The Supreme Court of South Carolina

O R D E R

The South Carolina Bar and Commission on Continuing Legal Education and Specialization have furnished the attached lists of lawyers who were administratively suspended from the practice of law on January 31, 2006, under Rule 419(b), SCACR, and remain suspended as of April 1, 2006. Pursuant to Rule 419(e), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall surrender their certificates to practice law in this State to the Clerk of this Court by May 1, 2006.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be terminated and the

lawyer's name will be removed from the roll of attorneys in this State. Rule 419(g), SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

April 5, 2006

SUSPENSIONS-
COMMISSION ON CLE AND SPECIALIZATION
2005 REPORT OF COMPLIANCE
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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 14

April 10, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Deborah W. Spence, Appellant,

v.

Deborah W. Spence and Floyd D. Spence, Jr., as the Personal Representatives of the Estate of Floyd D. Spence, Wayne K. Wilkes, Susan A. Wilkes, Donna T. Cromer, Roy Bunyan Cromer, Jr., Robert P. Wilkins, Jr., Floyd D. Spence, Jr., Zachariah W. Spence, Benjamin D. Spence and Caldwell D. Spence, Defendants,

of whom Donna T. Cromer and Roy Bunyan Cromer, Jr., are the Respondents.

ORDER

Appellant filed a petition for rehearing in this matter pursuant to Rule 221, SCACR. Respondents filed a return in opposition. We deny the petition for rehearing, but withdraw the former majority and dissenting opinions, and substitute the attached majority and dissenting opinions in their place. Chief Justice Toal and Justice Pleicones would grant the petition for rehearing and decide this case in accordance with their dissenting opinions.

IT IS SO ORDERED.

s/ Jean H. Toal, C.J.

s/ James E. Moore, J.

s/ John H. Waller, Jr., J.

s/ E. C. Burnett, III, J.

s/ Costa M. Pleicones, J.

April 10, 2006

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Deborah W. Spence, Appellant,

v.

Deborah W. Spence and Floyd D. Spence, Jr., as the Personal Representatives of the Estate of Floyd D. Spence, Wayne K. Wilkes, Susan A. Wilkes, Donna T. Cromer, Roy Bunyan Cromer, Jr., Robert P. Wilkins, Jr., Floyd D. Spence, Jr., Zachariah W. Spence, Benjamin D. Spence and Caldwell D. Spence, Defendants,

of whom Donna T. Cromer and Roy Bunyan Cromer, Jr., are the Respondents.

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 26104
Heard June 15, 2005 – Filed January 30, 2006 – Refiled April 10, 2006

AFFIRMED

William E. Booth, III, of Columbia, for Appellant.

Robert L. Widener and Robert W. Dibble, Jr., both of McNair Law Firm, of Columbia, for Respondents.

JUSTICE BURNETT: This appeal raises the issue of whether the circuit court properly dismissed the plaintiff's complaint for failure state a claim against two defendants because the defendants were innocent or bona fide purchasers for value of real property without notice of the plaintiff's adverse claim or alleged title defect. We certified this case from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 1999, the late Floyd D. Spence (Owner 1) executed and delivered a deed conveying a parcel of real property located in Spence Plantation, a development at Lake Murray in Lexington County, to his wife, Deborah W. Spence (Owner 2). This 1999 deed, which was not recorded at the time, identified a 0.72-acre parcel. The parcel was a portion of some 163 acres originally owned by Owner 1, according to allegations in the complaint.

In January 2000, Owner 2 agreed to sell the lakefront lot to Wayne K. Wilkes and Susan A. Wilkes (Owner 3) for $250,000. Robert P. Wilkins, Jr. (Agent), an attorney at law and a real estate agent, acted as agent for Owner 2.[1] The lot was independently surveyed by Owner 3 after

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[1] Owner 2 in her reply brief objects to any description of Robert P. Wilkins, Jr., as her agent because Wilkins purportedly did not admit such a relationship in his answer and the circuit court's order did not make such a finding of fact. We note that Owner 2 in her complaint asserts she had an attorney-client relationship with Wilkins in the 1999 gift conveyance and in the 2000 sale. Owner 2 is bound by that factual assertion in an appeal of a ruling made pursuant to Rule 12(b)(6), in which the facts asserted by the

continued . . .

questioning the boundaries verbally described by Agent in an on-site inspection.

Owner 2 alleges in her complaint she signed a deed conveying 0.72 acre to Owner 3 on April 3, 2000, with the understanding Agent would hold the deed until the closing date. Owner 2 alleges she and Owner 1 denied Agent's request, made on behalf of Owner 3, to redefine the lot's boundaries so that it contained 0.82 acre – one-tenth of an acre more.

Owner 2 further alleges Agent wrongfully and without her permission or knowledge (1) modified, submitted to county planning officials for approval, and caused to be recorded on April 20, 2000, a revised plat dated February 1, 2000, which shows a 0.82-acre parcel as Lot 42; (2) substituted a new page for the first page of the 1999 deed, which Owner 1 previously had signed conveying the lot to Owner 2, to identify a 0.82-acre parcel as Lot 42; and (3) substituted a new page for the first page of the 2000 deed, which Owner 2 previously had signed conveying the lot to Owner 3, to identify a 0.82-acre parcel as Lot 42 and the revised plat showing the new lot.

The closing on the sale of the lot occurred April 20, 2000. The 1999 gift deed and the 2000 sale deed were publicly recorded with the Lexington County Register of Deeds four days later.

In 2002, Owner 3 sold the 0.82-acre lot to Donna T. Cromer and Roy Bunyan Cromer, Jr. (Owner 4), respondents, for $340,000. According to allegations in the complaint, documents pertaining to Lot 42 then on record with the register of deeds were: (1) the 1999 gift deed from Owner 1 to Owner 2 conveying Lot 42 consisting of 0.82 acre; (2) two earlier deeds described in the derivation clause of the 1999 deed, of which Lot 42 was a portion; (3) the 2000 sale deed from Owner 2 to Owner 3 conveying Lot 42

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plaintiff in her complaint are deemed to be true. While Wilkins is deemed to be Owner 2's agent for purposes of this appeal, the parties and other litigants are not bound by this designation because it may present a factual issue in ongoing litigation of this matter.

consisting of 0.82 acre; (4) the Spence Plantation – Phase IV plat with a revision date of February 1, 2000, showing Lot 42 consisting of 0.82 acre; and (5) the original 1997 plat of Spence Plantation – Phase IV, which did not show Lot 42, but revealed that the area next to Lot 41 and from which Lot 42 later was later created was held by Owner 1. Furthermore, the complaint alleges the original 1999 gift deed from Owner 1 to Owner 2 conveying a 0.72-acre lot in the area of Lot 42 was never publicly recorded.

Owner 2 seeks reformation of the deeds due to mutual mistake, seeks a declaratory judgment that the lot size is 0.72 acre, and alleges Agent committed legal malpractice by negligently altering the deeds. Owner 4 moved pursuant to Rule 12(b)(6), SCRCP, to dismiss Owner 2's complaint for failure to state facts sufficient to constitute a cause of action against them.

The circuit court granted the motion and dismissed the case against Owner 4 with prejudice, ruling the "Complaint gives rise to no reasonable interpretation other than that the Cromers [Owner 4] were bona fide purchasers for value." The circuit court denied Owner 2's motion for reconsideration. This appeal follows.

ISSUE

Did the circuit court err in dismissing with prejudice, pursuant to Rule 12(b)(6), SCRCP, Owner 2's claims against Owner 4 because Owner 4 was an innocent or bona fide purchaser for value of the lot in question without notice of an alleged title defect or adverse claim?

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory,

then the grant of a motion to dismiss for failure to state a claim is improper. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. Id. Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987).

LAW AND ANALYSIS

Owner 2 presents four arguments alleging the circuit court erred in dismissing with prejudice her claims against Owner 4 pursuant to Rule 12(b)(6).

A. DUTY TO FURTHER EXAMINE TITLE

Owner 2 contends the circuit court erred in dismissing her complaint against Owner 4 because Owner 4 had a duty of inquiry to further examine a potential title defect or adverse claim. We disagree.

A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he has actually paid in full the purchase money (giving security for the payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide, *i.e.*, in good faith and with integrity of dealing, without notice of a lien or defect. The bona fide purchaser must show all three conditions – actual payment, acquiring of legal title, and bona fide purchase – occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property. S.C. Tax Commn. v. Belk, 266 S.C. 539, 543, 225 S.E.2d 177, 179 (1976); Jones v. Eichholz, 212 S.C. 411, 422, 48 S.E.2d 21, 25-26 (1948); Kirton v. Howard, 137 S.C. 11, 36, 134 S.E. 859, 868 (1926);

Black v. Childs, 14 S.C. 312, 318 (1880); S.C. Code Ann. § 30-7-10 (Supp. 2004);[2] 92A C.J.S. Vendor & Purchaser § 483 (2000).

There are two basic forms of notice by which a purchaser may be charged with knowledge of the rights of another in real property: actual notice and constructive/inquiry notice. Belk, 266 S.C. at 544-43, 225 S.E.2d at 179; Jones, 212 S.C. at 422, 48 S.E.2d at 25-26; Epps v. McCallum Realty Co., 139 S.C. 481, 498-99, 138 S.E. 297, 302 (1927).

1. ACTUAL NOTICE

We have explained in the context of an action brought under the South Carolina Tort Claims Act that "[a]ctual notice means all the facts are disclosed and there is nothing left to investigate. Notice is regarded as actual where the person sought to be charged therewith either knows of the existence of the particular facts in question or is conscious of having the means of knowing it, even though such means may not be employed by him.

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[2] Section 30-7-10 provides, in pertinent part:

> All deeds of conveyance of lands, tenements, or hereditaments, either in fee simple or for life . . . and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds or clerk of court . . . are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated. In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority is determined by the time of filing for record.

Generally, actual notice is synonymous with knowledge." Strother v. Lexington County Recreation Commn., 332 S.C. 54, 64 n.6., 504 S.E.2d 117, 122 n.6 (1998) (citations omitted). Moreover, "[a]ctual notice may be shown by direct evidence or inferred from factual circumstances." Id. at 65, 504 S.E.2d at 123.

Similarly, in the context of a real estate transaction, a purchaser of real property has actual notice of a title defect or other claim, lien, or interest adverse to his own in a particular property when he actually knows about the defect or claim, or when a reasonable person, if made aware of the same information known to the buyer, would be charged with actual notice of the defect or claim. Actual notice may consist of facts or conditions observed by a prospective purchaser as well as information conveyed orally or in writing to him. E.g. Adams v. Willis, 225 S.C. 518, 522, 83 S.E.2d 171, 173 (1954) (purchaser with actual knowledge that property was subject to lease, as well as fact that service station existed on lot, was charged with knowledge of the lease); Walker v. Taylor, 104 S.C. 1, 15, 88 S.E. 300, 303-04 (1916) (where land buyer prior to sale had actual notice, orally and in writing, of stepdaughter's claim of one-third interest in property, buyer was not a bona fide purchaser for value without notice; the stepdaughter's claim "was of interest to him, and he is charged with all the knowledge he could have had that day for the asking. He is charged with this full and complete information in ordinary fairness as well as in law.").

The complaint in the present case does not allege any fact or theory of recovery indicating Owner 4 had actual notice of a title defect or adverse claim with regard to Lot 42.

2. CONSTRUCTIVE OR INQUIRY NOTICE

We have explained in the context of an action brought under the Tort Claims Act that "[c]onstructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts.

Therefore, this person is presumed to have actual knowledge of the undisclosed facts." Strother, 332 S.C. at 64 n.6., 504 S.E.2d at 122 n.6.

The proper execution and delivery of a deed is effective to convey real property from grantor to grantee. As between grantor and grantee, a properly drawn deed is valid and dispositive of their respective ownership and rights in the property regardless of whether the deed is publicly recorded. Epps, 139 S.C. at 497, 138 S.E. at 302; Martin v. Quattlebaum, 14 S.C.L. 205, 207 (3 McCord) (1825).

However, constructive or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world. The recording of a document alerts all future grantees of the rights of the recorder because the law assumes the grantee will search the index and discover the interest or claim. Epps, 139 S.C. at 499, 138 S.E. at 303 ("recording amounts to notice, whether known or unknown, because the means of information are at hand"); Franklin Bank, N.A. v. Bowling, 74 P.3d 308, 313 (Colo. 2003) (en banc) (constructive notice in real estate transaction essentially is record notice).

Recording acts dating back to the days when South Carolina was an English colony – at least since 1698 – have provided that innocent or bona fide purchasers of real property, who pay valuable consideration, are protected from the claims of creditors or lienholders whose claims were not on record at the time of conveyance to the bona fide purchaser. Epps, 139 S.C. at 496-511, 138 S.E. at 302-07 (discussing development and importance of recording acts, and holding that mere possession of real property by person who held unrecorded contract of sale for deed did not constitute constructive notice of that claim, such that further investigation by subsequent mortgagee was required); S.C. Code Ann. § 30-7-10 (Supp. 2004); accord Belcher v. Powers, 573 S.E.2d 12, 19 (W. Va. 2002) (party is not entitled to protection as a bona fide purchaser, without notice, unless he looks to every part of the title he is purchasing, neglecting no source of information respecting it which common prudence suggests); Tauber v. Com. ex rel. Kilgore, 562 S.E.2d 118, 127 (Va. 2002) (purchaser of real property is bound by both actual and

constructive notice and has no right to shut his eyes or ears to the inlet of information, and then say he is a bona fide purchaser for value without notice).

Constructive or inquiry notice in the context of a real estate transaction also may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another. The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed. As this Court has explained in a case involving the transfer of real property,

> If there are circumstances sufficient to put a party upon the inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose; but constructive notice goes no further. It stands upon the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him; but he is not held to have notice of matter which lies beyond the range of that inquiry and which that diligence might not disclose. There must appear to be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter.

Black v. Childs, 14 S.C. 312, 321-22 (1880) (buyers did not have actual or constructive/inquiry notice that master-in-equity who oversaw the property sale had illegally bought it through a friend, or notice of master's alleged interest in the property; therefore, subsequent grantee was a bona fide purchaser for value without notice and the tainted sale six years earlier would not be voided).

"This Court has been most exacting in determining what actions satisfy the requirements of inquiry notice. We have denied subsequent purchasers comfort under the umbrella of a bona fide purchaser when the exercise of prudence would have avoided the difficulty." Belk, 266 S.C. at

544, 225 S.E.2d at 179 (claim of bona fide purchaser for value will be defeated when "sufficient record notice is available to charge the purchaser with a duty to inquire which, if pursued with due diligence would have supplied him with knowledge of the rights of other parties"); accord Adams v. Willis, 225 S.C. 518, 522, 83 S.E.2d 171, 173 (1954) (purchaser had duty to make reasonable inquiry and investigation as to commencement date of lease, and he was chargeable with notice of effective date, when he had both actual and constructive notice that property was subject to lease); Cathcart v. Matthews, 115 S.C. 1, 6, 104 S.E. 180, 181 (1920) (trial court properly submitted defense of bona fide purchaser to jury where facts were in dispute about constructive or inquiry notice).

The complaint in the present case alleges facts and a theory of recovery based on constructive or inquiry notice grounded in the public record. The question in this instance is whether the deeds and plats on record at the date of the conveyance from Owner 3 to Owner 4 imposed on Owner 4 a duty to inquire further about potential title defects or adverse claims. In other words, did the public record raise a "red flag" requiring further inquiry by Owner 4?

Owner 2 points to two facts alleged in her complaint which should have alerted Owner 4 to a potential title defect or adverse claim. First, Owner 2 cites the "long delay" between the execution date of the first deed in May 1999 and the preparation in February 2000 of the revised subdivision plat, which was recorded in April 2000. Second, Owner 2 cites the fact that the original 1997 plat recorded for Spence Plantation did not include Lot 42. Owner 4 should have investigated why the revised 2000 plat referenced in the deeds was not prepared until some nine months after the deed from Owner 1 to Owner 2 was executed.

We conclude neither of these facts would prompt a reasonable purchaser to conduct further inquiry after examining this public record. The record notice to Owner 4 as of the closing date in 2002 revealed Owner 1, according to the original 1997 plat, held additional acreage from which Lot 42 was drawn. Owner 1 conveyed the 0.82-acre Lot 42 to Owner 2, his wife, by deed executed in May 1999. This recorded deed referred, in a notation

stamped in the margin, to the revised plat showing Lot 42. In February 2000, two months before Owner 2's conveyance of Lot 42 to Owner 3, the original 1997 plat was revised to show the newly created Lot 42. The 1999 gift deed conveying the 0.82-acre Lot 42 to Owner 2 and the 2000 sale deed conveying the 0.82-acre Lot 42 to Owner 3 – both of which referred to the revised 2000 plat showing the 0.82-acre Lot 42 – were duly recorded in April 2000. The public record contains no mention of a 0.72-acre Lot 42.

A buyer examining the public record would reasonably have concluded that a legitimate chain of title existed with regard to Lot 42. The 1999 deed was recorded and the 1997 plat was revised in 2000 only when Owner 3 entered the picture as an unrelated purchaser who, naturally, would want the public record to accurately set forth the existence, chain of title, and boundaries of a lot costing $250,000.

We affirm the circuit court's dismissal of Owner 2's claim against Owner 4 because the facts as alleged in the complaint raise no issue of actual or constructive/inquiry notice with regard to Owner 4's purchase of Lot 42. Owner 4, under the facts alleged, is a bona fide purchaser for value because they actually paid the purchase money in full, purchased and acquired the legal title, and purchased in good faith and with integrity of dealing without notice of a lien or defect.

B. AFFIRMATIVE DEFENSE NOT PROPERLY RAISED

Owner 4 did not file and serve an answer to Owner 2's complaint. Instead, Owner 4 filed a motion to dismiss under Rule 12(b)(6), asserting the defense of bona fide purchaser for value. The grounds for the motion were debated at a subsequent hearing. Owner 2 argues the circuit court erred in dismissing her complaint against Owner 4 because Owner 4 is prohibited from asserting the affirmative defense of bona fide purchaser for value in a motion to dismiss pursuant to Rule 12(b)(6), SCRCP. We disagree.

Owner 2 correctly cites the principle that an affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6)

unless the allegations of the complaint demonstrate the existence of the affirmative defense. See Crocker v. Barr, 295 S.C. 195, 197, 367 S.E.2d 471, 472 (Ct. App. 1988) (stating the general principle), overruled on other grounds, 305 S.C. 406, 409 S.E.2d 368 (1991). This rule arises out of the notion that consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint. Therefore, because the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial. 5 Wright and Miller, Federal Practice and Procedure Civil 3d, § 1277 (2004).

In cases decided long before the adoption of the South Carolina Rules of Civil Procedure in 1985, this Court stated that the affirmative defense of bona fide purchaser for value usually must be pled and proved. See Carr v. Mouzon, 93 S.C. 161, 167, 76 S.E. 201, 203 (1912) (plea of bona fide purchaser when relied on as defense must be pleaded); Lupo v. True, 16 S.C. 579, 586 (1882) (purchaser for valuable consideration without notice is an equitable defense and must be set out in the answer and sustained by the defendant); L.S. Tellier, Pleading Bona Fide Purchase of Real Property As Defense, 33 A.L.R.2d 1322, §§ 1(b) and 2(a) (1954) ("it is recognized that, in order to avail himself of such defense, a defendant must aver in his pleadings that he was a bona fide purchaser").

However, the general prohibition against pleading an affirmative defense in a motion to dismiss has been relaxed in modern practice. Most courts allow such defenses to be raised in a motion to dismiss under Rule 12(b) "when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense. . . ." Wright and Miller, supra, § 1277. This view is in keeping with the pleading and discovery system established by the Rules of Civil Procedure, which allow a party to raise Rule 12(b) defenses in a pre-answer motion. See Rule 12(b), SCRCP and accompanying notes (allowing certain defenses to be raised by pre-answer

motion at option of pleader) and Rule 12(a), SCRCP (altering deadline for defendant's answer when defendant serves a pre-answer motion).

Owner 4 in this instance properly asserted the affirmative defense of bona fide purchaser for value in a Rule 12(b)(6) motion. The defense did not raise a disputed issue of fact and the relevant facts were completely disclosed in the complaint. Owner 2 has not shown that further facts could be developed by pretrial discovery or a trial on the defense of bona fide purchaser for value. The circuit court properly dismissed the complaint against Owner 4.

C. "NO-TITLE" ARGUMENT

Owner 2 argues the circuit court erred in dismissing her claims against Owner 4 because she never gained legal title to the disputed tenth of an acre; therefore, she could not and did not convey that tenth of an acre to Owner 3, meaning Owner 3 could not and did not convey it to Owner 4. We disagree.

Owner 2 correctly cites the principle that a grantee ordinarily may not claim bona fide purchaser status if his grantor never had title to the property in question. See Cook v. Eller, 298 S.C. 395, 397, 380 S.E.2d 853, 854 (Ct. App. 1989) (stating the general principle); 92A C.J.S. Vendor & Purchaser § 484 (2000) (stating "doctrine of bona fide purchaser without notice generally does not apply where there is a total absence of title in the vendor, and the good faith of the purchaser cannot create a title where none exists").

This principle is inapplicable in the present case because the title conveyed to Owner 4 was apparently perfect, good at law, and made by a regular conveyance. See 92A C.J.S. Vendor & Purchaser § 484. Owner 1 conveyed legal title in the 0.82-acre Lot 42, a portion of a larger tract in which he held legal title, to Owner 2 by a deed duly executed and delivered in 1999 and recorded in 2000. Owner 2 conveyed legal title in exactly the same lot to Owner 3 by a deed duly executed, delivered, and recorded in

2000. Owner 3 conveyed legal title in exactly the same lot to Owner 4 by deed duly executed, delivered, and recorded in 2002.

The issues of whether the conveyance of 0.82-acre from Owner 1 to Owner 2, and from Owner 2 to Owner 3, was a mutual mistake or the result of alleged negligence by Agent apparently remain pending in circuit court against the remaining defendants. But the factual allegations contained in the complaint reveal Owner 1 held valid legal title to the area from which the 0.82-acre lot was created, and the lot was properly conveyed from Owner 1 to subsequent owners. The circuit court properly dismissed the complaint against Owner 4.

Chief Justice Toal, dissenting, would hold the alleged material alteration of the deed by Agent without the consent of Owner 2 prevented title in the additional tenth of an acre from passing to Owner 3 or Owner 4. We agree generally with the principle of law stated by the Chief Justice, *i.e.*, that a fraudulent deed is void *ab initio* and, because it is a nullity, it ordinarily may not convey valid title to the grantee. However, we do not find this single principle dispositive in this case. Owner 2 in her complaint does not allege Agent acted with an intent to *defraud* Owners 1 and 2 of a portion of their property by materially altering the deeds and plat. Owner 2's complaint seeks only reformation of the deeds due to a mutual mistake, seeks a declaratory judgment that the lot size is 0.72 acre, and alleges Agent committed legal malpractice by *negligently* altering the deeds and plat. Furthermore, the proposition of law stated by the Chief Justice is incomplete, standing alone, to resolve this case because Owner 4 properly has asserted the defense of bona fide purchaser for value as previously explained.

Justice Pleicones, dissenting, would find the complaint states a declaratory judgment action that title in the disputed tenth of an acre did not pass to Owner 4 because Owner 2 never acquired title to that portion. Justice Pleicones agrees with us the complaint alleges an agency relationship between Agent and Owners 1 and 2. See footnote 1. But, he reasons, Agent lacked the authority to alter the deeds and plat because the complaint alleges Owners 1 and 2 did not give Agent actual authority to alter them and it does not allege Agent had apparent authority to do so. He would find Agent's

actions may not be imputed to Owners 1 or 2 due to the lack of authority, which means Owner 2's allegation she never acquired title to the tenth of an acre is sufficient to defeat Owner 4's motion to dismiss.

The doctrine of apparent authority provides that the principal is bound by the acts of his agent when he has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption. Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982); Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 868-69 (Ct. App. 1996). A principal may be held liable to a third person in a civil lawsuit for the fraud, deceit, concealment, misrepresentation, negligence, and other omissions of duty of his agent which occur in the scope of the agent's employment, even when the principal did not authorize, participate in, or know of such misconduct or even when the principal forbade or disapproved of the act in question. West v. Service Life & Health Ins. Co., 220 S.C. 198, 66 S.E.2d 816 (1951). This rule "is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency. . . . Seeing that some one must be loser by the deceit, it is more reasonable that he who employs and confides in the deceiver should be the loser than a stranger." *Id.* at 202, 66 S.E.2d at 817 (internal quotes omitted); accord Jones v. Elbert, 211 S.C. 553, 558, 34 S.E.2d 796, 798 (1945) (as a matter of public policy, principal who selects agent and directs manner in which agent executes his role, in justice to third person with whom agent may deal and who are not responsible either for his selection or conduct, is liable for agent's torts committed in furtherance of principal's business); Federal Land Bank of Columbia v. Ledford, 194 S.C. 347, 359, 9 S.E.2d 804, 809 (1940) (where agency is established and there is a wrong committed by agent, principal must ordinarily bear the loss whether the agency is actual or apparent; and equity intervenes under the rule where one of two innocent

persons must suffer, he who brings about the loss must bear it); 3 Am.Jur.2d Agency §§ 262-270 (2002).

These agency principles are rooted in the same ground as the doctrine of bona fide purchaser for value which applies in this case. In both instances, a third party may be entitled to rely on the actions of an authorized agent or the public record of land conveyances. In our view, the only reasonable conclusion which may be drawn from the facts and allegations set forth in the complaint is that Agent had apparent authority to act on behalf of Owners 1 and 2 in the 1999 gift conveyance and the 2000 sale. The complaint does not allege otherwise and, as previously noted, Owner 2 asserts in her complaint she had an attorney-client relationship with Agent. Consequently, it is appropriate to impute Agent's allegedly negligent actions to Owner 2. To hold otherwise would allow Owner 2 to avoid the doctrine of bona fide purchaser for value and seek damages from Owner 4 simply by asserting that her admitted Agent, although he had apparent authority to act generally on her behalf in the transactions, did not have authority to perform the specific, negligent acts alleged in the complaint.[3]

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[3] We find instructive the following observation made during a discussion of how to determine which acts of an agent fall within the scope of employment:

> It is not that the master or principal authorized the negligent act which caused the damage, but that the servant or agent acted negligently in carrying out the orders or in doing the work of the master or principal.
>
> To illustrate: The master or principal is responsible for the negligent act of the servant or agent in doing the work which he is directed to perform. If the master or principal direct[s] the servant or agent to drive an automobile carefully along the crowded street, and the latter does drive along such street, but by his negligence another is injured by such driving, the master or principal cannot escape responsibility by showing that the servant

continued . . .

D. DISMISSAL WITH PREJUDICE

Owner 2 in a motion made pursuant to Rule 59(e), SCRCP, asked the circuit court to grant her at least fifteen days to file and serve an amended complaint instead of dismissing the complaint with prejudice. Owner 2 contends the circuit court erred in denying her motion to amend the complaint, *i.e.*, the court should have dismissed the complaint *without* prejudice instead of *with* prejudice. We disagree.

Dismissal of a case "without prejudice" means a plaintiff may reassert her complaint by curing defects that led to the dismissal. In contrast, dismissal of a complaint "with prejudice" is intended to bar relitigation of the same claim. Collins v. Sigmon, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989).

Dismissal of a complaint does not bar a subsequent action brought before expiration of the statute of limitations if the dismissal is based merely on the insufficiency of the complaint. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986); Hennegan v. Atlantic Coast Line R. Co., 211 S.C. 357, 45 S.E.2d 331 (1947). Dismissal of a case precludes relitigation only on

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> neglected his orders to drive carefully. Again, if one dictates a letter to a stenographer, and, at the conclusion of the dictation, directs the stenographer to transcribe the letter, sign his principal's name thereto, and forward to the correspondent, can it be doubted that the employer in such case would be responsible for any negligent error of the stenographer in so transcribing and forwarding the letter, whereby the correspondent was misled to his damage?

Eureka Cotton Mills v. Western Union Tel. Co., 88 S.C. 498, 70 S.E. 1040, 1050 (1911). Similarly, Owners 1 and 2 directed Agent to prepare documents conveying real property to another. Owner 2 may not shift the burden of a loss caused by alleged errors in those documents to Owner 4 simply by asserting her admitted agent neglected to follow her instructions.

matters actually decided in the dismissal. Sealy, 289 S.C. at 544, 347 S.E.2d at 505 (dismissal for improper joinder and lack of capacity to sue precluded only those issues).

When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. See Foman v. Davis, 371 U.S. 178, 182 (1962) (rules of civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where amendment would have stated alternative theory of recovery); Small v. Mungo, 254 S.C. 438, 442-44, 175 S.E.2d 802, 804 (1970) (affirming dismissal of complaint for failure to proceed, but finding it should have been dismissed without prejudice); Dockside Assn., Inc. v. Deytens, Simmons & Carlisle, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (citing Rule 15(a), SCRCP, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)); Davis v. Lunceford, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice); accord Arkansas Dept. of Environ. Quality v. Brighton, 102 S.W.3d 458, 468 (Ark. 2003) (complaint dismissed for failure to state facts upon which relief can be granted should be dismissed without prejudice in order for plaintiff to decide whether to serve amended complaint or appeal); Thacker v. Bartlett, 785 N.E.2d 621, 624 (Ind. App. 2003) (dismissal for failure to state a claim is without prejudice because the complaining party may either file an amended complaint or stand upon complaint and appeal); Giuliani v. Chuck, 620 P.2d 733, 737 (Haw. App. 1980) (complaint is not subject to dismissal with prejudice unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations); James F. Flanagan, South Carolina Civil Procedure 95 (2d ed. 1996) (party who loses a motion to dismiss normally is given the right to amend the complaint to cure the defect).

When a complaint is dismissed without prejudice and the plaintiff is given the opportunity to file and serve an amended complaint, but instead chooses to appeal, the plaintiff ordinarily waives the right to amend his complaint. The appellate court may affirm the dismissal with prejudice if it determines the lower court properly dismissed the complaint. Brighton, 102 S.W.3d at 468; Swink v. Ernst & Young, 908 S.W.2d 660, 663 (Ark. 1995) (when trial court dismisses complaint pursuant to Rule 12(b)(6) for failure to state facts upon which relief can be granted, dismissal is without prejudice; plaintiff then has the election to plead further or appeal).

When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted. Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell, 708 A.2d 283, 286-87 (Me. 1998) (trial court acted within its discretion in dismissing case with prejudice pursuant to Rule 12(b)(6) where plaintiff was unable to show how he would cure defects in his complaint if granted leave to amend it); Barkley v. Good Will Home Assn., 495 A.2d 1238 (Me. 1985) (in absence of bad or dilatory motives on the part of plaintiff or undue prejudice to defendant, the trial court abused its discretion by denying the plaintiff an opportunity to amend her complaint after it was dismissed pursuant to Rule 12(b)(6)); Baker v. Town of Middlebury, 753 N.E.2d 67, 74 (Ind. App. 2001) (dismissal of complaint pursuant to Rule 12(b)(6) with prejudice was harmless error because plaintiff failed to show how he would have amended his complaint to avoid dismissal).

On the other hand, when a complaint is dismissed with prejudice and the plaintiff erroneously is denied the opportunity to file and serve an amended complaint, but the plaintiff fails to present additional factual allegations or a different theory of recovery which may give rise to a claim

upon which relief may be granted, the appellate court may in its discretion affirm the dismissal of the complaint with prejudice. Potter, 708 A.2d at 286-87; Baker, 753 N.E.2d at 74.

Applying these principles in the present case, we conclude this case falls in the final category. Owner 2's complaint was dismissed with prejudice pursuant to Rule 12(b)(6) when ordinarily the dismissal would have been without prejudice. However, Owner 2 has failed to present any additional factual allegations or a different theory of recovery which may give rise to a cause of action upon which relief may be granted against Owner 4. Owner 2 in her Rule 59(e) motion and on appeal merely reiterates the same allegations originally pleaded in her complaint. Those factual allegations are insufficient to state a cause of action against Owner 4, as previously discussed. Furthermore, Owner 2 has not asserted or shown the need for additional time to discover facts pertaining to Owner 4's potential liability in this matter. Cf. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) ("summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery"). Accordingly, the circuit court properly dismissed the complaint with prejudice against Owner 4.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's dismissal with prejudice of Owner 2's complaint against Owner 4 pursuant to Rule 12(b)(6), SCRCP.

AFFIRMED.

MOORE and WALLER, JJ., concur. TOAL, C.J., and PLEICONES, J., dissenting in separate opinions.

CHIEF JUSTICE TOAL: I respectfully dissent. In my opinion, the deed executed by Mrs. Spence (Owner) was fraudulent because the deed was materially altered prior to delivery to Buyer 3. As a result, I would reverse the ruling of the trial judge dismissing the complaint for failure to state a claim.

The majority holds that Buyer 4 was a bona fide purchaser who took title from Buyer 3 in good faith and without notice. I disagree. In my opinion, the majority fails to address the black-letter law which provides that a fraudulent deed is *void ab initio* and constitutes a nullity. 26A C.J.S. *Deeds* § 114 (2001). As a result, the deed cannot be the basis for superior title against an original grantor, even under the equitable doctrine of a bona fide purchaser. *Id*; *see also Concord Corp. v. Huff*, 355 P.2d 73, 76 (Colo. 1960) (holding that void deeds do not convey title); *Andre v. Hoffman*, 95 S.E. 84, 87 (W. Va. 1918) (holding that the grantee of a forged deed cannot acquire title under the forged instrument).

In the present case, Owner 2 executed a deed to convey 0.72 of an acre to Owner 3 in 2000. Prior to the delivery of the instrument to Owner 3, the deed was altered without the consent of Owner 2, by an Agent for Owner 2. The alteration made the instrument reflect a conveyance of 0.82 of an acre. Owner 3 then conveyed the 0.82 of an acre to Owner 4. However, Owner 2 wished to only convey 0.72 of an acre and signed an instrument that reflected such. The majority focuses on the intent of the person that made the alteration, Agent, however, this does not address the issue that instrument did not reflect the *intent* of Owner 2. As a result, the alteration of the instrument by Agent, regardless of Agent's intent, prevented title from passing.

Consequently, I would hold that the change by the agent without the consent of Owner 2 constituted a material alteration. In my opinion, this would prevent title from passing to Owner 3 or Owner 4 because the unauthorized change in acreage resulted in a fraudulent deed. Accordingly, I would reverse the trial court's decision dismissing the compliant.

JUSTICE PLEICONES: I respectfully dissent. I agree with the majority that neither Owner 3 nor Owner 4 had any notice of a defect in the chain of title. I agree with the Chief Justice, however, that it can be reasonably deduced from the face of the complaint that Owner 2 never acquired title to the tenth of an acre at issue and that Owner 4 therefore cannot be a good faith purchaser for value. Consequently, I would reverse the dismissal of the complaint for failure to state a cause of action for declaratory judgment.

"A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint." Toussaint v. Ham, 292 S.C. 415, , 416, 357 S.E.2d 8, 9 (1987). Regardless whether the court believes that the plaintiff is likely to prevail on the merits, " the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." Id.

The majority is correct that the complaint alleges an agency relationship between Wilkins and Owners 1 and 2. That is not dispositive, as the complaint further alleges that neither Owner 1 nor Owner 2 invested Wilkins with actual authority to alter the deeds or the plat at issue. Furthermore, the complaint does not aver that Wilkins had apparent authority to alter the instruments, nor can such be reasonably deduced from its four corners. If Wilkins lacked actual or apparent authority to perform these acts, then his conduct cannot be imputed to Owner 1 or Owner 2. Thus, principles of agency do not facially negate the allegation that Owner 2 never acquired title to the tenth of an acre. That allegation, on its face, is thus sufficient to defeat the claim that Owner 4 is a good faith purchaser for value.

I find troubling that the complaint fails to spell out the relief sought by Owner 2. The complaint does not allege that Owner 2 would be entitled to the tenth of an acre, as devisee or heir, if the disputed acreage were returned to Owner 1's estate. Nevertheless, the complaint reasonably indicates Owner 2's desire to insulate herself from a potential breach-of-warranty action. Further factual development is necessary to determine whether her concern is legitimate. I would therefore hold that the complaint states a cause of action for declaratory judgment.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Linda Erickson, Appellant,

v.

Jones Street Publishers, LLC, Respondent.

Appeal From Charleston County
Roger M. Young, Trial Judge
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No.26133
Heard January 19, 2006 – Filed April 10, 2006

AFFIRMED IN PART; REVERSED IN PART

Russell S. Stemke, of Island Law Offices, of Isle of Palms, for Appellant.

John J. Kerr, of Buist, Moore, Smythe, & McGee, P.A., of Charleston, for Respondent.

JUSTICE BURNETT: Linda Erickson (Appellant) appeals the dismissal of her causes of action for defamation, invasion of privacy, and negligence against Jones Street Publishers, LLC (Newspaper). We affirm in part, reverse in part, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Newspaper publishes the Charleston City Paper, a free weekly newspaper with a circulation of about 30,000. Newspaper on January 19, 2000, published a front-page news story titled "In A Child's Best Interest: Is the guardian ad litem program giving children a voice?" In a promotional teaser in the table of contents on page three, Newspaper stated:

> Protecting the Children
> The Guardian Ad Litem program has come under fire recently for a series of transgressions. One high profile case has a Guardian reportedly becoming romantically involved with the father of a child. Critics claim volunteers with a lack of training and professional expertise have too much authority. How did this happen, and what is being done to remedy the situation?

In introductory paragraphs preceding the main body of the article, Newspaper stated:

> Every child in the judicial system needs to have a voice.
> Parents have the benefit of experience, age, and lawyers to make their case. But what of a 7-year-old boy whose family is crumbling right in front of him and only sees himself to blame – who is to speak for him?
> In South Carolina, they are called Guardian Ad Litems (GALs). In a perfect world, they provide an objective perspective for what's best for the child – mom's house, dad's house, neither.
> But what happens if their objectivity is compromised? What if, while carrying out their duties, they step across the line, like sleeping with the client's father?
> It's already happened, and the result is a public effort to abolish half of the GAL system and radically modify the other half.

The article then began with a subsection titled "Whom to Believe?" In that first subsection, Newspaper recounted the claims of Pat Beal, a Summerville grandmother who said her daughter and two grandchildren had moved into her home to escape the daughter's physically abusive husband. Pat Beal said her "then six-year-old granddaughter began to complain of pain in her 'private area – vaginal pain'" and that "her granddaughter would cry out 'No, Daddy' in her dreams." The family took the granddaughter to doctors to investigate "possible molestations," as well as to a lawyer who ultimately contacted the Department of Social Services, according to the article.

In the article, Pat Beal stated that "the [guardian] assigned to the case did not do a thorough job of interviewing the family and did not even talk to the granddaughter"; the guardian prevented an arrangement between the parents in which the mother (Pat Beal's daughter) would get full custody of the children; the guardian "manipulated the judge into barring [Pat Beal] from contacting her granddaughter without supervision"; and the guardian, in the final divorce decree, "had it written that she [Pat Beal] could have no contact with either of her minor grandchildren." Pat Beal further stated in the article that she "became incensed when a second psychologist said that she had 'coached' her granddaughter into alleging sexual abuse at the hands of her father"; that she and her husband had "spent $64,000 fighting the decree in court, and were eventually successful"; and that she had joined a court reform movement begun by those who have been through "equally harrowing experiences with custody and abuse battles."

The article did not name the guardian who represented Pat Beal's granddaughter. Appellant testified there were only a handful of private, non-lawyer guardians in Dorchester County at the time. Two local lawyers testified they and others involved in the Dorchester County family court system were familiar with the "Beal case," and knew Appellant was the guardian who had worked on it. Furthermore, it apparently is undisputed

Appellant was sufficiently identified in the article because Newspaper did not attempt to defend on that ground.[1]

Appellant alleged the teaser, introductory paragraphs, and "Whom to Believe" subsection constituted defamation by libel. Appellant alleged and testified the false and defamatory statements included the charge she failed to properly investigate the case or speak with the child she represented, that she improperly blocked and tried to prevent the mother from getting full custody of the children, that she manipulated a family court judge, that she caused a court order to be written preventing Pat Beal from having visitation with her granddaughter, and that she had a sexual relationship with the father of a child she represented.

Appellant presented evidence that the child's "vaginal pain" was actually caused by pinworms. Investigations by Appellant, DSS, physicians, and a psychologist revealed no evidence William Litchfield had sexually abused his daughter. Appellant testified she concluded Pat Beal had coached her granddaughter to falsely accuse her father of sexual molestation in order to gain an advantage in the divorce and custody battle. A psychologist reached the same conclusion. Appellant testified the child, unprompted, said she "told the doctor that my daddy did something that he really didn't. My nana [Pat Beal] told me to because she wanted me to – my nana asked me to tell the doctor that my daddy hurt me and he really didn't. And my mama and grandpa are afraid we're going to get in trouble."

The family court judge in the Litchfield divorce decree ordered the parties to deny access or visitation of Pat Beal with the grandchildren until she "has completed a course of counseling which addresses the issues of coaching and interfering with the relationship of these parents and children." The order, the result of a settlement between the parties, was not appealed

[1] The parties and witnesses often referred to "the Beal case," as it was commonly known. The divorce case was William Litchfield v. Carla Litchfield, who were divorced by an order filed April 13, 1998, about two years before the article was published.

and Pat Beal's visitation rights were restored after she completed the required counseling.

Appellant exemplified something of a Horatio Alger tale. She testified she had a somewhat troubled childhood and adolescence, growing up in New York with an alcoholic father. She left home, dropped out of school at the age of sixteen, and had a failed relationship with a heroin addict. She later met and married and the couple had two children, moving to Charleston after her husband joined the Air Force. Appellant's husband was killed in a car wreck when she was twenty-five years old. Appellant passed tests of General Educational Development, obtaining her "GED." She then went to college for eight years while working part-time jobs and taking care of her children, eventually obtaining a bachelor's degree in sociology. Appellant ultimately obtained a master's degree in counseling and, finally, realizing part of her dream, became a licensed professional counselor able to work with children and families.

Appellant had planned to begin her own counseling business in Dorchester County, but Appellant and two lawyers testified her reputation and chance to start a counseling business were ruined by the defamatory newspaper article. No lawyer needing a guardian ad litem or family counselor could take a chance on hiring such a controversial person because it would simply bring too many extraneous issues and problems into a case.

Appellant testified she worked from her home as a guardian ad litem and counselor in divorce and other family-related cases, and she considered her role to be a private, confidential one involving very personal matters. She understood that legislators, family court officials, and others at the time were publicly debating potential changes in the guardian system, but she did not speak out publicly on the topic.

Newspaper defended the case primarily on the grounds the information in the article was true and accurate, *i.e.*, Appellant had not properly investigated the case, had reached erroneous conclusions and recommendations too summarily, and had manipulated the family court. The author of the article, Bill Davis, testified he and Newspaper handled the story

carefully and appropriately. Davis testified he tried to contact Appellant before publishing it even though none of his notes contained her telephone number. He did not try to contact attorneys involved in the Beal case. Davis conceded his only source for the "Whom to Believe" subsection was a fifteen- to thirty-minute telephone conversation with Pat Beal. Davis admitted he could have obtained the Litchfields' publicly recorded divorce decree, which refuted or at least called some of Pat Beal's claims into question.[2] In addition, Newspaper contended Appellant was a public figure or public official required to prove constitutional actual malice, which she was unable to do, in order to prevail in the lawsuit.

The trial initially progressed in the usual manner. It appears that, by the third day, Wednesday, the trial judge expressed concern about the potential length of the trial.[3] Newspaper suggested the evidence initially should be limited to issues of Appellant's status and whether she had presented sufficient evidence of actual malice to submit the case to the jury.

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[2] Davis repeatedly stated the article accurately and truthfully reported Pat Beal's comments and opinions on the guardian ad litem system and her daughter's custody battle. Newspaper repeats this same comment in its brief, stating it planned at trial to "demonstrate conclusively that there were four statements and the [Newspaper's] source honestly thought them to be true." This position distorts the concept that truth is a defense to defamation when, as occurred in this case, it is undisputed that certain statements were uttered and later published accurately in written form. A defendant or publisher asserting truth as a defense must prove that the statement or purported fact is true, not that the person quoted actually made the statement. *E.g.* Curtis Pub. Co. v. Butts, 388 U.S. 130, 151 (1967) (truth is an absolute defense in almost all libel and slander cases); Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 580, 556 S.E.2d 732, 737 (Ct. App. 2001) (publisher may avoid liability in any type of defamation case by proving the statement is true).

[3] The trial lasted eight days, from March 22-30, 2004. Appellant was on the witness stand from Monday, March 22, through Thursday morning, March 25.

The judge, in turn, suggested the parties agree to bifurcate the case between liability and damages, an idea Appellant initially resisted. By Friday morning, the decision to bifurcate the case apparently had been agreed upon and was understood by the parties, as the judge directed Appellant, "I don't want you to put on any damage witnesses right now. We're only talking about liability."[4]

On Friday afternoon, the trial judge explained to the parties he would instruct the jury after Appellant rested her case on liability and the parties presented closing arguments. He would then hear arguments and rule on Newspaper's directed verdict motion on whether Appellant was a private figure, public figure, or public official while the jury deliberated. The judge subsequently explained to the jury that he had "limited the amount of testimony that you have heard to only questions that involve the issue of liability." The jury would be given a special verdict form after hearing closing arguments and instructions on the law. Neither party objected to the procedure. Newspaper did not attempt to offer any witnesses or evidence during the liability phase of the trial.

The parties and judge discussed the jury charges and special verdict form at length. Both parties made closing arguments to the jury, focusing only on whether the article was false and defamatory, and whether Appellant had shown Newspaper acted negligently or with actual malice.

The judge instructed the jury it was only to determine the issue of liability, not damages, and charged the jury on the elements of a defamation action. The judge told the jury not to consider the statement regarding a guardian who had a sexual relationship with the father of a child she represented. The judge earlier had ruled that statement did not have a defamatory meaning with regard to Appellant because the article clearly identified another guardian accused of that act. Because he had not yet ruled

[4] Newspaper states that the trial judge communicated his decision regarding bifurcation of the trial in off-the-record discussions on Wednesday evening and Thursday morning.

on the issue of Appellant's status, the judge charged the jury on both private figure and negligence law, and the concepts of public figure, public official, and constitutional actual malice. The judge explained the special verdict form in detail to the jury.

While the jury was out, the judge heard arguments on Newspaper's directed verdict motion that Appellant was a public figure or public official who must prove Newspaper acted with actual malice, a burden she had failed to meet. The judge did not rule on the motion before the jury returned with its verdict.

The special verdict form approved by both parties posed four yes/no questions: (1) whether Appellant had proven by a preponderance of the evidence that Newspaper published a statement about Appellant that was false; (2) whether Appellant had proven by a preponderance that the false statement about Appellant was defamatory; (3) whether Appellant had proven by a preponderance that Newspaper's publication of a false and defamatory statement about Appellant was negligent; and (4) whether Appellant had proven by clear and convincing evidence that Newspaper acted with actual malice in publishing a false and defamatory statement about Appellant.[5] The jury answered "yes" to all four questions.

The trial judge told jurors they would have to return the following week to consider evidence of Appellant's damages, and sent them out to discuss when they would prefer to return. The judge then denied Newspaper's directed verdict motion, ruling Appellant was a private figure required to prove negligence to recover damages in her defamation action.

[5] The form instructed the jury to answer Question 2 only if the answer to Question 1 was "yes," and to answer Questions 3 and 4 only if it answered "yes" to the first two questions. The form further instructed the jury that Question 3 applied only if the Court found Appellant was a private figure, and Question 4 applied only if the Court found Appellant was a public figure or public official.

At this point the case took an unusual procedural turn. Newspaper moved for a mistrial because the judge had told jurors they would return only to determine damages, but Newspaper had not yet presented a defense. The judge agreed to correct his "misstatement." He called the jurors back in and told them that they would return to hear evidence of Appellant's damages and Newspaper's defense. The questions the jury answered in the special verdict form were only "advisory interrogatories."

On Monday morning, Newspaper restated its objection to the process followed. Counsel stated it had "never crossed my mind, of course, that you would let the case go out to the jury if there was any – if you had anything going on in your mind that I was going to put up a defense. . . . I thought you were sending a clear signal to me that I wasn't putting up a defense in this case. What else could it be to send the jury out before I put up a defense?" Newspaper believed the judge planned to dismiss the case on its directed verdict motion even if the jury returned with all "yes" answers. The jury was tainted in Appellant's favor by already discussing the merits of the case and ruling on "advisory interrogatories."

After much discussion, the judge instructed the jury the "special interrogatories" it had answered "are not binding upon you during the remainder of the trial." Appellant would present evidence of damages and Newspaper would present its defense. The case would be submitted anew to the jury, which would not be bound by its earlier answers in the special verdict form.

Accordingly, Appellant presented evidence of damages to her reputation, emotional distress and accompanying physical problems, and loss of the opportunity to start her own counseling business, then rested her case. Newspaper renewed its directed verdict motion on Appellant's status, which was denied.

Newspaper presented its defense, recalling the reporter (who already had testified in Appellant's case), Appellant, and the psychologist mentioned by Pat Beal in the article. Newspaper questioned Appellant about Karen Winner, the author of the "Winner report" which discussed the actions

of private guardians in several family court cases. Appellant testified she had separately sued Winner and several other persons for defamation. Appellant testified she asked another guardian ad litem (Marilyn Lassiter, who was named and accused of wrongdoing in the same article) to attend a publicly advertised meeting and secretly tape-record it because she had been told "that a group had been formed to ruin me [and] to try to put me in jail." Appellant also had listened to audiotapes secretly made by two other friends who had attended the group's meetings. Newspaper questioned Appellant about three private letters she wrote in 1999 regarding the guardian reform controversy and questions about her education and training to two Governor's Office officials.

Newspaper renewed its directed verdict motion on Appellant's status and the judge heard additional arguments. Reversing his earlier decision, the judge ruled Appellant was a limited public figure who had not presented clear and convincing evidence to prove Newspaper acted with actual malice. Therefore, the judge granted Newspaper's directed verdict motion. The case was not resubmitted to the jury.

Newspaper's motions to dismiss Appellant's claims for negligence and invasion of privacy had been previously granted pursuant to Rule 12(b)(6), SCRCP, after a pretrial hearing by another circuit judge. Appellant appealed the rulings of both judges. This appeal was certified to the Court on motion of the Court of Appeals pursuant to Rule 204(b), SCACR.

Appellant raises numerous issues. We find it necessary to discuss only three issues and we affirm the remaining issues pursuant to Rule 220(c), SCACR.

ISSUES

I. Did the trial judge err in ruling that Appellant, a private guardian ad litem appointed to represent the children's interests in a divorce and child custody dispute, was a limited public figure

who must prove constitutional actual malice in order to recover damages in a defamation action?

II. Does sufficient evidence support the jury's finding of constitutional actual malice such that Appellant, if she is determined to be a private figure, is entitled to recover punitive damages from Newspaper?

III. Did Newspaper agree to bifurcation of the trial on liability and damages, consequently waiving the right to object to bifurcation or its decision not to present evidence during the liability phase of the trial?

STANDARD OF REVIEW

In ruling on a motion for directed verdict, the trial court must view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. The trial court must deny the motion when either the evidence yields more than one inference or its inference is in doubt. Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Creech v. S.C. Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. Bultman v. Barber, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981). If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury. Quesinberry v. Rouppasong, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998).

When ruling on a motion for summary judgment or directed verdict in a defamation action, the court must review the evidence using the same substantive evidentiary standard of proof the jury is required to use in a particular case. George v. Fabri, 345 S.C. 440, 451-54, 548 S.E.2d 868, 874-

75 (2001). An appellate court reviews the granting of such a motion using the same standard. Id.

In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings. Townes Assoc, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

LAW AND ANALYSIS

I. APPELLANT'S STATUS AS A PUBLIC OFFICIAL, PUBLIC FIGURE, OR PRIVATE FIGURE

Appellant argues the trial judge erred in granting Newspaper's directed verdict motion that Appellant, a private guardian ad litem appointed to represent the children's interests in a divorce and child custody dispute, was a limited public figure who must prove constitutional actual malice in order to recover damages. Prior to publication of the article, Appellant was not famous, had no special access to the media, never sought the public's attention, did not thrust herself voluntarily into a public controversy, and did not assume any special prominence in the resolution of an issue of public concern. While the debate about potential reform of the guardian system was a public controversy, Appellant contends she was a private figure who must prove by a preponderance of the evidence that Newspaper acted negligently in publishing false and defamatory statements about her in order to recover damages. We agree in part.

The tort of defamation allows a plaintiff to recover for injury to his or her 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) (Holtzscheiter II). Defamatory communications take two forms: libel and slander. Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct. *Id.*

In order 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); Holtzscheiter II, 332 S.C. at 506, 506 S.E.2d at 518 (Toal, J., concurring).

A defamation action is analyzed primarily under the common law in cases in which the plaintiff is a private figure. A statement is classified as defamatory *per se* when the meaning or message is obvious on its face. A statement is classified as defamatory *per quod* when the defamatory meaning is not clear unless the hearer knows facts or circumstances not contained in the statement itself, and the plaintiff must introduce extrinsic facts to prove the defamatory meaning. Holtzscheiter II, 332 S.C. at 508-09, 506 S.E.2d at 501. In addition to those classifications, a statement may be actionable *per se*, in which case the defendant is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages. Or a statement may be not actionable *per se*, in which case nothing is presumed and the plaintiff must plead and prove both common law malice and special damages. The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve. *Id.* at 509-10, 506 S.E.2d at 501-02.[6]

Under the common law, "[l]ibel is actionable *per se* if it involves written or printed words which tend to degrade a person, that is, to reduce his

[6] General damages include injury to reputation, mental suffering, hurt feelings, emotional distress, and similar types of injuries which are not capable of definite money valuation. Special damages are tangible losses or injuries to the plaintiff's property, business, occupation, or profession in which it is possible to identify a specific amount of money as damages. Holtzscheiter II, 332 S.C. at 510 n.4, 506 S.E.2d at 502 n.4.

character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous." Holtzscheiter II, 332 S.C. at 510-11, 506 S.E.2d at 502. Essentially, all libel is actionable *per se*, while only certain categories of slander are actionable *per se*.[7] *Id.* Common law malice means the defendant acted with ill will toward the plaintiff, or acted recklessly or wantonly, *i.e.*, with conscious indifference of the plaintiff's rights. Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982).

There are three important caveats with regard to private-figure plaintiffs, resulting from the need to balance First Amendment rights with the right of individuals to be compensated for damage caused by defamatory statements. First, in a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the common law presumptions the defendant acted with common law malice and the plaintiff suffered general damages do not apply. Instead, the private-figure plaintiff must plead and prove common law malice and show "actual injury" in the form of general or special damages. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346-50, 94 S.Ct. 2997, 3010-12, 41 L.Ed.2d 789, 809-11 (1974); Holtzscheiter II, 332 S.C. at 512, 506 S.E.2d at 503 (plurality opinion); Holtzscheiter II, 332 S.C. at 519-20, 506 S.E.2d at 506-07 (Toal, J., concurring). Second, in a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the common law presumption that the libelous statement is false is not applied. Instead, the private-figure plaintiff must prove the statement is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-79, 106 S.Ct. 1558, 1563-65, 89 L.Ed.2d 783, 791-94 (1986); Holtzscheiter II, 332 S.C. at 512, 506 S.E.2d at 503; Parker v. Evening Post Pub. Co., 317 S.C. 236, 243, 452 S.E.2d 640, 644 (Ct. App. 1994). Third, in order to recover punitive

[7] Under the common law, slander is actionable *per se* only when it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession. Holtzscheiter II, 332 S.C. at 511 n.5, 506 S.E.2d at 502 n.5.

damages from a media defendant, a private-figure plaintiff must prove by clear and convincing evidence that the defendant acted with constitutional actual malice, *i.e.*, the defendant published the statement with knowledge it was false or with reckless disregard of whether it was false or not. Gertz, 418 U.S. at 346-50, 94 S.Ct. at 3010-12, 41 L.Ed.2d at 809-11; Holtzscheiter II, 332 S.C. at 512, 506 S.E.2d at 503.

Concepts of common law defamation have been significantly modified since the 1960s by the First Amendment jurisprudence of the United States Supreme Court. See Holtzscheiter II 332 S.C. 502, 506 S.E.2d 497 (plurality and concurring opinions discussing impact of First Amendment-based principles). "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. Since New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), federal and state courts have "sought to define the accommodation required to assure the vigorous debate on public issues that the First Amendment was designed to protect while at the same time affording protection to the reputations of individuals." Hutchinson v. Proxmire, 443 U.S. 111, 133-34, 99 S.Ct. 2675, 2687, 61 L.Ed.2d 411, 430 (1979).

"[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues." Gertz, 418 U.S. at 340, 94 S.Ct. at 3007, 41 L.Ed.2d at 805. Errors, however, are inevitable. "[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship." *Id.*

Consequently, to prove fault in a defamation action, a plaintiff who is a public official or public figure must prove by clear and convincing evidence that the defendant acted with actual malice in publishing a false and defamatory statement about the plaintiff. New York Times, 376 U.S. at 279-80, 84 S.Ct. at 726, 11 L.Ed.2d at 706; Time, Inc. v. Firestone, 424 U.S. 448, 453-55, 95 S.Ct. 958, 964-66, 47 L.Ed.2d 154, 162-63 (1976); Curtis v.

Butts, 388 U.S. 130, 162-65, 87 S.Ct. 1975, 1995-96, 18 L.Ed.2d 1094, 1115-17 (1967) (Warren, Ch. J., concurring); Fleming v. Rose, 350 S.C. 488, 494-95, 567 S.E.2d 857, 860-61 (2002); George v. Fabri, 345 S.C. 440, 451, 548 S.E.2d 868, 874 (2001); Holtzscheiter II, 332 S.C. at 521-23, 506 S.E.2d at 507-08 (Toal, J., concurring). Actual malice exists when a statement is made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times, 376 U.S. at 279-80, 84 S.Ct. at 726, 11 L.Ed.2d at 706. "Actual malice under the New York Times standard should not be confused with the concept of [common law] malice as an evil intent or a motive arising from spite or ill will." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510, 111 S.Ct. 2419, 2429, 115 L.Ed.2d 447, 468 (1991).

Thus, an important initial step in analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure.[8] This determination is a matter of law which must be decided by the court, on a case by case basis after a careful examination of the facts and circumstances, before the jury is charged on the law or asked to resolve a case. This ruling is needed in order for the court to determine whether to instruct the jury on law applicable to private-figure or public-

[8] The United States Supreme Court has explained that deciding whether a particular topic is a matter of public controversy or concern, while important in the analysis of a defamation action, is of lesser import than determining a plaintiff's status. "Whatever their general validity, use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the Rosenbloom test which led us in Gertz to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff." Time, 424 U.S. at 454-56, 95 S. Ct. at 965-66, 47 L.Ed.2d at 164 (citing Rosenbloom v. Metromedia, 403 U.S. 29, 91 S. Ct. 1811, 29 L.Ed.2d 296 (1971)).

figure and public-official plaintiffs.[9] See Rosenblatt v. Baer, 383 U.S. 75, 87, 86 S.Ct. 669, 677, 15 L.Ed.2d 597, 606 (1966) (trial judge generally has duty of in first instance to determine whether allegedly libeled party is a public official); Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1551 (4th Cir. 1994) (question of whether defamation plaintiff is a limited-purpose public figure is an issue of law for the court); Mead Corp. v. Hicks, 448 So.2d 308, 310 (Ala. 1983) (stating same principle); Tracey A. Bateman, Who is "Public Figure" for Purposes of Defamation Action, 19 A.L.R.5th 1, 57 (1994) (stating same principle); *cf.* Sanders v. Prince, 304 S.C. 236, 403 S.E.2d 640 (1991) (directing trial judge to charge only constitutional actual malice principles in retrial of case involving public official, and forbidding charge on inapplicable principles of common law malice).

A. PUBLIC OFFICIAL

Neither the Supreme Court nor this Court has provided a precise or all-encompassing definition of "public official," although it is clear the category does not include all public employees. See Hutchinson, 443 U.S. at 119 n.8, 99 S.Ct. at 2680 n.8, 61 L.Ed.2d at 421 n.8. In general, a public official is a person who, among the hierarchy of government employees, has or appears to the public to have "substantial responsibility for or control over the conduct of governmental affairs." Holtzscheiter II, 332 S.C. at 520 n.4, 506 S.E.2d at 507 n.4 (Toal, J., concurring) (quoting Rosenblatt, 383 U.S. at 85, 86 S.Ct. at 676, 15 L.Ed.2d at 605). "In considering the question of whether one is a public official, the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id.* (quoting Rosenblatt) (internal quotes omitted). "The status of a public official may be deemed sufficient to warrant application of the

[9] The ruling could be made before trial pursuant to a pretrial motion when facts pertaining to a plaintiff's status are either stipulated or sufficiently known, or made during trial after pertinent facts are sufficiently established. An earlier ruling may better focus the attention of the court and parties on pertinent issues and evidence.

New York Times privilege, not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular context." McClain v. Arnold, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980) (holding that police officer wrongly identified in lawsuit as officer who falsely arrested plaintiff while working as agent of grocery store was a public official required to prove newspaper acted with actual malice); see also Miller v. City of West Columbia, 322 S.C. 224, 471 S.E.2d 683 (1996) (treating assistant police chief as public official for purposes of defamation action); Goodwin v. Kennedy, 347 S.C. 30, 43-45, 552 S.E.2d 319, 326-27 (Ct. App. 2001) (concluding assistant school principal was not public official under circumstances of case).

The parties have not cited, nor have we found, any authority directly addressing whether a private guardian ad litem in a family court case is a public official. Newspaper relies on Press, Inc. v. Verran, 569 S.W.2d 435 (Tenn. 1978), Villarreal v. Harte-Hanks Commun., Inc., 787 S.W.2d 131 (Tex. App. 1990), and Kahn v. Bower, 284 Cal. Rptr. 244 (Cal. App. 1 Dist. 1991). Those cases are distinguishable from the case *sub judice*. The plaintiffs in those cases were found to be public officials because they were employees of state social service agencies who had the authority to investigate allegations of child abuse, decide which version of events to believe, and take actions such as removing a child from a home. In contrast, Appellant is a guardian who investigates a case on behalf of the family court and makes recommendations when asked, but has no unilateral authority to resolve care or custody issues. See Patel v. Patel, 347 S.C. 281, 287, 555 S.E.2d 386, 389 (2001) ("GAL functions as a representative of the court, appointed to assist the court in making its determination of custody by advocating for the best interest of the children and providing the court with an objective view"; Court set forth base-line standards on duties and responsibilities of a GAL); Fleming v. Asbill, 326 S.C. 49, 53, 483 S.E.2d 751, 753-54 (1997) (private guardian ad litem is not an agent or employee of the State, but functions as a representative of the court to assist the court in properly protecting the interests of an incompetent person; guardian does not create or resolve legal relationships between the court and third parties); S.C. Code Ann. §§ 20-7-1545 to -1557 (Supp. 2005) (South Carolina Private

Guardian Ad Litem Reform Act, enacted in 2002 and establishing duties and responsibilities of guardian).

Newspaper further urges us to find Appellant is a public official because a private guardian ad litem generally enjoys immunity from lawsuits. See Fleming, 326 S.C. at 54-58, 483 S.E.2d at 754-56 (private persons appointed as guardians ad litem in private custody proceedings are afforded absolute quasi-judicial immunity for acts performed within scope of their appointment). Newspaper argues that a private guardian should be deemed a public official because, given that a person affected by the guardian's allegedly offensive or wrongful statements or actions likely is prohibited from suing the guardian, then the wronged person is left without a remedy. He will not only be unable to sue but also forced to stand silent, prevented from criticizing or opposing the guardian for fear of prompting a defamation suit brought by a guardian who enjoys the less rigorous standard of proof afforded private-figure plaintiffs.

Immunity to suit is an appropriate factor to consider in analyzing whether a particular individual is a public official for purposes of a defamation action, and immunity may lend support to reaching such a conclusion in an appropriate case. However, no one factor is dispositive in the analysis and Newspaper's argument is not persuasive in the present case. It is not necessary to take the unwarranted step of designating a private guardian ad litem as a public official to enable litigants or persons who believe they have been wronged sufficient latitude to criticize or oppose the guardian's statements or conclusions. The law of defamation does not prevent a person from expressing and publishing truthful or non-defamatory statements – including pointed criticisms – of a guardian's actions in a particular case, regardless of whether the guardian is designated a public official, public figure, or private figure. Furthermore, as we explained in Fleming, other safeguards exist to control a wayward guardian. Such safeguards include the fact a guardian is not immune from suit for actions beyond the scope of her duty; the fact an opponent may cross-examine the guardian and supporting witnesses at a deposition and at trial, as well as present his own evidence in opposition; and the review and oversight powers

which both trial and appellate courts wield over a guardian. Fleming, 326 S.C. at 56-57, 483 S.E.2d at 755-56.

Accordingly, we conclude Appellant, a private guardian ad litem who represented children in a divorce and child custody dispute, is not a public official. Appellant is not a government employee, much less an official who has or would appear to the public to have substantial responsibility for or control over the conduct of government affairs. The position of a private guardian ad litem is not one which invites public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

B. PUBLIC FIGURE

The United States Supreme Court generally has defined a public figure as follows: "For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." Gertz, 418 U.S. at 345, 94 S.Ct. at 3009, 41 L.Ed.2d at 808 (an attorney was not a public figure even though he voluntarily exposed himself in a case certain to receive extensive media exposure); Time, 424 U.S. 448, 452-55, 95 S.Ct. at 964-66, 47 L.Ed.2d at 161-63 (New York Times actual malice standard did not apply to wife of wealthy industrialist allegedly defamed by media defendant in high-profile divorce case because she was not a public figure); George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001) (plaintiff candidate's engineering firm was a limited public figure under Gertz test in defamation action arising from statements made during political campaign); Holtzscheiter II, 332 S.C. at 523 n.8, 506 S.E.2d at 508 n.8 (1998) (Toal, J., concurring and discussing Gertz)

A limited public figure, the type more commonly found, is an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of

issues. In either case such persons assume special prominence in the resolution of public questions." Gertz, 418 U.S. at 351, 94 S.Ct. at 3013, 41 L.Ed.2d at 812. In determining whether a claimant is a private or public figure, the court must focus on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Gertz, 418 U.S. at 352, 94 S.Ct. at 3013, 41 L.Ed.2d at 812; Wolston v. Reader's Digest Assn., Inc., 443 U.S. 157, 167, 99 S.Ct. 2701, 2707, 61 L.Ed.2d 450, 460 (1979); Parker v. Evening Post Pub. Co., 317 S.C. 236, 243 n.3, 452 S.E.2d 640, 644 n.3 (Ct. App. 1994) (automobile dealer invited public's attention through extensive media advertising and, as to statements regarding his dealership, was a public figure).

The United States Supreme Court identified a third category of involuntary public figures who become public figures through no purposeful action of their own. However, "the instances of truly involuntary public figures must be exceedingly rare." Gertz, 418 U.S. at 345, 94 S.Ct. at 3009, 41 L.Ed.2d at 808.

All three types of public figures, just as public officials, must meet the New York Times standard of actual malice in order to recover damages for defamation. Public figures and public officials are entitled to less protection from defamation than private figures because they enjoy greater media access and are less vulnerable to injury from defamatory statements due to their ability to publicly rebut such statements. Furthermore, both public figures and public officials are less deserving of protection because they have voluntarily exposed themselves to the increased risk of defamation. Foretich, 37 F.3d at 1552 (discussing Gertz).

The court must focus on facts and circumstances relating to the claimant's status at the time the issue of public concern or controversy arose. "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." Wolston, 443 U.S. at 167, 99 S.Ct. at 2707, 61 L.Ed.2d at 460. "[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." Hutchinson, 443 U.S. at 134-135, 99 S.Ct. at 2687-88, 61 L.Ed.2d at 430-32 (focusing on whether

plaintiff research professor was a public figure prior to controversy engendered by senator's awarding of "Golden Fleece" to claimant's research project). A defendant may not transform a private figure into a limited public figure by dragging an unwilling participant into the spotlight of a public controversy through the defendant's own words or actions. Wolston, 443 U.S. at 166, 443 U.S. 157, 167, 99 S.Ct. at 2706-07, 61 L.Ed.2d at 459-60 (claimant, by refusing to comply with grand jury subpoena in espionage case, did not voluntarily thrust himself into the public controversy; "It would be more accurate to say that petitioner was dragged unwillingly into the controversy."). These principles do not, of course, mean a private figure may never become a limited public figure; such a transformation may occur by virtue of a private figure's own actions or words during the course of a public controversy.

Appellant does not fall into the first category of public figure. Appellant did not occupy a position of such persuasive power and influence that she is a public figure for all purposes. It is equally obvious that hers is not one of the exceedingly rare cases in which Appellant somehow became an involuntary public figure through no purposeful action of her own.

We agree with the analysis set forth by the Fourth Circuit in Foretich, 37 F.3d 1541, to determine whether Appellant is a limited public figure which, as we previously noted, is a matter of law for the court to decide before submitting a case to a jury. In order for the court to properly hold that a plaintiff is a public figure for the limited purpose of comment on a particular public controversy, the defendant must show: (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation. Foretich, 37 F.3d at 1553.

In the present case, Appellant had no more access to channels of effective communication, such as the media, than any ordinary, private person. Appellant did not voluntarily assume a role of special prominence in

the controversy over reforming the guardian system, and she did not seek to influence the outcome of that controversy. In fact, the record shows Appellant tried to avoid the spotlight and the controversy. The private letters Appellant wrote to the Governor's Office were intended to correct misinformation about her alleged lack of education and training, and to express concern over false accusations made by people upset about particular family court cases. The public meetings which Appellant's friends secretly tape-recorded for her do not constitute attempts to thrust herself into the controversy. Appellant simply was trying to learn what admittedly angry participants in a divorce and custody dispute were saying about her. The public controversy regarding the guardian system existed before Newspaper published the article. But neither the person who made the statements (Pat Beal) nor the publisher (Newspaper) may, by their own words and actions, transform Appellant into a limited public figure by dragging her unwillingly into the controversy over reform of the guardian system.

The trial judge erred in ruling Appellant is a limited public figure. Appellant, under the facts and circumstances of this case, is a private-figure plaintiff as a matter of law. As such, she is entitled to recover under the common law defamation principles set forth above.

Statements regarding Appellant's lack of investigation and manipulation of a judge were in the form of libel *per se* and were actionable *per se*; the statements regarding Appellant's attempts to prevent the mother from getting full custody and blocking the grandmother's visitation rights constituted libel *per quod* and also were actionable *per se*. The statements were published by a media defendant on an issue of public controversy or concern, *i.e.*, reforms purportedly needed in the private guardian ad litem system. Consequently, even though she is a private figure, Appellant may not benefit from any of the common law presumptions. Appellant is required to plead and prove common law malice, demonstrate the falsity of the statements, and show actual injury in the form of general or special damages. Appellant bears the burden of proving her case by a preponderance of the evidence.

In this case, the judge charged the jury that a private-figure plaintiff must prove by a preponderance of the evidence that Newspaper acted *negligently* in publishing a false and defamatory statement. No party objected to this charge and it was, in fact, the charge the parties requested and desired. Chief Justice Toal in Holtzscheiter II suggested we join the majority of jurisdictions which have adopted a negligence standard for private-figure plaintiffs. Holtzscheiter II, 332 S.C. at 523, 506 S.E.2d at 508-9.[10] However, the plurality of the Court in Holtzscheiter II chose to retain common law malice and accompanying presumptions in private-figure actions. We do not revisit the issue in this case because no party objected to use of the negligence standard; therefore, it is the law of the case. See Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (unappealed ruling, right or wrong, is the law of the case and requires affirmance); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970) (same). Moreover, a party may not complain on appeal of error or object to a trial procedure which his own conduct has induced. *E.g.* Shearer v. DeShon, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962); Floyd v. Thornton, 220 S.C. 414, 425-26, 68 S.E.2d 334, 339 (1951).

Accordingly, we reverse the trial judge's grant of a directed verdict to Newspaper on the issues of Appellant's status and liability for defamation. We conclude as a matter of law Appellant, under the facts and circumstances of this case, is a private-figure plaintiff. Appellant, as shown by the special verdict form, proved by a preponderance of the evidence that the statements were false and defamatory. The jury found Newspaper liable for defamation pursuant to instructions which were grounded in negligence

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[10] This Court upheld a jury verdict in favor of a private-figure plaintiff against a media defendant that apparently was grounded in negligence, although the issue was not addressed. Jones v. Sun Publishing Co., 278 S.C. 12, 292 S.E.2d 23 (1982). We have found no other South Carolina authority addressing the issue of using a negligence standard in private-figure defamation cases.

and which were agreed upon by the parties. Therefore, Appellant is entitled upon remand to seek actual damages, *i.e.*, general and special damages.

II. CONSTITUTIONAL ACTUAL MALICE

The jury in its special verdict form determined Appellant had proven by clear and convincing evidence Newspaper acted with constitutional actual malice, *i.e.*, Newspaper published the statement with knowledge it was false or with reckless disregard of whether it was false or not. This finding is relevant in Appellant's case because, as a private figure, she is entitled to recover punitive damages from a media defendant only if she proves actual malice. See Gertz, 418 U.S. at 346-50, 94 S.Ct. at 3010-12, 41 L.Ed.2d at 809-11; Holtzscheiter II, 332 S.C. at 512, 506 S.E.2d at 503. Newspaper argues the record does not support a finding of actual malice. We disagree.

Whether evidence is sufficient to support a jury's finding of constitutional actual malice in a defamation action is a question of law. The trial court must make such a determination before submitting the issue to a jury. When the jury makes such a finding, the appellate court must independently examine the record to determine whether the evidence sufficiently supports a finding of actual malice. Elder v. Gaffney Ledger, 341 S.C. 108, 113, 533 S.E.2d 899, 901-02 (2000) (citing Harte-Hanks Commun., Inc. v. Connaughton, 491 U.S. 657, 685-86, 109 S.Ct. 2678, 2694-95, 105 L.Ed.2d 562, 587 (1989). This review is necessary due to the "unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." Harte-Hanks Commun., 491 U.S. at 686, 109 S.Ct. at 2695, 105 L.Ed.2d at 587; accord George v. Fabri, 345 S.C. 440, 456-57, 548 S.E.2d 868, 876 (2001).

As we explained in Elder,

> Actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements. The

> constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. There must be evidence the defendant had a high degree of awareness of . . . probable falsity.
>
> Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. Actual malice may be present, however, where one fails to investigate and there are obvious reasons to doubt the veracity of the informant.

Elder, 341 S.C. at 114, 533 S.E.2d at 902 (citations, quotes, and emphasis omitted). "A subjective awareness of probable falsity can be shown if there are obvious reasons to doubt the veracity of the informant or accuracy of his report." Anderson v. Augusta Chronicle, 365 S.C. 589, 596, 619 S.E.2d 428, 432 (2005) (citing Harte-Hanks Commun., 491 U.S. at 688, 109 S.Ct. at 2696, 105 L.Ed.2d at 589). "The right of a free press is not absolute in a society that demands social responsibility and personal integrity. . . . In the interests of justice, we will not allow a publication to go so unchecked as to promote the tyrannical imposition of false and misleading information – the very concern our forefathers sought to eliminate in demanding the press be free." Anderson, 365 S.C. at 599-600, 619 S.E.2d at 433 (Burnett, J., concurring).

In the present case, Newspaper published allegations in a front-page story about a private figure which, on their face, appear potentially devastating to the reputation of a private guardian ad litem. Evidence supporting the jury's finding of actual malice includes (1) the fact that the portion of the article pertaining to Appellant was based solely on a fifteen- to thirty-minute telephone conversation with Pat Beal, an admittedly "incensed" person; (2) the fact Newspaper purportedly failed to even try to contact

Appellant to discuss the matter with her; (3) the fact Newspaper failed to contact attorneys or others involved in the Litchfield case; and (4) the fact Newspaper failed to even try to obtain the publicly recorded divorce decree in the Litchfield case, a reading of which would have called into question or refuted Pat Beal's allegations. This evidence does not indicate merely a failure to investigate which, standing alone, would be insufficient to uphold a finding of actual malice. This evidence constitutes a failure to investigate before publishing an article when there were obvious reasons to doubt the veracity of Pat Beal or the accuracy of her report. Thus, the evidence indicates Newspaper's subjective awareness of probable falsity of the report and is sufficient to support the jury's finding of actual malice. Accordingly, we affirm the jury's finding of actual malice and remand this case for a jury to consider the issue of punitive damages.

III. NEWSPAPER'S WAIVER OF OBJECTION TO BIFURCATION

A jury has not yet determined whether Appellant is owed any money damages in this matter. In reversing the trial judge's grant of a directed verdict to Newspaper on the issues of Appellant's status and liability, and remanding for a jury to determine whether to award damages, we must necessarily address whether the jury's verdict on liability must stand or whether this case should be remanded for a new trial absolute.

Appellant asserts the trial judge plainly bifurcated the case on liability and damages. After doing so, the judge was without authority to subsequently reopen the liability issue or disturb the jury's verdict on liability by treating it as a response to "advisory interrogatories" which could be ignored in reaching a new verdict addressing both liability and damages. Newspaper made a "calculated tactical decision" in declining to present a defense during the liability phase. Appellant argues Newspaper acquiesced to the procedure followed because Newspaper anticipated tired jurors would quickly return a defense verdict.[11]

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[11] Appellant needlessly muddles this issue by stating the jury was "discharged," which caused the circuit court to lose subject matter

continued . . .

Newspaper, at trial, in its brief, and at oral argument before us freely admitted it fully expected the judge to rule in Newspaper's favor on the directed verdict motion regardless of any verdict returned by the jury. In its brief, Newspaper states it "consented to the procedure advocated by the trial judge because there was more than enough evidence in the record at the time to ensure a directed verdict. By sending the jury out to deliberate, counsel assumed, incorrectly, that the trial judge did not want [jurors] to spend a week of their lives in the jury box for nothing. The belief that the trial judge would not send a jury out to deliberate before hearing all the evidence led the [Newspaper's] attorney to assume he would not be offering a defense to a deliberating jury. A granting of [Newspaper's] motion for directed verdict was thus perfunctory." (Emphasis in original.) Newspaper asserts the procedure followed, while unusual, was acceptable and "[t]here was no harm suffered by Appellant due to the procedure."

The resolution of factual issues may be submitted to an advisory jury in a case arising in equity. See Momeier v. McAlister, Inc., 190 S.C. 529, 538-39, 3 S.E.2d 606, 610 (1939) (judge in equity case has the right and power to refer issues to a jury for the enlightenment of his conscience and is not bound to accept jury's findings or verdict); First State Sav. and Loan Assn. v. Nodine, 291 S.C. 445, 448, 354 S.E.2d 51, 52-53 (Ct. App. 1987) (same); Neal v. Darby, 282 S.C. 277, 283, 318 S.E.2d 18, 22 (Ct. App. 1984) (same); Rule 39(c), SCRCP (providing for advisory jury in all actions not triable of right by a jury); Rule 52(a), SCRCP (requiring court to state findings of fact and conclusions of law in case tried with advisory jury).

The instant case in which Appellant seeks money damages for defamation arises in law, not in equity. See Cooper v. Poston, 326 S.C. 46, 483 S.E.2d 750 (1997) (parties in legal action for recovery of money

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jurisdiction. The jury was not discharged Friday evening. It was sent home for the weekend and told to return Monday. There is no issue of subject matter jurisdiction.

damages are constitutionally entitled to a jury trial). It is improper in a law case to submit factual issues to a jury in the form of non-binding "advisory interrogatories." A jury's resolution of factual issues in a law case is binding on trial and appellate courts. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). Moreover, it is improper in any case – arising in either law or equity – to ask jurors to resolve factual issues and then, after hearing additional evidence, reconsider the same issues and render another verdict. In this case, the deliberations and decision of the jury would have been irrevocably tainted if, after it had discussed the case and rendered a verdict in favor of Appellant on the issue of liability, it was asked to ignore the earlier verdict and reconsider the issue of liability. Therefore, the trial judge erred to the extent he attempted, at Newspaper's insistence, to transform the jury's verdict on liability into "advisory interrogatories" which could be reconsidered in a subsequent verdict addressing both liability and damages. We do not condone this unusual trial procedure.

The trial judge plainly bifurcated the case on liability and damages with the consent of both parties. That is the procedure the parties discussed and the ruling the judge made, as shown by facts discussed above. The parties participated in the preparation of a special verdict form on liability, made closing arguments on liability, the judge instructed the jury and stated it was to consider only the liability issue and not damages, and the issues of liability were presented to the jury in the special verdict form. Contrary to Newspaper's argument, the record contains no indication the trial judge initially submitted the case to jurors simply to allow them to participate fruitlessly in the trial process because they had spent more than a week listening to testimony and evidence.

Further, Newspaper chose, whether for tactical or other reasons, to acquiesce to bifurcation and not present a defense during the liability phase. Newspaper waived any objection it may have to bifurcation of the case, as well as its decision not to present evidence during the liability phase. See *e.g.* Charleston Lumber Co., 338 S.C. at 175, 525 S.E.2d at 871 (unappealed ruling, right or wrong, is the law of the case and requires affirmance). It would be patently inappropriate and unfair to Appellant, as well as a violation of well-established preservation of error principles and

notions of judicial economy, to give Newspaper a second chance under these circumstances to present its evidence regarding liability to a different jury in a new trial absolute. See *e.g.* I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (preservation of error rules "prevent[] a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case"); Shearer, 240 S.C. at 484, 126 S.E.2d at 520 (party may not complain on appeal of error or object to trial procedure which his own conduct has induced).

In sum, we conclude the case was bifurcated on liability and damages, and Newspaper waived any objection it may have to bifurcation and its decision not to present evidence during the liability phase. Therefore, we reinstate the jury's liability verdict and remand this case for a jury to consider the issues of actual and punitive damages.

IV. REMAINING ISSUES

First, Appellant contends the circuit court erred in granting summary judgment to Newspaper on her cause of action for invasion of privacy pursuant to Rule 12(b)(6), SCRCP. We affirm the dismissal of that action because we find it unnecessary to address it given our disposition of other issues raised in this appeal. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive); Rule 220(c), SCACR (appellate court may affirm for any reason appearing in the record).

In doing so, however, we do not intend to unwittingly limit evidence Appellant may present about her damages. The types of damages awarded in defamation and invasion of privacy actions often overlap. Viewed in general terms and not necessarily in the context of this case, a person may suffer emotional distress for two simultaneous reasons – the ruining of his reputation by a libelous statement and the wrongful publicizing of a private matter. See Snakenberg v. Hartford Cas. Ins. Co., 299 S.C. 164, 170-71, 383 S.E.2d 2, 5-6 (Ct. App. 1989) (identifying three causes of action which may arise under rubric of invasion of privacy: wrongful appropriation

of personality, wrongful publicizing of private affairs, and wrongful intrusion into private affairs); Brown v. Pearson, 326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct. App. 1997) (noting no South Carolina case has recognized a "false light" invasion of privacy claim). Similarly, a private figure who is defamed may feel that the veil of relative privacy most people enjoy has been shredded, wrongfully and unfairly exposing his actions, work, or life to the world. A private figure such as Appellant who proves she has been defamed is not barred from asserting damages rooted in the loss of her privacy simply because they are raised in a defamation action and not in an invasion of privacy action.

Second, Appellant contends the circuit court erred in granting summary judgment to Newspaper on her cause of action for negligence pursuant to Rule 12(b)(6), SCRCP. We affirm the ruling of the circuit court. A claim that a statement constitutes libel or slander must be brought in a defamation cause of action, which is grounded in and affected by both common and constitutional law. Again, in affirming the dismissal of the negligence action, we do not intend to limit evidence Appellant may present about her damages. This defamation case was brought, argued, charged, and resolved in part on a negligence theory; therefore, the types of damages generally available to a plaintiff who proves negligence are available to Appellant.

Third, Appellant contends the trial judge erred in granting a partial directed verdict on her allegation that the article may be read to say that Appellant was the guardian who had an illicit relationship with the father of the child she had been appointed to represent, a child who allegedly had been sexually molested by the father. Appellant asserts a reader may reasonably link the promotional teaser in the table of contents and introductory paragraph – both of which mentioned a guardian who had slept with a represented child's father – to Appellant. Appellant further notes two lawyers testified they understood the article to state she had slept with a represented child's father. We disagree with Appellant and affirm this ruling of the trial judge.

"[T]he intent and meaning of an alleged defamatory statement must be gathered not only from the words singled out as libelous, but from the context; all of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have." Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 582, 556 S.E.2d 732, 738 (Ct. App. 2001) (quoting Jones v. Garner, 250 S.C. 479, 485, 158 S.E.2d 909, 912 (1968)).

The article states one guardian had been accused of sleeping with the father of a child she represented, and plainly identifies that guardian. We agree with the trial judge that a reading of the article as a whole would make clear to a reasonable reader the identity of the guardian linked to this allegation of wrongdoing. Consequently, Appellant may not recover damages for this statement because the trial judge properly ruled it did not refer to her and the jury's liability verdict was not based on it.

We affirm the trial judge's rulings on remaining issues raised by Appellant because it is unnecessary to address them given our disposition of this appeal. See Whiteside, 311 S.C. at 340, 428 S.E.2d at 889; Rule 220(c), SCACR.

CONCLUSION

We reverse the trial judge's grant of a directed verdict to Newspaper on the issues of Appellant's status and liability for defamation. Appellant, as a matter of law under the facts and circumstances of this case, is a private-figure plaintiff who demonstrated Newspaper was liable for defaming her pursuant to a jury charge agreed upon by both parties. The jury determined by a preponderance of the evidence that the published statements were false and defamatory, and that Newspaper acted negligently in defaming Appellant as a private figure. These factual findings are supported by evidence in the record and will not be disturbed on appeal. The jury further determined Appellant had proven by clear and convincing evidence Newspaper acted with constitutional actual malice in publishing the statements. Our independent examination of the record reveals evidence which sufficiently supports the jury's finding of actual malice.

The case was bifurcated on liability and damages with the consent of both parties. Newspaper waived any objection it may have to bifurcation. Therefore, we reinstate the jury's verdict holding Newspaper liable for the defamatory statements. We remand this case for a jury to consider the issues of actual and punitive damages to Appellant. The trial judge's rulings on remaining issues raised by Appellant are affirmed.

AFFIRMED IN PART; REVERSED IN PART.

TOAL, C.J., MOORE, J., and Acting Justice Clyde N. Davis, Jr., concur. PLEICONES, J., concurring in part, dissenting in part in a separate opinion.

JUSTICE PLEICONES: I concur in part and dissent in part. I agree with the majority opinion that Appellant was a private figure and that the directed verdict on the defamation action should be reversed.[1] I respectfully dissent from the majority opinion's decision to "reinstate the jury's verdict holding Newspaper liable for defamatory statements." In my opinion, there is no jury verdict to reinstate, and I would therefore remand the case for a new trial on liability and damages.

As the majority observes, "the record contains no indication the trial judge initially submitted the case to jurors" for the purpose of rendering an advisory verdict. Further, the majority opinion correctly observes that Newspaper did not object to the trial judge's submission of the case to the jury despite Newspaper's having not yet presented a defense on liability. Because of this failure, Newspaper would ordinarily be bound by the jury's factual determinations. Appellant herself, however, never objected to the trial court's subsequent ruling that the jury's factual determinations were merely advisory. The court and the parties proceeded under the ruling that the jury had not yet delivered a verdict on liability, and the court directed a verdict in favor of Newspaper before the case was properly submitted to the jury. Finding no jury verdict to "reinstate," and finding the direction of a verdict improper, I would remand the case for a new trial on liability and damages

[1] I agree with the majority opinion that the partial directed verdict regarding the language in the article about a guardian's relationship with a man should be affirmed. I additionally agree with all other holdings in section IV of the majority opinion.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony Law, Vondeste G. Mole, Mark Holmes, Arthur A. Vaughan, Harry Jenkins, and Kenneth Green, Appellants,

v.

South Carolina Department of Corrections, Respondent.

Appeal From Allendale County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 26134
Heard January 18, 2006 – Filed April 10, 2006

AFFIRMED AS MODIFIED

Charles E. Johnson, of Columbia, for Appellants.

Marvin C. Jones and R. Clenten Campbell, both of Bogoslow, Jones, Stephens & Duffie, PA, of Walterboro, for Respondent.

JUSTICE BURNETT: Anthony Law, Vondeste Mole, Mark Holmes, Arthur Vaughan, Harry Jenkins, and Kenneth Green (Appellants) appeal the trial court's grant of summary judgment for South Carolina

Department of Corrections (Respondent) on their malicious prosecution claims, the trial court's grant of directed verdict for Respondent on their wrongful termination claims, and the trial court's grant of judgment notwithstanding the verdict (JNOV) for Respondent on their false imprisonment claims. We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

In early 1999, Willie Harrison, an inmate at the Allendale Correctional Institution (Institution), contacted Geraldine Miro, the Institution's warden. Harrison alleged Appellants, who were correctional officers at Institution, were trafficking drugs into and within the Institution. He further alleged Appellants gave him drugs to sell to other inmates and he, in return, gave them money from those drug transactions. Harrison also claimed Appellants would shake him down to collect the monetary proceeds from the drug sales. Miro contacted Al Waters, Director of Internal Affairs for Respondent, who set up an internal investigation and assigned Investigators Melissa Nettles and Joseph Baker to the case.

As part of the internal investigation, Nettles contacted the Greenville County Sheriff's Department to verify Harrison's credibility, and they advised her that Harrison had provided them with reliable information on prior occasions. Nettles and Baker interviewed at least four inmates prior to March 25, 1999, who corroborated Harrison's allegations. At trial, Nettles gave the following examples of information corroborated prior to March 25: inmate Larry David asserted Holmes was his drug supplier; inmate Eckerin Frazier said he received marijuana from Holmes and had paid Holmes over $4,700 from June 1998 to January 1999; Frazier also claimed Law, Holmes, Jenkins, and Green worked together to sell drugs in the Institution; and inmate Terry Fuller said he observed Law and Holmes give drugs to Harrison.

Nettles and Baker interviewed at least thirty-eight inmates at the Institution from March 15, 1999 to April 20, 1999, with at least twenty inmates corroborating Harrison's allegations. Nettles and Baker also searched bank records for Mole and Vaughan which showed large cash

deposits and wire transfers during the latter part of 1998 and the early part of 1999.

Nettles testified Harrison told her that Vaughan had purchased a mobile home with the money received from Harrison through the drug deals. Harrison gave Nettles a specific description of the mobile home, including where Vaughan purchased it and the purchase price. Nettles confirmed these two details. Harrison also picked Vaughan's mobile home from a photo lineup.

Waters testified the senior staff met and decided Nettles and Baker would apply for arrest warrants for Appellants. Nettles testified she assisted in preparing the affidavits and she and Baker gave sworn, oral testimony to support the warrants. She told the magistrate that Harrison's allegations had been corroborated and gave the magistrate the same kind of examples of corroboration that she gave during trial.

On March 25, 1999, Law, Mole, Holmes, Jenkins, and Vaughan were charged with conspiracy to traffic cocaine greater than 100 grams. Law, Holmes, Jenkins, and Vaughan were arrested while at work and were held at the Institution from approximately 6:30 p.m. on March 25 until 2:00 a.m. on March 26, at which time they were transported to the county jail. Mole was also arrested by the Dorchester County Police Department on March 25 while traveling through Dorchester County.

Upon arrest, Holmes admitted he had received $200 from Harrison in exchange for one ounce of marijuana but denied giving Harrison the marijuana. Upon arrest, Law admitted receiving money from Harrison and accused Holmes, Vaughan, Jenkins, and Green of running a drug ring within the Institution. On March 26, 1999, Law and Holmes were charged with misprision of a felony, common law, and acceptance of rebates or extra compensation, and Mole was charged with misprision of a felony, common law.

Green was arrested at work on April 15, 1999 and detained for approximately six to seven hours. He was charged with conspiracy to traffic crack cocaine, greater than 10 grams but less than 28 grams.

Based on the charges and the ongoing investigation, Respondent administratively suspended Appellants effective on the date of their arrests. A review meeting before the warden was scheduled for each Appellant. Respondent sent letters of termination to several Appellants but later rescinded the terminations.

Jenkins and Law voluntarily resigned on March 29, 1999; Green and Holmes voluntarily resigned on April 30, 1999, and May 21, 1999, respectively. None of the Appellants who voluntarily resigned filed a grievance with Respondent, but Green did request a review hearing. Mole was terminated on May 7, 1999, and Vaughan was terminated on May 20, 1999. After his termination, Mole filed a grievance report with Respondent and an investigative review was conducted by Respondent's General Counsel's Office. The Deputy Director of Operations upheld Mole's termination and the Director of Respondent subsequently upheld the termination. Also after his termination, Vaughan filed a grievance.

The indictments against Appellants were *nolle prossed* because "[t]he arresting agency has chosen to pursue these charges in federal court." Nettles and Baker testified after making the arrests they consulted with Solicitor Randolph Murdaugh, who decided to turn the cases over to the Federal Bureau of Investigation (FBI). Nettles and Baker continued to help the FBI with the investigation until the end of their employment with Respondent.

After filing verified claims with Respondent, Appellants individually sued Respondent on February 21, 2001. Each Appellant sued under the South Carolina Tort Claims Act[1] for: (1) civil conspiracy, (2) defamation, (3) false imprisonment, (4) malicious prosecution, and (5) wrongful discharge. Respondent simultaneously filed motions to dismiss and Answers on April 16, 2001.

[1] S.C. Code Ann. §§ 15-78-10 to -200 (2005).

Appellants' cases were consolidated for trial. Prior to trial, Appellants' causes of actions for defamation and civil conspiracy were dismissed by Appellants' consent. Respondent also moved for summary judgment on all causes of action. The trial judge granted summary judgment on the malicious prosecution claims only.

At the close of Appellants' cases, the trial judge granted a directed verdict for Respondent on the wrongful termination claims. The jury returned a verdict for Appellants on their false imprisonment claims, awarding $25,000 to each Appellant. The trial judge granted Respondent's motion for JNOV. This appeal follows, and this Court certified the case for review from the Court of Appeals, pursuant to Rule 204(b), SCACR.

ISSUES

I. Did the trial court err in granting Respondent's motion for summary judgment on the malicious prosecution claims?

II. Did the trial court err in granting Respondent's motion for directed verdict on the wrongful termination claims?

III. Did the trial court err in granting Respondent's motion for judgment notwithstanding the verdict on the false imprisonment claims?

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.

Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002); Conner v. City of Forest Acres, 348 S.C. 454, 462, 560 S.E.2d 606, 610 (2002).

In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law. Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

LAW/ANALYSIS

I. Summary Judgment on Malicious Prosecution

Appellants argue the trial court erred in granting Respondent's motion for summary judgment on the malicious prosecution claims.[2] We disagree.

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (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 damage." Parrott v. Plowden Motor Co., 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965); Eaves v. Broad River Elec. Co-op., Inc., 277 S.C. 475, 477, 289 S.E.2d 414, 415 (1982). An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of

[2] In support of its motion, Respondent presented the following evidence: affidavits of Nettles, Miro, Elizabeth Stewart, Robin Gracien, and Magistrate Walter Griffin; deposition of Baker; and several internal policies of Respondent. Appellants did not file additional evidence.

the evidence, including malice and lack of probable cause. Parrott, 246 S.C. at 322, 143 S.E.2d at 609.

Respondent admitted to the institution of original judicial proceedings by its instance, elements 1 and 2, but contends Appellants did not prove the remaining elements of malicious prosecution.

Appellants contend the trial judged erred in finding the original proceedings had not been sufficiently terminated in their favor. Appellants argue that the criminal proceedings were terminated in their favor because the charges were *nolle prossed*, Respondent has not commenced a federal action, lapse of time, and lack of tangible evidence of the alleged crimes.

First, Appellants failed to establish a favorable determination of their prior criminal charges. In McKenney v. Jack Eckerd Co., 304 S.C. 21, 22, 402 S.E.2d 887, 888 (1991), the Court held "where an accused establishes that charges were *nolle prossed* for reasons which imply or are consistent with innocence, an action for malicious prosecution may be maintained." On the underlying charges in the present cases, the reason stated for the *nolle prosse* was that the arresting agency had chosen to pursue the charges in federal court. This reasoning does not imply and is not consistent with Appellants' innocence.

Second, an essential element of malicious prosecution is the institution of judicial proceedings without probable cause against the plaintiff. Kinton v. Mobile Home Indus., Inc., 274 S.C. 179, 262 S.E.2d 727 (1980). The burden is on the plaintiff to show that the prosecuting person or entity lacked probable cause to pursue a criminal or civil action against him. Parrott, 246 S.C. at 322, 143 S.E.2d at 609. Probable cause means "the extent of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor that the person charged was guilty of a crime for which he has been charged, and only those facts and circumstances which were or should have been known to the prosecutor at the time he instituted the prosecution should be considered." *Id.* In determining the existence of probable cause, the facts must be "regarded from the point of view of the party prosecuting; the

question is not what the actual facts were, but what he honestly believed them to be." Eaves, 277 S.C. at 478, 289 S.E.2d at 415-16 (citing 54 C.J.S. *Malicious Prosecution* § 20, p. 977). South Carolina has long embraced the rule that a true bill of indictment is prima facie evidence of probable cause in an action for malicious prosecution. Kinton, 274 S.C. at 182, 262 S.E.2d at 728. Although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion. Parrott, 246 S.C. at 323, 143 S.E.2d at 609.

Appellants were indicted by the Allendale County Grand Jury in September 1999. Prior to the arrests on March 25, 1999, Nettles and Baker interviewed Harrison at least three times and interviewed several other inmates who corroborated Harrison's allegations. Nettles and Baker also searched bank records of Mole and Vaughan which revealed numerous, large cash deposits and wire transfers during the months prior to the investigation. Viewing the record in the light most favorable to Appellants, Appellants failed to establish a lack of probable cause because the indictments are prima facie evidence of probable cause and because the facts support a finding that Respondent had probable cause to pursue criminal charges.

Third, Appellants did not establish Respondent's malice in instituting the original proceedings. Malice is defined as "the deliberate intentional doing of an act without just cause or excuse." Eaves, 277 S.C. at 479, 289 S.E.2d at 416. Malice does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition, although such an attitude certainly may indicate malice. Malice also may proceed from an ill-regulated mind which is not sufficiently cautious before causing injury to another person. Moreover, malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person. Malice also may be implied in the doing of an illegal act for one's own gratification or purpose without regard to the rights of others or the injury which may be inflicted on another person. In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution. Margolis v. Telech, 239 S.C. 232, 122 S.E.2d 417, 420 (1961).

The record reveals Respondent conducted an internal investigation based upon an inmate's allegations that Appellants were trafficking drugs in the Institution. The two primary investigators interviewed Harrison and at least four other inmates prior to the arrests and interviewed no less than 38 inmates at the Institution during the entire investigation. Before completing the investigation, Nettles and Baker discussed the evidence with Waters who thought that arrests should be made based on historical conspiracy. The institution of the original proceedings against Appellants was the result of a thorough investigation, and Appellants failed to establish malice.

We conclude the trial judge properly granted summary judgment for Respondent because Appellants failed to establish termination of the original proceedings in their favor, lack of probable cause, and malice, all elements of malicious prosecution.

II. Directed Verdict on Wrongful Termination

Appellants argue the trial court erred in ruling they had failed to exhaust their administrative remedies and in granting a directed verdict for Respondent on their wrongful termination claims. We disagree.

The general rule is that administrative remedies must be exhausted absent circumstances excusing application of the general rule. Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 442 S.E.2d 582 (1994); Andrews Bearing Corp. v. Brady, 261 S.C. 533, 201 S.E.2d 241 (1973). "A general exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that a pursuit of them would be a vain or futile act." Moore v. Sumter County Council, 300 S.C. 270, 273-74, 387 S.E.2d 455, 458 (1990) (citing 82 Am.Jur.2d *Zoning and Planning* § 332 at 903 (1976)). Futility, however, must be demonstrated by a showing comparable to the administrative agency taking "a hard and fast position that makes an adverse ruling a certainty." Thetford Properties IV Ltd. P'ship v. U.S. Dep't of Hous. and Urban Dev., 907 F.2d 445, 450 (4th Cir. 1990).

The question of whether to require the plaintiff to exhaust administrative remedies is a matter within the sound discretion of the trial

judge. Andrews Bearing Corp., 261 S.C. at 536, 201 S.E.2d at 243. A matter within the sound discretion of the trial judge will not be disturbed on appeal absent an abuse of discretion. Tri County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). "An abuse of discretion occurs where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Id.*

Respondent, as a state agency, is governed by the State Employee Grievance Procedure Act, S.C. Code Ann. §§ 8-17-310 through 380 (1996 & Supp. 2005). Section 8-17-330 provides in pertinent part:

> Each agency shall establish an agency employee grievance procedure. . . .A covered employee who wishes to appeal the decision of the agency grievance procedure to the State Human Resources Director shall file an appeal within ten calendar days of receipt of the decision from the agency head or his designee or within fifty-five calendar days after the employee files the grievance with the agency, whichever occurs later. The covered employee or the employee's representative shall file the request in writing with the State Human Resources Director. Failure to file an appeal with the State Human Resources Director within ten calendar days of the agency's final decision or fifty-five calendar days from the initial grievance, whichever occurs later, constitutes a waiver of the right to appeal. . . . As used in this article, a covered employee may file a grievance or appeal concerning the following adverse employment actions: terminations, suspensions, involuntary reassignments, and demotions. . . .A covered employee has the right to appeal to the State Human Resources Director an adverse employment action involving the issues specified in this section after all administrative remedies to secure relief within the agency have been exhausted.

Appellants contend the trial court misinterpreted the State Employee Grievance Procedure Act as requiring an employee to appeal to the State Human Resources Director upon an adverse ruling by the agency

hearing the appeal. Appellants argue the statute uses permissive language regarding the appeal to the State Human Resources Director.

Appellants further argue the general rule of exhaustion of administrative remedies is inapplicable to them because they have demonstrated the pursuit of such remedies would have been vain or futile. Specifically, Appellant Mole's appeal was denied by the Director of Respondent; therefore his attempt was futile and because all Appellants were similarly situated, their attempts would have been futile.

Appellants' Law, Holmes, Jenkins, and Green voluntarily resigned. Therefore, we affirm the directed verdict for Respondent on their wrongful termination claims because they failed to state a cause of action.[3] See Troutman v. Facetglas, Inc., 281 S.C. 598, 316 S.E.2d 424 (Ct. App. 1984) (former employee who resigned under alleged threat to fire him did not state a cause of action for wrongful discharge).

Appellants' Mole and Vaughan were terminated because conspiracy to traffic crack cocaine violated Respondent's internal policy regarding employee behavior. Appellants had a grievable action under the State Employee Grievance Procedure Act which they voluntarily did not appeal.[4] Failure to file an appeal with the State Human Resources Director within the statutory time period constitutes a waiver of the right to appeal. See S.C. Code Ann. § 8-17-330. Furthermore, if Appellants were concerned of bias during the Respondent's appellate process because Respondent sought the charges, then an appeal to the State Human Resources Director, who was outside the agency, should have allayed any concerns of bias. The trial judge correctly determined their wrongful termination claims were foreclosed under

[3] This court may affirm the trial court based on any ground found in the record. Rule 220(c), SCACR; I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000).

[4] See S.C. Code Ann. §§ 8-17-320(7), -330 (defining "grievance" to include dismissal from employment).

the State Employee Grievance Procedure Act because they did not exhaust their administrative remedies.

III. JNOV on False Imprisonment

Appellants argue the trial judge erred in granting Respondent's motion for JNOV on the false imprisonment claims. We disagree.

The essence of the tort of false imprisonment consists of depriving a person of his liberty without lawful justification. Jones v. City of Columbia, 301 S.C. 62, 389 S.E.2d 662 (1990); Thomas v. Colonial Stores, Inc., 236 S.C. 95, 113 S.E.2d 337 (1960). To prevail on a claim for false imprisonment, the plaintiff must establish: (1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful. Gist v. Berkeley County Sheriff's Dep't, 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999); Jones by Robinson v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995); Caldwell v. K-Mart Corp., 306 S.C. 27, 410 S.E.2d 21 (Ct. App. 1991); see also Jones, 301 S.C. at 64, 389 S.E.2d at 663 (an action for false imprisonment cannot be maintained where one is arrested by lawful authority).

The fundamental issue in determining the lawfulness of an arrest is whether there was probable cause to make the arrest. Gist, 336 S.C. at 615, 521 S.E.2d at 165. Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise. Jones v. City of Columbia, 301 S.C. at 65, 389 S.E.2d at 663. Although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion. Parrott, 246 S.C. at 323, 143 S.E.2d at 609.

"All proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue." S.C. Code Ann. § 22-3-710 (1989). A warrant affidavit that is "insufficient in itself to establish probable cause may be supplemented before

a magistrate by sworn oral testimony." State v. Crane, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988).

Because Respondent admitted the first and second elements, the determinative issue is whether probable cause to make the arrests existed.

Appellants assert their situation is similar to Gist. Gist sued the Berkeley County Sheriff's Department for false arrest and false imprisonment. The sheriff's department conceded the affidavit supporting the warrant for Gist's arrest did not establish probable cause, but relied on the investigating officer's testimony that he orally told the judge information that was not referenced in the affidavit to establish probable cause. However, the record did not contain any evidence as to whether the affidavit was accompanied by sworn, oral testimony before the judge. The Court of Appeals reversed and remanded the trial court's grant of summary judgment for the sheriff's department. The court found viewing the evidence in the light most favorable to Gist, a genuine issue of material fact existed as to whether the judge was presented sworn, oral testimony concerning a photographic lineup when the probable cause determination was made. Gist, 336 S.C. at 615-17, 521 S.E.2d at 165-66.

In the present case, the magistrate, who issued the arrest warrants, testified he routinely conducted an oral report, under oath, in addition to the affidavits presented to him before making a probable cause determination. Nettles testified she and Baker gave sworn, oral testimony to the magistrate, which included examples of corroboration of Harrison's allegations.[5]

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[5] At trial, Nettles testified as follows:

Q: And did you give sworn testimony to?
A: Yes, sir, both myself and Officer Baker or Investigator Baker did.
Q: And did you tell [the magistrate] essentially the same things that you told the Court here today?
A: Yes, sir, I told [the magistrate] essentially what is written on the affidavits of each warrant, yes, sir.

The present situation is distinguishable from Gist because the record contains evidence the affidavits were supplemented with sworn, oral testimony. The facts known to the magistrate at the time of the probable cause determination included information from the affidavits[6] and from sworn, oral testimony. We conclude, as a matter of law, the facts known to the magistrate "would induce an ordinarily prudent and cautious man, under the circumstances, to believe" that Appellants had committed the offenses. Jones, 301 S.C. at 65, 389 S.E.2d at 663. The trial judge correctly granted Respondent's JNOV because Appellants failed to establish the restraint was unlawful.

CONCLUSION

Q: Did you tell him about the corroboration of Mr. Harrison?
A: Yes, sir.
Q: And give him the same kinds of examples that you've given us here today?
A: Yes, sir, I did.

[6] For example, the affidavit supporting the warrant for Law provides:

That between May 1997 thru March 25, 1999 while at Allendale Correctional Institution located in Allendale County South Carolina, the defendant Anthony F. Law, did violate statute 44-53-375 of the South Carolina Code of Laws, 1976 as amended, Conspiracy To Traffic Crack Cocaine Greater Than 100 Grams. In that the defendant did willfully, unlawfully, and feloniously conspire with Harry Jenkins, Mark Holmes, Vondeste Mole, and Arthur Vaughan, to Traffic Crack Cocaine Greater Than 100 Grams with a Confidential Reliable Informant (CRI) at the Allendale Correctional Institution during the period of May 1997 thru March 25, 1999. A statement was provided by the Confidential Reliable Informant which has been determined factual through corroboration of the facts. Investigators Joseph Baker and Melissa [Nettles] are witnesses to prove the same. All of which are against the Law, Peace, and Dignity of the State of South Carolina.

We affirm the trial court's grant of Respondent's motions for summary judgment on the malicious prosecution claims and for JNOV on the false imprisonment claims. We affirm as modified the directed verdict for Respondent on the wrongful termination claims.

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, J., and Acting Justice Clyde N. Davis, Jr., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: I concur in part and dissent in part. I agree with the majority opinion that the grant of summary judgment on the malicious-prosecution claims and the directed verdict on the wrongful-termination claims should be affirmed. I respectfully dissent from the affirmance of JNOV on the false-imprisonment claims, because the evidence in the record yields at least one inference that supports the jury's verdict. See Strange v. S.C. Dep't of Highways and Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994) (providing the standard for ruling on motions for JNOV).

The lawful-authority determination here turns on whether the insufficient warrant affidavits were sufficiently supplemented by sworn oral testimony pursuant to State v. Crane, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988). If so, then the warrants were valid and lawful authority to arrest was present. If not, then the warrants were not issued pursuant to legal process, and lawful authority to arrest was absent. The relevant evidence is the trial testimony of the magistrate and the trial testimony of Investigator Nettles. As stated in the majority opinion, "the magistrate, who issued the arrest warrants, testified he routinely conducted an oral report, under oath, in addition to the affidavits presented to him before making a probable cause determination. Nettles testified she and Baker gave sworn, oral testimony to the magistrate, which included examples of corroboration of Harrison's allegations." The majority holds that this trial testimony proves the warrant affidavits were orally supplemented. In so holding, the majority necessarily passes on the credibility of witness. I disagree with the holding because it was within the jury's province to believe or disbelieve this trial testimony. See Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003) (holding that "[w]hen considering a JNOV, neither an appellate court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence") (internal quotation omitted). In my opinion, the evidence yields at least one reasonable inference that the warrant affidavits were not orally supplemented. That inference supports a conclusion that the warrants were not issued pursuant to legal process and that lawful authority was therefore absent. Consequently, I would reverse the grant of JNOV and reinstate the jury's verdict on Appellants' false-imprisonment claims.