

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

(ORAL ARGUMENT REQUESTED)

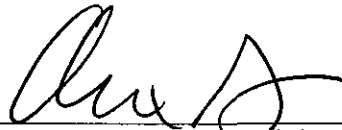
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CERTIFICATE OF INTERESTED PERSONS

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, PC, Former Counsel for Appellee
8. Darren E. Gray, Esq. and Jackye C. Bertucci, Esq., Counsel for Appellee



Alexander F. Guidry
Counsel for Appellants

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STATEMENT REGARDING ORAL ARGUMENT

Simmons Law Group, P.A. and Heber S. Simmons, III, Esq. respectfully suggest that oral argument will be of assistance to the Court in resolving the issues presented.

I. STATEMENT OF ISSUES

Whether the Circuit Court of Greene County abused its discretion in denying Appellants, Simmons Law Group, P.A.'s and Heber S. Simmons, III's ("Simmons"), Motion for Summary Judgment by finding that Appellee, Corporate Management, Inc. ("CMI"), had introduced sufficient evidence under Miss. R. Civ. P. 56 to support its position that there was a genuine issue as to whether Simmons' allegedly defamatory statement was false.

Whether the Circuit Court of Greene County abused its discretion by failing to find that CMI had not met its burden to introduce sufficient evidence to show there was any genuine issue as to whether 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.

II. STATEMENT OF THE CASE

A. Nature of the Case

In January 2008, CMI and the Greene County Board of Supervisors ("Greene County") were embroiled in litigation over Greene County's termination of CMI's contracts to manage Greene Rural Health Center ("GRHC"). See, Greene County v. Corporate Mgmt., 10 So.3d 424 (Miss. 2009). Shortly following a January 23,

2008 motion hearing on CMI's failure to produce financial records (the "January Motion Hearing"), Simmons, as Greene County's attorney, said the following, in part, to a reporter which was later published on January 25, 2008 in the Hattiesburg American:

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.

CMI filed a defamation suit against Simmons a month later. Simmons then moved for summary judgment asserting that CMI was a "vortex" public figure and, as such, could not meet its burden of proof because Simmons' statement was based on undisputed facts and even if the facts were ultimately proven to be untrue now, that does not prove actual malice.

At the hearing, CMI admitted that it was a "vortex" public figure thus subjecting itself to the actual malice standard. CMI's offer of proof of actual malice was CMI's C.O.O.'s self-serving affidavit alleging only that the facts on which Simmons' statement was based were false - and therefore the statement itself was not true. The Circuit Court of Greene County held the affidavit created a genuine issue of material fact as to whether the facts Simmons relied on were false. The Circuit Court committed two errors. First, the Circuit Court's ruling failed to consider whether CMI's proof was adequate under Rule 56 to show that Simmons' statement was false. Therefore, the Circuit Court abused its discretion when it ruled that CMI had created a genuine issue

as to whether the statement was false.

Second, the Circuit Court's ruling failed to consider whether CMI's evidence, taken as true, could prove by clear and convincing evidence another essential element of CMI's vortex public figure - defamation case. Since this case involves a vortex public figure, CMI had the burden to prove actual malice and to do that CMI not only had to prove that Simmons' statement was false, it also had to prove that at the time Simmons made his statement he had a high degree of awareness of the probable falsity of, or entertained serious doubts as to the truth of, what he said. CMI's proof, even taken as admissible, probative and true, only goes to prove that today there might be some small doubt that what Simmons said could possibly be false. Therefore, there is this essential element of CMI's case as to which there is no genuine issue and CMI's cause of action must fail. The Circuit Court abused its discretion when it did not find that CMI had failed to prove this essential element of CMI's vortex public figure - defamation case.

B. The Course of Proceedings and Disposition in the Court Below

On March 7, 2008, CMI filed the present action against Simmons. R:6. Simmons moved for summary judgment, R:16, and after a hearing on March 19, 2009, the trial court entered an Order denying Simmons' motion. R.E. Tab 3; R:109-110.

C. Statement of the Facts

CMI, a private hospital and nursing home administrator, contracted to manage the public hospital and nursing home in Greene

County, known as the Greene Rural Health Center ("GRHC"). R.E. Tab 4; R:33. Greene County terminated CMI's management contracts. R.E. Tab 4; R:33-34. CMI filed suit against Greene County and others for breach of contract ("CMI v. GRHC"). R.E. Tab 4; R:34. Greene County retained Heber Simmons and the Simmons Law Group as defense counsel.¹ R.E. Tab 4; R:35.

A year prior to Simmons' retention, James Aldridge, a former administrator of GRHC, gave a sworn statement about his experiences working for CMI at GRHC ("Aldridge Statement"). R.E. Tab 4; R: 36-55. Aldridge testified in part:

Quest Medical is owned by Corporate Management, Incorporated. It is the medical supply company for all the medical facilities that they operate.

Quest Rehab is an independent rehab company that provides basically occupational therapy, speech therapy, physical therapy.

R.E. Tab 4; R:39.

* * *

Seeking competitive prices and services was really never an option. It was always mandated that we will buy from Quest Medical.

* * *

I was told from day one basically that we buy all of our medical supplies from Quest Medical. We buy all of our supplies from Quest Medical and we use rehab services through Quest Rehab, that was not an option, that was just the way it is. We own these companies.

¹ Greene County and CMI's contractual relationship and the complicated procedural history in the Greene County Chancery Court is comprehensively detailed in Greene County, 10 So.3d at ¶¶ 2-23.

R.E. Tab 4; R:40.

* * *

... [StarAnn Lemear, C.O.O. of CMI] said, "You always get the Quest Medical bids first, then you find higher ones than Quest Medical, so we can always buy from Quest Medical."

R.E. Tab 4; R:42.

* * *

I could have bought straight from the vendor or I could have bought from a multitude of other people that sell that same product; however, per the mandate that was issued to me by StarAnn Lemear, okay, buying from another company besides Quest Medical was not an option unless Quest Medical did not offer the same product.

R.E. Tab 4; R:46.

* * *

[The Board] had done some research and discovered that the RFP was 3,000 or \$3500, and that you had to get multiple bids over \$3500. Well, I was freaking out because I was told by Miss Lemear that it was \$15,000. And so I started calling - I called Miss Lemear, I said, "What do you want me to do about all of this stuff that we bought that was over \$15,000?" She said, "I want you to go back and get multiple bids." I said, "Well, we've already purchased them and some of this equipment is already in the building." And she said, "go back and get backdated quotes."

R.E. Tab 4; R:48.

* * *

[A] majority of the time [Quest was] not the lowest 90 percent of the time.

R.E. Tab 4; R:50.

* * *

There was quite a bit of self-dealing going on besides the purchasing of the medical supplies through Quest Medical, which is owned by Ted Cane, CMI. They also own - "they," Ted Cane, CMI, also owned a corporate company called Quest Rehab Services. They provide physical therapy, occupational therapy, speech therapy to the residents of the hospital and/or nursing home. They are directly housed in the hospital and in an old Operating Room 1. They are on-site basically eight hours a day, five days a week.

And how the money trail sort of goes is because in a critical access hospital, okay, you are not making a huge profit. You want to keep your cash flow up. So Corporate Management, StarAnn Lemear, had instructed me to get patients from the nursing home brought over to the hospital and admitted to one of our three beds. And to keep three in it at all times so that they could get rehab services, we could buy medical supplies from their company, and we also could keep a cash flow going for the hospital in order to meet payroll and pay some of the leases that we had initiated.

Well, if a patient needs to go to a hospital legitimately, that's fine, they come through the emergency room, the doctor decides whether or not they need to be admitted to one of the three rooms.

In the very beginning, we were at a occupancy rate of around 33 percent, which is one room out of three being filled. I was ordered by StarAnn Lemear and Terry Beard, and so was Miss Hunt, to find patients from the nursing home, to have them transferred over to the hospital to use their swing bed days.

R.E. Tab 4; R:52-53.

* * *

I had this case come up in late July, you know, where an individual was admitted, the 100 days were used. The patient wasn't really

sick. He was eating, doing good, talking, that whole nine yards. And we sent him back to the nursing home after we used his 100 days, got somebody else in. The patient became sick and needed to go back on swing bed. Well, you have to have a 60-day wellness period in between hospital stays in order to regenerate the 100 days again. So if he goes into the hospital, which he did, he had to pay a large amount of money for that service, and that's when it really became apparent to me what was going on.

R.E. Tab 4; R:54-55.

On January 21, 2008, two days before the January Motion Hearing and four days before the published Simmons statement, Cary Williams, CPA, produced a court-ordered report detailing CMI's purchases while CMI was managing the GRHC ("Williams Report").

R.E. Tab 4; R:56-58. The Williams Report stated in part:

1. For this sampling process 161 samples were taken that resulted in an average markup of 74% in prices paid by GRHC facility from CMI affiliates compared to the 3 distributors.

* * *

4. An array of the 161 samples is as follows:

Number of Samples	Markup rates as paid by GRHC over 3 distributor prices
2	CMI affiliates had better prices by 4% and 12% on the two invoices
11	Distributor prices better by less than 5%
148	Distributor prices better by 9% to 367%

* * *

6. In addition to the sampling discussed above, another sample was conducted by [Williams] where one out of every 15 purchases, taken from CMI invoices, was priced using internet sources. This was an attempt to insure pure random selection. Results of this sampling was an average 70% increase price paid by GHRC thru CMI affiliates over prices paid on the open market.

R.E. Tab 4; R:57.

At the January Motion Hearing in CMI v. GRHC, Simmons made certain statements on the record regarding CMI's management of GRHC that were based on known facts in CMI v. GRHC in addition to the Aldridge Statement and the Williams Report:

What they did is they took over \$600,000 that was in GRHC's operating fund, and they spent that to get a three bedroom hospital ER, quote, up and running and the nursing home. That wasn't coming out of his pocket. That came out of GR - 600 plus thousand. Specifically \$626,263. They spent more than that. In four months they spent a million two eight. That was in the financial records that they produced.

Then we look at, because we want to know, Your Honor, what they're doing with their affiliates. CMI has wholly owned subsidiaries. Quest. Rehab. Quest Pharmacy. And it turns out that the information that we finally get, which again doesn't show us - and I'll tell you why that's important. It shows us that on average they are paying a 74 percent markup from cost to its own subsidiaries for the same products and goods that can be obtained on the open market.

R.E. Tab 4; R:63-64.

* * *

So if an item cost \$10, and their subsidiaries go out and get it, and we've determined that these items are available on the open market

for \$10, then they are sending an invoice to CMI and charging CMI - not CMI - GRHC, 17.50 roughly. And that's coming straight through, and it's coming out of GRHC's operating budget. On top of that, we're paying them a management agreement of 25 grand a month.

So he's making it on the management agreement for managing the facilities. 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 percent markup. That's what these 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.

R.E. Tab 4; R:64-65.

* * *

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 percent of 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 that.

R.E. Tab 4; R:66.

On January 25, 2008, the Hattiesburg American published an article about the January Motion Hearing and the article contained

a Simmons' out of court statement:

CMI purchases nearly all of the supplies, medications and services it uses through three wholly-owned subsidiaries: Quest Medical, Quest Rehab and Quest Pharmacy. Simmons said that these entities purchase the supplies, services and medicines on the open market and mark them up an average of 74 percent when they are sold to the Greene Rural Health Center. Many of the charges are as much as 200 percent higher than open market prices.

Simmons said that in addition to management fees and mark-ups, CMI also received an additional \$21,000 annual consulting fee through Quest Pharmacy, on top of paying more than \$100,000 per year to a part-time pharmacist.

Particularly troubling to Simmons is that CMI was ordered three times by the court and finally held in contempt before providing any financial information. Nor did CMI provide regular financial information to the GRHC trustees.

"This is a prime example of why the Medicare situation in the state and across the country is in the shape it is," Simmons said. "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."

R.E. Tab 4; R:68-69.

On March 7, 2008, CMI filed the present action against Simmons and Simmons moved for summary judgment on November 20, 2008. R:6; R:16. At the March 19, 2009 hearing on Simmons' Motion for Summary Judgment, CMI admitted that it was a "vortex" public figure:

No. No, we have an obligation to correctly advise the Court legally and we're doing that. It was a public issue that had been in the public domain, i.e., whether or not to change management of the public hospital. Public dollars were being spent on it so I think, you know, legally, they were a vortex public --

they were brought into the public fray by that. But, so, our standard is to prove that he acted with reckless disregard for the truth or actual malice.

R.E. Tab 6; T:17-18.

III. SUMMARY OF ARGUMENT

CMI's evidence is inadequate under Miss. R. Civ. P. 56, Stuckey v. Provident Bank, 912 So.2d 859, 865 (Miss. 2005), and CMI's evidence fails to prove an essential element of its vortex public figure - defamation case. Moon v. Condere Corp., 690 So.2d 1191, 1196 (Miss. 1997).

IV. STANDARD OF REVIEW

According to Faulkner v. Wilcher (In re Will of Wilcher):

In reviewing a trial court's grant or denial of summary judgment, the well-established standard of review is de novo. Summary judgment is appropriate where "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 and that the moving party is entitled to a judgment as a matter of law." "A summary judgment motion is only properly granted when no genuine issue of material fact exists." "[T]he evidence must be viewed in the light most favorable to the party against whom the motion has been made."

994 So.2d 170, 174 (Miss. 2008) (internal citations omitted).

"The appropriate summary judgment question is whether the evidence in the record could support a reasonable jury finding either that [CMI] has shown actual malice by clear and convincing evidence or that [CMI] has not." Franklin v. Thompson, 722 So.2d 688, 692 (Miss. 1998).

V. ARGUMENT

In order for a plaintiff to prove a typical defamation claim, it must show:

- (1) a false and defamatory statement concerning the plaintiff;
- (2) an unprivileged publication to a third party;
- (3) fault amounting at least to negligence on the part of the defendant; and
- (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Moon, 690 So.2d at 1195 (citing Blake v. Gannett Co., Inc., 529 So.2d 595, 602 (Miss. 1988); Franklin, 722 So.2d at 692. However, the standard for element, "fault amounting at least to negligence," is raised in the case at bar:

Where a defamed party is a public figure, however, such party is prohibited from recovering damages unless that party 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.

Moon, 690 So.2d at 1195 (citing Blake, 529 So.2d at 600-01).

"[P]rivate individuals who become 'limited purpose' or 'vortex' public figures may also be subjected to this 'malice standard of proof.'" Moon, 690 So.2d at 1195 (citing Blake, 529 So.2d at 600-01; Ferguson v. Watkins, 448 So.2d 271 (Miss. 1984)). CMI is an admitted "vortex" public figure. R.E. Tab 6; T:17-18.

In a vortex public figure - defamation case, "[A] person's ill will or personal spite will not, standing alone, support a finding

of actual malice . . . [T]he evidence must show that [Simmons] made a false publication with a 'high degree of awareness of . . . probable falsity' or must have 'entertained serious doubts as to the truth of his publication.'" Franklin, 722 So.2d at 692.

The Circuit Court erred: A) when it held that the proof CMI tried to proffer was sufficient to create a genuine issue as to whether what Simmons said was true; and the Court erred: B) when it failed to find that CMI did not introduce any proof on another essential element of CMI's vortex public figure - defamation case - that Simmons had a high degree of awareness that what he said was false.

A. Issue: Whether the Circuit Court abused its discretion when holding that CMI's evidence was sufficient under Rule 56 to create a genuine issue that Simmons' statement was false

The Circuit Court held CMI created a genuine issue as to whether Simmons' statement was based in fact. R.E. Tab 3; R:110. The Circuit Court made that holding based on an affidavit of CMI's C.O.O. R.E. Tab 5; R:95-96. CMI's affidavit simply alleging that everything that Simmons said and the facts he relied on are false does not by itself create a genuine issue on this or any other material fact.

1. CMI's unsupported affidavit was not legally sufficient proof to oppose Simmons' Motion for Summary Judgment

CMI's affidavit is not sufficient evidence under Miss. R. Civ. P. 56 to refute Simmons' statement or prove the facts he relied upon are false. "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." Luvane v. Waldrup, 903 So.2d 745, 748 (Miss. 2005). In Stuckey v. Provident Bank, the Court reiterated the standard of evidence a non-moving party must submit to defeat summary judgment:

[T]he "unmistakable language" of Rule 56 as providing "that mere denial is insufficient to create an issue of fact This is true whether the denial be in pleadings, briefs or arguments. Only sworn denials providing a credible basis therefore in evidentiary fact will suffice." Citing federal precedent, we ultimately held: Our Rule 56 mandates that the party opposing the motion [for summary judgment] be diligent. "Mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment." The party opposing the motion is required to bring forward significant probative evidence demonstrating the existence of the triable issue of fact.

912 So.2d 859, 865 (Miss. 2005)(internal citations omitted). Stuckey holds, "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." Id. at 868.

CMI's affidavit, R.E. Tab 5; R:95-96, fails to create any genuine issue of material fact because it fails to allege any detailed and precise facts required by law to show that Simmons' statement was false or that the facts Simmons relied on were false.

The law demands that a non-moving party submit "detailed and precise facts" because "[m]ere general allegations . . . will not prevent the award of summary judgment." Stuckey, 912 So.2d at 865.

That is because a "mere denial is insufficient to create an issue of fact." Id. CMI's two page affidavit, R.E. Tab 5; R:95-96, is only a mere denial:

3. Mr. Cary Williams' analysis of CMI's actions is unfounded and without merit and untruthful.

4. Mr. Heber Simmons allegations of fraud and misappropriation of funds are untruthful.

* * *

6. All charges for equipment, supplies and/or services provided by CMI, Quest Rehab, Inc., Quest Medical Services, Inc., Quest Pharmacy, Inc., LTC Consulting, and Stone County Hospital, Inc. were to Greene Rural Health Center were usual and customary charges and did not deviate from what those companies charged any other customer.

7. The statements made by James Aldridge regarding any type of purchasing practices or price manipulations under taken by the above mentioned entities are totally false.

8. Remarks by Mr. Aldridge are retaliatory in nature and in complete contrast to previous statements made while Mr. Aldridge was employed by Greene County. In fact, Mr. Aldridge as facility Administrator was completely in charge of all start-up aspects or re-opening the Greene County Hospital. He and his staff personally picked and ordered every supply and piece of equipment necessary to open and continue operations of the facility. The remarks by Mr. Aldridge occurred after he was terminated by Stone County Hospital, Inc. for egregious violation of company policy and an express directive from superiors not to confront employees who made allegations against Mr. Aldridge.

9. Mr. Simmons' remarks were made with malice and with the intent to damage CMI's reputation in the community just before an election was to be held concerning CMI's continued operation of the facility known as GRHC.

R.E. Tab 5; R:95-96.

CMI, as the sole possessor of this evidence, either refused to produce the evidence to support these allegations or it has none.² Among the glaring failures to introduce logically required supporting evidence are:

1. CMI alleges that a report produced by a court-appointed Certified Public Accountant is false without any evidence, such as its own audit of its purchases to prove the CPA report is false;
2. CMI alleges Mr. Simmons' allegations are false without any supporting financial data to the contrary;
3. CMI claims the purchases at GRHC were reasonable and customary without any supporting evidence such as prices paid as compared to competitor's purchases on the open market;
4. CMI alleges that Mr. Aldridge's statements about GHRC purchases are false without any evidence such as documentation of CMI's purchasing policy or Aldridge's allegations of GHRC's purchases;
5. CMI alleges that Mr. Aldridge was in fact in charge of the purchasing decisions at GRHC without any evidence that Mr. Aldridge exclusively made all of the purchasing

² See, Greene County, 10 So.3d at 429, nt. 10 ("Greene County also argued that the Trustees and CMI had failed to submit a full accounting of the financial affairs of the [GRHC] as required in the final order").

decisions at GRHC;

6. CMI alleges that Mr. Aldridge's statements are retaliatory due to his termination without any evidence pertaining to his termination, why he was terminated or any evidence that his termination influenced his testimony;

Mississippi law does not allow for CMI to simply allege that everything Simmons knew about CMI v. GRHC is false. "Mere general allegations . . . will not prevent the award of summary judgment." Stuckey, 912 So.2d at 865.

CMI's affidavit is wholly unsupported by any probative evidence and this fails to meet its burden of proof under Rule 56 to show that the facts Simmons relied on were false. Therefore, CMI's proof fails to create a genuine issue on this, or any other, material fact and the Circuit Court abused its discretion when it ruled otherwise.

2. Truth is a complete defense to defamation

Since CMI's proof in rebuttal to Simmons' Motion for Summary Judgment fails under the law, Simmons' statement and the facts he relied on must be taken as true. Without the required proof that what Simmons said was false, Simmons cannot be liable for defamation. "Truth is a complete defense to an action for libel." Blake v. Gannett Co., Inc., 529 So.2d 595, 602 (Miss. 1988). "This Court only requires that the statements be 'substantially' true." Armistead v. Minor, 815 So.2d 1189, 1194 (Miss. 2002).

B. Issue: Whether the Circuit Court abused its discretion by failing to find that CMI's evidence failed to prove an essential element of this vortex public figure - defamation case

The Circuit Court's denial of Simmons' Motion for Summary Judgment failed to consider whether CMI's evidence, even taken as true, would prove by clear and convincing evidence another essential element of this vortex public figure - defamation case. Not only must CMI prove that Simmons' statement was false, it must also prove that Simmons acted with actual malice--that is, with knowledge that his statement was false or that he acted with reckless disregard of whether it was false or not. To do that, CMI must prove that at the time Simmons made his statement, he knew it was false or entertained serious doubts that it was false. At best, CMI's proof taken as true only alleges that the facts Simmons relied on might now be determined to be false and not that Simmons knew that his facts were false at the time of the statement. That knowledge of falsity, at the time of his statement, is an essential element of CMI's case. The Circuit Court abused its discretion when it failed to consider whether CMI had put forward any evidence to establish that essential element.

1. CMI's failure of proof on an essential element of its case renders all other facts immaterial

CMI's defamation claim does not exist as a matter of law because it cannot prove actual malice, an essential element of its case. "For summary judgment review, the mere existence of triable issues do not entitle one to a trial . . . the mere existence of a disputed factual issue, therefore, does not foreclose summary

judgment. The dispute must be genuine, and the facts must be material." Williams v. Bennett, 921 So.2d 1269, 1272 (Miss. 2006); See, Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc., 519 So.2d 413, 416 (Miss. 1988); Galloway v. Travelers Ins. Co., 515 So.2d 678, 684 (Miss. 1987); Spoos v. T. L. Wallace Constr. Co., 858 So.2d 199, 205 (Miss. Ct. App. 2003). "Where 'the summary judgment evidence establishes that one of the essential elements of the plaintiffs' cause of action does not exist as a matter of law . . . all other contested issues of fact are rendered immaterial." Williams, 921 So.2d at 1272 (quoting Celotex v. Catrett, 477 U.S. 317, 323 (1986)). As discussed below, CMI failed to advance any admissible, probative evidence to establish one essential element of CMI's vortex public figure - defamation case; therefore, CMI's cause of action does not exist as a matter of law. Williams, 921 So.2d at 1272 (quoting Celotex, 477 U.S. at 323).

2. CMI's evidence does not and cannot prove actual malice

a. CMI must prove actual malice

CMI admitted at the March 19, 2009 hearing on Simmons' Motion for Summary Judgment that CMI was a vortex public figure for the purposes of its defamation claim. R.E. Tab 6; T:17-18. "Where a defamed party is a public figure, however, such party is prohibited from recovering damages unless that party 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." Moon v. Condere Corp., 690 So.2d 1191, 1195 (Miss. 1997) (citing

Blake v. Gannett Co., Inc., 529 So.2d 595, 600-01 (Miss. 1988)).

"[P]rivate individuals who become 'limited purpose' or 'vortex' public figures may also be subjected to this 'malice standard of proof.'" Moon, 690 So.2d at 1195 (citing Blake, 529 So.2d at 600-01; Ferguson v. Watkins, 448 So.2d 271 (Miss. 1984)).

As a vortex public figure, CMI must prove by clear and convincing evidence that Simmons' statement was made with actual malice in order to succeed in its defamation claim. Franklin v. Thompson, 722 So.2d 688, 692 (Miss. 1998). "[T]he First Amendment requires that the public official prove 'actual malice', which is knowledge of falsity or reckless disregard of truth or falsity." Staheli v. Smith, 548 So.2d 1299, 1304 (Miss. 1989); Ferguson, 448 So.2d at 279. "[A] person's ill will or personal spite will not, standing alone, support a finding of actual malice . . . [T]he evidence must show that [Simmons] made a false publication with a 'high degree of awareness of . . . probable falsity' or must have 'entertained serious doubts as to the truth of his publication.'" Franklin, 722 So.2d at 692. Negligence alone is not sufficient to establish actual malice. Moon, 690 So.2d at 1196; Weems & Weems, Miss. Law of Torts, §11-2(a).

CMI has not even attempted to put forth any probative evidence that Simmons made his statement with a "high degree of awareness of . . . probable falsity' or . . . 'entertained serious doubts as to the truth of his publication.'" Franklin, 722 So.2d at 692. CMI's only alleged basis for actual malice is that: 1) the facts Simmons relied on were false; and 2) as an attorney, Simmons had some

heightened duty to investigate the facts to confirm whether they were true or not. As demonstrated below, pursuant to Mississippi law, actual malice cannot be proven even if the facts Simmons relied on in good faith are ultimately proven untrue now (which here they are not, see, V.B.1 above) and there is no legal basis to claim that Simmons is under any heightened duty to investigate whether the facts he was relying on were true.

b. CMI's evidence, even taken as true, can at best only prove simple negligence.

CMI's evidence, taken as true, cannot prove an essential element of CMI's case because CMI's evidence only attempts to show that the facts Simmons relied on might be false now but not that Simmons' knew that the facts were false at the time of the statement. The Mississippi Supreme Court in Moon v. Condere Corp. held that reliance on facts that are later proven untrue is simply "misfeasance" and only "[rises] to a level of simple negligence." 690 So.2d 1191, 1196 (Miss. 1997).

In Moon, Moon and Young worked for Armstrong Tire and lost their jobs when Armstrong Tire announced that it was closing its Natchez plant. Id. at 1193. Thereafter, Condere Corporation (organized by former management of Armstrong) announced that it had purchased the plant from Armstrong and would begin making tires. Id. Condere did not hire Moon and Young so the two filed suit against Condere to be reinstated. Id.

An attorney for Moon and Young researching the ownership structure of Condere, wrote a letter to Moon stating that Condere

was 100% owned by an Armstrong holding company. However, the attorney's information was not correct, i.e. it was false, because it was in fact based on an inaccurate publication. Id. Condere actually had no connection with Armstrong.

One of the requirements of Condere's application for special tax exempt status was that it had to be a "new" business. Moon, 690 So.2d at 1193. At a hearing to discuss Condere's tax exemption application, and in reference to Condere's alleged relationship with Armstrong, Moon said:

I just believe there is a lot more laying [sic] there that the Board of Supervisors needs to look into. I think the record is going to show that when you talk about Fidelity or Condere Corporation, whichever you prefer, it's going to show that the information that we have still shows that it's still Armstrong.

Id. Moon's wife said:

We understand that [Condere] has asked for a large tax break which, of course, we just heard. Our information shows that Armstrong still controls the Natchez plant which is known as [Condere] and we feel that it would bring an undue burden on the taxpayers.

Id. The comments were broadcast on local television and Condere asked Moon to retract his statement. Id. Moon refused. Id.

Young wrote a letter to the editor of the Natchez newspaper asserting that Condere was linked to Armstrong and that "[Condere] has accepted federal money to 'train' men to do jobs they have had for years!" Id. Young relied on a Special Assistant Attorney General's letter stating that Armstrong was doing business as Condere, in addition to the same inaccurate information Moon relied

on. Id. at 1196. Condere asked Young to retract but he refused. Id. at 1193.

Condere filed defamation suits in federal court against Moon and Young when they refused to retract their statements. The district court held that Condere was a "vortex" public figure and could not prove actual malice. Moon, 690 So.2d at 1196. Moon and Young then filed a malicious prosecution claim against Condere. Id. at 1197.

The Mississippi Supreme Court agreed with the district court that Condere was indeed a "vortex" public figure and that "their activities were the subject of fair comment." Moon, 690 So.2d at 1195. The Court further agreed with the district court that Moon and Young's "'misfeasance' in relying on the information they received concerning Condere's corporate structure 'only rises to the level of simple negligence,' rather than actual malice." Id. at 1196; see also, New York Times Co. v. Sullivan, 376 U.S. 254, 287-288 (1964) ("We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.").

In this case, Simmons' statement to the Hattiesburg American is based on facts that he knew to be true at the time the statement was made and, to date, there is still no proof those facts are false. Moon shows that reliance on facts known to be true at the time of the publication, even in the situation where they later turn out to be false, can only be simple negligence. At most, even

if CMI's self-serving affidavit is accepted as proof, CMI can only possibly prove that the facts Simmons relied may turn out to be false now, not that Simmons knew that then. To meet its burden of proof, CMI must show that Simmons had a "high degree of awareness of . . . probable falsity" or must have 'entertained serious doubts as to the truth of his publication.'" Franklin, 722 So.2d at 692. No evidence at all to that effect has been proffered. In fact, the evidence here, the Aldridge Statement and the Williams Report, proves Simmons had every reason to justifiably rely on the truth of the facts that supported his statement. Therefore, CMI failed to advance any evidence to establish this essential element of its vortex public figure - defamation case and its cause of action does not exist as a matter of law. Williams, 921 So.2d at 1272.

c. Simmons had no heightened duty to investigate the facts he relied on

At the hearing on Simmons' Motion, CMI argued that Simmons acted with actual malice because he was "reckless" in relying on the Aldridge Statement and the Williams Report. R.E. Tab 6; T:15. CMI's legally groundless premise was apparently that Simmons, as an attorney, should have investigated the Aldridge Statement and Williams Report further before speaking. Again, CMI cited no, and in fact there is no, legal authority for this extra duty they try to place on Simmons. In effect, what CMI claims is that Simmons acted with actual malice when he relied upon a sworn statement and a court-ordered CPA's report. The United States Supreme Court clearly refutes this argument:

Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added); see, Gulf Pub. Co. v. Lee, 434 So.2d 687, 696 (Miss. 1983). CMI's affidavit, R.E. Tab 5; R: 95-96, alleges that the facts Simmons relied on were not true but offers no proof as to what level of investigation it would have taken to allegedly show the facts were false. The unreasonableness of CMI's assertion is further demonstrated by the fact that CMI is the only possessor of the information required to allegedly show the relied upon evidence was false and CMI was reluctant to share that information. See, Greene County, 10 So.3d at 429, nt. 10 ("Greene County also argued that the Trustees and CMI had failed to submit a full accounting of the financial affairs of the [GRHC] as required in the final order"). If CMI, the purported holder of the evidence that proves Simmons did not adequately investigate what would have proven to be an inaccurate statement, fails to produce the evidence to support that contention, then Simmons cannot be shown to have failed to meet an unsupported elevated investigation standard.

St. Amant shows Simmons was entitled to rely on the Aldridge Statement and the Williams Report and that he had no further duty to investigate the veracity of the proof. The facts show there was no reason for Simmons to question the facts he relied upon.

Aldridge is a former employee but he had not been discredited when he made his statement and in fact, he has not been discredited now. Williams is a CPA and produced his report pursuant to a court order. His report has never been refuted. CMI cannot meet its burden of proof to show actual malice by simply alleging that an attorney has some heightened duty to investigate the sources of his statement with no legal support for that proposition.

VI. 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, 529 So.2d at 602. 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, 921 So.2d at 1272.

This the 9th day of October, 2009.

Respectfully submitted,

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VII. 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 Brief of the Appellant to the following:

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The Honorable Kathy King Jackson
Circuit Court Judge
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This the 9th day of October, 2009.



ALEXANDER F. GUIDRY