

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal From Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2014-002725

RECEIVED

AUG 20 2015

SC Court of Appeals

Clark D. Thomas, Appellant,

V.

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

FINAL REPLY BRIEF OF APPELLANT

Clark D. Thomas
Appellant

BRCI / Moultrie A-2087
4460 Broad River Road
Columbia, SC 29210

Pro se Appellant

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Statement of Issues on Appeal	1
Facts	2
Arguments	3
I. Did the trial court err when denying Appellant's motions for continuance or, for dismissal without prejudice and tolling of the statute of limitations in violation of Appellant's right to due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and South Carolina law?	3
II. Did the trial court err when granting Respondents' motion for summary judgment on grounds that Appellant failed to proffer evidence establishing a genuine issue of material fact in violation of Appellant's right to due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and South Carolina law?	5
III. Did the trial court err when failing to remand for review the novel issue of being libel-proof in violation of Appellant's right to due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and South Carolina law?	8
Conclusion	9
Certificate of Compliance	10

TABLE OF AUTHORITIES

South Carolina Cases:

<i>Anderson v. The Augusta Chronical</i> , 585 S.E.2d 506 (S.C.App. 2003)	5
<i>Castine v. Castine</i> , 743 S.E.2d 93 (S.C.App. 2013)	5
<i>Dauterman v. State-Record Company</i> , 154 S.E.2d 919 (S.C. 1967)	5
<i>First Union Nat. v. FCVC Comm.</i> , 469 S.E.2d 613 (S.C.App. 1996)	8
<i>Murray v. Holnam</i> , 542 S.E.2d 743 (S.C.App. 2001)	5

Federal Cases:

<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	5
--	---

Other Authorities:

<i>Appellate Practice in South Carolina (2nd Edition 2002)</i>	3,8
---	-----

Constitutional Provisions:

Fourteenth Amendment to the United States Constitution	Passim
--	--------

STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court err when denying Appellant's motions for continuance or, for dismissal without prejudice and tolling of the statute of limitations in violation of Appellant's right to due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and South Carolina law?

II.

Did the trial court err when granting Respondents' motion for summary judgment on grounds that Appellant failed to proffer evidence establishing a genuine issue of material fact in violation of Appellant's right to due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and South Carolina law?

III.

Did the trial court err when failing to remand for review the novel issue of being libel-proof in violation of Appellant's right to due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and South Carolina law?

FACTS

Respondents' Statement of the Case

Respondents have falsely claimed that Appellant, Clark D. Thomas, filed a summons and complaint seeking to assert libel claims for publications on June 9, 2006, March 1, 2007, and July 12, 2008. (Respondents' Brief, p. 2). The truth is that Thomas specifically stated in his *Complaint* that the only article in dispute was the one published on September 23, 2012. (R. pp. 12-14, ¶¶ 17-23, 27-28). Respondents have also falsely implied that their motion for judgment on the pleadings was granted on grounds that the falsely alleged libel claims arising from publications on June 9, 2006, March 1, 2007, and July 12, 2008, were time barred. (Respondents' Brief, p. 2). What's more, Respondents falsely implied that Thomas then sought to remedy what they are suggesting was a fatally flawed *Complaint* by filing an *Amended Complaint* dated November 2, 2013, to assert the article published on September 23, 2012, as the cause for this libel action. (Respondents' Brief, p. 2).

To that end, Thomas' *Amended Complaint* was both dated and filed on November 22, 2013, (R. p. 87; p. 96), to supplement the pleadings with, among other things, resounding specificity as to the cause of this action being the article in dispute published September 23, 2012. (R. p. 88, ¶¶ 5-7). And despite Thomas' attempts to make known that Respondents' motion for judgment on the pleadings was unnecessary, (R. p. 11, ¶ 1; p. 115, ¶ 1), Respondents declined to withdraw their motion until Thomas was transported to the hearing nearly two months later on January 10, 2014. (R. p. 141, lines 11-14). In other words, it appears that instead of *judicial economy* and avoiding the expense of unnecessarily transporting Thomas to a moot hearing: Respondents' counsel was only concerned with billing his clients for having to drive from Columbia to Charleston to appear.

ARGUMENT

I.

The trial court erred when denying Appellant's motions for continuance or, for dismissal without prejudice and tolling of the statute of limitations in violation of Appellant's right to due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and South Carolina law.

"There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Jean Hoefer Toal, Shahim Yafai, Robert A. Muckenfuss, Appellate Practice in South Carolina 57 (2nd Edition 2002). "So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon ... counsel to harass the judge by parading the issue before him again. (Citation omitted). *Id.*

Preservation

Thomas' motion in the case at hand for continuance or, in the alternative, dismissal without prejudice and tolling of the statute of limitations is preserved for appellate review whereas it was raised (1) to and ruled upon by the trial court; (2) by Thomas the appellant; (3) in a timely manner; and (4) was raised to the trial court with sufficient specificity. (R. p. 153, lines 10-25—p. 155, lines 1-15). Therefore, a 59(e) motion is not required to preserve this issue.

Prejudice

Furthermore, Thomas has adequately set forth the facts necessary to establish that he was prejudiced by the trial court's denial of his continuance and tolling motion. And Respondents' line of reasoning that Thomas' convictions render him *libel-proof*—which is the grounds for Thomas' motion—should preclude any legal prejudice they may have otherwise been entitled to argue. (R. p. 150, lines 13-17). Therefore, the trial court erred when denying Appellant's

motions for continuance or, for dismissal without prejudice and tolling of the statute of limitations.

ARGUMENT

II.

The trial court erred when granting Respondents' motion for summary judgment on grounds that Appellant failed to proffer evidence establishing a genuine issue of material fact in violation of Appellant's right to due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and South Carolina law.

"[O]n the question of reporting police investigations[,] ... these are not privileged as are reports of judicial proceedings." Dauterman v. State-Record Company, 154 S.E.2d 919, 921 (S.C. 1967). "[R]eckless disregard where the defamatory matter was not 'hot news' and the newspaper failed to verify it despite warnings concerning its falsity." (Citation omitted). (Internal quotation marks in original). Anderson v. The Augusta Chronical, 585 S.E.2d 506, 520 (S.C.App. 2003). "It is likely that the newspapers inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity. Although failure to investigate will not support a finding of actual malice ... the purposeful avoidance of the truth is in a different category...." (Citation and internal brackets omitted). *Id.* at 519.

"Evidence of an intent to avoid the truth ... was sufficient to convince the plurality." (Internal brackets omitted). *Id.* "Refusal to retract an exposed error tends to support a finding of actual malice." (Citation omitted). *Id.* at 520. "[D]ivorce of prominent citizen not a matter of legitimate public concern." (Citation omitted). Gertz v. Robert Welch, Inc., 418 U.S. 323, 378 n. 10 (1974). "[T]he question whether the privilege has been abused is one for the jury." Murray v. Holnam, 542 S.E.2d 743, 749 (S.C.App. 2001). "[F]ailure to undertake a reasonable investigation into the matter creates a jury question as to whether it published the [article] with malice." (Citation omitted). *Anderson*, 585 S.E.2d at 518. "Whether ... statements were false is a matter for the jury." Castine v. Castine, 743 S.E.2d 93, 97 (S.C.App. 2013).

Official Proceedings & Records

Respondents' argument that the article in dispute in the case at bar is privileged as a fair and substantially accurate report of official proceedings and records is flawed because the references made to Thomas' wrongful convictions (underlying criminal matter), by their own admission, came from police reports. (Respondents' Brief, pp. 2-5). By way of explanation: the alleged victim, Rachel M. Crowley, who was Thomas' wife, leaped from their van while in motion when Thomas asked for a divorce and began making the allegations documented in the North Charleston Police Department's (NCPD) *Incident Report*. And over the next 30 days, Crowley gave NCPD and other officials three more statements.

Consequently, by way of those statements and during Thomas' trial, Crowley was exposed to having told more than 47 lies. (R. pp. 231-238). However, Respondents refused to accept the documents proving this fact. (Appellant's Brief, pp. 13-14). Furthermore, Respondents have erroneously argued that Thomas failed to file anything challenging the accuracy of Smith's reporting of the contents of the police report. (Respondents' Brief, p. 5). To that end, Thomas' request for retraction attached to his *Complaint* and *Exhibit B* attached to his *Memorandum* both challenge the accuracy of Smith's reporting of the police report. (R. pp. 9-81; pp. 231-238). Therefore, Respondents are not entitled to any privilege whereas they did not publish an account of Thomas' *official proceedings*: they were only interested in the inadmissible hearsay evidence of the police report.

Malice & Reckless Disregard

Thomas' divorce was not a matter of legitimate public concern. And it is malicious for Respondents to single-out Thomas for exercising his right to self-representation whereas that also is not a matter of public concern because this is a common practice—which should be

considered a conscious indifference toward Thomas' rights. That said, when Thomas saw Respondent Smith seated in the gallery during his divorce trial, he knew that Smith would once again print the same inaccurate facts that were in the Respondents' previous articles. Therefore, Thomas entered into the record of those proceedings the disparaging truth about all of the Respondents. (R. p. 348, lines 24-25—p. 350, lines 1-15). And in retaliation, Respondents printed the article in dispute with a reckless disregard for the truth to avenge Thomas for his comments. What's more, Smith's *affidavit* is entirely refuted in Thomas' request for retraction that was ignored. (R. pp. 36-64).

To that end, Thomas' *affidavit* attached to his motion for judicial notice does attest to the truth in his request for retraction, the *Complaint* and the *Amended Complaint* and, both complaints have been verified to the extent of cumulatively demonstrating the existence of specific facts showing that there are genuine issues for trial. In other words: Smith acted with ill-will, and he had an obligation to seek the truth once notified to the falsity of his articles. Therefore, the trial court erred when granting Respondents' motion for summary judgment on grounds that Thomas failed to proffer evidence establishing a genuine issue of material fact.

ARGUMENT

III.

The trial court erred when failing to remand for review the novel issue of being libel-proof in violation of Appellant's right to due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and South Carolina law?

"Even if the court only issues a form order in response to a[n] ... [issue], and a party does not make 59(e) motion, if the arguments in support of the [issue] are included in the record on appeal, they are preserved." (Citation omitted). Jean Hoefer Toal, Shahim Yafai, Robert A. Muckenfuss, Appellate Practice in South Carolina 60 (2nd Edition 2002). "When a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved." (Citation omitted). *Id.* "If a[] [respondent] fails to respond to an issue in its brief, the [appellate] court may treat the failure to respond as a confession that the appellant's position is correct." First Union Nat. Bank v. FCVC Comm., 469 S.E.2d 613, 617 (S.C.App. 1996).

Preservation

The trial court in the instant matter acknowledged having received and read Thomas' *Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment*. The trial court also confirmed that Thomas' *Memorandum* would be incorporated for purposes of appellate review. (R. p. 149, lines 4-8; p. 157, lines 4-7; p. 158, lines 12-24). And therein that *Memorandum*, Thomas argued that he was not *libel-proof*. (R. pp. 224-225). What's more, Thomas' motion to alter or amend embodies his line of reasoning that a jury should be allowed to determine if he is *libel-proof*. (R. pp. 136-137). Therefore, the issue is preserved for appellate review. And because the Respondents failed to respond to this issue, Thomas' position that the trial court erred when failing to remand for review the novel issue of being *libel-proof* should be considered correct.

CONCLUSION

For the foregoing reasons, this Court should remand this case to the lower court for a trial by jury.

WHEREFORE, Appellant prays this Court grant the relief requested; and, for such other relief as this Court deems just and proper.

Respectfully submitted,

Clark D. Thomas

Clark D. Thomas

BRCI / Moultrie A-2087

4460 Broad River Road

Columbia, SC 29210

August 20, 2015
Columbia, SC

RECEIVED
AUG 20 2015
SC Court of Appeals

CERTIFICATE OF COMPLIANCE

RECEIVED

AUG 20 2015

SC Court of Appeals

I hereby certify that this *Final Reply Brief of Appellant* complies with Rule 211(b),
SCACR.

Respectfully submitted,

Clark D. Thomas

Clark D. Thomas #187845
BRCI / Moultrie A-2087
4460 Broad River Road
Columbia, SC 29210

August 20, 2015
Columbia, SC

RECEIVED

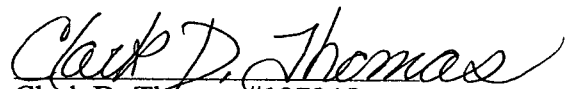
AUG 20 2015

SC Court of Appeals

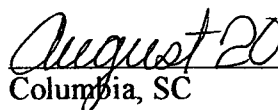
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Final Reply Brief of Appellant* has been sent by U.S. Mail to:

Jay Bender, Esquire
P.O. Box 8057
Columbia, South Carolina 29202.



Clark D. Thomas #187845
BRCI / Moultrie A-2087
4460 Broad River Road
Columbia, SC 29210

 2015
Columbia, SC