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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2012-CP-20-099
Appellate Case No. 2013-001257

David Michael Hollis..Appellant,

v.

Fairfield County, Philip Hinely, Davis Anderson and
David Brown, in their individual capacities..Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES PRESENTED

I. DID THE CIRCUIT COURT COMMIT ERROR OF LAW WHEN IT HELD THAT APPELLANT WAS A *NEW YORK TIMES V. SULLIVAN* PUBLIC OFFICIAL IN A DEFAMATION LAWSUIT WHERE APPELLANT WAS AN UNELECTED AND UNAPPOINTED COUNTY ANIMAL CONTROL SUPERVISOR.

II. DID THE CIRCUIT COURT IMPROPERLY HOLD THAT APPELLANT WAS BARRED FROM BRINGING A CIVIL CONSPIRACY CLAIM BECAUSE HE WAS A PUBLIC OFFICIAL AND AN EMPLOYEE AT-WILL.

STATEMENT OF THE CASE

Appellant, David Michael Hollis, filed this lawsuit, arising out of his employment, on March 1, 2012. Appellant, a former animal control supervisor, was terminated by Fairfield County on January 20, 2012. (R. p. 6). Appellant's lawsuit alleges defamation against Fairfield County and civil conspiracy against Phillip Hinely, Davis Anderson and David Brown (hereinafter "Individual Respondents"). Appellant alleges that the County, by and through its agents, have *per se* defamed him by falsely accusing him of incompetence in his profession in the time leading up to and following his termination. (R. p. 13 - 14). Appellant also alleges that the Individual Respondents acted, outside the course and scope of their employment, to get Appellant fired so that Respondent Brown could assume his job and that they are thus liable for civil conspiracy. (R. p. 14).

On March 7, 2013, after some, but not all, discovery had occurred the Defendants moved pursuant to South Carolina Rules of Civil Procedure, Rule 12(c) for Judgment on the Pleadings. The Circuit Court, Judge Brooks P. Goldsmith presiding, granted that motion on March 18, 2013. The lower court held: (1) that plaintiff was a *New York Times v. Sullivan* public official who must prove actual malice and that therefore the County could not be held liable for Defamation, requiring proof of actual malice, under the South Carolina Tort Claims Act; and that (2) because Appellant was a public official and an at-will employee he could not maintain a claim for Civil Conspiracy against the Individual Respondents. *New York Times v. Sullivan*, 376 U.S. 254, *84 S. Ct. 710* (1964); S.C. Code Ann. § 15-78-10 *et. seq*. The Appellant filed a Motion to Reconsider the decision on April 5, 2013. The Court denied that motion. The Appellant filed a Notice of Appeal on June 6, 2013, received an extension of time to submit the instant brief, and

this Action is timely. The Appellant here argues that he is not a public official and that his at-will employment status does not foreclose his claim for civil conspiracy.

STATEMENT OF THE FACTS

Appellant was fired for alleged incompetence in handling a dog fight between two dogs, owned by the same owner. (R. p. 12). Upon learning of the dog fight, Appellant advised the owner that under the County's policies, the suspected aggressing animal would either have to be euthanized or be securely confined to prevent further attacks. (R. p. 12). The owner chose the latter option and assured Appellant that he would build a secure enclosure to confine the animal. (R. p. 12). Appellant attempted to follow up with a veterinarian regarding the other dog involved; but had no further conversations about the incident with owner, the veterinarian, County officials, or anyone else until he was summarily fired by Respondent Anderson. (R. p. 12). Later, on February 9, 2012, Appellant attended a County Council meeting and was approached by Respondent Brown in the hallway who publically accused him, in front of others, of incompetence in the handling of the incident and bringing about his own termination. (R. p. 12). The termination of the Appellant and his portrayal as an incompetent, abusive employee by the County, through its agents and employees, has been published throughout the County and beyond. (R. p. 13). Appellant also has alleged that the Individual Respondents acted in combination, outside the course and scope of their employment with the County, to bring about the loss of his job and to cause him special damages. (R. p. 14 - 15).

Appellant was hired as an Animal Control Attendant on or around 2002 with an hourly wage of approximately $10.50, he was terminated on January 20, 2012, with an hourly wage of approximately $17.50; at all times Appellant punched a time-clock to record hours worked and did not receive a salary. (R. p. 44). Appellant did not have the right to hire or fire employees

nor was he authorized to create policy. (R. p. 44) While on the clock, along with all other animal control officers, Appellant wore a collared short-sleeved shirt that solely stated Fairfield County Animal Control Officer and a name-tag similar to all County employees. (R. p. 45). Prior to and after receiving his limited duty law enforcement certification, Appellant's immediate supervisor, Respondent Anderson, informed him that he was not a law enforcement official, would not have a badge, radio or gun; and that he was to contact the Sherriff's Office for any instance requiring law enforcement intervention. (R. p. 45). Appellant in his entire employment wrote only one ticket which was written to a dog and presented to the dog owner by a Fairfield County Sherriff's Deputy and Appellant. (R. p. 45).

Appellant was not elected or appointed by the County Council; rather he was hired and fired pursuant to the same policies and procedures by which all other entry to middle level county employees are hired or fired. (R. p. 45). When Appellant was terminated his title was Animal Control Supervisor and he solely had capture, shelter and euthanasia responsibilities. (R. p. 45). Respondent Brown is now over all of animal control for Fairfield County and has the title **Animal Control Director**. (R. p. 45) (**emphasis added**).

ARGUMENT

I. THE CIRCUIT COURT IMPROPERLY HELD THAT APPELLANT WAS A PUBLIC OFFICIAL.

The South Carolina Tort Claims Act bars claims against government entities which require the proof of actual malice. S.C. Code Ann. § 15-78-60(17). Pursuant to *New York Times v. Sullivan* in a defamation case a plaintiff, who is determined to be a public official, must prove actual malice. *New York Times v. Sullivan,* 376 U.S. at 269. Appellant is not a public official and need not prove actual malice to sustain a Defamation Claim. Furthermore, the determination that Appellant was a public official, made before the conclusion of discovery, is premature;

because in this case the public official analysis is a novel issue in this jurisdiction and the overwhelming majority of other jurisdictions.

A. Appellant Is Not A Public Official Under *New York Times v. Sullivan* And Its Progeny; Thus, Dismissal Of His Defamation Claim Was Error.

The standard for what constitutes a "public official" as enunciated in *New York Times v. Sullivan* and its progeny, does not apply to the position held by the Appellant. *New York Times v. Sullivan*, 376 U.S. 254, *84 S. Ct. 710* (1964). *New York Times* made clear that the term "public official" included elected officials and public officials of the "public concern", but did not include all public employees. The term "public official" was more clearly defined in *Rosenblatt v. Baer* where the court held that a "public official" applies "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966). The court also held that "[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply." *Id.* Only one court in the nation,[1] an intermediate appellate court in Florida, has held conclusively that an **Animal Control Director** is a public official.[2] *Demby v. English* 667 So. 2d 350, 20 FLW D2411 (1995) (**emphasis added**).

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[1] When South Carolina determined that Police Officers were *New York Times* public officials it noted that it was **"join[ing] the majority of jurisdictions** which have denominated police officers as 'public officials' within the meaning of the New York Times doctrine". **(emphasis added)** *McClain* v. *Arnold,* 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980).

[2] In *Demby*, the Florida Circuit Court of Appeals determined that the Leon County, Florida (2012 pop. est. 283,769) was a public official; however, here Appellant was Animal Control Supervisor

The *Rosenblatt* court was careful to point out that the finding of "public official" status under these tests should not sweepingly apply to all public employees.

> It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy. *Id.* at 676 n. 13.

Furthermore, Public official analysis is made without reverence to state administrative titles.

> **States have developed definitions of "public official" for local administrative purposes, not the purposes of a national constitutional protection. If existing state-law standards reflect the purposes of New York Times, this is at best accidental.** Our decision in New York Times, moreover, draws its force from the constitutional protections afforded free expression. The standards that set the scope of its principles cannot therefore be such that "the constitutional limits of free expression in the Nation would vary with state lines." *Id.* at 675; *quoting*, *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S. Ct. 1029, 1031 (1946) **(emphasis added)**.

The *Rosenblatt* court noted that a full factual analysis was necessary to determine whether or not the appellant in that case, a recreation director over a state-owned ski resort, was a public official; the "record here, however, leaves open the possibility that Respondent could have adduced proofs to bring his claim outside the New York Times rule." *Rosenblatt*, 86 S. Ct. at 677. Furthermore, the public official standard should only be applied cautiously and on a case-by-case basis: "moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal

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in Fairfield County, South Carolina (2012 pop. est. 23,363) and Appellant was not the Animal Control Director as Respondent Brown currently is.

interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society." *Id.* at 680 (J. Stewart, *concurring*).

Although Respondents can only cite to one case where an official similar in title to Appellant was a public official and it is a wholly novel issue in South Carolina and in the Federal Courts, there are several cases in which other courts have held that persons with positions akin to that of the Appellant were not public officials. *See e.g.*, *Peoples v. Tautfest*, 274 Cal. App. 2d 630, 79 Cal Rptr. 478 (Cal 2nd Dist. 1969) (former city recreation director not a public official for defamation purposes regarding accusations made against her before and after her termination)[3]; *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 19 Tex. Sup. J. 390 (1976) (engineer regularly hired by county for consulting not a public official); and, *Michaelis v. CBS, Inc.*, 119 F.3d 697, 1997 U.S. App. LEXIS 17347 (8th Cir. 1997) (county coroner assisting county coroner in another county is not a public official). Based on these cases, Appellant is not a "public official" as the court determined.

Appellant was not and did not appear to be "one of those among the hierarchy of government employees who [has/had] . . . substantial responsibility for or control over the conduct of governmental affairs;" thus his right to his reputation is not overcome by the public's interest in his job duties. Appellant's position as an Animal Control Supervisor does not exhibit the necessary criteria to make him a "public official". Appellant was neither elected nor appointed and he did not have the authority to make policy, hire or fire, and he appeared to the public just as any other Animal Control Officer. (R. p. 44). Furthermore, as a limited duty police officer, Appellant's immediate supervisor, Respondent Anderson, informed him that he was not a law enforcement official, would not have a badge, radio or gun; and that he was to

[3] Appellant alleges that the defamatory publications occurred in part after his termination. (R. pp. 12 - 13).

contact the Sherriff's Office for any instance requiring law enforcement intervention. (R. p. 45). For these reasons and in light of the relevant case law, the holding that Appellant was a public official was error of law by the Circuit Court and should be overturned.

B. The Determination That Appellant Was A Public Official On A South Carolina Rules of Civil Procedure Rule 12(c) Motion Was Premature Given The Novelty Of This Issue.

The issue of whether an Animal Control Supervisor is a "public official" is a novel issue of law in South Carolina, as well as in the United States, and it requires the Court to conduct a full factual adjudication before making a determination. Whether an Animal Control Supervisor is a "public official" under *New York Times* has not been addressed by any South Carolina court nor has it been ruled any Federal Court. In fact, the issue has only ever been directly addressed in the Florida Circuit Court of Appeals in *Demby v. English* under different facts.

In light of the novelty of this issue, a Motion for Judgment on the Pleadings is not the proper stage for the Court to decide whether an Animal Control Supervisor is a "public official". The Supreme Court has held that novel issues of law are best determined not on a motion to dismiss, but in the light full evidence adduced at discovery and the testimony of the witnesses at trial. *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980) *citing*, *Williams v. Streb*, 270 S.C. 650, 243 S.E.2d 926 (1978). Therefore, all relevant evidence must be brought to light before this Court can conclude that Appellant is or is not a public official. *See, Id.*

Because Appellant does not fit the *New York Times* definition of a "public official" and because whether an Animal Control Supervisor and limited duty police officer is a public official is novel issue of law, it was inappropriate for the Circuit Court to hold that the Appellant was a

public official in a Judgment on the Pleadings where all facts and inferences are to be drawn in the light most favorable to the Appellant.

II. APPELLANT IS NOT A PUBLIC OFFICIAL AND IS NOT BARRED FROM BRINGING A CIVIL CONSPIRACY CLAIM.

The judgment against the Appellant with regards to his civil conspiracy claim should be overturned as it is an erred application of the current law and creates a manifest injustice. The Circuit Court held that under *Angus v. Burroughs & Chapin Co. (Angus I)*, the Appellant could not maintain a civil conspiracy claim against Anderson and Hinley. However, the only holding from *Angus I* that is still good law is that an employee cannot bring a civil conspiracy claim against his former employer. *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 503, 596 S.E.2d 67, 70 (Ct. App. 2004) (rev'd on other grounds). Appellant does not seek to maintain an action against the County, his employer, or even members of County Council, as in *Angus I*, rather his civil conspiracy claim is against Anderson and Hinley in their individual capacities for actions outside the course and scope of their duties. The holding in *Angus I* does not bar claims against employees in their individual capacities for actions outside of the course and scope of their duties; in fact more recent case law allows it.

In *Pridgen v. Ward et al*, the South Carolina Court of Appeals held that an Appellant's claim against supervisory co-employees was not barred by *Angus I*. *See Pridgen v. Ward*, 391 S.C. 238, 246, 705 S.E.2d 58, 63 (Ct. App. 2010). Appellant, in this case, was fired by persons who had the authority to do so within the course and scope of their employment, *on behalf of the County* (his employer), but did so here outside of the course and scope of their employment; thus, Appellant's civil conspiracy claim is not barred by *Angus I*. *See*, *Crittenden v. Thompson-Walker Co., Inc.*, 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986); (holding, "On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected

with the furtherance of his master's business, his conduct falls outside the scope of his employment").[4] Moreover, Defendant Brown had no such authority, whether within the scope of his employment or without, to terminate the Appellant thus *Angus I* does not apply. Furthermore, whether or not the Individual Respondents did or did not act within the course and scope of their employment is a fact question not properly addressed on a motion for judgment on the pleadings. *See, Broyhill v. Resolution Mgmt. Consultants,* 736 S.E.2d 867, 872, 2012 S.C. App. LEXIS 365, (S.C. Ct. App. 2012). Since Appellant's action here is against co-employees for conspiring to have him terminated outside the course and scope of their duties and because the individual defendants did so, outside the course and scope of their duties Appellant's civil conspiracy claim is not barred by *Angus I.*

The holding that Appellant's civil conspiracy claim is barred under *Angus v. Burroughs & Chapin Co. (Angus II)* was also error; because, Appellant is not and cannot be held to be a public official at this time for the same reasons set forth in Section I above. *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 170, 628 S.E.2d 261, 262 (2006). Therefore, Appellant's civil conspiracy claim is not barred by *Angus I* nor *Angus II* and the Appellant respectfully requests this Honorable Court overturn the Circuit Court's ruling to the contrary.

CONCLUSION

For the foregoing reasons Appellant respectfully asks this Honorable Court to Reverse the holding of the Circuit Court and Remand this case for the trial.

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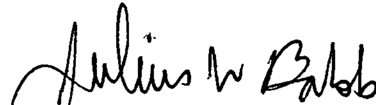
[4] The Fourth Circuit Court of Appeals upheld the right of at-will public employees to sue co-employees acting in their individual capacities in *Anthony v. Ward. Anthony*, 336 Fed. Appx. 311, *2009 U.S. App. LEXIS 14847* (4th Cir. 2009)(unpublished) (interpreting South Carolina Law and recognizing an action in civil conspiracy against may lie where a deputy director and inspector, who had the right to terminate Appellant and were co-employed by Appellant's employer, conspired to cause him harm.) Appellant's civil conspiracy claim against Anderson and Hinely in their individual capacities is not barred under *Angus I*, and is specifically permitted under *Anthony*.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Respectfully Submitted,

J. LEWIS CROMER & ASSOCIATES, LLC



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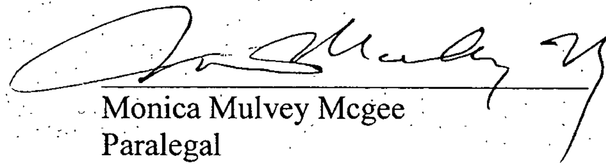
PROOF OF SERVICE

I certify that I, the undersigned employee of J. Lewis Cromer & Associates, L.L.C., did cause to have served copies of the Supplemental Record on Appeal, Appellant's Final Brief & Apprellant's Reply Brief on Respondents Fairfield County, Philip Hinely, Davis Anderson and David Brown by hand delivering a copy of it, on January 30, 2014, addressed to their attorney of record, Derwood L. Aydlette, III, with the law firm of Gignilliat, Savitz & Bettis, L.L.P., 900 Elmwood Avenue, Suite 100, Columbia, South Carolina 29201.

January 30, 2014



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