IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-IA-00651-SCT

SIMMONS LAW GROUP, P.A. and
HEBER S. SIMMONS, III

APPELLANTS

V.

CORPORATE MANAGEMENT, INC. (CMI)

APPELLEE

**BRIEF OF THE APPELLEE,
CORPORATE MANAGEMENT, INC.**

ORAL ARGUMENT NOT REQUESTED

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V.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Simmons Law Group, P.A., Appellant
2. Heber S. Simmons, III, Esq., Appellant
3. Corporate Management, Inc., Appellee
4. Honorable Thomas K. Griffis, Jr., Special Chancellor in related action
5. Honorable Kathy King Jackson, Greene County Circuit Judge
6. Mockbee Hall Drake & Hodge, P.A., Counsel for Appellants
7. Law Offices of John R. Reeves, P.C., Former Counsel for Appellee
8. Darren E. Gray, Esq., Counsel for Appellee
9. Jackye C. Bertucci, Esq., Counsel for Appellee

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I. STATEMENT OF THE ISSUES

1. Whether the Circuit Court of Greene County was correct in denying the Defendant/Appellant's Motion for Summary Judgment based on the Court's finding that the Plaintiff had brought forth evidence in support of its position that the statements of the Defendant were not based in fact, and that issues of fact therefore prevented the Court from granting summary judgment.

2. Whether the Circuit Court of Greene County was correct in denying the Defendant/Appellant's Motion for Summary Judgment because the evidence in the record is sufficient to support a finding of actual malice.

II. STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

Corporate Management, Inc. (hereafter, sometimes, "CMI") filed the instant lawsuit against Heber S. Simmons, III and Simmons Law Group, P.A., asserting a cause of action for defamation. R. 06. The remarks on which the claim is based were made by Heber Simmons to a reporter for the HATTIESBURG AMERICAN, commenting on CMI's management of a hospital and nursing facility in Greene County. R. 68-69. Simmons said the following:

> This is a prime example of why the Medicare situation in the state and across the country is in the shape it is. CMI is sucking these facilities dry. That money is coming out of the pockets of the people laying in those beds, their families and Medicare.

The context of the statement is extremely important, as Simmons was representing the Greene County Board of Supervisors, which wanted to take the management contract away from CMI and give it to George Regional Health System. R.

2, 33. The statement was made shortly before a special election in which Greene County voters were to decide who would operate the facilities. R. 68.

CMI filed its Complaint against the Defendants on March 7, 2008. R. 06. Defendants filed a Motion for Summary Judgment which the trial court denied on April 1, 2009. R.E. Tab 3, R. 109. This appeal followed.

B. Statement of Facts

The Defendant, Heber S. Simmons, III, is an employee, officer, and agent of Simmons Law Group, P.A. R. 12. The Defendant, Simmons Law Group, P.A., is therefore responsible for the acts of Heber S. Simmons, III. R. 12.

The Greene County Board of Supervisors (hereafter, "Greene County") retained the Defendants to represent them in an action filed by Corporate Management, Inc. (hereafter, "CMI") against Greene County and others for breach of a management contract. R. 18. Greene County had purported to terminate CMI's contract to manage a nursing facility and hospital owned by Greene County. R. 75. While the parties were embroiled in litigation, a petition drive was started to have the public vote on whether CMI should continue to manage the facility, or whether George Regional Hospital (hereafter, "George County") should take over its management. R. 25, 83.

Not long before the election was to be held, Heber Simmons made statements to the HATTIESBURG AMERICAN newspaper, accusing CMI of "sucking these facilities dry" and characterizing CMI as "a prime example of why the Medicare situation in the state and across the country is in the shape it is." R: 28, 68-69. Greene County citizens voted 1,750 to 893 to turn over operation of the hospital and nursing home to George Regional

Health System. R. 70. Simmons' statements met their mark, and helped to oust CMI from its management of the facilities in question.

In their brief, Defendants claim that the trial court erred in two respects: first, in finding that the facts on which Simmons based his statement were false; and second, in not finding that CMI had failed to prove malice on the part of Simmons. Plaintiff submits that the trial court was correct in its ruling, as will be illustrated herein.

III. SUMMARY OF THE ARGUMENT

The Plaintiff's burden in this defamation cause of action is to establish the following:

(1) A false and defamatory statement concerning another;

(2) An unprivileged publication to a third party;

(3) Fault amounting at least to negligence on the part of the publisher; and

(4) Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Anders v. Newsweek, 727 F. Supp. 1065, 1066 (S.D. Miss. 1989) (citing *Fulton v. Mississippi Publishers Corp.*, 498 So. 2d 1215 (Miss. 1986)).

Because the Plaintiff has conceded that the defamation involved a matter of public concern, a showing of malice is also required. *Anders*, 727 F.Supp. at 1066 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Ferguson v. Watkins*, 448 So. 2d 271 (Miss. 1984)). Malice, however, may be shown through an accumulation of circumstantial evidence. *Anders*, 727 F.Supp. at 1067 (citing *Connaughton v. Harte Hanks Communications, Inc.*, 842 F.2d 825 (6th Cir. 1988), *aff'd*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989)).

Defendants have proceeded in their argument as if Simmons merely repeated or paraphrased statements made to him by others. Defendant Simmons, however, went far beyond the disputed facts on which he allegedly relied, and made sensational statements with absolutely *no* basis in fact.

At a time when Medicare cuts and deficits were being heavily covered by the media, Simmons accused CMI of being "a prime example of why the Medicare situation in the state and across the country is in the shape it is." R. 68-69. He accused CMI of "sucking these facilities dry" and claimed, "[t]hat money is coming out of the pockets of the people laying in those beds, their families and Medicare." R. 68-69.

These statements were not supported by any facts, even disputed ones, but were clearly made to inflame the citizens of Greene County and to influence them to vote against CMI in the upcoming election. The allegations were "so inherently improbable that only a reckless man would have put them in circulation." *See St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

The courts have recognized the difficulty in obtaining direct evidence of a defendant's subjective state of mind in order to prove malice, and have therefore held that a plaintiff may prove that state of mind through "an accumulation of circumstantial evidence." *See, e.g., Anders v. Newsweek*, 727 F.Supp. 1065, 1067 (S.D. Miss. 1989). A reasonable jury could find from the evidence in the record that Simmons had no reasonable grounds to believe in the truth of his statements. Therefore, summary judgment is inappropriate, and the trial court was correct in so holding.

IV. STANDARD OF REVIEW

This Court has consistently admonished trial courts to make use of summary judgments with great caution, and has stated:

> It is also important to note that Rule 56 requires that before a summary judgment can be granted there must be no genuine issue of "material" fact. The question then becomes, what is a "material" fact? This Court has recently held that a material fact "tends to resolve any of the issues, properly raised by the parties.". . . This means that if a "material" fact or facts are present in the case, summary judgment should not be granted.

Stegall v. WTWV, Inc., 609 So. 2d 348 (Miss. 1992) (quoting *Mink v. Andrew Jackson Casualty Ins. Co.*, 537 So. 2d 431, 433 (Miss. 1988)).

With particular respect to libel actions, the *Stegall* court stated:

> The U.S. Supreme Court has adopted as a summary judgment standard in libel actions the requirement that the trial court must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists. The evidence must be such that a reasonable jury might find that actual malice had been shown with convincing clarity. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-2511, 91 L.Ed.2d 202, 212 (1986); *Johnson v. Delta-Democrat Publishing Co.*, 531 So. 2d 811, 815 (Miss. 1988). The appropriate summary judgment question is whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not. *Anderson*, 477 U.S. at 255-256, 106 S.Ct. at 2513-2514, 91 L.Ed.2d at 216.

Stegall, 609 So. 2d at 352.

If reasonable minds could differ on a material issue, a plaintiff is entitled to have a jury decide his claim. *Stegall*, 609 So. 2d at 351 (citing *Stamps v. Estate of Watts*, 528 So. 2d 812, 815 (Miss. 1988)). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge when he is ruling on a motion for summary judgment." *Stegall*, 609 So. 2d at 352-

53 (citing *Anderson*, 477 U.S. at 255; and *James v. Mabus*, 574 So. 2d 596, 600 (Miss. 1990)). Furthermore, in making determinations of fact on a motion for summary judgment, the court must view the evidence presented by the parties in the light most favorable to the non-moving party. *McPherson v. Rankin*, 736 F. 2d 175, 178 (5th Cir. 1984).

V. ARGUMENT

In order to prove a claim of defamation under Mississippi law, the plaintiff must establish:

(1) A false and defamatory statement concerning another;

(2) An unprivileged publication to a third party;

(3) Fault amounting at least to negligence on the part of the publisher; and

(4) Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Anders v. Newsweek, 727 F.Supp. 1065, 1066 (S.D. Miss. 1989) (citing *Fulton v. Mississippi Publishers Corp.*, 498 So. 2d 1215 (Miss. 1986)). In addition, if the defamation involves a matter of public concern, the level of proof must rise to that of actual malice. *Anders*, 727 F.Supp. at 1066 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Ferguson v. Watkins*, 448 So. 2d 271 (Miss. 1984)).

The Plaintiff/Appellee has conceded that due to the public interest surrounding the issue giving rise to the statements made by the Defendants/Appellants, a showing of malice is required, either by proving that the Defendants/Appellants knew the statements were false, or that they made the statements in reckless disregard of whether or not they were true. *Stegall*, 609 So. 2d at 352 (citing *Ferguson v. Watkins*, 448 So. 2d 271, 277 (Miss. 1984); *Reaves v. Foster*, 200 So. 2d 453, 458-59 (Miss. 1967)).

The malice standard, however, is a subjective one, and the courts have therefore held that "[a] public figure plaintiff may prove the defendant's subjective state of mind through an accumulation of circumstantial evidence, direct evidence often being difficult, if not impossible, to obtain." *Anders*, 727 F.Supp. 1065, 1067 (citing *Connaughton v. Harte Hanks Communications, Inc.*, 842 F.2d 825 (6th Cir. 1988), *aff'd,* 491 U.S. 657 (1989)).

"The threshold question is whether the publication at issue is defamatory." *Anders*, 727 F.Supp. at 1066 (citing *Ferguson*, 448 So. 2d at 275). In making that determination, Mississippi follows the common law rule that "[a]ny written or printed language which tends to injure one's reputation, and thereby expose him to public hatred, contempt or ridicule, degrade him in society, lessen him in public esteem or lower him in the confidence of the community is actionable per se." *Fulton v. Mississippi Publishers Corp.*, 498 So. 2d 1215, 1217 (Miss. 1986) (quoting *Ferguson v. Watkins*, 448 So. 2d at 275).

In *Anders v. Newsweek, Inc.*, the district judge explained the summary judgment standard for defamation cases as being whether "a reasonable jury properly instructed under a clear and convincing evidentiary standard [could] find that the language in question was (1) clearly directed toward the plaintiff and (2) clearly and unmistakably defamatory from the words themselves, without the jury having to rely upon innuendo, speculation or conjecture." *Anders*, 727 F.Supp. 1065, 1067 (S.D. Miss. 1989).

The statement made by the Defendant/Appellant and at issue in this case follows:

> This is a prime example of why the Medicare situation in this state and across the country is in the shape it is. CMI is sucking these facilities dry. That money is coming out of the pockets of the people laying in those beds, their families and Medicare.

There can be no question that the statement was directed toward the Plaintiff, as the Defendant named the Plaintiff. Furthermore, such a statement clearly would tend to injure the reputation of the Plaintiff, a company operating a medical facility, and "lessen [it] in public esteem or lower [it] in the confidence of the community." *See Fulton, supra.*

The jury would not have to engage in any speculation to interpret the statement as meaning CMI was wrongfully taking money from the patients, their families, and Medicare. The fact that CMI lost the election held to determine management of the nursing facility is clear evidence that the statement injured the Plaintiff's reputation and standing in the community. CMI received only 893 votes (R. 70), when almost 2000 citizens signed a petition circulated by supporters of CMI before Simmons made his statement. (R. 68).

The law allows a public figure plaintiff to prove the defendant's subjective state of mind through circumstantial evidence. *Anders*, 727 F. Supp. at 1067 (citing *Connaughton v. Harte Hanks Communications, Inc.*, 842 F.2d 825 (6th Cir. 1988), *aff'd*, 491 U.S. 657 (1989)). "Such subjective awareness of probable falsity may be found if there are obvious reasons to doubt the veracity of an informant or the accuracy of his reports." *Id.* (citing *Herbert v. Lando*, 441 U.S. 153, 156-57 (1979)). Knowing that James Aldridge was a disgruntled former employee of CMI was an obvious reason for Simmons to doubt the veracity of the information provided by Aldridge.

In *Stegall v. WTWV, Inc.*, this Court reversed a grant of summary judgment "due to the existence of genuine dispute of material facts and due to the existence of possible actual malice on the part of [the defendants]." *Stegall v. WTWV, Inc.*, 609 So. 2d 348,

353 (Miss. 1992). J.P. Stegall alleged that WTWV and its reporter, Cathy Coggin, willfully, maliciously, and knowingly issued a false broadcast regarding Stegall on the television's evening newscast. *Id.* at 349. Stegall was a candidate for supervisor in Pontotoc County. *Id.*

In an evening newscast on election day,[1] Coggin reported that Stegall, the candidate, had been arrested and had pled guilty to wrongdoing in a probe of corrupt county purchasing practices. *Id.* at 350. In fact it was Bobby Stegall, J.P. Stegall's cousin and the incumbent supervisor, who was arrested and indicted in the matter. *Id.* at 349-50.

In opposition to the defendants' Motion for Summary Judgment, Stegall submitted affidavits from Mary Evelyn Jones, a deputy circuit clerk in Pontotoc County, stating, in summary, that Coggin had called the courthouse on the afternoon of the primary election, and that in the course of a discussion, Ms Jones had informed Coggin that J.P. Stegall was not the person who had been indicted. *Id.* at 349. Coggin and the television station claimed that Coggin never called Jones or anyone else at the courthouse on the day of the election. *Id.*

The Mississippi Supreme Court found that there were numerous material facts in dispute, warranting a jury trial. *Stegall,* 609 So. 2d. at 351. Specifically addressing the "actual malice" requirement necessary due to Stegall's status as a public figure, the Court found that the evidence in the record "could support a reasonable jury finding that Stegall has shown actual malice, by clear and convincing evidence." *Id.* at 352. The Court noted, "[a] reasonable juror hearing testimony from Mary Evelyn Jones could find that

[1] The parties disagreed as to whether the report was broadcast at 6:00 p.m. or at 7:00 p.m., after the polls closed. *Id.* at 350.

Coggin exhibited a reckless disregard for the truth rather than a misinterpretation of available information." *Id.* If a jury believed Jones's testimony, then they could have reasonably believed that Coggin's frame of mind indicated she did not care whether her report was true or not. *Id.*

The Court observed that the trial court did not believe the affidavits of Jones to be of sufficient weight and credence, but did believe Coggin's denial of any phone call to be sufficient. *Id.* The appellate court found this to be error by the trial judge, noting that "credibility must be determined by the jury." *Id.* at 352-53. Similarly, the credibility of the witnesses in the instant action must be determined by a jury.

The Defendant/Appellant criticizes the Plaintiff's affidavit submitted in this matter, but the Defendant submitted no affidavit, nor any evidence of the Defendants' state of mind when he made the defamatory statements. The burden of rebutting a summary judgment motion does not arise unless and until "the moving party has satisfied its burden of demonstrating that no genuine issue of material fact exists." *Hurst v. Southwest Mississippi Legal Servs. Corp.*, 610 So. 2d 374, 383 (Miss. 1992).

Defendants contend they are entitled to summary judgment because CMI's cause of action is missing an essential element. But where a defendant moves for summary judgment on the ground that the plaintiff does not have an enforceable claim, the defendant "has the burden of clearly establishing the lack of any triable issue of fact and must take the initiative of marshalling a record so showing." *Blanke v. Time, Inc.*, 308 F.Supp. 378, 381 (E.D. La. 1970) (citing 6 MOORE, FEDERAL PRACTICE ¶56.04(2) (2d ed. 1985)). The Defendants have failed to establish such a record.

The Defendants submitted the following exhibits in support of their summary judgment motion: copies of newspaper articles; a letter reflecting Simmons' retention as attorney for Greene County; a copy of a report from Cary Williams, CPA; a copy of a statement from James Aldridge; and a copy of a transcript of a hearing in Greene County Chancery Court. R. 16-74. Nothing in the record demonstrates that the Defendants are entitled to prevail as a matter of law. Plaintiff CMI submitted an affidavit from its Chief Operating Officer, explaining the falsity of the Defendant's statements, even though the Defendant's motion for summary judgment was not supported sufficiently to require a response by the Plaintiff. R. 95-96.

The Defendants cite *St. Amant v. Thompson* in support of their contention that Simmons had no duty to investigate before he made his statements. The Defendants' reliance on *St. Amant* is flawed, however, in more than one respect. First of all, the *St. Amant* Court pointed out that a "defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). The Court noted that professions of good faith will not likely prove persuasive when the "allegations are so inherently improbable that only a reckless man would have put them in circulation." *Id.* Most importantly, the Court stated, "[t]he *finder of fact* must determine whether the publication was indeed made in good faith." *Id.* (emphasis added). The question of good faith is one for a jury.

A district court judge in Louisiana reiterated *St. Amant's* recognition that 'reckless disregard' may be shown circumstantially, and stated:

> . . . The credibility of a claim that the publisher's failure to suspect falsity was in good faith and not reckless is a question of fact, which may depend

> on the circumstances surrounding publication, the reliability of sources, the opportunity available to investigate, and the urgency of publication, *as well as the degree of sensationalism, from which improbability may be inferred and which may also increase the likelihood of damage to the individual defamed.*

Blanke v. Time, Inc., 308 F.Supp. 378, 380 (E.D. La. 1970) (emphasis added) (citing *St. Amant v. Thompson, supra; Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); and *Washington Post Co. v. Keogh*, 125 U.S. App. D.C. 32 (1967), *cert denied*, 385 U.S. 1011 (1967)).

The Defendants' statements that CMI was "sucking these facilities dry" and that "[t]his is a prime example of why the Medicare situation in the state and across the country is in the shape it is" were certainly so sensational that improbability may be inferred. *See Blanke, supra.* The Plaintiff should not be denied its constitutionally protected day in court to present evidence, direct and circumstantial, that the Simmons Defendants had no reasonable grounds to believe in the truth of the statements made. The credibility of the witnesses is crucial, and the Plaintiff is entitled to have that credibility determined by a jury which has had the opportunity to observe the demeanor of the witnesses when subjected to cross-examination.

Defendants also rely on *Moon v. Condere Corp.*, 690 So. 2d 1191 (Miss. 1997), but *Moon* is easily distinguishable from the instant case. The information relied upon by the plaintiffs in *Moon* was based in large part on findings of an attorney, whose "findings were based on disclosures of Condere's ownership structure in two national corporate reference guides and an employment advertisement in a Nashville newspaper. . . ." *Moon*, 690 So. 2d at 1196. Furthermore, the court found no evidence of any damages

suffered by Condere as a result of the statements. *Id.* "In the absence of damages a defamation suit of this type must fail." *Id.*

Simmons' reliance on a statement made by a former disgruntled employee, who was not subject to cross-examination, cannot be compared to the *Moon* plaintiffs' reliance on disclosures in two national corporate reference guides. Defendants also suggest they relied on the report of Cary Williams, CPA. However, Mr. Williams' report contained the following disclaimers:

> Whether all of the items purchased were necessary for a three-bed hospital is beyond the capability of the undersigned and would best be answered by a medical expert experienced in these matters. R. 57
>
> There is a potential error in any sampling process, as there may well be in the above data. Because of time constraints, this sampling was not accomplished in a textbook manner that would be used by a professional statistician. . . R. 58.

Moreover, Simmons did not simply repeat statements previously made by Aldridge and Williams. He sensationalized to portray CMI as a crooked business, stealing from its patients and being partly responsible for the Medicare crisis in the state and the nation. These statements were fabrications of Simmons, not a regurgitation of any reliable information provided to him.

A similar situation was addressed in *Trentecosta v. Beck*, 703 So. 2d 552 (La. 1997),[2] in which a police officer referred to the plaintiff's business activities as a "large-scale illegal bingo operation," and stated the operation had "bilked thousands of dollars from charities using the [bingo] hall over the years." *Trentecosta*, 703 So. 2d at 557.

[2] The Plaintiff realizes that Louisiana cases are not binding precedent in Mississippi, but this Court has looked to other jurisdictions for guidance, and in some cases has adopted the logic of those cases in defamation cases. *See, e.g., McCollough v. Cook*, 679 So. 2d 627, 632 (Miss. 1996) (adopting logic of *Memphis Publishing v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978)).

The facts were that Trentecosta had operated a bingo hall in St. Bernard Parish for a number of years, and had leased the hall to charitable organizations for the rental price of $600.00 per event. *Id.* at 554. However, Trentecosta actually allowed the charitable organization to keep the first $300.00 in receipts and pay as rent only the amount of receipts in excess of $300.00, with $600.00 being the maximum. *Id.* Because there was a statute that prohibited basing rent on a percentage of profits, Trentecosta had his plan approved by the assistant director of the State Police Charitable Gaming Division. *Id.*

Nevertheless, the State Police initiated an investigation of Trentecosta's bingo hall operation, and formed a fictitious charitable organization. *Id.* at 555. An undercover agent posed as the leader of the organization, using the name "Victor Montalbano." *Id.* Montalbano rented out the bingo room, orally agreeing to the plan described above. *Trentecosta*, 703 So. 2d at 755.

Montalbano also asked Trentecosta about "operating the game when a sufficient number of volunteers from the membership was not available." *Id.* Trentecosta suggested contacting organizations who operated games at other halls. *Id.* Montalbano ultimately hired three of Trentecosta's former employees, paying them from a donation jar funded by winners at the games. *Id.* Louisiana's licensing law at the time prohibited charitable organizations from paying workers who assisted in the games. *Id.*

Following this "sting" operation, the State Police obtained two arrest warrants against Trentecosta, one for violation of the statute prohibiting percentage based rental rates, and one for "conspiring to cause another person to violate state gaming laws by paying workers to run bingo games for charitable organizations" *Id.* On the day the warrants were issued, a press release was also issued by the Supervisor of Public Affairs

for the State Police. *Trentecosta*, 703 So. 2d at 755. The following day, an article appeared in the Times Picayune newspaper, quoting Lt. Ronnie Jones as labeling Trentecosta's activities a "large-scale illegal bingo operation" and attributing to Sgt. Kermit Smith the statement that "the operation bilked thousands of dollars from charities using the hall over the years." *Id.* at 557.

Trentacosta filed a defamation action against Jones, Smith, another trooper, and their employer. *Id.* The trial court entered judgment against all four defendants, finding that the troopers had defamed the plaintiffs, and "that the results of the undercover investigation did not support the information they had released to the newspaper." *Id.* The court of appeal affirmed, and the Louisiana Supreme Court granted certiorari.

In addressing Smith's statement, the court pointed out that it was not simply the repeating of a defamatory statement of an informant. *Id.* at 562. The court explained:

> As to the "bilking" statement, Smith went beyond the facts uncovered by the investigation. In his verbal statements to the press, he embroidered onto the underlying facts a sensational statement about Trentecosta that, on this record, was not based on information furnished to Smith by investigators, by an informant, or by anyone else, but was apparently created by Smith.
>
> . . .
>
> Smith's conduct appears to fit under the *St. Amant* decision's examples of bad faith publication of defamatory statements that would constitute "reckless disregard," namely, a story fabricated by the defendant or a product of the defendant's imagination. Here, Smith's attributing to Trentecosta any misuse of the charitable organization's profits from the bingo games had no basis in reality. According to this record, Smith did not obtain this information from any source, reliable or otherwise. He apparently used information about misuse of funds and added his own suspicions to form a sensational connection with the target of the investigation. In making the statement that had no basis in fact or in information furnished to him from any source, Smith acted in bad faith and with reckless disregard as to whether the statements were false or not.

Trentecosta, 703 So. 2d at 562.

Likewise, in the instant case, Simmons cannot claim reliance on the statement of James Aldridge or the report of Cary Williams for the basis of his statement that "[t]his is a prime example of why the Medicare situation in the state and across the country is in the shape it is." *See* R. 28. Nor did Aldridge or Williams say that "CMI is sucking these facilities dry" or that the "money is coming out of the pockets of the people laying in those beds, their families and Medicare." *Id.* These were reckless, "sensational" statements made to inflame the residents of Greene County and influence the voting public against CMI.

Simmons had not received any information pertaining to the allegations against CMI and how they might relate to the Medicare situation in Mississippi or the rest of the nation, nor the source of the money at issue. Simmons "embroidered" onto the information given to him, the truth of which is also disputed, "a sensational statement" that was not furnished to him by anyone, but was apparently fabricated by Simmons. *See Trentecosta*, 703 So. 2d at 562. Simmons acted in bad faith and with reckless disregard as to whether the statements were true or not.

VI. CONCLUSION

The trial court correctly denied the Defendant's Motion for Summary Judgment. In ruling on such a motion, "[t]he evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor." *Anders v. Newsweek, Inc.*, 727 F.Supp. 1065, 1066 (S.D. Miss. 1989). The trial court should act with great caution in granting summary judgment, and may deny summary judgment "in the case where there is reason to believe that the better course would be to proceed to a full trial." *Id.* (citing *Anderson*, 477 U.S. at 255).

The summary judgment inquiry is the same in a defamation case as in any other case, *i.e.*, whether there is a genuine issue of material fact. *Anders*, 727 F.Supp. at 1066 (citing FED.R.CIV.P. 56(c)). In this case, a reasonable jury could find from the evidence that Simmons had no reasonable grounds to believe in the truth of the statements he made. Not only did he rely on statements he knew were made by a disgruntled former employee not subject to cross-examination, but he added sensational statements of his own, not based upon *any* facts. The trial court was correct in finding that summary judgment is not appropriate in this case. The trial court's order denying summary judgment should be affirmed and the case allowed to proceed to trial by a jury.

Respectfully submitted, this the 11th day of January, 2010.

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Certificate of Service

I, Jackye C. Bertucci, do hereby certify that I have this day forwarded, via United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellee to the following:

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