THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Presiding Judge

Case No. 2013-000826

William R. Ferrara .... Appellant

v.

Michael E. Hunt, Sheriff of Aiken County;
and Charles Cain in his individual capacity
as Deputy Sheriff .... Defendants

Of whom Michael E. Hunt is the .... Respondent.

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

A. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT HUNT SUMMARY JUDGEMENT AS TO APPELLANTS CLAIM FOR MALICIOUS PROSECUTION?

B. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT HUNT SUMMARY JUDGEMENT AS TO APPELLANT'S CLAIMS FOR MALICIOUS PROSECUTION?

B. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT HUNT SUMMARY JUDGEMENT AS TO PLAINTIFFS DEFAMATION CLAIMS ON THE GROUNDS THAT RESPONDENT'S COMMUNICATION WAS PROTECTED BY A QUALIFIED PRIVILEGE

C. DID THE TRIAL COURT ERR IN HIS APPLICATION SOUTH CAROLINA CODE SECTION 17-1-40 TO THE FACTS OF THIS CASE?

STATEMENT OF THE CASE

This is an appeal from an Order of the Honorable Doyet A. Early, III, Presiding Judge of the Second (2nd) Judicial Circuit dated April 3, 2013 and entered on the following day, April 4, 2013. Judge Early's Order granted Respondents Michael E. Hunt, Sheriff of Aiken County ("Respondent Hunt") Summary Judgment as to Appellant's causes of action for Malicious Prosecution and Defamation. (R. pp. 1-8).

Appellant commenced this action *Pro Se* against Respondents Hunt and Cain in the Aiken County Court of Common Pleas. Appellant's Complaint sought actual and punitive damages for causes of action. (R. pp. 52-127). Respondent's filed their Answer and subsequently removed this case to the United States District Court for the District of South Carolina, on or about August 10, 2009. (R. pp. 128-148). Subsequently the parties entered into written and deposition discovery.

On or about December 23, 2011 Respondent moved for Summary Judgment. (R. pp. 788-789). This matter was subsequently referred to the United States Magistrate, who issued her Report and Recommendations on March 19, 2012, recommending that the Court grant in part and deny in part Respondent's Motion for Summary Judgment and that the remaining State Law causes of action be set for a trial before a jury as demanded by Appellant. (R. pp. 34-51). After hearing argument of counsel, Judge Gergel issued his Order on or about March 28, 2012 granting Summary Judgment as to certain causes of action and with consent of the Parties, remanded the remaining State Law Causes of Action back to State Court. (R. pp. 21-31).

Respondent subsequently moved for Summary Judgment as to all remaining State Court Causes of Action. (R. pp. 876-877). Judge Early heard oral arguments. (R. pp.

368-436). Judge Early entered his Order granting Respondent Hunt Summary Judgment on April 4, 2013 against Appellant as to all of Appellant's remaining causes of action. (R. pp. 1-8). This appeal timely followed. (R. pp. 1273-1274).

STATEMENT OF THE FACTS

THE PARTIES

The Plaintiff, William Ferrara, is a citizen and resident of the County of Aiken, State of South Carolina. He is a graduate of the United States Military Academy, West Point, New York and an honorably discharged decorated officer and veteran of the United States Army. (R. pp. 55-56; 462, lines 21-23). He does not have a criminal record. He is a post graduate from the Massachusetts Institute of Technology (M.I.T.), and worked at the Savannah River Site as a nuclear engineer employed by the prime contractor for the United States Department of Energy (USDOE). (R. pp. 54-55; 458, lines 18-25; 459, lines 1-23; 461, lines 1-14). Appellant has served on numerous volunteer community service boards, committee and organizations in Aiken County to including, but not limited to; Aiken County Council, Aiken County Council Public Safety and Judicial Committee, Aiken County United Way (Budget & Evaluation Review Board), South Carolina Boys State, Aiken Sunrise Rotary Club, Aiken Tax Review Board, CSRA Science & Engineering Fair Director and Chairman, CSRA Engineering College Night 1st Year Chairman, Boy Scout Unit Commissioner (Unit Commissioner of the Year), Aiken Toastmasters, Leadership Aiken County and SRP Credit Union Board of Directors. He is a former candidate for both the Aiken County School Board and South Carolina House of Representatives. (R. pp. 54-55; 468-469; 471, lines 19-25).

Appellant owns Whiskey South, Inc., a South Carolina Corporation in the business of leasing residential real estate. (R. pp. 55; 478, lines 17 - Page 479, line 1). Through Whiskey South, Appellant manages numerous properties in the Aiken area which are leased by residential tenants. (R. pp. 53-55; 477, lines 25 - 479, line 25). One of these properties owned by Whiskey South was a 12 unit apartment complex on Banks Mill Road in Aiken. (R. pp. 54-55; 477, lines 4-8).

Respondent Sheriff Michael E. Hunt is a citizen of the United States of America and resident of Aiken County, South Carolina and is the duly elected Sheriff of Aiken County, South Carolina. He was also responsible for the supervision, training and employment of Deputy Charles Cain and under South Carolina law is liable for his actions. (R. pp. 55-56).

On or about April 17, 2006 an individual named Kari Driggers moved into apartment 2860-B Banks Mill Road and signed a lease with Appellant. (R. pp. 58-59). Less than a month later Ms. Driggers summoned Aiken County Law Enforcement because of a domestic dispute involving her and another individual named Chad Black, a registered sexual offender. (R. p. 58). Aiken County Law Enforcement also responded to domestic violence calls made by Ms. Driggers (and directed against Mr. Black) on May 31, 2006 and June 3, 2006. (R. pp. 58-59). On June 20, 2006 Aiken County Law Enforcement personnel responded to a call alleging Mr. Black was disturbing three other female residents of Appellant's apartment facility. (R. pp. 58-59). At the instruction of law enforcement, Appellant obtained a trespassing notice against Mr. Black on June 22, 2006 and instituted eviction proceedings against Ms. Driggers on June 23, 2006. The following day Mr. Black was arrested for breaking into the apartment of a female resident

of Appellant's property (he subsequently received a twelve (12) year sentence after being convicted for burglary arising out of this incident.) (R. pp. 58-60).

On June 28, 2006 Ms. Driggers was personally served with a Court notice of an eviction hearing scheduled for July 18, 2006. (R. p. 59). On July 12, 2006, six days prior to her scheduled eviction action, Aiken County Sheriff's Deputy Stuart Johnson once again responded to 2860-B Banks Mill Road and took a complaint from Kari Driggers; however, this time against the Appellant for alleged incidents that occurred sometime during the course of more than three months (from April 1, 2006 to July 12, 2006). (R. pp. 1114-1115; 58-61). Deputy Johnson did not observe any marks, injuries, cuts, or bruises on the body of Ms. Driggers and did not advise her to seek any medical attention whatsoever. In addition, he did not receive any information whatsoever from her associated with anyone attempting to or intending to inflict serious bodily injury upon her body. He stated to Appellant and/or his two painters that he could not understand anything she was saying only that she was upset because she was being evicted. The incident report is 06-037313. (R. pp. 58-64; 1114-1115). Deputy Johnson made a report to his superiors and took no further action.

The following day, another deputy in the Aiken County Sherriff's Department, Deputy Charles Cain of the Aiken County Sheriff's Department, was assigned to the case as lead investigator. He contacted Ms. Driggers regarding these allegations that same day. (R. p. 1121, lines 7-10). Deputy Cain presented Ms. Driggers who is hearing impaired with fourteen (14) written questions regarding her charges against Appellant that he touched her and solicited sex from her. (R. pp. 60-61). Ms. Driggers signed this document as an unsworn voluntary statement. Deputy Cain did not observe any marks,

injuries, cuts or bruises on the body of Ms. Driggers nor did he advise her to seek any medical attention whatsoever.

Deputy Cain returned later that day with additional handwritten questions for Ms. Driggers. The second statement included allegations similar to the original statement but added a claim that Appellant showed Ms. Driggers pictures of his penis on a cell phone. Ms. Driggers signed this unsworn document. (R. p. 1136). Again he did not observe any marks, injuries, cuts or bruises on her body and once again he did not advise her to seek medical attention.

That same afternoon Deputy Cain appeared before Magistrate Patrick Dorn Sullivan for the purpose of obtaining arrest and search warrants against Appellant. In the process of obtaining these warrants, Deputy Cain mislead and withheld pertinent information from the Court as to the facts and circumstances regarding the ongoing eviction notice against Ms. Driggers. (R. pp. 62-64).

On that same day, Deputy Cain took a statement from Ms. Driggers' boyfriend, Billy Cook. (R. pp. 1138). The two sentence statement simply claims Appellant was "looking for" Ms. Driggers at some point in time. In his discovery deposition, Deputy Cain admitted that Mr. Cook's statement failed to collaborate anything that Ms. Driggers alleged and failed to corroborate that a crime actually occurred. (R. pp. 443, lines 12-14; 451, lines 14-16; 452, lines 12-15).

On the afternoon of July 13, 2006, as the result of an investigation that lasted less than three hours Deputy Cain obtained five arrest warrants for the Appellant and a search warrant for his residence at 109 Fox Lea Trail, Aiken, South Carolina. The arrest warrants were for assault and battery of a high and aggravated nature, indecent two

counts of exposure, solicitation of prostitution and disseminating obscenities. (R. pp. 1140-1149). Aside from the three statements taken by Deputy Cain, no other investigation was made regarding Ms. Driggers' allegations whatsoever. (R. pp. 440, lines 14-17; 442, lines 18-25; 452, lines 12-15). In his discovery deposition Mr. Cain admitted that he did not have a single piece of evidence to corroborate anything Ms. Driggers said in her unsworn statements. (R. pp. 440, lines 11-17; 442, lines 18-23; 443, line 12; 451, lines 14-16; 452, lines 12-15). Deputy Cain also admitted that he had no evidence whatsoever that Ms. Driggers was truthful or honest in any way. He had no knowledge, nor did he conduct any investigation into her credibility. He did not conduct any investigation into the existence of factors which may have impacted her veracity and truthfulness. (R. pp. 440, lines 20-23; 444, lines 20 – 445, line 5; 446, lines 10-13; 447, lines 7-9; 448, lines 4-10). Aside from these unsworn affidavits, Deputy Cain did no further investigation into Ms. Driggers' allegations. (R. p. 451, lines 11-16). Armed only with these unsworn statements, Mr. Cain swore to an affidavit supporting these warrants. (Exhibit 7 to Defendants Memorandum of Law in Opposition to Summary Judgment dated February 3, 2012; R. pp. 1139-1149).

Once the arrest warrants were issued, Deputy Cain contacted Appellant and told him to turn himself in. Appellant cooperated and turned himself into the police later that day. (R. p. 453, Lines 19-21).

On the same day Aiken County Sheriff Michael Hunt ("Respondent Hunt") published a news release on his agency's website regarding Appellant's arrest. The report, entitled, "Former Aiken County Councilman Arrested for Sex Crimes" stated:

> Aiken, SC – July 13 – The Aiken County Sheriff's Department tonight arrested an Aiken man, who is accused

> of improperly touching a 23 year old Aiken woman and asking the victim for sexual relations in exchange for free rent. William R. Ferrara, 47, 109 Fox Lea Trail, Aiken, South Carolina is charged with Assault and Battery High and Aggravated Nature, Solicitation of Prostitution, Indecent Exposure (two counts) and Disseminating Obscenities. Shortly before 6:00 PM, ACSO investigators arrested the subject at his Attorney's office. Since April 1, the subject has repeatedly fondled the victim. The subject has also offered the victim free rent or money in exchange for sexual relations. Investigators learned the subject exposed himself to the victim and displayed obscene photographs on a cellular telephone to the victim as well. Ferrara represented District 7 on Aiken County Council from May 1993 until December 1996. The subject is being held at the Aiken Detention Center.

(Exhibit 8 to Memorandum in Opposition; R. pp. 1151-1152).

Respondent Hunt admitted during deposition testimony that the purpose of these news releases was to provide information to the media. These false written statements of absolute guilt regarding moral turpitude were published across the United States by the media immediately after Defendant Hunt's publication on the Internet on Thursday, July 13, 2006.

Over the course of the next two years, all of the charges against Appellant were either dismissed or *nolle prossed.* (R. pp. 1244-1249; 1154-1155). In the mean time, Appellant was confined to house arrest, was unable to manage his personal or business affairs, and was subject to public ridicule because of the false claims of sexual deviance. (R. pp. 479, lines 12 – 480, line 15; 575, lines 15-17). Despite these developments, Respondent Hunt continued to publish the original false news release defaming the Appellant on his agency's website, and failed to cite the fact that several of the charges lodged against the Appellant had been dismissed for lack of probable cause. Respondent

did not modify his original news release in anyway whatsoever, but continued its daily written publication on the Internet.

The unfounded and unsupported charges against Appellant were never indicted and on October 17, 2008 were favorably terminated by the South Carolina Second Judicial Circuit Solicitor Solicitor Barbara Morgan recognized that as a matter of law there wasn't any evidence whatsoever to go forward with these false claims and filed a nolle prosequi, dismissing all charges against the Plaintiff. (R. pp. 1244-1249; 1154-1155). Despite the fact that the State's charges against Appellant had fallen completely apart, Respondent Hunt continued to publish the original false news release defaming the Plaintiff on his agency's website, and failed to cite the fact that ALL of the unfounded charges lodged against the Plaintiff had been dismissed by the prosecutor due to victim credibility issues. (R. pp. 504, lines 14 - 505, line 19).

On February 12, 2009 the Plaintiff filed a verified claim in a good faith effort to avoid a prolonged civil litigation. (Affidavit of Ruth Gordy with Attached Verified Claim for Damages; R. pp. 1265-1272). Respondent Hunt received a copy of this claim by certified mail. (R. pp. 1265-1272). However, Respondent Hunt ignored this claim and continued to publish daily the original false news release defaming the Appellant on his agency's website.

On March 6, 2009 the Honorable Doyet A. Early, III, of the Court of General Sessions for Aiken County issued an expungement order regarding all of Appellant's charges. (Exhibit 9 to Memorandum in Opposition, R. pp. 1154-1155; 120). Pursuant to this Order, Respondent was required to destroy all records relating to Appellant's charges. (R. pp. 1154-1155). In spite of this Order, Respondent allowed this press

release to be republished in the Aiken County Sheriff's Department website every day for more than two and a half years past the expungement order.

Appellant filed a civil complaint the state court on July 1, 2009. Respondent Hunt was served a copy of this complaint. (R. pp. 595-598). At that time the Appellant once again informed Respondent Hunt in writing that he was in contempt of court for failing to obey Circuit Court Judge Doyet Early's expungment order. However, Respondent Hunt once again ignored Appellant's written complaint and Judge Early's written order, and continued to publish the original false news release defaming the Appellant on his agency's website.

Appellant was deposed by Counsel for Respondent Hunt and Deputy Cain in 2011. At that time the Appellant once again informed Respondent Hunt that he was in contempt of court for failing to obey Circuit Court Judge Doyet Early's expungment order Respondent continued to publish the press release on his website until October of 2011. Immediately thereafter on that day Respondent Hunt removed not only Appellant's news release, but all other published news releases associated with others who had been arrested over a several year period of time. Henceforth, Respondent Hunt has not published any other news releases on his agency's website regarding the arrest of any defendants.

STANDARD OF REVIEW

The Appellate Court's standard of review in evaluating a summary judgment motion is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn there from. *Lattie v. SHS Enterprises, Inc.,* 390 S.C. 417, 389 S.E.2d 300 (Ct. App.

1990); *Gilmore v. Ivey,* 290 S.C.53, 348 S.E.2d 180 (Ct. App. 1986). Summary Judgment is proper only when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.,* 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

ARGUMENT

I. JUDGE EARLY REILED ON THE ORDER ISSUED BY FEDERAL JUDGE GERGEL, WHICH CONTAINS INCONSISTENCIES IN FINDINGS.

If a verdict contains inconsistent findings as to a controlling fact, no judgment can be entered. *Dunn v. United States,* 284 U.S. 390, 400, 52 S. Ct. 189, 193, 76 L. Ed. 356 (1932). "The verdict on a material point finds for each party, and against each party; being, in effect, equivalent to disagreement of the jury. The answer assumes to cut a single and indivisible truth in two. No judgment can rest on such a verdict, and no court should receive it." *Id.* (internal citations omitted).

Judge Early found and ruled as a matter of law that Respondent was entitled to Summary Judgment based upon the fact that the question of probable cause was decided and ruled upon by Judge Gergel (R. p. 4). This ruling ignores the plain and clear language of Judge Gergel's Order. The Federal Court made no ruling in regard to State Court claims for either Malicious Prosecution or Defamation. As stated by the Federal Court in its Order:

> Plaintiff has further asserted state tort claims for malicious prosecution against Defendants Hunt and Cain (Second Cause of Action) and defamation against Defendant Hunt (Twentieth Cause of Action). . . . Prior to addressing these state law issues, the Court finds it necessary to resolve the

> question of whether the Court will exercise its supplemental jurisdiction once it has dismissed the pending federal claims. . . .

(R. pp. 29-30). Subsequent to Judge Gergel's Order, all parties requested that the Court remand the case to state court should only state claims remain. (Dkt. No. 160 at 3; Dkt. No. 161 at 2-3; R. p. 30). Respondent, in particular, noted the presence of various unsettled state law issues that will necessarily arise under Appellant's South Carolina Tort Claims Act causes of action. (Dkt. No. 161 at 2-3; R p. 30). Judge Gergel's Order concluded:

> Therefore, the Court denies to adopt that portion of the R & R which references any of the state causes of action and makes no ruling on Defendants' motions for summary judgment regarding the Plaintiff's Second and Twentieth Causes of Action. The Court hereby declines to exercise its supplemental jurisdiction pursuant to 28 U.S.C § 1367(c)(3) and remands the case to the Aiken County Court of Common Pleas.

(R. pp. 30-31).

The federal court did not rule on any state court issue. Rather, it remanded the state claims. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988) ("[A] district court has discretion to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate"). The federal order also states a finding inconsistent with the order of remand.

One of the elements of Mr. Ferrara's state claim of Malicious Prosecution is a want of probable cause. *Law v. S. Carolina Dept. of Corr.*, 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006). The order states that "Deputy Cain had probable cause for the arrest of Plaintiff." The order also states that the "Magistrate Judge recommends granting

summary judgment on the malicious prosecution claim," due to the lack of probable cause. However, the federal court did not grant summary judgment on this claim. Instead, it remanded this claim to the state court, stating: "the Court declines to adopt that portion of the R & R which references any of the state causes of action and *makes no ruling on Defendants' motions for summary judgment* regarding the Plaintiff's [state law] claims." (R. pp. 29-30).

In one paragraph, Judge Gergel stated that there was no action for malicious prosecution because of sufficient probable cause. However, in a subsequent paragraph, he states that he makes *no ruling* on the state claims and remands them to state court. These statements are inconsistent, and therefore, should be resolved by a trial in the state court, as Judge Gergel clearly intended in his Order.

The Court erred in concluding as a matter of law that Judge Gergel's Order contained any finding with respect to Probable Cause and therefore should be reversed by this Court.

II. SUMMARY JUDGMENT WAS INAPPROPRIATE IN THIS INSTANCE BECAUSE THERE IS A QUESTION OF FIRST IMPRESSION FOR THE COURT.

This issue, concerning inconsistencies in a federal order and whether the principal of res judicata applies, is a question of first impression for the court. "As a general rule, important questions of novel impression should not be decided on a summary judgment. Instead, a novel issue is best decided in light of the testimony to be adduced at trial." *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 272 S.E.2d 633 (1980). "In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant,*

338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C.Code Ann. § 14-3-320 and -330 (1976 & Supp. 2003), and S.C. Code Ann § 14-8-200 (Supp. 2003)); *Osprey, Inc. v. Cabana Ltd. Partnership,* 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); *Clark v. Cantrell,* 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same); *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche,* 320 S.C. 143, 153, 463 S.E.2d 618, 624 (Ct.App.1995) (stating that although all issues of novel impression do not require a trial, summary judgment is inappropriate where further inquiry into the facts is desirable to clarify application of the law).

A thorough search of South Carolina case law has yielded no case directly on point. No case has been found in which a remand order contains inconsistent findings or results. However, an axiom in the law of contract is that contract is ambiguous "only when it may fairly and reasonably be understood in more ways than one." *Hansen v. United Servs. Auto. Assoc.,* 350 S.C. 62, 565 S.E.2d 114, 117 (S.C.Ct.App.2002). If that occurs, the contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity. *Myrtle Beach Lumber Co. v. Willoughby,* 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981); *see also Columbia East Assocs. v. Bi–Lo, Inc.,* 299 S.C. 515, 519–20, 386 S.E.2d 259, 261–62 (Ct.App.1989) ("Where the contract is susceptible of more than one interpretation, the ambiguity will be resolved against the party who prepared the contract."). In applying the Uniform Commercial Code to inconsistencies, the general rule is that if there are conflicting terms in a contract, they "knock-out" each other and the conflicting terms do not become a part of the contract. S.C. Code Ann. § 36-2-207 (2013).

However, there seems to be no source that defines the result of an inconsistency in a remand order. Therefore, because this is a point of first impression, summary judgment was inappropriate, and the case should be remanded to the Aiken County Circuit Court to be tried on the merits.

III. SUMMARY JUDGMENT WAS INAPPROPIATE AS THERE IS AMPLE TO SUPPORT APPELLANT'S CLAIM FOR MALACIOUS PROSECUTION

There is ample evidence in the record to support the Appellant's causes of action for malicious prosecution against Respondent who is statutorily liable for the actions of his deputies. See, S. C. Code Annotated Section 23-13-10. Respondent's Deputy, Charles Cain appears to believe that police work is essentially a ministerial function whereby a civilian may have anyone arrested, for any reason, simply by stating the elements of a crime to a police officer. According to Deputy Cain, if an individual tells a police officer that a person has committed a crime, regardless of the existence or lack of existence of truthfulness, veracity, reliability. (R. p. 448, lines 4-10).

"It is basic that an arrest with or without a warrant must stand upon firmer ground that a mere suspicion, though the arresting officer need not have in hand evidence which would suffice to convict." *Wong Sun v. U.S.*, 371 U.S.471, 83 S. Ct. 407 (1963) (internal citations omitted). "The quantum of information which constitutes probable cause – evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed – must be measured by the facts of a particular case." *Id.* "The history of use and not infrequent abuse of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id.*

Appellant was arrested pursuant to a warrant using information obtained entirely from a single informant, Ms. Driggers. (R. p. 451, lines 11-16). Because Deputy Cain did not rely on his own personal knowledge when swearing to the arrest warrant, his warrants were based upon hearsay. Hearsay warrants are treated with heightened scrutiny when determining matters of proximate cause. The warrant is a hearsay warrant but does not say on its face that it is. The magistrate who issued the warrant was misled when he was not informed that it was a hearsay warrant. (R. pp. 1140-1149).

In *Illinois v. Gates,* the United States Supreme Court addressed the issue of warrants based on hearsay information. *Illinois v. Gates,* 462 U.S.213, 103 S. Ct. 2317 (1983). At the outset the Court recognized that "an informant's 'veracity,' 'reliability' and 'basis for knowledge' are all highly relevant in determining the value of his report." *Id.* at 230, 103 S. Ct. at 2328. The issues of informant reliability and corroboration factored heavily into the *Illinois v. Gates* decision.

In *Gates* an anonymous informant wrote a letter to authorities accusing the Defendant in that case of drug trafficking. In the letter the accuser described the Defendant and predicted his drug trafficking activities. The letter alone was insufficient as a basis of finding probable cause. The Court reasoned:

> The letter provides virtually nothing from which one might conclude its author is either honest or his information reliable; likewise the letter gives absolutely no indication of the basis of the writers predictions regarding the (Defendant's) criminal activities. Something more was required, then before a magistrate could conclude there was probable cause to believe (the evidence of a crime would be found).

Illinois v. Gates, 462 U.S. at 227, 103 S. Ct. at 2326. This "something more" required by the Supreme Court came in the form of a follow-up investigation by the police department.

Hearsay affidavits, like the affidavit used in Appellant's case, require special scrutiny in a probable cause analysis. "(A)n affidavit relying on hearsay 'is not to be deemed insufficient on that score, so long as a *substantial basis* for crediting the hearsay is presented." *Id.* at 241-242, 103 S. Ct. 2334. The Court's decisions when applying the totality of the circumstances test have "consistently recognized the value of corroboration of detailed of an informant's tip by independent police work." *Id.*

In short, before an officer seeks an arrest warrant based on hearsay information, he or she must do some further investigation into: (a) whether there is evidence to corroborate the hearsay information; or (b) whether there is a substantial basis to give credit to the hearsay presented. The officer must present evidence the hearsay information is truthful or reliable. If there is no indication to the reliability or veracity of the information, the officer must present evidence of corroboration before the hearsay may be relied upon for proximate cause. Without evidence of either veracity or corroboration, there is simply no probable cause to act on hearsay.

A. THE APPELLANT ARRESTED APPELLANT WITHOUT PROBABLE CAUSE BECAUSE DEPUTY CAIN DID NOT INVESTIGAGE HIS INFORMANT'S RELIABILITY OR VERACITY.

By Deputy Cain's own admission, he had no evidence of veracity or corroboration before he swore out a warrant for Appellant's arrest. (R. pp. 440, lines 20 -24; 440, lines 20 - 445, line 25; 447, lines 7-9; 448, lines 4-10; 440, lines 22-24; 446, lines 10-13; 450, line 8; 450, line 23). Here Deputy Cain acted solely on hearsay. He

had no probable cause because he did not investigate the allegations as required, yet he swore out an affidavit claiming he did have probable cause.

Deputy Cain admits he had no evidence whatsoever to prove his informant, Ms. Driggers, was providing truthful, honest or reliable information. He simply did not investigate anything about her in this regard. He did not investigate whether or not she might have an ulterior motive for making criminal allegations against Appellant. He did not investigate whether she had previously made unfounded allegations to the Aiken County Sheriff's Department. He did not ask her to swear to her own statement under threat of perjury before proceeding with the arrest of Appellant. (R. pp. 440, lines 20 -24; 440, line 20 - 445, line 25; 447, lines 7-9; 448, lines 4-10; 440, line 22; 446, lines 10-13; 450, line 8; 450, line 23). There is ample evidence in the record that Respondent arrested Appellant without probable cause and Summary Judgment in this case is improper.

B. RESPONDENT ARRESTED APPELLANT WITHOUT PROBABLE CAUSE BECAUSE DEPUTY CAIN FAILED TO CORROBORATE HIS INFORMANT'S ALLEGATIONS

Just as Deputy Cain failed to investigate his informant's reliability, he also failed to investigate whether there was any evidence to corroborate her allegations. To this day he and the Sheriff's Department have failed to produce any evidence to corroborate anything that Ms. Driggers said. (R. p. 451, line 16). During his deposition, Deputy Cain admitted he did no investigation to corroborate Ms. Driggers. (R. pp. 451, lines 11-16; 440, line 14; 443, line 12; 452, line 12). In fact, he admitted more than five (5) times in his deposition that he did nothing whatsoever to corroborate the accusations if his informant. Because he did not investigate the information provided by Ms. Driggers,

either for truthfulness, reliability or corroboration, the hearsay warrants he swore out are insufficient and fail to state probable cause.

In the affidavit supporting the arrest warrant, Deputy Cain, relying on nothing more than uncorroborated testimony, swore he had proximate cause to arrest Appellant. (R. pp. 1139-1149). Looking at these affidavits in the light most favorable to Appellant, these warrants are tantamount to perjury. At best they were made with reckless disregard for the truth. To allow such a flagrant violation of due process would, "leave law-abiding citizens at the mercy of the officer's whim and caprice." *Wong Sun v. U.S., supra* at p. 479, 83 S. Ct. 413. Because Deputy Cain perjured himself to obtain an arrest warrant against Appellant, this amounts to a prima facie evidence of malicious prosecution.

C. APPELLANT'S ARREST WARRANTS ARE BASED UPON THE PERJURED TESTIMONY OF DEPUTY CAIN AND FAIL TO STATE PROBABLE CAUSE

In *Illinois v. Gates,* the Supreme Court warned against what it pejoratively referred to as a "bare bones" affidavit. A "bare bones" affidavit is an officer's affidavit containing a "mere conclusionary statement. Sufficient information must be presented to the Magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Id.* For instance, an officer's sworn statement that "he has cause to suspect and does believe that a crime has been committed "simply will not do." *Id.* (referring to *Nathanson*, 290 U.S. 41). "An officer's statement that 'affiants have received reliable information from a credible person and believe' (a crime has been committed) is likewise inadequate." *Id.,* referring to *Aguilar v. Texas,* 378 U.S.108).

When compared to the "bare bones" affidavits provided by the Supreme Court's opinion in *Illinois v. Gates,* the insufficiency of Deputy Cain's affidavit is immediately apparent. For every crime Deputy Cain charged Mr. Ferrara with, each affidavit essentially reads, "I have probable cause to believe the defendant committed the crime based on the following facts: Upon information and belief (the Appellant committed the crime in Aiken)." In other words, Deputy Cain swore that Appellant committed a crime because Deputy Cain believed Appellant committed a crime. This is essentially the definition of a conclusory affidavit and the warrant is the definition of an invalid and insufficient "bare bones" affidavit.

Deputy Cain did not reveal to the magistrate his belief was based solely on uncorroborated testimony. Thus, the magistrate had no way to judge probable cause because of the nature of the information concealed by Deputy Cain. Deputy Cain essentially swore that he had probable cause when by definition he did not.

As a result of his nonexistent investigation, Deputy Cain swore out an arrest warrant based on nothing more than his personal belief that Appellant had committed a crime. He did not base his affidavits on any facts. Deputy Cain based his probable cause entirely on his own meritless and uncorroborated believe that Appellant committed a crime. As a matter of law Respondent did not have probable cause to arrest Respondent and Summary Judgment is not proper in this case.

IV. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO THE DEFAMATION CAUSES OF ACTION.

A. THERE WAS NO QUALIFIED PRIVILEGE FOR THE FALSE STATEMENTS MADE ON THE INTERNET.

The tort of defamation permits a plaintiff to recover for injury to his reputation as the result of the defendant's communications to others of a false message about the plaintiff. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). To prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Fleming v. Rose,* 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.*

A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 530, 506 S.E.2d 497, 512 (1998). Defamatory communications may be in the form of libel or slander. *Holtzscheiter,* 332 S.C. at 508, 506 S.E.2d at 501. A statement is defamatory *per se* when the meaning or message is obvious on its face, and defamatory *per quod* when the defamatory meaning is not clear unless the hearer knows facts or circumstances not contained in the statement. *Erickson v. Jones Street Publishers, LLC,* 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). Even "[a] mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain." *Murray,* 344 S.C. at 139, 542 S.E.2d at 748.

The Appellant is a former county councilman for Aiken County. (R. pp. 468, lines 15 - 469, line 23). In or about July of 2006, Deputy Charles Cain obtained warrants against the Appellant. As set forth above, the warrants appear to be "bare bone" warrants. Even though they were based on hearsay, the Deputy signed the warrants.

On the day he was arrested, Respondent Sheriff Michael Hunt published a news release on his website. The news release did much more than simply notify the public that Appellant had been arrested. The news release stated as a fact that Appellant was guilty of the acts with which he had been charged. (R. p. 1151).

In his deposition, Hunt admitted the news releases were issued in order to publicize the Plaintiff's arrest to the local media and others. In the light most favorable to the Appellant, the material contained in the news release is false. The charges against the Appellant were serious and accused the Appellant of having committed crimes of moral turpitude.

At the preliminary hearing in this case, several of the charges were dropped for lack of probable cause. Notwithstanding this fact, the news release put forth by the Respondent was not altered. The posting continued and indicated the Respondent was guilty of having engaged in the activities described in the warrant. The news release was not modified and continued to publish that the Appellant was under arrest and actually guilty of charges which had been dismissed.

The charges against the Appellant were ultimately dismissed by the Solicitor's Office. The Solicitor recognized there was no evidence to move forward with criminal charges and all of the charges against the Appellant were dismissed. Notwithstanding the dismissal, the Respondent Hunt continued to publish the original false news release

alleging the Appellant to be under arrest and stating as a fact that all of the charges were true.

Following the dismissal of all charges, an Expungement Order was issued by this court. The Expungement Order was issued on March 6, 2009, and a certified copy was sent to the Aiken County Sheriff's Department. (R. pp. 1153-1155). The Respondent acknowledges receipt of the Expungement Order. Instead of destroying all of the material pursuant to the Expungement Order, Respondent Hunt continued to publish the false statements on his website and continued to publish that the Appellant was in fact guilty of the charges. Thus, notwithstanding the charges; and notwithstanding a Court Order that all records be destroyed; the Respondent maintained his active website publication and continued to publish the facts of the Appellant's arrest as well as stating that he was in fact guilty of the charges. (R. pp. 1111, lines 14 – 1112, line 11).

In 2009, this action was filed. Hunt was served with a copy of the Complaint. Once again, Hunt was informed of the unlawful press release. The press release was not taken down. It continued to be accessible to the public until 2011. (R. pp. 1111, lines 14 – 1112, line 11).

The Respondent contends his actions are somehow privileged. "Defendant Hunt asserts that the press release issued by his office touched on a matter of public concern, namely alleged sexual misconduct directed toward a vulnerable adult." (R. p. 5).[1]

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[1] There was no evidence offered to support the factual conclusion that the alleged victim was a "vulnerable adult". According to the laws of South Carolina, a vulnerable adult is a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. S.C. Code Ann. § 43-35-10. Adding this qualifier without proper determination serves as an additional defamatory statement by the Defendants.

"In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties." *Bell v. Bank of Abbeville,* 208 S.C. 490, 493, 38 S.E.2d 641, 643 (1946). A communication is privileged if the person making the statement has an interest in the subject matter of the communication and the person to whom it is made has a corresponding interest, and the communication is made in good faith. The statement "must be such as the occasion warrants, and *must be made in good faith* to protect the interests of the one who makes it and the persons to whom it is addressed. *Id.* at 493-94, 38 S.E.2d at 643, citing *Smith v. Youmans*, 3 Hill 85, 21 S.C.L. 43; *Switzer v. American Ry. Exp. Co.*, 119 S.C. 237, 112 S.E. 110, 26 A.L.R. 819; *Bosdell v. Dixie Stores Co.,* 168 S.C. 520, 167 S.E. 834.

Generally, the question of whether an occasion gives rise to a qualified or conditional privilege is one of law for the court. 50 Am.Jur.2d *Libel and Slander* § 276 (1995). However, the question whether the privilege has been abused is one for the jury. *Id.*

> Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused.

Murray v. Holman, Inc., 344 S.C. 129, 140, 542 S.E.2d 743, 749 (Ct. App. 2001), citing 50 Am.Jur.2d *Libel and Slander* § 276.*; see also* Restatement (Second) of Torts §§ 599–610. The Supreme Court of South Carolina has held that it was a question for the jury to determine if the publication went beyond what the occasion required and was unnecessarily defamatory. *Fulton v. Atlantic Coast Line R.R.,* 220 S.C. 287, 297, 67 S.E.2d 425, 429 (1951); *cf. Woodward,* 277 S.C. at 32–33, 282 S.E.2d at 601 ("While

abuse of privilege is ordinarily an issue for the jury, ... in the absence of a controversy as to the facts ... it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.") In support of its privileged argument, the Respondents and Judge Early's Order cite various cases dealing with news paper reporters. Respondent has not been able to cite any case at all stating any form of privilege to an individual making comments in violation of statutory law and Court Order. No case has been found which would allow the continued publication of non-truths following dismissal charges and an expungement order. ***The reason no case has been cited is that no such case exists.***

B. THE DEFENDANTS WILLFULLY VIOLATED THE COURT'S EXPUNGEMENT ORDER.

Appellant brought an action for contempt of court and malicious prosecution. Following the Order of Expungement, the Respondent had an obligation to destroy all of their records. Instead of destroying their records, the Respondent kept a public website publicizing the facts of the arrest and claiming the Appellant to have actually been guilty of the dismissed charges.

According to S.C. Code § 17-1-40, there is a very legitimate argument to be made that the Defendants are in contempt of court. S.C. Code § 17-1-40(A) reads as follows:

> A person who after being charged with a criminal offense and the charge is discharged, proceedings against the person are dismissed, or the person is found not guilty of the charge, the arrest and booking record, files, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge may be retained by any municipal, county, or state law enforcement agency. . . . Information retained by a local or state detention or correctional facility as permitted under this section after an expungement order has been issued is not a public document and is exempt from disclosure. Such

> information only may be disclosed by judicial order, pursuant to a subpoena filed in a civil action, or as needed during litigation proceedings. A person who otherwise intentionally retains the arrest and booking record, files, mug shots, fingerprints, or any evidence of the record pertaining to a charge discharged or dismissed pursuant to this section is guilty of contempt of court.

S.C. Code Ann. § 17-1-40. While this section refers to criminal contempt, the Respondent has cited nothing to indicate a person injured as a result of contemptuous behavior is not entitled to make a claim. In addition, the South Carolina General Assembly, obviously cognizant of the problems created by publication on the Internet, added the following to the statute this year: "If a charge enumerated in subsection (C) is discharged, proceedings against the person are dismissed, or the person is found not guilty of the charge, the charge *must be removed from any Internet-based public record no later than thirty days from the disposition date*." Crimes And Offenses—Fines And Penalties—Expungement, 2013 South Carolina Laws Act 75 (H.B. 3184) (D) (emphasis added).

It was not until 2011 that the press release was finally taken off the website. It was taken down on or about the time that Respondent Hunt and Deputy Cain were called for depositions. It took two years for the Respondent to comply with the Court's Order.

The Respondent was told to remove all records of the arrest and they were only lawfully allowed to produce information pursuant to a Court Ordered Subpoena. Without any subpoena and contrary to the Court Order, it appears the Respondent continued to publicize charges against the Plaintiff and continued to insist upon his guilt. It is hard to understand how the Respondent can claim a privileged right which would allow them to violate the court order regarding expungement. It is further hard to understand how the

Respondent can legitimately claim that actions which appear to be contemptuous are not actionable by the aggrieved party.

In any event, giving the Respondent the benefit of every doubt, the Court is presented with a novel question of first impression. Novel questions of first impression should not be basis of summary disposition. *Jackson v. Atl. Soft Drink Co., Inc.,* 286 S.C. 577, 579, 336 S.E.2d 13, 14 (1985).

The charges against the Appellant accused him of serious acts of sexual impropriety. Those charges are libelous per se. Even if they were not, there is certainly proof of actual malice in this case. "Actual Malice" means a Defendant has acted with ill will towards the Plaintiff or that he acted recklessly and with conscious indifference towards Plaintiff's rights. *Padgett v. Sun News*, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). In the light most favorable to the Appellant, the Respondent published charges contrary to S.C. Code § 17-1-40. Additionally, considering the evidence in the light most favorable to the Appellant, the publications in question were made contrary to a Circuit Court Order. The publications continued to be made after the Respondent was aware of the falsity of the charges upon which the publication was based. There are questions of fact as to whether the Respondent acted properly. There is certainly more than ample evidence to submit the question of whether the Respondent is guilty of contempt of court to the jury. A jury could certainly find that this contemptuous activity, contrary to statutory law and a Court Order, to be reckless.

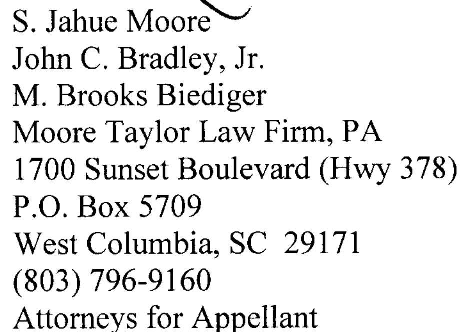
In light most favorable to the Appellant, he did not engage in any improper sexual acts. The Respondent issued a press release indicating he had been charged with improper sexual activity and declaring as a fact that the activity had taken place.

Notwithstanding the issuance of an expungement order, and notwithstanding a dismissal of the charges, Respondent continued to make publications that the allegations against the Appellant were true. Such facts give rise to serious questions of fact which are properly pled and which should be submitted to a jury for consideration. The Trial Court erred in concluding otherwise in its Order.

CONCLUSION

Based on the foregoing, this court should reverse the April 4, 2013 Order of Judge Early granting summary judgment to the Defendants, and remand this case to be heard by a jury in the Aiken County Court of Common Pleas.

Respectfully submitted,



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Presiding Judge

Case No. 2013-000826

William R. Ferrara...Appellant

v.

Michael E. Hunt, Sheriff of Aiken County;
and Charles Cain in his individual capacity
as Deputy Sheriff..Defendants

Of whom Michael E. Hunt is the ....Respondent.

PROOF OF SERVICE

I, Lynn G. Ivey, am employee of Moore Taylor Law Firm, PA, certify that I have served the Brief of Appellant, by United States mail, in an envelope with sufficient postage affixed thereto, upon all counsel of record on November 6, 2014.

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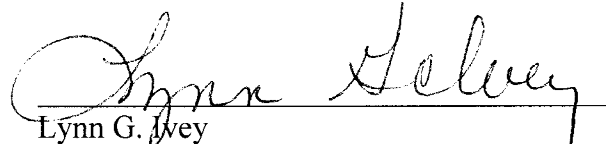

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West Columbia, South Carolina
November 6, 2014