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

REPLY BRIEF OF THE APPELLANTS, SIMMONS LAW GROUP, P.A. and HEBER S. SIMMONS, III

(ORAL ARGUMENT REQUESTED)

Danny A. Drake, MS[redacted]
Alexander F. Guidry, MS[redacted]
Mockbee Hall Drake & Hodge, P.A.
Capital Towers, Suite 1820
125 South Congress Street
Jackson, MS 39201
(601) 353-0035
(610) 353-0045

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

Appellants continue their request for oral argument.

I. ARGUMENT

In order for CMI to prove actual malice, CMI must show that Heber S. Simmons, III ("Simmons") knew or should have known that what he said was false according to the information available to Simmons at the time he made his statement. CMI relies on inadmissible evidence and illogical deductions premised on the only admissible evidence, to argue that Simmons should have known what he said was false. The opposite is true and what CMI does not mention is that CMI has withheld the only proof that might in any way indicate Simmons' statement might not be true. As this Court may remember, it upheld a sanction against CMI for defying a court order to produce its financial information in the underlying matter, Corporate Mgmt. v. Greene County, 23 So.3d 454 at ¶¶ 31-43 (Miss. 2009). For that reason, Simmons did not have CMI's financial information when he made his statement. Simmons believes that CMI's financial information would not prove Simmons knew or should have known what he said was false. But without the production of that evidence to even potentially call the facts Simmons relied upon into question there is absolutely no evidence that the information Simmons had, and relied upon, was anything but true.

Therefore, other than the proof Simmons relied on, the only other potentially admissible proof that could question the veracity

of the facts Simmons relied on is in the sole possession of CMI and CMI refused to produce it. Id. See also, Greene County v. Corporate Mgmt., 10 So.3d 424, nt. 13 (Miss. 2009). Instead of providing what might be relevant information, CMI tries to show that Simmons knew what he said was false with a self-serving affidavit stating only that the facts that Simmons relied on in reaching his conclusion are not true. As argued at summary judgment and here on appeal, Simmons' statement is true according to the known facts and there is no proof that Simmons knew or should have known his statement was false; therefore, there is no proof of actual malice.

A. CMI failed to create a genuine issue of material fact as to whether Simmons' statement was false

CMI has failed to put forth any admissible proof that what Simmons said was not true. CMI's alleged proof is an inadmissible affidavit of CMI's C.O.O., R.E. Tab 5; R:95-96, alleging without support that everything Simmons said was false and the facts he relied on were false. The affidavit by itself fails to create a genuine issue as to this or any other material fact.

"The non-moving party's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." Luvene v. Waldrup, 903 So.2d 745, 748 (Miss. 2005). "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the

matter stated therein." Stuckey v. Provident Bank, 912 So.2d 859, 868 (Miss. 2005). Instead of producing its financial records that could potentially prove what Simmons said was wrong or somehow document that Simmons should have known what he said was false, CMI simply put forth an affidavit denouncing the veracity of Simmons' statement and the facts he relied on.

CMI relies on Stegall v. WTWV, 609 So.2d 348 (Miss. 1992), in support of its argument that its affidavit is sufficient proof. In Stegall, the parties had different versions of three events that if taken as true for the plaintiff-political candidate, might prove actual malice on the part of the defendant-reporter. Each side's only proof of their version of the contested events were the affidavits of the parties and witnesses. Apparently, there was no documentary evidence documenting or conclusively proving either side's version of whether or when phone calls were made and when a broadcast aired. The Court held that the trial court abused its discretion when it chose to believe the defendant's affidavit over the plaintiff's affidavit because the decision of which party's affidavit, or testimony, to believe regarding the disputed proof of actual malice is a jury function.

The present case is distinguishable because the only admissible evidence as to what Simmons relied upon when he made his statement proves Simmons' statement was well founded and based upon what he knew at the time which, as a matter of fact, is still what Simmons knows.

Unlike Stegall, where the disputed proof of actual malice was a person's version of an event, the disputed proof of actual malice is CMI's financial records and whether Simmons had them when he made his statement. As previously stated, CMI has failed and refused to produce them. What Simmons did have was two (2) undisputed documents to base his statement on. Those two (2) pieces of evidence, the Aldridge Statement and the Williams Report, show that CMI was mismanaging the GRHC and overcharging its patients by purchasing supplies through its wholly-owned subsidiaries at 74% above the market value prices.

CMI tries to call these two pieces of admissible evidence into question with an affidavit that says both pieces of proof are not true. Even if CMI's affidavit was admissible, which it was not, it does not offer any factual proof to show the falsity of the facts Simmons relied upon. It cannot be stated enough that the only admissible evidence that might even possibly call into question that the evidence Simmons relied upon was not true is solely in the possession of CMI. CMI has flatly refused to release this financial information pertaining to managing the GRHC. The hearing that preceded Simmons' statement to the Hattiesburg American dealt in part with CMI's refusal to turn over its financial documents. CMI was ultimately sanctioned for defying a court order to produce this financial information and the Court upheld that sanction. Corporate Mgmt. v. Greene County, 23 So.3d 454 at ¶¶31-43 (Miss. 2009).

Therefore, unlike Stegall where there was disputed proof of actual malice to show that the defendant knew or should have known her statement was false, there is none here except what might lie in CMI's own financial records. Of course, Simmons had no access to that information then or now. The only proof that could be submitted to a jury is what Simmons had at the time he made his statement and are still the only records Simmons has, which show that CMI was mismanaging the GRHC and spending 74% more on medical supplies through its wholly-owned subsidiaries. There is no admissible evidence to prove that Simmons' statement, based upon these facts, was false. Therefore, there is no disputed proof of actual malice in this case.

B. CMI failed to prove Simmons had a high degree of awareness of the probable falsity of, or entertained serious doubts as to the truth of, his allegedly defamatory statement.

CMI argues that Simmons' reliance on the Aldridge Statement and the Williams Report could not have logically led to the conclusions he reached to try to show Simmons knew what he said was false. CMI deduces that Simmons' statement was merely a fabrication and not a logical conclusion of the Aldridge Statement or the Williams Report.

CMI depends on the Louisiana case of Trentecosta v. Beck, 203 So.2d 552 (La. 1997) as support for this proposition. In Trentecosta, a bingo hall operator, Trentecosta, sued Louisiana State Police officers for defamation for comments made by the officers in a press release after Trentecosta's arrest for

allegedly violating two Louisiana gaming statutes. One for allegedly leasing his bingo hall at a rate based on a percent of gross profits and the other was for paying workers to run a bingo game for a charitable organization. Id. at 555. The article about the arrest quotes an officer who said that Trentecosta was running a "large scale illegal bingo operation" and had "bilked thousands of dollars from charities over the years." Id. at 557.

The trial court found that the officer simply had no evidence that Trentecosta was either running a large scale illegal operation or bilking his customers. Id. The Louisiana Supreme Court held that the evidence from the investigation proved the officer's statements were clearly false. Id. at 559. Since there was no direct evidence that the officer knew his statements were false, the court looked to whether there was clear and convincing proof that the statements were made with reckless disregard for whether the statement was false or not. Id. at 561.

The court used the United States Supreme Court case of St. Amant v. Thompson, 390 U.S. 727 (1968) for a definition of "reckless disregard." The Supreme Court stated, "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant, 390 U.S. at 731. The Supreme Court noted that such a test could put a premium on ignorance when holding:

> The 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. The finder of fact must determine whether the publication was indeed made in bad faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found when there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

St. Amant, 390 U.S. at 732.

The Louisiana court held that the officer's conduct was an example of bad faith publication. The publication was "reckless," specifically because the officers never had any evidence that Trentecosta was bilking charities. Trentecosta, 703 So.2d at 562. Because there was no admissible evidence to support the statement from any source, the court concluded the officer acted in bad faith and with reckless disregard as to whether the statements were false or not. Id.

The present case is completely the opposite situation and thus easily distinguishable. Simmons' statement was neither a fabrication, nor a product of his imagination or premised on an unverified anonymous source. Simmons' statement is not illogical or improbable and there are no reasons to doubt the veracity of his statement, or that Simmons had any logical reason to doubt what he said was true, when considered in the light of the known facts.

The known facts at the time Simmons made his statement were:

1. Simmons was retained to represent the Greene County Board

of Supervisors in a dispute with CMI, R.E. Tab 4; R:35;

2. A former officer of the GRHC gave a lengthy sworn statement about CMI's questionable management of the GRHC, R.E. Tab 4; R:36-35;

3. CMI defied a court order to produce its financial records, R.E. Tab 4; R:63-64;

4. Simmons had a court-ordered CPA report stating that CMI was purchasing supplies through its wholly-owned subsidiaries at an average markup 74% above market rates. R.E. Tab 4; R:56-58; R:75.

5. Simmons' conclusions pertaining to Medicare and Medicaid were logical in part because he knew the Board of Supervisors would be ultimately responsible to accurately report to Medicaid and Medicare. At the January 23, 2008 hearing, Simmons set out his logic concerning the impact of CMI's actions on medical issues when he said:

> GRHC is paying the employees not CMI, and on top of that every product or service coming in is coming through his own subsidiaries, and we're paying a 75% mark up. That's what theses financial records have shown. Now the main concern and why this last item is so important, Your Honor, the reasons it was argued and this Court found important enough to list, we need to know the place where these things that we've purchased are? Where they're currently located, and the things that you purchased where were they used? How were they used? Because one of the biggest problems is Medicaid fraud is that we're going to be eligibly responsible for because all these are being reported on a cost report to Medicaid and Medicare that Greene County is ultimately as the owner is going to be responsible for is that one of the biggest problems is that these are phantom things.

> Let's say there's a surgical tray that's allegedly used in the ER, and they buy it from Quest Medical, but that surgical tray never appears. Now I can't determine that fraud issue until I get that item and its identified where it was, where it was used, or it's a monitor, where is it today?
>
> And it was important enough for the Court to order it, and it's been in writing ever since, and we've been through this now for the fourth time. And it's important to us not only because of the amount of money that's involved, but now we see what's happening in reality. The light of day has shown on the circumstance. The people of this County need to know this and more importantly if they are going to argue that they are entitled to continue under a management contract that takes 15% of the gross revenue that jumps up to roughly a million five a year. This facility will not survive that. They are sucking everything out, and they want more, and the fraud issue, which concerns me the most, can be answered by them. That they have decided not to produce it and tell us; although I think unequivocally made it very clear.
>
> And now we're going to have to deal with, No. 1, answering the Medicare and Medicaid as to these reimbursement that have been submitted. Are they real? Are they valid?
>
> R.E. Tab 4; R:76-77.

Based on these known facts, the only known facts, what Simmons said was not only logical and plausible, but true.

Simply put, knowing what he knew to be true, there was no reason for Simmons to have any doubts about the veracity of his statement. That is especially true when you consider CMI was defying a court order to produce the only evidence that might have shed some further light on CMI's activities. It was reasonable to take CMI's refusal to obey a court order as a further affirmation that the Aldridge Statement and the Williams Report were true.

Taking all the facts and circumstances into account, Simmons did not act in bad faith or with reckless disregard as to whether his statement was false or not.

C. Moon is on point.

This Court's decision of Moon v. Condere Corp., 690 So.2d 1191 (Miss. 1997) is squarely on point. The facts in this case clearly show that the information Simmons had regarding CMI's financial management of the GRHC came from the Aldridge Statement, the Williams Report and any other facts he obtained as counsel for the Board of Supervisors. Just like the individuals in Moon, Simmons made a statement based on information provided by reliable sources with no known contradictory evidence. As held in Moon, even if those facts later turn out to be false, and here there is still no reason to believe they will, Simmons' reliance on those facts would be merely negligence and not actual malice. Moon, 690 So.2d at 1196. Therefore, CMI's defamation claim fails as a matter of law.

II. CONCLUSION

CMI's rebuttal evidence is not sufficient under Miss. R. Civ. P. 56, Stuckey, 912 So.2d at 865, to refute Simmons' statement or prove the facts he relied upon are false; therefore, Simmons' statement must be taken as true and is not defamatory. Blake v. Gannett Co., Inc., 529 So.2d 595, 602 (Miss. 1988). Even if Simmons' statement could somehow later be proven not true, CMI failed to advance any evidence to establish that Simmons had any reason to doubt the truth of what he said when he said it, Moon, 690 So.2d at 1195, and therefore, CMI's cause of action is missing

an essential element and does not exist as a matter of law. Williams v. Bennett, 921 So.2d 1269, 1272 (Miss. 2006).

This the 26th day of February, 2010.

Respectfully submitted,

SIMMONS LAW GROUP, P.A. and

HEBER S. SIMMONS, III

By Their Attorneys,

MOCKBEE HALL DRAKE & HODGE, P.A.

BY: _____

DANNY A. DRAKE, MS [redacted]

ALEXANDER F. GUIDRY, MS [redacted]

Mockbee Hall Drake & Hodge, P.A.
Capital Towers, Suite 1820
125 South Congress Street
Jackson, MS 39201
(601) 353-0035
(601) 353-0045

III. CERTIFICATE OF SERVICE

I, Alexander F. Guidry, 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 Reply Brief of the Appellants to the following:

Darren E. Gray, Esq.
Jackye C. Bertucci, Esq.
P.O. Box 3269
Gulfport, MS 39505

ATTORNEYS FOR CORPORATE MANAGEMENT, INC. (CMI)

The Honorable Kathy King Jackson
Circuit Court Judge
PO Box 988
Pascagoula, MS 39568-0998

This the 26th day of February, 2010.

ALEXANDER F. GUIDRY