

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
SC Court of Appeals Case No. 2013-001581
Unpublished Opinion No. 2015-UP-201, Filed April 15, 2015

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JUN - 8 2016

SC SUPREME COURT

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.

RESPONDENT'S BRIEF

Jay Bender
BAKER, RAVENEL & BENDER, L.L.P.
Post Office Box 8057
3710 Landmark Dr., Suite 400
Columbia, SC 29202
803.799.9091 (telephone)
803.779.3423 (facsimile)
ATTORNEYS FOR RESPONDENTS

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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 (Trexler) filed an "Amended Complaint" on June 23, 2010 in which he alleged:

Prior to the month of March 2008, the Plaintiff's mother operated a business in Richland County, South Carolina, in which the Plaintiff's mother bred for profit, Arabian horses.

During February of 2008, the horses owned by the Plaintiff's mother were seized, due to alleged charges of mistreatment of animals. In addition, the Plaintiff's mother and brother were charged with various crimes.

Although the Plaintiff had no ownership interest whatsoever in the ownership of the horses or the operation of his mother's business, the Richland County Sheriff's Department charged the plaintiff as if he were an owner.

(App. p. 125, ¶¶13-15)

Following extensive discovery, respondents moved for summary judgment on grounds that Trexler's defamation claims (the other claims having been voluntarily dismissed) were barred by the statute of limitations, the publications complained of were true or substantially true, and that petitioner could not meet his burden of proving fault on the part of respondents in publishing the news reports of which he complained. Respondents argued, and the trial court held, that Trexler was a public official for purposes of the libel action. (App. pp. 103-05) The trial court noted that regardless of whether Trexler was a public official or private figure, he was obligated to prove the falsity of the publications upon which his libel claim was premised. (App. pp. 97-100) Respondents supported their motions with affidavits, public records, pleadings, responses to interrogatories, and depositions. Prior to the hearing on the summary judgment

motions Trexler submitted an affidavit addressing only his status as a public official. (App. pp. 1146-1148) Counsel for Trexler acknowledged at a hearing on Trexler's motion for reconsideration of the grant of summary judgment that the evidence which Trexler claims established the existence of a genuine issue of material fact was not submitted to the trial court until after the hearing on the motion for summary judgment, stating, "...[W]e submitted our evidentiary material with our proposed orders...." (App. p. 230, lines 14-22) The proposed orders were submitted subsequent to the hearing on the motions for summary judgment. (App. pp. 221-22)

Respondents' motions for summary judgment were granted on grounds of the statute of limitations, except as to one publication, the existence of the common law fair report privilege which immunized the publications from liability, and the failure of Trexler to meet his burden of proof as to falsity and fault. (App. pp. 91-106) Trexler appealed, and the Court of Appeals affirmed on grounds that the publications were subject to the fair report privilege, and that the publications were true or substantially true. (App. pp. 1248-1253)

This court granted Trexler's petition on the question of whether the record "contains sufficient evidence to create a genuine question of fact regarding the falsity of Respondents' publications."

ARGUMENT

1. The record before the trial court at the time the motions for summary judgment were considered contained no evidence from Trexler on the issue of falsity.

Respondents supported their motions for summary judgment with pleadings, depositions, responses to interrogatories, public records and affidavits. Under the requirements of Rule 56(e), SCRCP, when a defending party's motion for summary judgment is supported by affidavits or

other material allowed under the rule, the adverse party must respond in a prescribed fashion to demonstrate the existence of specific, genuine issues for trial:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Rule 56(e), SCRPC.

Opposing affidavits must be served not later than two days before a hearing on the motion for summary judgment. Rule 56(c), SCRPC; *Black v. Lexington School Dist. No. 2*, 327 S.C. 55, 488 S.E.2d 327 (1997). Trexler's post-hearing submission of "150 pages' worth of evidence" (App. p. 228, lines 16-19), cannot now be used to demonstrate the existence of genuine issues for trial as the submission was untimely and not before the court as the motions were being heard. The record to be considered by this court in determining whether "the Record contains sufficient evidence to create a genuine question of fact regarding the falsity of Respondents' publications" (Quest. 3 in Petition for Writ of Certiorari; Order of April 15, 2016) is the record that was before the trial court at the time of the hearing on the motions. The failure by a party opposing a properly supported motion for summary judgment to present affidavits or depositions precludes the creation of a question of fact for trial. *Klippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 399 S.E.2d 162 (Ct. App. 1990).

Trexler's attorney argued that the news reports "mischaracterize, mislead and are false in the sense where they accuse Mr. Trexler of crimes well beyond what he was accused of." (App. p. 188, lines 1-3) No reference was made by way of affidavit or otherwise to specific facts demonstrating the falsity alleged by Trexler's attorney, and "[F]actual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not

be considered by the court in determining whether a genuine issue of material fact exists. *Gilmore [v. Ivey]*, 290 S.C. 53, 348 S.E.2d 180 [(Ct. App. 1986)].” *Higgins v. Medical Univ. of S.C.*, 326 S.C. 592, 486 S.E.2d 269, 272 (Ct. App. 1997). Trexler’s attorney argued that the publications should only have reported that Trexler was arrested on misdemeanor counts of ill treatment of animals. (App. p. 188, lines 7-23) Such reporting would have ignored Trexler’s subsequent indictments for forty-five (45) instances of felony ill treatment of animals. (App. pp. 896-903)

Nothing in the record before the court at the hearing on the summary judgment motions identified specific issues of fact for determination at trial. Summary judgment on the question of falsity was appropriate on the record before the court when the motions were heard.

2. Trexler had the burden of proof on the issue of falsity in this case, and failed to demonstrate the existence of genuine issues of material fact on the question of falsity of the publications.

Respondents argued, and the trial court found that Trexler was a public official for purposes of his libel claim. (App. p. 103) As a public official Trexler was required to prove the publication of false and defamatory statements regarding him when the publisher knew the statements to be false or had reckless disregard of the truth—the constitutional malice standard. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000). Even had the trial court not found Trexler to be a public official, First and Fourteenth Amendment protections for the press placed the burden on Trexler to prove the falsity of the publications in this case involving matters of public interest and concern. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); *Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 629 S.E.2d 653

(2006); *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998); *Parker v. Evening Post Pub. Co.*, 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994).

As the United States Supreme Court explained, requiring even a private figure libel plaintiff to prove the falsity of a publication on a matter of public interest provides the desired “breathing space” for true speech. *Hepps, supra*, 475 U.S. at 778, 106 S.Ct. at 1564. As in *Hepps*, the news reports in this case described allegations of illegal conduct by a government official. Speech relating to the conduct of government officials is at the core of the First Amendment and most deserving of protection.

In his brief Trexler attempts to argue that respondents must demonstrate the truth of their publications to support their motions for summary judgment. (Br. of Pet. pp. 7-12) This argument demonstrates a clear misapprehension of the applicable authorities. Since Trexler had the burden of proof on the question of falsity of the publications, he was obligated to come forward with specific facts showing the existence of a genuine issue for trial, as this court explained in *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537, 545 (1991):

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990). With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility “may be discharged by ‘showing’—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554, 91 L.Ed.2d at 275. The moving party need not “support its motion with affidavits or other similar materials *negating* the opponent’s claim.” *Id.* At 323, 106 S.Ct. at 2553, 91 L.Ed.2d at 274. (Emphasis in original).

Once moving party carries its initial burden, opposing party must, under Rule 56(e), “do more than simply show that there is some metaphysical doubt as to the material facts” but “must come forward with ‘specific facts

showing that there is a *genuine issue for trial.*” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986) (emphasis in original). Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings. *See SSI Medical Services [v. Cox]*, *supra* [301 S.C. 493, 392 S.E.2d 789 (1990)]; *Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988).

As discussed fully above, Trexler made no effort in advance of the summary judgment hearing to identify specific publications which were false. In his “Amended Complaint” Trexler alleged libel in the publication of news reports stating falsely that he had been charged with kidnapping and that “authorities had removed horses from him that had been abused.” (App. p. 126 ¶¶ 25-26) The report that Trexler had been arrested for kidnapping was false, but found by the trial court to be privileged because the reports of the kidnapping charge were protected by the common law fair report privilege, the kidnapping charge having been announced incorrectly by the Richland County Sheriff’s Department. (App. pp. 100-01; pp. 575-77)

Even had Trexler submitted to the court affidavits or other material allowed under Rule 56 in advance of the hearing, what false publications could he prove that were material to his libel claim. Trexler was arrested for ill treatment of animals. (App. p. 514) Trexler was indicted in March 2008 for ill treatment of animals in violation of section 47-1-40 of the South Carolina Code of Laws. (App. pp. 888-893) Trexler was indicted in October 2009 for ill treatment of forty-five (45) horses in violation of section 47-1-40(B) of the South Carolina Code of Laws, a felony. (App. pp. 896-903) Nothing submitted by Trexler to the court in advance of the hearing on the motion for summary judgment met the requirements of Rule 56, SCRPC or demonstrated the existence of a genuine issue of material fact. Trexler had the burden of demonstrating to the court that the news reports were false in specific instances, but failed to do so. And, as the

record before the trial court demonstrated conclusively, the news reports were supported fully by the public record.

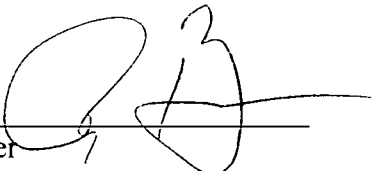
CONCLUSION

If the requirements of Rule 56, SCRPC are to have any meaning, appellate review must be restricted to the record as it existed at the time of the hearing on a motion for summary judgment. The rule imposes an obligation on a party opposing a properly supported motion for summary judgment to file not later than two days in advance of a hearing on the motion affidavits setting forth specific facts showing there is a genuine issue for trial. A failure to respond in the prescribed fashion authorizes the entry of a summary judgment, if appropriate. Trexler failed to file a timely response to respondents' motions, and did not demonstrate genuine issues of material fact that would enable him to meet his burden of proving the falsity of the publications about which he complained. Under the authorities cited herein, summary judgment in respondents' favor was appropriate in the absence of proof of falsity of the publications. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

Columbia, South Carolina

June 8, 2016



Jay Bender
BAKER, RAVENEL & BENDER, L.L.P.
3710 Landmark Dr., Suite 400
Post Office Box 8057
Columbia, SC 29202
803.799.9091 (telephone)
803.779.3423 (facsimile)
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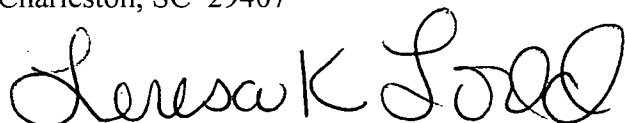
PROOF OF SERVICE

I, Teresa K. Todd, Legal Assistant to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with a Respondents' Brief by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

William H. Johnson, Esquire
P.O. Box 137
Manning, SC 29102

William K. Austin, Esquire
W. Westbrook Wills, III, Esquire
Austin, Fowler & Wills, LLP
38 Broad Street
Suite 200
Charleston, SC 29401

Matthew D. Hamrick, Esquire
1524 Ashley River Road
Charleston, SC 29407

A handwritten signature in black ink, reading "Teresa K. Todd". The signature is written in a cursive style with a large, looped "T" and "D".

Teresa K. Todd

June 8, 2016