

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2008-CP-10-1200

Terrence J. Hickey Appellant/Respondent

v.

Resolution Management Consultants, Inc., Gerard P. O'Keefe,
Jeffery B. Kozek, and Thomas Cummings..... Defendants,

Of Whom Resolution Management Consultants, Inc. is.....Respondent/Appellant,,

And Gerard P. O'Keefe and Jeffrey B. Kozek are.....Respondents.

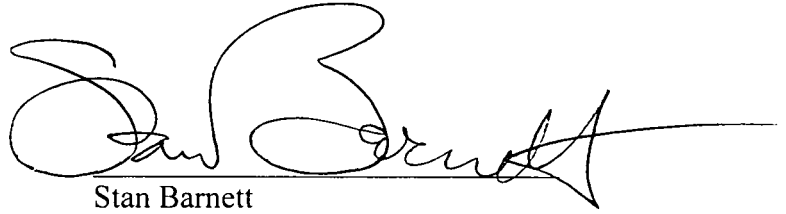
PETITION BY APPELLANT/ RESPONDENT, TERRENCE J. HICKEY FOR REHEARING

Pursuant to S.C. Appellate Court Rule 240, Appellant/Respondent, Terrence J. Hickey hereby petitions this Honorable Court for rehearing as to the following issue decided in the Opinion filed in the above appeal on December 12, 2012:

The holding that the individual defendant, Gerard P. O'Keefe, is not liable personally for the torts of malicious prosecution and civil conspiracy in which her participated when such action was taken in the name of the corporation of which he was an owner and officer.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stan Barnett", with a long horizontal flourish extending to the right.

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December 21, 2012
Mount Pleasant, South Carolina

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(D)(2), SCACR.**

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In The Court of Appeals**

Terrence J. Hickey, Appellant/Respondent,

v.

Resolution Management Consultants, Inc., Gerard P.
O'Keefe, Jeffrey B. Kozek, and Thomas Cummings,
Defendants,

Of whom Resolution Management Consultants, Inc. is
Respondent/Appellant,

And Gerard P. O'Keefe and Jeffrey B. Kozek are
Respondents.

Appellate Case No. 2010-152087

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Unpublished Opinion No. 2012-UP-657
Heard May 22, 2012 – Filed December 12, 2012

AFFIRMED

Stanley E. Barnett, Smith, Bundy, Bybee, & Barnett, PC,
of Mount Pleasant, for Appellant/Respondent.

John J. Pringle, Jr., Ellis, Lawhorne & Sims, PA, of Columbia, and John T. Lay, Jr., Gallivan, White & Boyd, PA, of Columbia, for Respondent/Appellant and Respondent Jeffery B. Kozek.

Julius H. Hines, Womble Carlyle Sandridge & Rice, LLP, of Charleston, for Respondent Gerard P. O'Keefe.

PER CURIAM: This cross-appeal arises out of a trial in which a jury returned a verdict in favor of Terrence Hickey against Resolution Management Consultants, Inc. (RMC) for malicious prosecution. RMC argues the trial court erred in only partially granting its motion for directed verdict. Hickey argues the trial court erred in directing a verdict for Gerard O'Keefe, Jeffrey Kozek, and Thomas Cummings on his claim for malicious prosecution, and in directing a verdict for all the defendants on his civil conspiracy claim. We find support in the record for each of those decisions, and therefore we affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: *Martasin v. Hilton Head Health Sys., L.P.*, 364 S.C. 430, 440, 613 S.E.2d 795, 801 (Ct. App. 2005) (reversing directed verdict for two defendants where "a reasonable jury could have found" for the plaintiff against them); 364 S.C. at 442, 613 S.E.2d at 802 (affirming directed verdict for another defendant where there was "no evidence upon which a reasonable jury could conclude the alleged negligent acts or omissions . . . proximately caused Mr. Martisan's death"); *Goodwin v. Kennedy*, 347 S.C. 30, 38, 552 S.E.2d 319, 323 (Ct. App. 2001) (stating, on review of denial of directed verdict, that "we must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor" (citation omitted)); *see also Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 175-76, 648 S.E.2d 585, 588 (2007) (stating, "When reviewing the denial of a motion for directed verdict . . . , this Court applies the same standard as the trial court" and, "The motion[] should be denied when either the evidence yields more than one inference or its inference is in doubt").

AFFIRMED.

FEW, C.J., and HUFF and SHORT, JJ., concur.

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MEMORANDUM IN SUPPORT OF
PETITION BY APPELLANT/ RESPONDENT, TERRENCE J. HICKEY FOR
REHEARING

INTRODUCTION

Shortly before this Court’s Opinion of December 12, 2012 was filed, a settlement was consummated between Terrence J. Hickey on the one hand and Resolution Management Consultants, Inc. (“RMC”) and Jeffrey B. Kozek on the other hand. Thomas Cummings settled before briefing of the case. The only issues remaining between the parties, therefore, are the claims by Hickey against O’Keefe. Those claims were dismissed at trial and this Court affirmed that dismissal. In addition, this Court

reversed the judgment against RMC having found that the trial judge's charge to the jury concerning malicious prosecution was insufficient.

For the reasons set forth below, Hickey respectfully requests this Court to reconsider its decision that an individual corporate officer may not be held liable for his actions which otherwise constitute malicious prosecution and/or civil conspiracy because he took those actions in the name of the corporation.

I.

PERSONAL LIABILITY OF CORPORATE OFFICERS FOR MALICIOUS PROSECUTION AND CIVIL CONSPIRACY

The sole basis on which the trial judge dismissed the malicious prosecution claims against the individual defendants, including O'Keefe, was that all actions they had taken to institute the suit against Hickey and to continue the suit were taken as corporate officers. This Court upheld that dismissal on the same basis.

The evidence was uncontested that the institution of suit against Hickey, like all corporate decisions of significance at RMC, could only be taken by the individual principals directing such action. O'Keefe and Kozek testified that this is exactly what occurred. *Trans.*, p. 182-183, 207-208. This Court noted that any damages which might have been recovered by RMC in the original litigation would have belonged exclusively to RMC, the corporation and not to O'Keefe. This has not heretofore been the standard for imposing personal liability on corporate officers for actions in which they participate, but taken in the name of a corporation.

The general rule in South Carolina relating to the liability of directors and officers of a corporation for torts in which they commit, participate, or direct was stated in BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct.App. 2005) as follows:

“Worthy claims that as an officer of Carolina Benefit, he is immune from liability. He cites *Hunt v. Rabon*, 275 S.C. 475, 272 S.E.2d 643 (1980), for this proposition. In *Hunt*, the Supreme Court articulated:

Generally the reason for the creation of a corporation is to limit liability. While there are instances in which directors and/or trustees and officers may be personally liable, an officer or a director of a corporation is not, merely as a result of his standing as such, personally liable for torts of corporate employees. To incur liability he must ordinarily be shown to have in some way participated in or directed the tortious act.

We find the following relevant rule in 19 Am.Jur.2d Corporations, 4, Liability for Torts:

§ 1382. Generally.

A director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character; he is not liable for torts committed by or for the corporation unless he has participated in the wrong. Accordingly, directors not parties to a wrongful act on the part of other directors are not liable therefore. If, however, a director or officer commits or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby, and it does not matter what liability attaches to the corporation for the tort

§ 1383. Liability for acts of subordinate officers, agents, or employees.

Ordinarily, a director is not liable for the tortious acts of officers, agents, or employees of the corporation, unless he participated therein or authorized the wrongful act. It is held that directors cannot be held liable for the acts of subordinate officers which they neither participated in nor sanctioned, and where they could not, in the exercise of ordinary and reasonable supervision, have detected the wrongdoing of such subordinate officers

In 19 C.J.S. Corporations § 845-Torts, the rule is stated this way:

“A director, officer, or agent is not liable for torts of the corporation or of other officers or agents merely because of his office. He is liable for torts in which he has participated or which he has authorized or directed.”

Id. at 477-78, 272 S.E.2d at 644.

Nothing in the law shields Worthy from direct liability in tort for his own actions. See *Rowe v. Hyatt*, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) (“An officer, director, or controlling person in a corporation is not, merely as a result of his or her status as such, personally liable for the torts of the corporation. To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act.”). Worthy is personally liable for any tortious acts he participated in or directed.

Similarly, the corporate veil does not protect Worthy from liability for his own actions. Section 33-6-220(b) (1999) of the South Carolina Code states: “Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation *except that he may become personally liable by reason of his own acts or conduct.*” (Emphasis added).”

The BPS, Inc. case concerned a number of torts including fraud, unfair trade practices, intentional interference with contract, negligent misrepresentation, and fraud in the inducement. This Court has previously reaffirmed the general rule relating to the personal liability of officers and directors for torts in which they personally commit, direct, or participate. Moseley v. All Things Possible, Inc., S.C. 31, 694 S.E.2d 43 (S.C.App. 2009). The Supreme Court has also recently reiterated this standard for personal liability for corporate officers for torts in which they participate directly. 16 Jade Street, LLC v. R. Design Construction Co., LLC, 398 S.C. 338, 728 S.E.2d 448 (2012), “More importantly, this also has long been the rule with respect to shareholders and officers of corporations, an organizational structure from which LLCs borrow heavily. *See* S.C.Code Ann. § 33-6-220(b) (‘ [A] shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.’”

Though South Carolina has not specifically addressed a case dealing with malicious prosecution, the South Carolina general rule is commensurate with the general rule related to the liability of officers and directors for malicious prosecution. Fletcher Cyclopedia of the Law of Corporations states the following:

“A person cannot escape liability for malicious prosecution merely because he or she acted as an officer of a corporation and not as an individual.”

3A Fletcher Cyc. Corp. § 1160 (emphasis supplied).

Other jurisdictions also agree that a corporate officer or director may himself be liable for damages for false arrest, false imprisonment or malicious prosecution where he directs tortious actions though acting on behalf of a corporation. See Burke v. Musarra, 261 N.Y.S.2d 314 (1965); Farmers Mut. Fire Ins. Ass'n of Allen County v. Stewart, 167 Ind. 544, 79 N.E. 490 (1906); and Freides v. Sani-Mode Mfg. Co., 211 N.E.2d 286 (Ill. 1965). Freides was an action for malicious prosecution against a manufacturing company and its president by a subcontractor who had been charged with taking company property and converting to its own use with the intent to steal the property. In that case, the subcontractor had been found not guilty.

Finally, the Restatement (Third) of Agency is in accord with the general rule of South Carolina, the treatise cited above, and the foregoing jurisdictions in stating as follows:

“An agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment.”
The Restatement (Third) of Agency § 7.01 (2006).

The comments to the Restatement cite the exact South Carolina general rule: “Holding a position as an officer or director of a corporation or other organization does not insulate a person from liability for the person's own tortious conduct. Thus, an organizational officer is subject to liability when the officer directly participates in conduct that constitutes a tort...”

Therefore, if an officer or director directly participates in the tort, in this case the tort of malicious prosecution, that director or officer is not insulated by the corporate

form. The immunity is only provided to those whose only connection to liability is their mere status as an officer and director.

Similarly, Am Jur's article on Malicious Prosecution confirms that this is the law generally as to individual liability of corporate officers for instigating a malicious prosecution. In fact, that article explains that in some jurisdictions it was formerly the law that a corporation could not itself be liable and could rely on its "soulless character" to shield itself from liability. The officers who brought about the prosecution in the name of the corporation, however, have always been held to be liable. 52 Am Jur 2d Malicious Prosecution § 63.

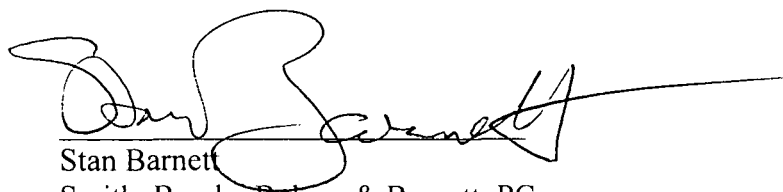
The Am Jur article on Corporations also explains that corporate officers who personally participate in committing a tort, even though in the name of the corporation, are themselves personally liable for the damages caused thereby. 18B Am Jur 2d Corporations § 1877, which cites the South Carolina Supreme Court decision in Hunt v. Rabon, 275 S.C. 475, 272 S.E.2D 643 (1980) holding:

While there are instances in which directors and/or trustees and officers may be personally liable, an officer or a director of a corporation is not, merely as a result of his standing as such, personally liable for torts of corporate employees. ***To incur liability he must ordinarily be shown to have in some way participated in or directed the tortuous acts.*** (Emphasis supplied).

In this case, there were no subordinate employees involved in the decision to sue Hickey. The officers of RMC, including O'Keefe, admitted their direct and personal role in instigating the suit against Hickey and they are, therefore, each jointly and severally liable for the damages thereby inflicted on Hickey. Liability for malicious prosecution extends to those, like the individual defendants in this case, who advised, counseled, aided and abetted the institution of the malicious proceedings or their continuation after it

was clear there was no probable cause justifying the claims asserted in the proceeding. Gibson v. Brown, 245 S.C. 547, 550 S.E.2D 141 (1965). They would not be protected by the corporate shield or their positions as corporate officers from liability for this tort or for the tort of civil conspiracy under the prevailing precedent in South Carolina prior to this Court's Opinion. Affirming the trial court's departure from the prevailing law on this point will substantially alter the standard in South Carolina for personal liability for corporate officers for the torts in which they participate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stan Barnett", written over a horizontal line.

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SC Court of Appeals

I certify that I, on behalf of Appellant/Respondent, Terrence J. Hickey, have served the Petition by Appellant/Respondent, Terrence J. Hickey for Rehearing on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, addressed to their attorneys at the addresses listed on the attached sheet showing Other Counsel of Record:

December 21, 2012



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