THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable L. Casey Manning, Circuit Court Judge

Civil Action Case No. 2018-CP-40-01224
Appellate Case No. 2020-000550

Kevin L. Paul .....Appellant,

v.

Kevin L. Paul vs. Walmart Stores East, L.P.: Wal-Mart Supercenter, d/b/a Wal-Mart Store 1339; and Richland County Sheriff's Office.....Respondent.

FINAL BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THAT THE APPELLANT'S CAUSES OF ACTION DID NOT REST ENTIRELY ON THE CRIMINAL ACTIONS OF A THIRD PARTY.

II. THE TRIAL COURT ERRED IN FINDING THE RESPONDENT WAS ENTITLED TO JUDICAL AND/OR QUASI-JUDICIAL IMMUNITY FOR ADMINISTRATIVE ACTIONS.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THE RESPONDENTS ASSUMED A VOLUNTARY DUTY.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENT ON THE APPELLANTS DEFAMATION CLAIMS AND ON REFUSING TO CORRECT INCORRECT FACTUAL FINDINGS WITHIN ITS ORDER.

STATEMENT OF THE CASE

On March 29, 2017, RCSO Deputy Melvin Brown was dispatched to the WalMart Supercenter located on Two Notch Road in Columbia, South Carolina. WalMart had contacted RCSO to ask for assistance in dealing with an alleged shoplifting incident. Deputy Brown arrived and questioned the suspect, obtaining the Appellant's name and date of birth from the suspect. Brown ran that name and DOB through the National Crime Information Center (NCIC) on the computer terminal in his patrol vehicle, obtaining additional information on the Appellant such as his address, South Carolina's driver's license number, height, weight and eye color. Deputy Brown then provided all of that information to WalMart, arrested the suspect for shoplifting and had him transported to the Alvin S. Glenn Detention Center, where an arrest warrant was obtained in, and the suspect was booked under, the Appellant's name.

The information Brown obtained, subsequently provided to WalMart and which RCSO used to charge the suspect was incorrect. The suspect arrested was actually Mack

Paul, Jr., the Appellant's brother, who provided Brown his brother's name and date of birth.

RCSO knew that they had charged the wrong person and shared inaccurate information no later than April 28, 2017 when Sgt. Ronald "Cris" Truluck sent an email to the Pontiac Magistrate Court Clerk of Court requesting a continuance for a May 2, 2017 appearance because "the real Kevin Paul has a brother named Mack Paul who was using his name. The continuance is needed to clear this issue up when the arresting deputy comes back from vacation." WalMart took the information provided by RCSO and entered the Appellant into their system as a shoplifter, which automatically began a civil recovery process against the Appellant.

Despite the above, the false criminal charges remained pending against the Appellant, requiring him to retain an attorney and expend time and money in order to clear his name. It was not until June 26, 2017, sixty (60) days after Respondent's admitted notice that the Appellant had been falsely identified, that the criminal charges against the Appellant were dismissed. Respondent's own witnesses have admitted it was the Appellant's attorney who actually got the charges cleared and that they never contacted WalMart to inform them that they had provided WalMart with false identification information on the suspect.

On March 2, 2018, the Appellant brought a civil action against both RCSO and WalMart. That lawsuit alleged causes of action of malicious prosecution, defamation per se and gross negligence against RCSO and abuse of process, malicious prosecution and defamation per se against WalMart. The claims against WalMart were resolved. RCSO moved for summary judgment. The Appellant filed a response in opposition to that

motion for summary judgment and a hearing was held on that motion and a pending motion for protective order on January 30, 2020.

An order was issued by the Court granting RCSO's motion for summary judgment on February 24, 2020. The Appellant filed a timely motion to alter or amend judgment/reconsider on March 2, 2020. An order was issued by the Court on March 24, 2020, denying Appellant's motion.

This appeal follows.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THAT THE APPELLANT'S CAUSES OF ACTION WERE INDEPENDENT OF THE CRIMINAL ACTIONS OF A THIRD PARTY.

In its order granting summary judgment, the trial court stated: "Taking the facts in a light most favorable to Plaintiff, any damages sustained in this matter arose as a result of the criminal activities of his brother, Mack Brown [sic]." (R. p.7) The trial court's order then proceeds to quote a page of deposition testimony that portrays the testimonial evidence in this case similar to what was initially represented to the trial court at the motions hearing, where the Respondent argued that the suspect "goes around memorizing – he's a pro – he memorizes his good brothers information." (R. p.111, lines 14-15)

After recounting the deposition transcript excerpts, the trial court found:

> Based on the foregoing testimony, "but for" Plaintiff's brother's shoplifting and then giving false arrest to the police, Plaintiff would not have suffered the damages as alleged in the Complaint. To this extent, Plaintiff's alleged loss arose from the criminal actions of the third party Mack Brown [sic] and therefore, is fully barred by the SCTCA.

(R. p.9)

There is a footnote at the end of the quoted language above in the trial court's order. That footnote states:

> That as to Plaintiff's defamation claim, this Defendant asserts the affirmative defense of conditional or qualified privilege. Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if: (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). When the occasion gives rise to a qualified privilege, a prima facie presumption to rebut the inference of malice exists, and the plaintiff has the burden to show either actual malice or that the scope of the privilege has been exceeded. *See, Knust v. Loree*, 424 S.C. 24, 43, 817 S.E.2d 295, 304-05 (Ct. App. 2018). This Court finds that it was the false information furnished by Plaintiff's brother to Wal-Mart and law enforcement employees which led to its inclusion on charging documents. As such, this Defendant is entitled to a qualified privilege. Since Plaintiff is not alleging actual malice on the part of this Defendant's representatives, Plaintiff's cause of action for defamation fails.

(R. p.9, fn.1)

However, as the Appellant pointed out at the hearing, these representations made to the trial court were not accurate.

> Your Honor, first off, there were representations made that Walmart got the information from this gentleman. That's not what the Walmart employee testified to. He got the information from Richland County. Richland County, the representations were made that the bad brother memorized all this information and gave it to them. That's not what happened. According to their own deputy what happened was the bad brother knew his brother's name and the date of birth. That deputy then plugs it into the terminal in his car, gets all the other information that goes with it, he shares that with Walmart. That's where the deformation [sic] comes from. Richland County identified my client as, as the identity of the person Walmart had arrested. That's what Walmart's employee testified to. That was what Deputy Brown testified to in his deposition. The phrase "but for" was used. The "but for" in this case stops on April 28, 2017. On April 28, 2017, Sumter County investigator who had a relationship with Sergeant Truluck in Richland County, she's looking for the bad brother for grand theft. She finds out he got arrested ---
>
> --- And so she looks up on Richland County on the Alvin S. Glenn website, looks it up and sees the guy she's looking for, for stealing a car but realizes that ain't his name. She calls, she calls Truluck. She gets him on the phone. She says this is the wrong guy. The guy y'all got, the name y'all got he's a county employee over here. He's a good guy. The other brother is ne'er-do-well. Truluck, in his deposition, admits that he got online, he pulled up the pictures to compare of the booking photo of the

> bad brother and the drivers license of my client. He admits, I could tell right away it was the wrong guy. That day he sends an email to Deputy Brown that says – it's got the picture of, um, the bad brother drivers license picture that correctly identifies him. Then it's got the bad brother's booking photo with my guy's information on. And then it's got a little line that says, "now, meet the real Kevin Paul," my client. And then it's got my client's picture on. And it said, you know, "get up with me Monday, we'll take your – well we'll work on getting this fixed." That same day Truluck sends and email to the Pontiac Magistrate that says "this case is scheduled for a," this is April 28th, "there's a court appearance May 2nd. It needs to be continued. The wrong person is identified." Truluck testifies that after sending that email to Brown, that's all he did. Brown has testified that he got that email from Truluck. We took his deposition just a few weeks ago, Brown's deposition. Brown has with him a memo that he sent to the Pontiac Magistrate Court that says, "the May date has got to be continued, it's the wrong person." He faxes it over with a plea offer sheet that has the case number on it, my guy's name, and it's got on the plea offer sheet where you can check, you can write in a plea and check plea **or you can mark it dismissed**. He doesn't mark dismissed on it. He just used it as the fax cover sheet. I said, "Well, why didn't you just mark dismissed on it?" **"Well, I don't know." "Well, what did you do after that to clear this up?" "Nothing. It wasn't my responsibility after that."**

(R. p.120, line 25- p.123, line 14) *emphasis added.*

As noted at the hearing, the Appellant specifically avoided relying on criminal actions of a third party by not bringing an action for false arrest:

> So we didn't bring a claim of false arrest, judge. Because I think arguably Richland County it's an honest mistake. I think it was – I think it's negligence to take the theft's word for what they're saying, but, okay, whatever. This is about what the malicious prosecution and the case law says that it isn't just about instituting the charges it's the continuation of the charges. And we've got two emails from Richland County Agents after they both knew that it's the wrong person. Because Holdorf testified when Marion and my client walked in he could look at him and say, "Oh yeah. That's not him." You know, **so after they knew that this was the wrong guy they actually communicated to the court to continue the criminal case. Not to dismiss it, to continue it. And so I believe that those factual situations leave them up there.**

(R. p.125, lines 7-22) *emphasis added.*

This argument was memorialized in section II of the Appellant's response, captioned "There is a material question of fact as to whether probable cause existed to charge the Plaintiff with a crime and, assuming arguendo, such probable cause did ever

exist, **it disappeared once Defendant RCSO admitted knowing the Plaintiff had never committed the alleged criminal conduct**." (R. p.47) emphasis added. In that section, the Appellant noted:

> In order to recover in an action for malicious prosecution, the plaintiff must show, (1) the institution **or continuation** of original judicial proceedings, either civil or criminal; (2) by or at the instance of the defendant; (3) the termination of such proceedings in the plaintiff's favor; (4) defendant's malice in instituting the proceedings; (5) lack of probable cause for the proceeding; and (6) resulting injury or damage." Ruff v. Eckerds Drugs, Inc., 265 S.C. 563, 220 S.E.2d 649 (1975), *emphasis added.*
>
> Probable cause, which is a defense to an action for malicious prosecution, has been defined as "the existence of such facts or circumstances as would excite the belief of a reasonable mind, acting on facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." Ruff at 568, 652.
>
> Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rest on such grounds that would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise. Jones v. Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990) and Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, §26-3.
>
> The issue of probable cause is essentially a question of fact and ordinarily for the determination of the jury. Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992), citing Jones at 65, 663.

(R. p.48)

The Respondent admits the Appellant never committed the alleged crime of shoplifting. During the deposition of Sgt. Travis Holdorf, regarding a written statement that the Appellant had to come in to RCSO headquarters to give on June 21, 2017:

> Q: At this, at this point in time, Kevin's done nothing wrong?
> A: I had nothing saying that Kevin did anything wrong.
> Q: He had committed no crime?
> A: I can't say that but there is no crimes I know of he did.

(R. p.49), quoting *Deposition of Sgt. Travis Holdorf*, (R. 69, lines, 9-15)

Respondent knew as early as April 28, 2017 that the Appellant was not the person who had committed the alleged shoplifting on March 29, 2017. During the deposition of Sgt. Cris Truluck, Sgt. Truluck confirmed what the Appellant had alleged in his complaint, that the Respondent was contacted by Inv. Jennifer Thomas with the Sumter County Sheriff's Office. (R. p. 18, ¶ 12)

> Q: How did you get involved in this case?
> A: Investigator Jennifer Thomas contacted me over an issue with, I believe, the plaintiff in this case, a mistaken identity with his brother.
> (R. p. 49), quoting *Deposition of Sgt. Cris Truluck*, (R. p. 74, lines 15-18)

and:

> Q: Okay. Did she tell you that y'all had the wrong person identified?
> A: Yes.

(R. p. 49), quoting *Deposition of Sgt. Cris Truluck*, (R. p. 74, lines 13-15)

Sgt. Truluck was examined about an email he sent to Pontiac Magistrate Court Clerk of Court Wanda Durel. That email was dated April 28, 2017, courtesy copied Inv. Jennifer Thomas and read:

> Will you please continue the shoplifting case for Kevin Paul which is scheduled for May 2, 2017. The real Kevin Paul has a brother named Mack Paul who was using his name. The continuance is needed to clear this issue up when the arresting deputy comes back from vacation.

When examined about the circumstances around that email, Sgt. Truluck testified as follows:

> Q: Had Jennifer – and maybe I'm mistaken about this. Jennifer – that email was not sent until after Jennifer had reached out to you, right?
> A: That is correct.
> Q: And did you send that email to the court the same day or was that something that happened later?
> A: I would assume it was the same day. It could have been the following day. Like I say, I don't know for sure. It was pretty in close proximity of her reaching out to me, though. I would assume that would be the proper thing to do.
> Q: Was Investigator Thomas pretty clear on the fact that she believed y'all had the wrong person identified?
> A: Yes.

Q: And did you have any reason to doubt Investigator Thomas?
A: No. I saw the photos myself.
Q: Okay. So that's where I'm going to. Well, how did you see the photos?
A: Because I was able to pull up the Paul that got arrested compared to the Paul that didn't get arrested, DMV compared to Alvin S. Glenn, and could clearly see Kevin Paul didn't get arrested. What's the other one's name, Mark?
Q: Mack. Mack Paul –
A: Mack.
Q: -- is the other one.
A: Mack Paul got arrested, so.
Q: Okay. And so if, if what I understand you're telling me is you looked up Kevin Paul digitally and saw his driver's license and then you also looked up Mack Paul digitally and saw the booking photo and you were able to compare the two and tell they were not the same person?
A: Yes.
Q: And is it fair to assume that you would have done that the day you were contacted by Investigator Thomas?
A: Yes.

(R. p. 50), quoting *Deposition of Sgt. Cris Truluck*, (R. p.76, line 24 – p.78, line 13)

The Respondent produced in discovery a copy of an email that had been sent by Sgt. Truluck to Deputy Brown dated April 28, 2017 at 3:01 p.m. In that email, Truluck sent Brown three pictures: First, is the DL picture of Mack Paul Jr. Second, is the booking photo of the arrested suspect (falsely listed as "Kevin Lee Paul"). Third, and after the caption "Meet the Real Kevin Paul," is the DL picture of the Plaintiff. During his deposition, Brown admitted the hand-writing on the copy of the email produced that said "Real Name Defendant" beside Mack Paul Jr.'s DL photo was his hand-writing acknowledging that was the true identity of the person he had arrested. (R. p.51), referencing *Deposition of Melvin Brown*, (R. p.87, line 23 – p.88, line 5)

As the Appellant argued, the discovery in this case showed that there was a material question of fact as to whether the Respondent had "a good faith belief that [the Appellant] was guilty of a crime when this belief rest on such grounds that would induce

an ordinarily prudent and cautious person, under the circumstances, to believe likewise," at the time they chose a "**continuation**" of the criminal prosecution of the Appellant through their April 28th and June 22nd 2017 emails, when Sgt. Truluck and Sgt. Holdorf admitted to knowing the Appellant had committed no crime.

Probable cause in a malicious prosecution context turns "upon whether the facts within the prosecutor's knowledge would lead a reasonable person to believe the plaintiff was guilty of the crimes charged." Kinton v. Mobile Home Industries, Inc., 274 S.C. 179, 181, 262 S.E.2d 727, 728 (1980). In this case, Respondent has admitted to **knowing** the Appellant was not guilty of the crime charged, yet **continuing** the criminal prosecution. It would be a reasonable inference for a jury to find such conduct grossly negligent. (R. p.96)

"Taking the facts in light most favorable to Plaintiff, any damages sustained in this matter arose as a result of the criminal activities of his brother, Mack Brown [*sic*]." (R. p.7) This finding by the trial court, right before it begins quoting edited deposition testimony excerpts in its order ignores the admissions by the Respondent of their own acts and failures to act that came **after** and were **independent of** any criminal actions of the brother. As the Appellant argued at the hearing, the "but for" of blaming any injury on the brother ended on April 28, 2017. The brother had absolutely nothing to do with the decisions to ask that the criminal charges be continued instead of dismissed or the failure by the Respondent to ever actually follow-up and make sure the matter was resolved. The Respondent is solely responsible for those acts and omissions and any damage they caused. As such, the trial court's order should be reversed.

II. THE TRIAL COURT ERRED IN FINDING THE RESPONDENT WAS ENTITLED TO JUDICIAL AND/OR QUASI-JUDICIAL IMMUNITY FOR ADMINISTRATIVE ACTIONS.

As part of its order granting summary judgment, the trial court found that the actions by the Respondent that caused the harmful delay to the Appellant were "administrative actions (or any such alleged inactions)" and "were of a judicial or quasi-judicial nature and as a result, the [Respondent] is entitled to absolute immunity." (R. p.11)

Appellant had originally addressed this issue in his response when addressing exceptions to the waiver of immunity contained within S.C. Code §15-78-60, noting that in the case of Faile v. South Carolina Dept. of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002), the South Carolina Supreme Court had refused to grant absolute immunity to law enforcement officers in similar situations.

> The *Faile* court refused to accept DJJ's argument that a probation agent being sued for improper placement of a juvenile was immune pursuant to exception (1) because a court order allowed the placement. In refusing to accept DJJ's order, the *Faile* court noted, "Just as police officers are not granted absolute immunity when they apply for arrest warrants, probation officers generally are not immune in performing their enforcement duties." Faile at 326, citing to Gant v. United States Probation Office, 994 F.Supp. 729 (S.D. W. Va. 1998); Acevedo v. Pima County Adult Prob. Dept., 142 Ariz. 319, 690 P.2d 38 (Ariz. 1984).
>
> Similar to Faile, the complained of conduct in this case cannot be considered judicial or quasi-judicial or administrative judicial or quasi-judicial conduct in nature and would not fit within exceptions (1) or (2).

(R. p.43)

In his motion to alter or amend/reconsider, Appellant pointed out that the trial court's finding that these actions or failures to act were "administrative actions" precluded the acts or omissions from enjoying judicial or quasi-judicial immunity.

> The Order does not mention that evidence, rather it finds the delay this evidence supports would not matter because "even if there had been a

> delay in this regard, the nature and timing of RCSD employees' actions simply constitute immune functions under the SCTCA," finding that RCSO's acts and omissions were "administrative actions" that were "of a judicial or quasi-judicial nature." Finding RCSO's acts and omissions are "administrative actions" precludes such acts and omissions from enjoying judicial or quasi-judicial immunity. Even judges are not insulated by judicial immunity when they act **in administrative capacity**. See Faile, citing to Forrester v. White, 484 U.S. 219, 108 S.Ct. 538 (1988).
>
> The *Faile* court specifically noted, "Just as police officers are not granted absolute immunity when they apply for arrest warrants, probation officers generally are not immune in performing their enforcement duties." Faile at 326, citing to Gant v. United States Probation Office, 994 F.Supp. 729 (S.D. W. Va. 1998); Acevedo v. Pima County Adult Prob. Dept., 142 Ariz. 319, 690 P.2d 38 (Ariz. 1984). Here, the complained of conduct is similar to that example the *Faile* court noted: applying for and dismissing warrants. As noted in his email dated June 22, 2017, Sgt. Holdorf specifically informed the court that he would "be doing new warrants on Mack Paul and dropping warrant 201103." (See Exhibit C *Plaintiff's Memo in Opposition*). (R. p. 64) Despite those representations to the court, Holdorf never completed that "administrative action" he told the court he was going to do, admitting he "moved on to the next thing" despite knowing of no one else with RCSO who was trying to resolve the matter. (See Exhibit D *Plaintiff's Memo in Opposition*). (R. p. 71, lines 15-19)
>
> Put simply, Faile says that "administrative action," as the Court's order describes RCSO's complained of conduct, does not enjoy the protection of S.C. Code Ann. §15-78-60(1).

(R. pp. 98-99)

The trial court did not address this issue raised by the Appellant in his motion to alter or amend/reconsider, instead merely stating that the Appellant's motion "simply repeats his arguments attempting to defeat absolute sovereign immunity based upon the administration or quasi-judicial actions or inactions under S.C. Code Ann. §15-78-60(1)." (R. p.3) This was error, as the Appellant raised a specific legal issue and brought it to the trial court's attention: that a factual finding in its order precluded one of the order's legal rulings under controlling case law. As such, the trial court's order should be reversed.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THE RESPONDENT ASSUMED A VOLUNTARY DUTY.

South Carolina law specifically recognizes that the "State, an agency, a political subdivision, and a governmental entity **are liable for torts in the same manner and to the same extent as a private individual under like circumstances**, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code §15-78-40, emphasis added. "The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." Steinke v. S.C. Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999).

A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty. Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." Bishop v. S.C. Dept. of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998).

An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003), citing Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997). Ordinarily, the common law imposes no duty on a person to act. **Where an act is voluntarily undertaken, however, the actor assumes the duty to**

use due care. Hendricks at 457, 714, citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991), *emphasis added.*

Appellant addressed this issue in section IV of his response, arguing that the Respondent charged him with a crime that he did not commit, and:

> Setting aside whether they were negligent or grossly negligent in bringing those charges against the Plaintiff, Defendant Lott has admitted they had notice that the criminal charge against the Plaintiff was false by the April 28, 2017. **Not only has Defendant Lott admitted to knowing the false nature of the criminal charge by that time, but they also affirmatively acknowledged (in writing via the email) their duty (or in the least volunteered to undertake the duty) "to clear up this issue." Despite that acknowledgment, there is a material question of fact as to whether Defendant Lott used due care in "clearing up" the issue, as the false criminal charge remained pending against the Plaintiff for approximately two (2) months.**
>
> Sgt. Truluck admitted that once he asked the Court for the continuance via his April 28, 2017 email, his involvement in trying to rectify the matter was done. *Deposition of Sgt. Cris Truluck*, (R. p.80, lines 11 – 21)
>
> Sgt. Holdorf testified that he spent "maybe an hour" attempting to rectify this situation and that despite never receiving any further communication from the Court about how the matter would be handled, he did not follow up, instead he "moved on to the next thing." Sgt. Holdorf did this despite knowing of no other person who was trying to resolve the matter for Defendant Lott. *Deposition of Sgt. Travis Holdorf*, (R.p.67, lines 15-18, p.71, lines 11-19). In fact, when asked who actually cleared this matter up, Sgt. Holdorf testified "I think it was his attorney when he did the expungement." *Deposition of Sgt. Travis Holdorf*, (R. p.70, lines 14-15. Deputy Brown testified that he spent all of five (5) minutes in trying to resolve the matter via his memo concluding "it wasn't my responsibility after that." *Deposition of Melvin Brown*, (R. p.86, lines 1-22).
>
> Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care. Clyburn v. Sumter County Sch. Dist. #17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994).
>
> In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury. Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 333, 566 S.E.2d 536, 545 (2002).

(R. pp.54-55)

The trial court did not rule on this issue. As such, the Appellant's motion to alter or amend/reconsider drew the trial court's attention to the fact this issue had not been addressed:

> The Order also ignores Plaintiff's argument that **RCSO undertook a voluntary duty to clear the false charges against the Plaintiff**. An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, **or some other special circumstance**. Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003), citing Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997), emphasis added. **Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care**. Hendricks at 457, 714, citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991), emphasis added. See Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (holding that duty can arise by voluntary undertaking). See also Sherer v. James, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986) (it has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care).
>
> In the present case, there is more than a mere scintilla of evidence that RCSO undertook a voluntary duty. There is actual documentary evidence produced to the Court in the form of correspondence from RCSO agents/employees to the magistrate's court wherein RCSO affirmatively states they were going to "clear this issue up." See Exhibits A, B and C Plaintiff's Memo in Opposition). It is reasonable that a jury could view this evidence and find that RCSO was grossly negligent in failing to complete this voluntary duty they undertook.

(R. pp.96-98)

The trial court's order denying Appellant's motion to alter or amend/reconsider fails to address the issue and is an error of law. Because the Respondent voluntarily undertook to relay information to third parties about the Appellant and to resolve the false identification of the Appellant as the perpetrator of a crime, they voluntarily assumed a duty to perform those acts with due care. As such, it was error of law to grant the Respondent summary judgment.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENT ON THE APPELLANTS DEFAMATION CLAIMS AND ON REFUSING TO CORRECT INCORRECT FACTUAL FINDINGS WITHIN ITS ORDER.

Appellant argued that the Respondent publicized false statements to a third party (Wal-Mart) outside of any judicial proceeding. Specifically, Deputy Brown told Jonathan Simons, an asset protection associate at Wal-Mart, that the person they had caught shoplifting was named "Kevin Paul" and provided Simons with the Appellant's name, address, date of birth, South Carolina driver's license number, height, weight, and eye color, all at the scene. *Deposition of Johnathan Simons*, (R. p.91, line 4 – p.92, line 1). Those publications alone are enough to defeat a claim of absolute immunity.(R.pp.51-52)

However, as discussed above in section I of this brief, the trial court disposed of the Appellant's defamation claims via a footnote when finding that the Appellant's causes of action relied on the criminal acts of a third party. In finding that the Appellant's defamation cause of action failed, the trial court noted:

> That as to Plaintiff's defamation claim, this Defendant asserts the affirmative defense of conditional or qualified privilege. Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if: (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). When the occasion gives rise to a qualified privilege, a prima facie presumption to rebut the inference of malice exists, and the plaintiff has the burden to show either actual malice or that the scope of the privilege has been exceeded. See, *Knust v. Loree*, 424 S.C. 24, 43, 817 S.E.2d 295, 304-05 (Ct. App. 2018). This Court finds that it was **the false information furnished by Plaintiff's brother to Wal-Mart** and law enforcement employees which led to its inclusion on charging documents. As such, this Defendant is entitled to a qualified privilege. Since Plaintiff is not alleging actual malice on the part of this Defendant's representatives, Plaintiff's cause of action for defamation fails.

(R. p.9, fn.1), *emphasis added.*

Appellant specifically noticed the trial court that this factual finding in the order was incorrect. In section IV of the motion to alter or amend/reconsider, the Appellant argued:

> This Court's Order notes that "taking the facts in light most favorable to Plaintiff, any damages sustained in this matter arose as a result of the criminal activities of his brother, Mack Brown," and then recites excerpts of deposition testimony from the Plaintiff that purports to recount what information his brother gave Deputy Brown at the scene. However, that examination **contained questioning wherein defense counsel was asking about all kinds of information that was not relayed by the Plaintiff's brother, but was instead obtained by Deputy Brown through the NCIC terminal in his car. As alleged in the Complaint and admitted to in the Answer, the only information the Plaintiff's brother relayed to Deputy Brown at the scene was the Plaintiff's name and date of birth**. See ¶11 in both *Complaint and Answer*. (R. p.18, ¶11) (R. p. 29, ¶ 11)
>
> Plaintiff is concerned that the Court's Order includes testimony related to answers given regarding an entire topic of examination, yet only cites to certain parts of it. This raises concern that the record could be construed to argue other information was obtained from the Plaintiff's brother when it was in fact obtained and publicized to third parties by RCSO.

(R. p.101)

The motion to alter or amend/reconsider was not the first time the Appellant had brought the trial court's attention to such inaccurate factual representations. As noted above, at the hearing, the Appellant began his argument by noting the following:

> Your Honor, first off, **there were representations made that Walmart got the information from this gentleman. That's not what the Walmart employee testified to. He got the information from Richland County.** Richland County, the representations were made that the bad brother memorized all this information and gave it to them. That's not what happened. According to their own deputy what happened was the bad brother knew his brother's name and the date of birth. That deputy then plugs it into the terminal in his car, gets all the other information that goes with it, he shares that with Walmart. That's where the deformation [sic] comes from. Richland County identified my client as, as the identity of the person Walmart had arrested. That's what Walmart's employee testified to. That was what Deputy Brown testified to in his deposition.

(R. p.120, line 25 – p.121, line 14) *emphasis added.*

Appellant provided the trial court with unedited testimony from the excerpted portions contained in the trial court's order. The regular font representing what was produced in the order, the italicized font representing testimony omitted:

> Q: The information that the merchant had at the time of your brother's arrest, he provided the following information according to this form, Kevin Lee Paul. Is that your name?
> A: [ ] Yes, sir.
> *Q: Is that the correct spelling of your name?*
> *A: That's the correct spelling.*
> *Q: It says DOB, I presume that's date of birth. What did he provide here or what's indicated here?*
> *A: That's correct.*
> *Q: Can you just say it out loud? What is indicated here?*
> *A: 12/20/1970.*
> *Q: You're saying that is correct?*
> *A: Yes, sir.*
> *Q: Which street address is provided here?*
> *A: The 3155 Cox Road.*
> *Q: Is that correct?*
> *A: Yes, sir.*
> *Q: You've lived in that house you said for the better part of 15 plus years now?*
> *A: Yes, sir.*
> *Q: City, state, ZIP code, is that correct?*
> *A: Yes, sir.*
> *Q: Social security number, last four digits, that was provided by Walmart, is to Walmart, is that correct, 2950?*
> *A: Yes, sir.*
> *Q: Your sex, race, is that correct? White Male?*
> *A: Yes, sir.*
> *Q: 5-9? Five foot nine inch height, is that correct?*
> *A: Yes.*
> *Q: More or less 185 pounds, is that more or less correct?*
> *A: Yes, sir.*
> *Q: You've been issued a South Carolina drivers license?*
> *A: Yes, sir.*
> *Q: I understand a CDL?*
> *A: Yes, sir.*
> *Q: Could you read out the drivers license number in the record?*
> *A: 8989753*
> *Q: Is that your correct driver's license number?*
> *A: That's my correct number.*
> *Q: Was that your correct number at the time on March 29, 2017, to the best of your knowledge?*

A: It is.
Q: If you look up in the right, upper right-hand column, Mr. Paul, and it looks like it says hair and then eyes?
A: Yes, sir.
Q: Can you read out for the record what that states?
A: Gray hair and blue eyes.
Q: Is that fact accurate?
A: Yes.
Q: With respect to you?
A: Hm-hmm.
Q: Is that a yes?
A: Yes, sir.
Q: The first page is the arrest report. You also seep that it's Kevin Lee Paul. Is that the correct spelling of your name?
A: Correct.
Q: Again this is a little faded, but it appears to say 12/20/1970. Wouldn't you agree with that as far as date of birth on that same line?
A: Yes, sir.
Q: It says white male. That information is correct too, isn't it?
A: Yes, sir.
Q: You would have been 46 at the time that your brother was arrested in March 29, 2017?
A: Yes, sir.
Q: Sometimes those sevens and nines look alike on this, because I've looked at it a bunch. You're 5 foot 9 inch, 185 pounds, gray hair, blue eyes, all that is correct?
A: Yes, sir.
Q: 2950 the last four digits of your Social, is that correct?
A: Yes, sir.
Q: Read out the driver's license number
A: 8939753.
Q: Deputy Brown, all the information that I have that was reported to [Deputy Brown] at the scene, all of that is correct about you?
A: Yes, sir.
Q: It's pretty amazing. Your brother is pretty slick, isn't he?
A: He is except he didn't have a drivers license on him.
Q: I understand that. But he was pretty slick to kind of know all that off the top of his head.
A: He's my brother.
Q: I understand. I got two sisters. I don't know their drivers license numbers, sir. I'm just asking. That's pretty slick, wasn't it.
See, Pl. depo., p. 54, - *p.57, l.24.* (R. pp. 102-103)

Q: [ ] That's pretty slick, wasn't it?
A: Yes, sir. You got to understand, he [Mack Brown] is a criminal. He knows. He takes in stuff. He knows how to get around stuff.

Id., pp. 57, l.24 – p.58, l.2
(R. p. 103)

Q: Do you have any idea sitting here today looking back at this how your brother would have had such specific accurate information about all your personal and private identifying information off the top of his head?
A: I cannot answer that 100 percent unless for some reason he got some of it from my mama if she had it when he was staying over there.
Q: I understand.
A: I can't answer that as far as that how he got my information.
Q: In fact, he didn't get any information wrong. Everything he got was correct that he provided the authorities, didn't he, about you?
A: [ ] Yes.
Q: At the scene?
A: Yes, sir.
Q: You weren't there to refute it obviously?
A: No, sir.
Id., p. 58, l.13 – p.59, l.9
(R. pp.102-104)

The Appellant explained that the relevant excerpted deposition testimony came from Respondent's counsel examining the Appellant with: a) the "merchant's statement" about information Wal-Mart's witness admitted under oath came from Respondent, including the Appellant's name, address, date of birth, South Carolina driver's license number, height, weight, and eye color, all at the scene (R. p.91, line 4 - p.92, 1ine 1); and b) Deputy Brown's arrest report which Brown admitted was all information he would have been able to get once he ran the Appellant's name and DOB in NCIC. That Brown ran the name and DOB through NCIC is memorialized in his report and admitted to in Defendant RCSO's *Answer*.

In short, the Appellant spent an entire four (4) page section of the motion addressing the factual error behind the trial court's finding that "it was the false information furnished by the Plaintiff's brother to Wal-Mart..." in disposing of his

defamation claim against the Respondent. Despite that, the trial court inexplicably found the following:

> In his motion, Plaintiff does not point to any factual errors or otherwise present legal challenges to this Court's Order with respect to the claim of defamation, and therefore, ostensibly does not see reconsideration of this Court's dismissal of the defamation cause of action.

(R. p.3, fn.2)

This was error. The Appellant raised a factual error and supported it with testimonial evidence and admissions from the Respondent, arguing the deposition testimony in the trial court's order was selectively edited and ignored the admissions by the Respondent and witnesses that the majority of personal identifying information obtained about the Appellant and publicized to third parties came from Respondent. Appellant specifically argued "to the extent the trial court may have mistakenly relied on this information having come from the [Appellant's] brother, and thus the 'criminal actions' of another, the [Appellant] would ask that the Court reconsider its findings." In the alternative, [Appellant] asks the Court to alter/amend the Order is such a way as to more accurately reflect the evidence and facts of the case." (R. pp.104-105)

Where defamation is made in good faith and with proper motives, a defendant may claim a qualified or conditional privilege. The privilege exists if the defendant correctly or reasonably believes that some important interest of his own or a third party is threatened. Cullum v. Dun & Bradstreet, Inc., 228 S.C. 384, 90 S.E.2d 370 (1955). A qualified privilege may exist where the parties have a common business interest. Conwell v. Spur Oil Company, 240 S.C. 170, 125 S.E.2d 270 (1962). However, the qualified privilege exists only when the publication has occurred in a proper manner and to proper parties only. Prentiss v. Nationwide Mutual Insurance Company, 256 S.C. 141, 181 S.E.2d 325 (1971). Notably, even if a party initially demonstrates a qualified privilege,

that privilege can be lost. Abofreka v. Alston Tobacco Co., 288 S.C. 122, 126, 341 S.E.2d 622, 625 (1986), *emphasis added.*

In the present case, despite providing information to Wal-Mart falsely identifying the Appellant as the alleged shoplifter, and knowing that identification was false by April 28, 2017, the Respondent never contacted Wal-Mart to notify them that the Appellant was not the alleged shoplifter.

> Q: Did you ever reach out to anybody with Walmart?
> A: No.
> *Deposition of Sgt. Cris Truluck*, (R. p.79, lines 2 – 4)

and,

> Q: Did anyone from Richland County Sheriff's Department ever contact Walmart and let them know that the information about the suspect was not correct?
> A: I, I did not myself. I don't know of anyone. I don't know.
> *Deposition of Sgt. Travis Holdorf*, (R. p.68, lines 13-17)

The reliance by the trial court on an erroneous finding of fact constitutes error. The failure to recognize that it was the Respondent who publicized false, defamatory information to a third party and then the Respondent's failure to correct that false, defamatory publication once they had notice of its falsity and instead grant summary judgment on the defamatory claims against the Respondent was error. As such, the trial court's order should be reversed.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

August 26, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable L. Casey Manning, Circuit Court Judge

Civil Action Case No. 2018-CP-40-01224
Appellate Case No. 2020-000550

Kevin L. Paul …….Appellant,

v.

Kevin L. Paul vs. Walmart Stores East, L.P.: Wal-Mart Supercenter,
d/b/a Wal-Mart Store 1339; and Richland County Sheriff's Office, Defendants,

Of Which Richland County Sheriff's Office is the Respondent…..……Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief complies with Rule 211(b), SCACR.

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