]here an act is voluntarily undertaken, ... the actor assumes the duty to use due care"); Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813 (1997)("[t]he common law ordinarily imposes no duty on a person to act. If an act is voluntarily undertaken, however, the actor assumes the duty to use due care").[3] That the reported cases have all

[3] MBW in its Brief at 21 cites Miller for the proposition that "the undertaking *must* be for 'the benefit of third parties' like plaintiff." (emphasis added). Nowhere did the court make such a statement. The question the Miller court addressed was whether the defendant was a volunteer at all, not whether he intended to benefit or to hurt the plaintiff. As noted above, the Miller court said flatly that "[i]f an act is voluntarily undertaken... the actor assumes the duty to use due care." 329 S.C. at 314.

involved attempts to benefit the plaintiff is not surprising since this is the most common fact situation and South Carolina has no comparable reckless or gross negligence "report to the police" cases. Ms. Johnson respectfully submits that the voluntary assumption of duty rule applies with even greater force when the defendant attempts to hurt the plaintiff as happened in this case. Hence MBW's argument that the rule applies only in benefit cases is meritless.

MBW makes a half-hearted argument that Quigley did not voluntarily agree to meet with the police but was merely "cooperating with law enforcement." (Brief at 22). On summary judgment, however, the evidence and inferences must be viewed in the light that favors Ms. Johnson. Viewed in this manner, the evidence clearly shows that Quigley volunteered to meet with the police and told them he had performed "an audit." The police were left with the firm conclusion that an accountant had thoroughly vetted whether the $9100.00 deposit was missing or not. In any event, "[w]here there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder." Miller v. City of Camden, 329 S.C. 310, 315, 494 S.E.2d 813 (1997). See also Vaughan v. Town Of Lyman, 370 S.C. 436, 447-48, 635 S.E.2d 631 (2006)("[w]e hold that this issue was inappropriately decided on summary judgment. There is a genuine issue of fact regarding whether Lyman undertook the duty of maintaining city streets"). Thus, whether Quigley was a volunteer, or was merely "cooperating with law enforcement," is a question of fact for the jury.

Incredibly, MBW also argues that there is no evidence that Quigley's meeting with law enforcement was a proximate cause of Ms. Johnson's arrest because the police

already suspected that Ms. Johnson had stolen the $9100.00 deposit. This argument is ethically troubling given that the evidence *is almost undisputed* to the contrary. Captain Burke squarely testified that the police relied on the audit in deciding to make the arrest. (Burke Dep. at 22, lines 16-21) (R. Vol. V, p. 2102, lines 16-21). ("there was an audit conducted in which we were told initially that they had determined that the $9,100 - this was the briefing that I got – that the $9,100 was missing. This is what... Investigator Collins came to me with"). Collins agreed in his affidavit:

> Based on this information [the MBW "audit"], it appeared to me that the Plaintiff prepared and was in control of a deposit of $9,100.00 which was not in fact deposited. I sought an arrest warrant for the Plaintiff based upon the missing $9,100.00 on August 15, 2006 on a charge of breach of trust with fraudulent intent over $5,000.00. The warrant was issued by Magistrate Alston W. Woodham on the same day.
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> (Collins Aff. para. 7). (R. Vol. II, p.565)

On August 17, 2006, *The Item* even reported Captain Burke as saying "we are basing everything on the audit report.... An auditor is telling us what he thinks happened...." MBW's argument that there is no summary judgment evidence of proximate causation thus is absolutely meritless.

MBW also contends that the voluntary assumption of duty cases apply only where the plaintiff has suffered a physical injury. Although all of the voluntary assumption of duty cases prior to Hendricks v. Clemson University, 353 S.C. 449, 578 S.E.2d 711 (2003) did involve personal injury, the court in Hendricks decided the educational malpractice case before it on policy grounds and *not* on grounds of the absence of personal injury. Hence this contention is meritless. Moreover, although MBW's argues that Ms. Johnson suffered only economic or pecuniary injury, (Brief at 25) MBW

conveniently ignores that Ms. Johnson suffered a loss of freedom when she was arrested and was subject to the terms of her release on her own recognizance until the charges were dropped. The deprivation of liberty in addition to the economic loss suffered makes this case a compelling one for applying the voluntary assumption of duty rule. MBW thus has utterly failed to show that the Circuit Court properly entered summary judgment in its favor with respect to Quigley's initial reckless conduct in making a false report to the police.

B. MBW has failed to show that the Circuit Court properly entered summary judgment on Ms. Johnson's claim that Quigley failed to exercise reasonable care to correct his false report to the police after he discovered his error.

MBW attempts to avoid liability for Quigley's failure to exercise reasonable care to correct his false report by relying on Captain Burke's refusal to immediately drop the charges when Ms. Woodham on August 16, 2006 advised him the money was not missing. But this argument ignores that Captain Burke could hardly rely on Ms. Woodham in the face of the "audit" conducted by the accounting firm. He needed to hear from the auditor himself that "I made a mistake." On summary judgment, the evidence that the police relied on the audit report is sufficient to establish proximate causation, notwithstanding Ms. Woodham's notification at the hearing.

Finally, MBW contends in effect[4] that Quigley did exercise reasonable care to correct his mistake by sending an email to the SLED agent rather than to the Bishopville Police Department. Given that SLED is a state agency, that the SLED agent did not read

[4] MBW attempts to cast this issue as one of duty to avoid its obvious fallacy. But the duty Quigley assumed was to exercise reasonable care to correct his mistake, not to simply notify some state employee of his error.

the email in time to notify the police of the mistake, and the ease with which Quigley could have contacted the police directly by telephone, it is a question for the jury as to whether he exercised reasonable care.

MBW seems to contend that notification to a SLED agent as a matter of law is notification to the Bishopville Police Department. No South Carolina authority is presented for this proposition and the out-of-state cases cited involve probable cause determinations – i.e., that collective facts known to all investigating officers may be considered in determining probable cause for an arrest even if the arresting officer lacks personal knowledge of some of the facts. E.g., Johnson v. State, 660 So.2d 648 (Fla. 1985); People v. Hardaway, 718 N.E.2d 683 (Ill. App. 1999). The cases thus are obviously distinguishable on this basis and do not remotely stand for the proposition that notification to a SLED agent *as a matter of law* is notification to the Bishopsville Police Department.

II. MBW HAS FAILED TO SHOW ANY BASIS FOR AFFIRMING THE ORDER DENYING MS. JOHNSON'S RULE 59 MOTION

Because Ms. Johnson raised her voluntary assumption of duty argument in both the summary judgment opposition and the Rule 59 motion, and because South Carolina law would clearly recognize a duty of care in this case, Ms. Johnson in her Initial Brief contended that the Circuit Court abused its discretion in denying the Rule 59 motion.

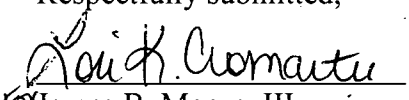
MBW does not contend that these issues were not properly preserved for appellate review but simply disputes that Ms. Johnson is correct on the merits. As shown above, however, Ms. Johnson's arguments track South Carolina law precisely and MBW has

failed to show otherwise. Ms. Johnson accordingly respectfully submits that the Circuit Court abused its discretion in denying the Rule 59 motion.

CONCLUSION

For the reasons stated, Ms. Johnson renews her request that the summary judgment entered in favor of MBW and against the Appellant must be reversed and the case remanded for trial.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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April 27, 2012

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PROOF OF SERVICE

I certify I have served a copy of Final Reply Brief of Appellant and Motion to Allow Final Reply Brief by Appellant by electronic mail and by depositing a copy of it in the United States Mail, postage prepaid, on May 2, 2012, addressed to Mason Summers, Anthony E. Rebollo, Francis M. Mack, Esquire, Richardson, Plowden & Robinson, 1900 Barnwell Street, Columbia, SC 29201, FMack@RichardsonPlowden.com.

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