

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

Civil Action Number: 09-CP-02-1529

STATE OF SOUTH CAROLINA  
COUNTY OF AIKEN  
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this 4th day of April, 2013  
Liz Godard  
C.C.C.P. & G.S. Aiken County, S.C.  
Anna Connor  
Deputy Clerk

William R. Ferrara,

Plaintiff,

v.

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

Defendants.

ORDER

FILED April 4 2013  
Liz Godard  
C.C.C.P. & G.S.  
Anna Connor  
Deputy Clerk 12:15 pm

This matter came before this Court by way of Defendant Sheriff Michael E. Hunt's Motion for Summary Judgment pursuant to Rule 56, SCRPC. A hearing on this motion was held on February 6, 2013 in Barnwell, South Carolina. Present at the time and presenting oral arguments were counsel for Defendant Hunt, Robert D. Garfield; for Defendant Cain, Matthew B. Rosbrugh; and for Plaintiff, S. Jahue Moore.

**I. RELEVANT FACTUAL BACKGROUND**

Taking the facts in a light most favorable to Plaintiff, the Aiken County Sheriff's Office (ACSO) conducted a criminal investigation involving a female complainant and tenant of Plaintiff regarding events allegedly taking place in June and July 2006. The nature of these criminal allegations included, but was not limited to, Plaintiff having requested sex on several occasions and offering the complainant cash and free rent in exchange for sex. Plaintiff also purportedly exposed himself to her and fondled her buttocks and body on several occasions.

Based upon the complainant's information, ACSO Investigator Charles Cain attested and swore to same before Aiken County Magistrate Judge Patrick Sullivan. Judge Sullivan thereafter

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found probable cause and issued all five (5) warrants sought against Plaintiff. These included warrants for Assault and Battery of a High and Aggravated Nature ("ABHAN"), Solicitation of Prostitution, Disseminating Obscenity, and Indecent Exposure [two counts].

On October 17, 2008, the criminal charges were dismissed by the Second Circuit Solicitor. On or about March 6, 2009, an expungement order was issued.

At the time of Plaintiff's arrest in July 2006, the Sheriff's Public Information Officer Michael Frank issued a press release with information pertaining to Plaintiff's arrest, the charges, with a brief recitation of Plaintiff's professional and public background (*i.e.*, previous county councilman), all of which were reflected in the respective arrest warrants previously issued by Judge Sullivan.<sup>1</sup> Further, this release was initially posted and accessible on the Sheriff's website for a period of time beyond the issuance of the expungement order.

## II. RELEVANT PROCEDURAL BACKGROUND

On July 1, 2009, Plaintiff filed a civil action in Aiken County Common Pleas against Sheriff Hunt, Cain, and other party-Defendants.<sup>2</sup> He filed his Complaint in a *pro se* capacity and since some of his causes of action contained federal constitutional claims, the matter was removed to U.S. District Court by defense counsel.

On December 29, 2010, the Court ruled on the dispositive motions filed by the respective Defendants. At this time, the Court granted partial summary judgment, specifically maintaining the actions against the Sheriff in his official capacity and Cain individually. However, many of the initial twenty-one (21) causes of action were dismissed against one or both of these remaining Defendants, solidifying the present posture of this matter.

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<sup>1</sup> Frank died in 2008.

<sup>2</sup> On October 13, 2009, the claims against these additional Defendants were dismissed with prejudice by the Court.

On March 28, 2012, the Honorable Richard M. Gergel granted both Defendants' motions for summary judgment with respect to Plaintiff's federal causes of action. In the District Court Order, Judge Gergel declined to exercise its supplemental jurisdiction over the remaining state causes of action of malicious prosecution and defamation and thereby remanded the case to the Aiken County Court of Common Pleas. Following remand, Defendant Hunt filed the instant Motion for Summary Judgment as to the two remaining claims on numerous grounds, each of which will be addressed in the ensuing discussion.

### III. ANALYSIS

#### A. Malicious Prosecution Claim

Plaintiff's first remaining claim is a state law cause of action for malicious prosecution. Under South Carolina law, a plaintiff must plead and prove each of the following elements to state a cause of action for malicious prosecution: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damages. *Eaves v. Broad River Electric Cooperative*, 277 S.C. 475, 289 S.E.2d 414, 415 (1982). Thus, in order to prevail, Plaintiff must establish the lack of probable cause and malice in instituting judicial proceedings. In his motion, Defendant Hunt asserts that Plaintiff cannot establish these two elements and is precluded from arguing otherwise.

"Res judicata requires three elements: (1) the judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical in the first; (3) the second action must involve matters properly included in the first action." *Latimer v. Farmer*, 360 S.C. 375, 385, 602 S.E.2d 32, 37 (2004). Similarly, "[u]nder the doctrine of issue preclusion, if an issue of



fact or law was actually litigated and determined and necessary to a valid and final judgment, the determination is conclusive in a subsequent action on that claim or a different claim." *Laughton v. O'Braitis*, 360 S.C. 520, 526, 602 S.E.2d 108, 111 (Ct. App. 2004). Moreover, the law of the case doctrine prohibits a party from relitigating an unappealed ruling. *See, e.g., Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003), and *In re Morrison*, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996).

In order to prevail on his federal claim for malicious prosecution, Plaintiff was required to plead and prove that he was arrested without probable cause. *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183-84 (4th Cir. 1996). In granting summary judgment on this cause of action in favor of Defendants, the District Court specifically held, "Defendant Cain had probable cause for the arrest of Plaintiff based upon the multiple consistent written and oral statements of the alleged victim and the corroborating statement of the neighbor." *See*, District Court Order, p. 8. The District Court further held that Cain's "conduct was objectively reasonable." *Id.*

It is clear that the parties actually litigated the existence of probable cause; the District Court thereafter expressly decided that probable cause existed; and Plaintiff had not appealed this ruling. Under any of the three doctrines referenced above, Plaintiff is now precluded from asserting or attempting to establish the absence of probable cause. As such, Plaintiff cannot demonstrate the requisite elements of his claim and, consequently, Defendant Hunt is entitled to summary judgment as to this cause of action.

**B. Defamation Claim**

Plaintiff's second remaining state law claim is for defamation. The tort of defamation permits a plaintiff to recover for injury to his reputation caused by the defendant's communication to others of a false message about plaintiff. *McBride v. School Dist. of*

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*Greenville Cnty.*, 389 S.C. 546, 559, 698 S.E.2d 845, 852 (Ct. App. 2010). To prevail on this claim, 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.” *Id.* at 559-60.

#### PRIVILEGE ISSUE

When a statement regarding a private figure plaintiff touches on a matter of public concern, several common law presumptions fall in favor of First Amendment concerns. *Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 466, 629 S.E.2d 653, 665 (2006). Specifically, in a case touching on a matter of public concern, a private-figure plaintiff must plead and prove common law malice and actual injury in the form of general or special damages, *id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346-50 (1974)), as well as falsity, *id.* (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-79 (1986)).

Even if a statement is defamatory and actionable *per se*, a qualified privilege can attach to such statement in one of several ways. For example, qualified privilege can arise when there exists a common interest in the subject matter at issue:

When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, 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.

*McBride*, 389 S.C. at 562, 698 S.E.2d at 853 (emphasis omitted).

Here, Defendant Hunt asserts that that the press release issued by his office touched on a matter of public concern, namely alleged sexual misconduct directed toward a vulnerable adult.

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This Defendant also argues that the communication at issue was privileged, both under the general formulation of qualified privilege set forth in *McBride*, and under the fair reporting privilege. Plaintiff has not offered argument rebutting Defendant's positions. This Court agrees that Plaintiff's arrest for alleged sexual misconduct directed toward a vulnerable adult is a matter of public concern, especially in light of Plaintiff's then-recent arrest for criminal sexual conduct with a minor. Moreover, it is apparent that Defendant Sheriff had an interest in the subject matter of the press release, Plaintiff's arrest, and that the public -- to whom the communication was made -- had a corresponding interest in that subject matter.

#### EXPUNGEMENT ORDER ISSUE

As an initial matter, Plaintiff has not established an actual violation of the expungement order. The expungement order was issued pursuant to S.C. Code Ann. § 17-1-40. This section provides that "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." § 17-1-40(A). Notwithstanding the conclusory allegation that the expungement order was violated, Plaintiff advances no argument that the press release on the website was an arrest, booking record, file, mug shot, or fingerprint, which would require its expungement.

Moreover, the South Carolina Supreme Court has recently offered an interpretation of the expungement statute. *See, Compton v. South Carolina Dept. of Corr.*, 392 S.C. 361, 709 S.E.2d 639 (2011) (Section 17-1-40 "does not apply to any recordation of historical events beyond the charge itself. For example, the facts precipitating the charge are not covered by this statute



because they are mere events that exist irrespective of any criminal proceedings.”)<sup>3</sup> The facts precipitating the criminal charges against Plaintiff are the primary focus of his claim for defamation. Such facts are not covered by the expungement statute. As a result, Plaintiff has not alleged a violation of the statute or the order.

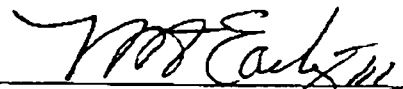
Additionally, Plaintiff has not shown that the press release remaining on the ACSO’s website was anything other than an oversight. The remedial portion of the expungement statute only applies to *intentional conduct*. S.C. Code Ann. § 17-1-40(A) (“A person who otherwise intentionally retains . . . [such material] . . . is guilty of contempt of court.”). However, assuming *arguendo* that Plaintiff had established a violation of the statute, the statute itself provides the remedy, and Plaintiff has failed to follow the proper procedure to address the alleged violation.

### CONCLUSION

Based on the arguments of counsel and on the materials submitted to the Court, I find that the Defendant Sheriff is entitled to summary judgment on his claims for malicious prosecution and defamation.

**IT IS THEREFORE ORDERED** that the Motion for Summary Judgment with respect to Defendant Michael E. Hunt, Sheriff of Aiken County is **GRANTED** and that the pending causes of action against this Defendant are hereby dismissed with prejudice.

**IT IS SO ORDERED.**



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The Honorable Doyet A. Early, III  
Circuit Court Judge, Second Judicial Circuit

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<sup>3</sup> Persuasive in this respect is the South Carolina Attorney General Opinion that a news article on a police department’s website is specifically excluded within the ambit of § 17-1-40. *See*, 2007 Op. Att’y Gen., 2007 WL 4284646. As such, an expungement order pursuant to that section does not require the removal of the news article. *Id.* This opinion also noted that although the news report may be removed from the Department’s website, it may still be accessible through a “Google” search. *Id.*

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**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

Judge Code

Date

**For Clerk of Court Office Use Only**

This judgment was entered on 4-4-2013, and a copy mailed first class or placed in the appropriate attorney's box on 4-4-2013, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

*Liz Godard by Lisa Carter, Jr.*  
Liz Godard - Clerk of Court

Court Reporter