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## STATEMENT OF THE CASE

Plaintiff, Linda Angus (Angus), was County Administrator for Horry County. On January 14, 2000, Angus filed a summons and complaint alleging causes of action for tortious interference with contractual relations, defamation, civil conspiracy, and unfair trade practices against the Myrtle Beach Herald, its publisher Deborah Johnson, Burroughs & Chapin Co., Doug Wendel, Pat Dowling, Chandler C. Prosser, Marvin Heyd, Chandler Brigham and Terry Cooper (App. pp. 18-27). Upon motion to dismiss by petitioners herein (Newspaper Defendants), the trial court dismissed Angus' unfair trade practices claim and granted her leave to amend her complaint with regard to the other three causes of action. (App. pp. 15-16). Angus voluntarily dismissed her claim for defamation. (App. pp. 8-9).

Angus filed and served an amended complaint dated October 11, 2000. (App. pp. 28-33). Newspaper Defendants moved to dismiss the two remaining causes, civil conspiracy and tortious interference with contractual relations. The trial court granted the motion to dismiss as to the claim for tortious interference with contractual relations, but denied the motion as to the civil conspiracy claim (App. pp. 9-12).

All defendants moved for summary judgment on the civil conspiracy claim. Following a hearing and a review of briefs submitted by the parties, the trial court granted summary judgment for all defendants on the civil conspiracy cause of action (App. pp. 6-8). Angus timely filed a notice of intent to appeal on December 13, 2001. The Court of Appeals reversed in part and affirmed in part in an opinion filed February 9, 2004. (App. pp. 271-278). Thereafter, Newspaper Defendants petitioned separately for a rehearing. (App. pp. 279-285). The petition for rehearing was denied, but the opinion of February 9, 2004 was withdrawn and a substituted opinion was re-filed May 12, 2004. (App. pp. 301-311). Newspaper Defendants' Petition for a Writ of Certiorari was granted by order of the Supreme Court of South Carolina dated August 26, 2005.

## ARGUMENT

1. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT BY RELYING ON THE AUTHORITY OF GYNECOLOGY CLINIC V. CLOER, 334 SC. 555, 514 S.E.2d 592 (1999), TO CONCLUDE THERE IS NO FIRST AMENDMENT PROTECTION AGAINST A PUBLIC OFFICIAL'S CLAIM FOR CIVIL CONSPIRACY BASED ON PUBLICATION OF CRITICISM OF THE PUBLIC OFFICIAL.

Before the Court of Appeals, Newspaper Defendants asserted as an additional sustaining ground pursuant to Rule 220(c), SCACR, and I'on, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), that the First and Fourteenth Amendments to the United States Constitution precluded Angus' claim for civil conspiracy against a newspaper and its publisher based on allegations that the Newspaper Defendants had published "articles and statement[s] intended to decrease public support for the Plaintiff and to discredit her." [App. p. 32].

The Second Amended Complaint identified Newspaper Defendants by alleging:

> 3. The Defendant, Myrtle Beach Herald, is the trade name of a newspaper of general circulation in the Myrtle Beach area in the County of Horry. Upon information and belief, Myrtle Beach Herald is a corporation organized and existing pursuant to the laws of the state of South Carolina.
>
> * * *
>
> 6. Deborah Johnson is a citizen and resident of the State of South Carolina, County of Horry. At all times herein Deborah Johnson was acting in a dual capacity both as an employee of Defendant, Myrtle Beach Herald, and also in her individual capacity and was at the same time attempting to further the interests of her employer and her own personal interests.

(App. pp. 28-29).

Plaintiff described her influential position in Horry County government in the Second Amended Complaint, stating:

> 14. Plaintiff served as the County Administrator for Horry County from June 3, 1996 until May 25, 1999.
>
> 15. As County Administrator, Plaintiff was required to act as the administrative head of the county government and be responsible for the administration of all the departments of county government.

(App. p. 31).

The duties of plaintiff are more fully described by statute, S.C. Code Ann. § 4-9-630 (Rev. 1986), and establish beyond doubt that Angus is a public official for purposes of evaluating her relationship to Newspaper Defendants. See e.g., Rosenblatt v. Baer, 383 U.S. 75 (1966); Elder v. Gaffney Ledger, 341 S.C. 108, 533 S.E.2d 899 (2000); Beckham v. Sun News, 289 S.C. 28, 344 S.E.2d 603 (1986); Scott v. McCain, 275 S.C. 599, 274 S.E.2d 299 (1981). Given the range of duties imposed upon plaintiff by statute, e.g., "to direct and coordinate operational agencies," "to prepare annual . . . budgets," "to supervise the expenditure of appropriated funds," and "to be responsible for employment and discharge of employees," it is obvious that plaintiff's performance of her public employment is a matter of intense public interest. Angus' status and her performance are public matters under South

Carolina law which states clearly that there is nothing private about the performance of a public duty. Burton v. York Sheriff's Dept., 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004).

Plaintiff's status as a public official stands in sharp contrast to all other plaintiffs asserting civil conspiracy claims under South Carolina law. No civil conspiracy claim that is the subject of a published opinion from a South Carolina appellate court has involved a public official plaintiff seeking to recover damages from citizens for their criticism of the plaintiff's official performance. Angus' status is distinctive and the precise legal issue before the court below and here has not been decided in South Carolina.

The initial opinion of the Court of Appeals was withdrawn and a new opinion published in response to Newspaper Defendants' motion for rehearing, which motion called to the court's attention its failure to rule on the additional sustaining ground asserting a First and Fourteenth Amendment bar to plaintiff's claim. (App. pp. 279-285).

In the substituted opinion, the Court of Appeals disposed of Newspaper Defendants' constitutional arguments summarily in a footnote, stating:

> The Myrtle Beach Herald and Deborah Johnson assert that the First Amendment protects them against an action for civil conspiracy since Angus was a civil servant.[1] However, our supreme court has already rejected a similar argument. See Gynecology Clinic, 334 S.C. at 556, 514 S.E.2d at 592.

Angus v. Burroughs & Chapin Co., 358 S.C. 498, 504, n. 2, 596 S.E.2d 67, 70, n.2. (App. p. 305).

The dismissal of the Newspaper Defendants' constitutional argument was clearly error, and Gynecology Clinic is not authority for the proposition that a public official has a claim for civil conspiracy against a newspaper and its publisher for publishing material

[1] The title "civil servant" was created by the Court of Appeals, is not representative of Angus' public responsibilities, and is not a term used in any of the relevant decisions considering First Amendment protection for criticism of high government officials. Its use by the Court of Appeals seems designed to minimize the status of Angus and discount the importance of the right of citizens to criticize those officials.

critical of the public official. The case cited by the Court of Appeals has no application to claims by public officials against critics of their official conduct. It is true that defendants in Gynecology Clinic argued that their protest activity outside an abortion clinic was protected by the First Amendment, but nothing in the case involves a claim by a public official against critics of her official conduct. Even the most superficial reading of Gynecology Clinic leads to the inescapable conclusion that the case is not authority for the astonishing proposition that a public official in South Carolina can seek money damages against critics of her public performance merely by alleging that the criticism is a part of a civil conspiracy.

The error committed by the Court of Appeals in reliance on Gynecology Clinic rests in the failure to analyze Angus' public position and the constitutional issue before the court. The footnote conclusion by the Court of Appeals that Newspaper Defendants' constitutional argument was similar to and had already been rejected by the Supreme Court in Gynecology Clinic ignored crucial distinctions between the cases including the status of the plaintiffs (public official versus private business), the activity of defendants (publishing a newspaper versus interfering with a private business), and the nature of the controversy (performance of government versus private commercial activity). The only common ground between the two cases is that defendants in both cases sought constitutional protection. It is not necessary to question the ruling in Gynecology Clinic to conclude that it is not precedent for the present case. Gynecology Clinic involved "speech" and "nonspeech" elements in a course of conduct aimed at a private business. In such cases, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968). The injunction issued by the trial court in Gynecology Clinic barred defendants from activities that were

designed to interfere with the clinic and its patients:

> (1) trespassing on the private property of the clinic; (2) interfering with ingress to and egress from the clinic; (3) interfering with the free flow of traffic on the property of the clinic and adjoining public streets and sidewalks and approaching any physician employed by the clinic or any vehicle containing such a physician; (4) protesting within a 12-foot buffer zone along the public sidewalk on either side of the driveway of the clinic; (5) obstructing the view of street traffic by any vehicle that is attempting to exit the clinic; and (6) making any noise that would be heard inside the clinic.

Cloer v. Gynecology Clinic, Inc., 528 U.S. 1099 (2000) (Scalia, J., dissenting from the denial of certiorari).

In contrast to the conduct enjoined in Gynecology Clinic, the allegations with respect to Newspaper Defendants here relate to "Publication of articles and statement[s] intended to decrease public support for the Plaintiff and to discredit her." (App. p. 32). These allegations addressed clearly protected "speech" as distinguished constitutionally from "nonspeech conduct." Analytically, it is impossible to stretch the nonspeech conduct intended to destroy a private business in Gynecology Clinic so as to equate it with the publication of a newspaper containing criticism of a governmental official here. Gynecology Clinic must be read to hold that restrictions on conduct which have an incidental effect on speech may be consistent with the First and Fourteenth Amendments, but it cannot be read to hold that speech in the form of newspaper criticism of a public official is subject to the same restrictions. Gynecology Clinic, the superficial analysis of the Court of Appeals notwithstanding, is not authority for the proposition that the publication of newspaper articles critical of a public official is outside the protection of the First and Fourteenth Amendments. There is no South Carolina precedent to support the conclusion of the Court of Appeals that a newspaper and its publisher have no constitutional protection when publishing criticism of public officials. That being so, there was no South Carolina authority which would require the reversal of the grant of summary judgment in favor of Newspaper

Defendants in this case.

2. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT WHICH HOLD THAT A PUBLIC OFFICIAL MUST SATISFY THE ACTUAL MALICE REQUIREMENTS OF NEW YORK TIMES V. SULLIVAN, 376 U.S. 254 (1964) TO RECOVER ON A CIVIL CLAIM ALLEGED TO HAVE ITS ORIGIN IN PUBLICATIONS BY A NEWSPAPER AND ITS PUBLISHER CRITICAL OF A PUBLIC OFFICIAL

Plaintiff's claim, as characterized by her, sounds in civil conspiracy notwithstanding her references in the Second Amended Complaint to injuries customarily associated with defamation claims, to wit: "smearing the plaintiff's reputation" and "loss of her job," "humiliation," and "prejudice in future advancement in business, government and society." (App. p. 32). Plaintiff's characterization is of no consequence, however, when it comes to this Court's consideration of the constitutional limitations on the power of the state to restrict speech. The appropriate inquiry must focus on the effect of the claim on protected activity rather than on the label assigned to the claim.

Governmental restrictions on speech have operated under many labels, the most notorious being sedition. The Sedition Act of 1798, 1 Stat. 596, provided criminal penalties for false, scandalous and malicious writing made with an intent to defame or bring contempt or disrepute to government officials. "[T]he Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison" even though truth was a defense and the jury was to judge both the facts and the law. New York Times Co. v. Sullivan, 376 U.S. 254, 274 (1964) (hereinafter Times v. Sullivan). Although the Sedition Act expired before it was tested in the United States Supreme Court, there has developed a near universal belief that the law was unconstitutional because of its repression of speech critical of government and government officials, as the United States Supreme Court summarized its historical review of sedition in Times v. Sullivan:

> These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

Id. at 276.

As offensive as the Sedition Act was to notions of free expression in a democracy, the decision of the Court of Appeals is more odious in that regard since truth was a defense to sedition, but under the Court of Appeals' view, truth plays no role in the determination of the potential liability of one publishing criticism of a public official if the publication can be cast as a part of a civil conspiracy.

The Sedition Act was, of course, a Congressional enactment where the operation of the power of government to restrict speech was in the language of the legislation. The power of the state operates here to restrict speech through the common law as applied in a civil action. But, as the United States Supreme Court decided in Times v. Sullivan, the test that determines whether the Constitution applies to limit the power of the state depends not on the form of the power applied by the state, but "whether such power has in fact been exercised" to restrict speech. Id. at 265. In like manner, the United States Supreme Court instructs that labels attached to the exercise of state power restricting speech must be disregarded so that the restrictions on speech will "be measured by standards that satisfy the First Amendment." Id. at 269.

The constitutional limitation on the power of the state to restrict speech is not merely incidental to our democratic form of government, but is a central feature of the design that places political power in the governed as the United States Supreme Court has explained:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." [Citation omitted]. "The maintenance of the opportunity for free political discussion to the end that government may be

> responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." [Citation omitted].

Id.

Speech on public institutions and public officials is not required to be in good taste, and the decisions of the United States Supreme Court protecting speech reflect:

> a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

Id. at 270.

Times v. Sullivan involved a claim by a public official who alleged that he had been libeled by criticism of governmental actions and personnel in Montgomery, Alabama. In reversing a state verdict for the plaintiff, the United States Supreme Court struck a balance between the rights of citizens to criticize public officials and the rights of public officials to avoid injury to their reputations, holding:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279.

Applying this constitutional principle beyond libel and holding consistently with the principle articulated in N.A.A.C.P. v. Button, 371 U.S. 415 (1963), and reaffirmed in Times v. Sullivan, supra, that freedom of expression needs breathing space to survive, the United Sates Supreme Court reversed an award of damages in a case brought under the common law theory of intentional infliction of emotional distress when the plaintiff failed to prove the publication of a defamatory falsehood with actual malice as that term was defined in Times v. Sullivan. Hustler Magazine v. Falwell, 485 U.S. 46 (1988). The values inherent in the

First Amendment rest on "the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." Id. at 50. In order to protect "robust political debate . . . bound to produce speech that is critical of those who hold public office," the Court held in Hustler Magazine that public figures or public officials could not recover damages for intentional infliction of emotional distress occasioned by publications critical of the plaintiff without demonstrating in addition to the common law elements of the tort also that the publication contained a false statement of fact made with the actual malice required by Times v. Sullivan. Id.

In both Times v. Sullivan and Hustler Magazine v. Falwell, the United States Supreme Court held that public persons could not recover civil damages from publishers of commentary critical of their public activity unless the public plaintiffs could prove the publication of a false statement of fact in circumstances that could satisfy the actual malice standard. Angus does not allege the publication by Newspaper Defendants of false statements of fact, but seeks a recovery for the publications. These publications must be considered to have been truthful lest plaintiff would have continued with her libel claim. Clearly, plaintiff is seeking to recover damages for truthful speech contrary to the rule that "truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986); Garrison v. Louisiana, 379 U.S. 64 (1964).

Other authority extends the constitutional protection found in Times v. Sullivan to alternate tort theories where damages are sought for publication-related injuries. Where, as here, a public plaintiff seeks to recover damages alleged to have been caused by a publication, even though that plaintiff has not brought a libel action, the United States Court of Appeals for the Fourth Circuit, relying on the authority of Hustler Magazine v. Falwell,

has held that the First and Fourteenth Amendment restrictions obligate the plaintiff to meet the actual malice standard of Times v. Sullivan. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999).

Plaintiff voluntarily dismissed her libel claim and in the within action complains that Newspaper Defendants published "articles and statement[s] intended to decrease public support for . . . [her] and to discredit her." (App. p. 32). Significantly, plaintiff does not allege that the publications contained false statements of fact made with actual malice. Under plaintiff's theory and the decision of the South Carolina Court of Appeals, any publication critical of the public performance of a public official would be actionable if the criticism proved to be effective. If the citizens of Horry County wished to criticize plaintiff, and if Newspaper Defendants chose to publish such criticism, or indeed publish criticism of their own, this criticism does not lose constitutional protection because it results in governmental change. Under plaintiff's theory and the decision of the Court of Appeals, publication of editorials or letters to the editor stating that the voters of South Carolina erred in selecting a governor in the 2002 race would expose the newspaper to liability if the incumbent were voted out of office in the 2006 election. Such a result seems inconceivable in a society that has such a long history of constitutional protection for speech and publications, but who among us would have dared suggest prior to the decision of the Court of Appeals in this case that liability could be imposed on citizens under a civil conspiracy theory for their criticism of a public official. Such a result is no less than sedition redux. That can never be allowed to become the law again or our fundamental liberties and democratic form of government are at risk.

## CONCLUSION

The decision of the Court of Appeals was not mandated by the decision of the Supreme Court of South Carolina in Gynecology Clinic v. Cloer, 334 S.C. 555, 514 S.E.2d 592 (1999), and is inconsistent with the decisions of the United States Supreme Court imposing First and Fourteenth Amendment restrictions on the power of the states to sanction speech regarding public officials and their official conduct. The decision of the Court of Appeals should be reversed, and the grant of summary judgment for Newspaper Defendants reinstated.

Respectfully submitted,

_____

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