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NO. COA11-944  
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

BRIAN JAMES and JULIUS A. FULMORE,  
Plaintiffs

v.

Guilford County  
No. 07 CVS 12345

JERRY BLEDSOE; WILLIAM EDWARD  
DAVIS HAMMER, Individually and as  
President of HAMMER PUBLICATIONS,  
INC., JOHN HAMMER, Individually,  
as Secretary of Hammer  
Publications, Inc. and Editor-in-  
Chief of THE RHINOCEROS TIMES; and  
HAMMER PUBLICATIONS INC. d/b/a THE  
RHINOCEROS TIMES,  
Defendants

Appeal by plaintiffs from orders entered 1 August 2008 by  
Judge Vance Bradford Long and 5 April 2011 by Judge Edgar B.  
Gregory in Guilford County Superior Court. Heard in the Court  
of Appeals 22 February 2012.

*Rossabi Black Slaughter, P.A., by Amiel J. Rossabi and  
Gavin J. Reardon, for plaintiff-appellants.*

*Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, for  
defendant-appellees.*

CALABRIA, Judge.

Brian James ("James") and Julius A. Fulmore ("Fulmore")

(collectively "plaintiffs") appeal from an order denying their motion to compel discovery and an order granting summary judgment in favor of Jerry Bledsoe ("Bledsoe"); William Edward Davis Hammer, individually and as President of Hammer Publications, Inc.; John Hammer ("Hammer"), individually, as Secretary of Hammer Publications, Inc., and Editor-in-Chief of *The Rhinoceros Times*; and Hammer Publications Inc. d/b/a *The Rhinoceros Times* ("*The Rhino Times*") (collectively "defendants"). We affirm.

### I. Background

Plaintiffs are African-American law enforcement officers employed by the Greensboro Police Department ("GPD"). At some point during the period from 2003-2005, plaintiffs were investigated by GPD. In the summer of 2005, allegations surfaced that some African-American officers at GPD were being targeted on the basis of race. As a result of these allegations, an investigation was initiated and Chief of Police David Wray ("Wray") was forced to resign.

After researching the issue, Bledsoe contacted Hammer, the Editor-in-Chief of *The Rhino Times*, about writing a series in the newspaper entitled "Cops in Black and White." The focus of the series was to show the reason for the investigations and

whether race or legitimate concerns led to the initiation of the investigations. The series consisted of ninety-two parts in which Bledsoe made statements concerning plaintiffs.

Based on Bledsoe's statements, plaintiffs filed a complaint on 19 November 2007 against defendants alleging defamation *per se* and civil conspiracy to commit defamation. Defendants timely answered the complaint, claiming, *inter alia*, that plaintiffs' claims were barred by the doctrine of qualified or conditional privilege. After some limited discovery, plaintiffs filed a motion to compel discovery, seeking all documentation Bledsoe used in his research. After hearings on 19 May 2008 and 11 June 2008, the trial court denied plaintiffs' motion to compel discovery. Plaintiffs appealed to this Court, but the appeal was dismissed as interlocutory. On 21 September 2010, defendants moved for summary judgment. This motion was granted by the trial court on 5 April 2011. Plaintiffs appeal.

## II. Summary Judgment

Plaintiffs claim the trial court erred by granting summary judgment because they forecast competent evidence of each element of the defamation *per se* claims and because defendants have the burden of showing the absence of actual malice. We disagree.

Summary judgment is appropriate when "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 any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). "For a defending party to prevail on a motion for summary judgment, the party must demonstrate that (1) an essential element of [the claimant's] claim is nonexistent ... [and 2] [the claimant] cannot produce evidence to support an essential element of [her] claim...." *Mkt. Am., Inc. v. Christman-Orth*, 135 N.C. App. 143, 149, 520 S.E.2d 570, 575 (1999) (internal quotations and citation omitted). The evidence must be viewed in the light most favorable to the nonmoving party who also "must be given the benefit of all favorable inferences regarding the evidence." *Id.* at 149, 520 S.E.2d at 575-76.

To prove defamation, the plaintiff must allege that the defendant made (1) false, (2) defamatory statements (3) concerning plaintiff that (4) were published to a third person and that (5) injured the plaintiff's reputation. *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002).

North Carolina has long recognized the harm that can result from false statements that impeach a person in that person's trade or profession — such statements are deemed defamation *per se*. The mere saying or writing of the words is presumed to cause injury to the subject; there is no need to prove any actual injury.

*Cohen v. McLawhorn*, \_\_\_\_ N.C. App. \_\_\_\_, \_\_\_\_, 704 S.E.2d 519, 527 (2010) (internal quotations and citations omitted). Publications or statements are defamatory *per se* if they “are susceptible of but one meaning, when considered alone without innuendo, colloquium, or explanatory circumstances, and [they] tend to disgrace and degrade the party or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided.” *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993) (internal quotations and citation omitted).

When the alleged defamatory statements are published regarding a public officer's official conduct, the plaintiff must prove “that the defamatory statements were made with actual malice.” *Boyce*, 153 N.C. App. at 34, 568 S.E.2d at 900. Actual malice is present when a statement is made “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 34, 568 S.E.2d at 900 (citation omitted). “[R]eckless 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." *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267 (1968). "When a defamation action brought by a 'public official' is at the summary judgment stage, the appropriate question for the trial judge is whether the evidence presented is sufficient to allow a jury to find that actual malice had been shown with convincing clarity." *Varner v. Bryan*, 113 N.C. App. 697, 704, 440 S.E.2d 295, 299 (1994); *see also Lewis v. Rapp*, \_\_ N.C. App. \_\_, \_\_, \_\_ S.E.2d \_\_, \_\_ (2012) (recognizing that plaintiff must "forecast any evidence that defendant acted with actual malice, an essential element of [the] claim" to overcome defendant's motion for summary judgment). In the instant case, the parties do not dispute that plaintiffs are public officials. *See Schlossberg v. Goins*, 141 N.C. App. 436, 445, 540 S.E.2d 49, 56 (2000) (a governmental immunity case stating that "[o]ur courts recognize police officers as public officials.").

Plaintiffs contend that defendants had the burden of showing the absence of actual malice at summary judgment, with that burden only shifting to plaintiffs at trial. *Hall v. Piedmont Publ'g Co.*, 46 N.C. App. 760, 765, 266 S.E.2d 397, 401

(1980) ("*Hall II*"). In the first *Hall* case, the Court reversed the trial court's entry of summary judgment for defendants. *Hall v. Piedmont*, 33 N.C. App. 637, 235 S.E.2d 800 (1977) (unpublished) ("*Hall I*"). However, *Hall I* was unpublished and the Court in *Hall II* reviewed a directed verdict, not a summary judgment. Therefore, the Court's discussion in *Hall II* about the appropriate burden of proof at the summary judgment stage was dicta. We will evaluate the instant case according to the standard described in *Varner*.

As previously noted, plaintiffs concede that they are public officials. Therefore, they were required to produce sufficient evidence "to allow a jury to find that actual malice had been shown with convincing clarity." *Varner*, 113 N.C. App. at 704, 440 S.E.2d at 299.

As an initial matter, we note that plaintiffs alleged in their complaint that *The Rhino Times* published twenty-four defamatory statements, but only addressed seventeen of these statements in their brief. Consequently, plaintiffs' claims based upon the remaining seven statements are deemed abandoned.

#### A. Statements about James

James was investigated by GPD because of his interactions with a woman named Nicole Pettiford ("Pettiford"). A federal

task force was set up to investigate a drug and money laundering scheme. In connection with that investigation, a source was arrested. Prior to his arrest, the source paid for and received sensitive law enforcement information pertaining to the case. The source offered to help officers discover where Pettiford obtained information.

On or about 14 October 2004, the source made recorded calls to Pettiford who corroborated his statements that she had previously helped and would do so again. Earlier, Pettiford had sold information to the source for \$5,000. When the source sought additional information, Pettiford informed him that James provided the information in their last encounter. Pettiford stated that she could get sensitive information from law enforcement officers again and proved this by making three-way calls to police officers. One of these calls was made to James and was recorded. In the conversation, Pettiford indicated that she needed James to do something for her.

During the time the source sought information from Pettiford, she was under surveillance. On 21 October 2004, while Pettiford was being followed, she drove to a parking lot at a Sam's Club store ("Sam's"), parked beside James's car and entered his city vehicle. The two of them remained in the



parking lot for approximately ten minutes. As a result of these events, Scott Sanders ("Sanders"), a detective with the Special Intelligence Section of GPD, investigated James. When James and Pettiford were questioned, both of them admitted that they met that day at Sam's.

James claims that eight statements published in *The Rhino Times* concerning his involvement with Pettiford were defamatory. However, the evidence fails to show that these statements were published with actual malice.

Two of the statements regarding James's meeting with Pettiford at Sam's indicated that James drove straight to Pettiford's car; however, in actuality, Pettiford drove straight to James's car. While Bledsoe admitted in his deposition that he thought these statements should have been corrected, he also indicated that he was alerted that these statements were inaccurate *after* they were published. After he discovered the statements were inaccurate he contacted his sources, Wray and Randall Brady ("Brady"), seeking a clarification. His sources responded that they "didn't have that right...she was under surveillance, and she drove to...his car...." Therefore, at the time the statements were published, defendants neither had

knowledge that the statements were false nor made them with reckless disregard as to their falsity.

Plaintiffs claim that defendants' failure to retract these statements shows actual malice; however, plaintiffs fail to cite any North Carolina law in support of this proposition. The federal case they cite, *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1070 (5th Cir. 1987) cites *Golden Bear Distrib. Sys. of Texas, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950 (5th Cir. 1983). In *Golden Bear*, the Court found that refusal to retract "might be relevant in showing recklessness at the time the statement was published." *Id.* (citation omitted). In the instant case, Bledsoe's sources indicated that the statement was correct at the time of publication and therefore, the fact that defendants did not retract the statement did not show recklessness at the time the statement was published. Furthermore, James admitted to meeting Pettiford at Sam's, and therefore, a correction would not have changed the substance of the statements.

Three statements were published in *The Rhino Times* articles regarding James's involvement in a federal drug investigation: that James's "name emerged from another major federal drug and money laundering investigation;" that James "was now a prime

suspect;" and that James "was being investigated because his actions had made him a prime suspect in a major federal drug case." James claims these statements are defamatory because each statement is false. However, the underlying investigation concerning the source was a federal drug and money laundering scheme, and thus it was accurate to indicate that James's name arose in connection with a "federal" investigation. Wray confirmed that there was federal involvement in the case and that James was "a suspect in information getting out of the department that was tied to a drug investigation."

Another statement published by *The Rhino Times* indicated that James was "now a prime suspect" and a "prime suspect in a major federal drug case." In his deposition, Bledsoe indicated that James became a prime suspect in "possibly passing information to [Pettiford]...[b]ut it didn't have anything to do with [James] laundering money or - or selling drugs." Wray confirmed that James "was a prime suspect in information getting out of the GPD." Plaintiffs claim the statement in the article, that James was a "prime suspect in a major federal drug case," indicated that James was a prime suspect of "federal drug charge investigations," even though there were never any "drug related charges against James." Plaintiffs are mistaken. The article

indicates that James was a suspect in that investigation, not that he had been charged with any drug offenses. This statement, published on 22 February 2007, was the last of the three statements. The other two statements were published at the beginning of February. The context of the articles makes it clear that James was not suspected of drug-related activity, but rather passing information to individuals that were involved in the federal drug investigation. Sanders confirmed in his deposition that James was a prime suspect in his investigation regarding police officers passing information to Pettiford. Sanders also confirmed that he believed his entire executive summary ("the James summary") indicated that James was a prime suspect in a major federal drug case.

James was very disturbed that he was referred to as a "prime suspect," rather than a "person of interest." While James's personal definitions of these two terms indicate the phrase "person of interest" may have been more appropriate, this statement was not made with knowledge that it was false or with reckless disregard of its falsity. Furthermore, James admitted in his deposition that he knew his behavior looked suspicious, and he thought an investigation was warranted, but he just did not like the manner in which the investigation was conducted.

Even if the published statements were false, Bledsoe's sources indicated that they were true, and therefore the statements were not made with knowledge that they were false. Bledsoe had a copy of Sanders's interview with James ("James interview"). During the interview, Sanders informed James that he was investigating a federal case that dealt with drug trafficking and money laundering which involved Pettiford. The James interview revealed that James confirmed a relationship with Pettiford, that there were fifty-six calls between James and Pettiford over a period of six months, and that James met Pettiford at Sam's. While Sanders told James in the interview he was not the "focus" of the investigation, Sanders also told him that the investigators paid Pettiford to obtain information, that she reached out to James for that information, and that the U.S. Attorney's Office wanted to know why she did so. The information contained in the James interview and executive summary indicated that these statements were substantially true and thus, defendants had no knowledge that the statements were false or made with reckless disregard as to their falsity.

Plaintiffs also challenge defendants' statement that "[w]hile James' actions clearly raised serious suspicions with Wray and investigators, as well as to federal authorities,

without Pettiford's help it was impossible to prove that he had committed a crime." Sanders confirmed that this statement was true. During the James interview, Sanders stated that the money that was given to Pettiford to pay her informant was never recovered and therefore they could not trace it back to any officer. Thus, the only way the investigators could prove that James or any officer had committed a crime was evidence produced from Pettiford. Since Pettiford denied that James had given her any information, it was impossible to prove he had committed a crime. Furthermore, the James summary indicated that Sanders told James that the investigators wanted to know why Pettiford had reached out to him for information. Wray confirmed that James's meeting with Pettiford at Sam's gave him a "strong level of concern about what was going on." Even if this statement was not true, Bledsoe neither had knowledge that it was false nor published it with reckless disregard as to its falsity.

In addition to defendants' two published statements regarding James's interactions with Pettiford, Bledsoe summarized his interpretation of those facts:

It seemed unlikely that Pettiford hadn't asked James for information. She had told him in her first conversation that she needed him to do something for her. And the day of their meeting at Sam's was just one day after she had taken \$1,250 from a drug

dealer as a down payment for finding out the name of a person who had given information to the police about him.

With the exception of the first statement, documents confirmed the veracity of the statements published by defendants. A transcript of the call between James and Pettiford was included in the James summary in which Pettiford said she needed James "to do something for her." In addition, another document confirmed that on 20 October 2004, the source met Pettiford and gave her \$1,250, "half of what was requested for having the outstanding paper on [the source] dismissed." The James summary confirms that the meeting between James and Pettiford at Sam's occurred on 21 October 2004, one day after she received the money from the source. Therefore, these statements were true. Even if these statements were false, the fact that Bledsoe consulted documentation before he published these statements negates actual malice.

The first sentence, which stated that "it seemed unlikely that Pettiford hadn't asked James for information" was merely Bledsoe's opinion of the situation. A statement of one's opinion is not defamatory. See *Craven v. Cope*, 188 N.C. App. 814, 817, 656 S.E.2d 729, 732 (2008) ("If a statement cannot reasonably be interpreted as stating actual facts about an

individual, it cannot be the subject of a defamation suit. Rhetorical hyperbole and expressions of opinion not asserting provable facts are protected speech." (citation omitted)).

The second statement published was

Pettiford clearly needed that information to avoid problems with the drug dealer. It seemed improbable that she would arrange a furtive meeting in a parking lot with an officer whom she had claimed to the informant to be a primary source without asking him for information. It was harder yet to believe that she would arrange such a meeting merely to show off baby pictures.

Again, this statement just combines facts and opinion. The James summary indicated that Pettiford told the source "'you know the other person that fixed your thing for you, that's the one that I was just calling a few minutes ago.'" Bledsoe's sources indicated that Pettiford had taken money from a drug dealer to get information from law enforcement officers, that she met James at Sam's the next day and that this meeting was not by chance, but arranged. James told Sanders that Pettiford showed him baby pictures during the meeting. All the facts in the statement were confirmed. The remainder of the statement is just Bledsoe's opinion about the probability that the scenario Pettiford and James presented to Sanders was accurate. The fact



that Bledsoe included his opinion of the situation in the article does not make the statement defamatory. *See id.*

B. Statement about James and Fulmore

On 11 October 2007, Hammer wrote an article that appeared in *The Rhino Times* entitled, "Mitch to Stop Free Flow of Information." In that article, Hammer discussed city manager Mitch Johnson's decision to stop releasing documents about why Wray was locked out of his office. Hammer stated that, "[t]he City Council could demand that more information be released that would explain why police officers who hang out with prostitutes and drug dealers are still on the force, while the officers who investigate such behavior are forced to retire, resign or are put on administrative leave."

In their complaint, plaintiffs inserted the phrase [Lt. Brian James and Officer Julius Fulmore are] before the words "police officer" in the statement. However, the statement does not appear this way in the article because none of the police officers were named prior to this statement. During Hammer's deposition, he stated that he was referring to "the city manager and the city council," not the police officers. For a statement to be defamatory *per se*, it must be "susceptible of but one meaning, when considered alone without innuendo, colloquium, or

explanatory circumstances...." *Andrews*, 109 N.C. App. at 274, 426 S.E.2d at 432. Plaintiffs claim that the reference to "police officer" in the statement implicates them, but this is incorrect. Although plaintiffs are mentioned later in the article, neither James nor Fulmore are specifically mentioned as being involved with prostitutes or drug dealers. Since Hammer's statement was susceptible to more than one meaning, it was not defamatory *per se*.

C. Statements about Fulmore

Fulmore claims that eight additional statements published in *The Rhino Times* concerning him were defamatory.

There were two statements published concerning a business called Game Time Lounge: that "Fulmore was protecting Game Time Lounge said an informant" and that there was "...a report from a reliable person in the community that [Fulmore] had provided protection for [Game Time Lounge]." Bledsoe's sources show that this information was true. In an email from GPD Detective Brian Williamson ("Williamson") to Rick Ball, Williamson indicated that a woman reported to him that there was an illegal bar on Grove St. known as the "Game Time Lounge." She stated that female dancers dance nude, perform acts with sex toys and give oral sex to customers in the "VIP room." She identified herself

as "Aunt Flossie." Aunt Flossie's Printing Press and Gifts, run by Joan Bricefield, was located at 1212 Grove St. The caller indicated that the reason the place had not been shut down was because Fulmore "protects them, frequents the place, gets services there, etc." Mike Toomes's affidavit indicated that he told Bledsoe that he believed the source of the email to be reliable and that he "specifically remember[ed] telling [Bledsoe] that [he] thought the source, who [he] believed to be [Bricefield], was a 'reliable' source." Even if Fulmore was not protecting Game Time Lounge, Bledsoe based these statements on his sources, and therefore they were not made with knowledge that they were false or published with reckless disregard as to their falsity.

There was also a statement published that Fulmore "frequently was at his commercial garage during duty hours." While Fulmore claimed this statement was untrue, and therefore defamatory, he admitted during his deposition that he stops by his garage to use the restroom while he is working and to make sure it is locked. He said he stops at the garage one to three times during his standard four-day rotation. Based on this information, Bledsoe's statement was substantially true and therefore not defamatory *per se*. See *Kwan-Sa You v. Roe*, 97

N.C. App. 1, 10-11, 387 S.E.2d 188, 192-93 (1990) (where the Court found that statements made by various persons concerning a researcher in a university hospital did not constitute slander, as the statements were substantially true).

Defendants also published the statement that Fulmore "often was at the homes of known criminals, although he was not involved in investigating them." This statement was confirmed by Bledsoe's sources. Bledsoe testified that Brady told him that Fulmore was frequently at the homes of known criminals he was not investigating. This information was based on the GPS tracking device that was placed on Fulmore's car. In addition, Sanders's executive summary of his investigation of Fulmore ("the Fulmore summary") stated that, "Fulmore is seen at the residence of known felon Rodney Donathan. Fulmore has no informant contact paper work on this individual and the location is outside the city." As Bledsoe relied on his sources when writing this statement, he had no knowledge it was false and could not have published it with reckless disregard as to its falsity.

The remainder of the statements Fulmore claimed to be defamatory concerned a federal Organized Crime and Drug Enforcement Task Force ("OCDETF") investigation known as "Hole

Shot" that Fulmore began in 1999 to investigate a man named Terry Bracken ("Bracken"). According to the Fulmore summary, Sanders was assigned to inspect Fulmore's investigation. Sanders uncovered suspicious activity, including leaks to suspects. On one occasion, the task force learned of Bracken's location, but when they attempted to initiate a surveillance operation, the house was vacated. On another occasion, the task force obtained a court order to place a GPS tracking device on a vehicle, but the next day the vehicle was parked at the residence and never utilized again. Furthermore, only a few small time subjects were ever charged. During this time, Fulmore had a female informant about whom he failed to file contact paperwork. He also refused to allow surveillance equipment in her business.

Based on this information, defendants published two statements indicating that Fulmore was the source of the leaks: "[s]ome officers, records show, believed that Fulmore... was the source of the leak" and "...some task force officers believed that Fulmore was the source" of those leaks. While the Fulmore summary did not directly state that task force officers believed Fulmore was the source of the leak, the document did indicate that Sanders was assigned to "investigate the implications that

[Fulmore] had compromised the previous investigation of [Bracken]."

Plaintiffs claim that because the Fulmore summary did not "include findings or conclusions...that Fulmore was the source of the leak" it was some evidence that the statements published were false, and thus summary judgment was inappropriate. However, the Fulmore summary showed that defendants based the statements on GPD documentation indicating that there were leaks in an investigation that Fulmore was involved in, and subsequently Sanders was assigned to investigate Fulmore's involvement with that investigation. Therefore, even if the statements were untrue, the Fulmore summary indicated that the statements were true. In addition, Brady told Bledsoe that some officers believed Fulmore was the source of the leaks and the summary showed examples of the leaks. Therefore, defendants had no knowledge that the statements were false or that they were made with reckless disregard as to their falsity.

A woman named Pamela Williams ("Williams") was also connected to the Bracken case and Fulmore's involvement with her was the subject of several statements published in *The Rhino Times*. Bledsoe wrote that "investigators were concerned that Fulmore might be aware of Williams's criminal activities and

could be involved in them." Bledsoe's sources showed that on 16 August 2001, David Shaw ("Shaw") with the Guilford County Sheriff's Department received a call from Fulmore, inquiring about Williams's case. Fulmore indicated she was an informant but declined to provide any more information. Shaw found this information was suspicious and noted it. In October 2003, Williams was arrested and interrogated. She told officers that Bracken wanted her to run "packages" from her clothing stores in Greensboro. When Williams hesitated, he sent Fulmore to meet with her. Fulmore advised her that it was in her best interest to cooperate. Once Williams agreed and started receiving packages, Fulmore arrived to pick up the packages and pay Williams. Williams also indicated she delivered drugs with Fulmore. Williams claimed she had a sexual relationship with Fulmore and that Fulmore and Bracken had been working together since 1999. Based on this information, Bledsoe's statement was true. Williams told investigators that Fulmore not only knew of her activities but also that he was involved in them. Again, even if this statement was not true, Bledsoe based the statement on his sources and therefore the statement was not published with knowledge that it was false.

The series also published a statement that "it was clear that [Fulmore] was deeply concerned by what [Williams] might be telling authorities." The Fulmore summary indicated that while Williams was incarcerated, she implicated Fulmore in criminal activities. Subsequent to the statements by Williams, Fulmore came to the Greensboro jail to see her but would not interview her in a bugged room, had a clandestine meeting in a parking lot, made a phone call to Williams's daughter and according to Williams, threatened Williams at the Greensboro jail. Based on the information included in the Fulmore summary, it was a logical opinion that Fulmore was concerned about the information Williams was giving authorities. A statement of one's opinion is not defamatory. *See Craven*, 188 N.C. App. at 817, 656 S.E.2d at 732.

#### D. Failure to Investigate

Plaintiffs claim that actual malice existed because Williams, the source of the information, was unreliable and because defendants "purposely avoided the truth." We disagree.

According to defendants, the purpose of publishing the articles was not to determine whether James and Fulmore were guilty of any actions, but rather to determine "whether certain investigations of African-American police officers, including



plaintiffs, were racially motivated." While both summaries regarding James and Fulmore indicated that the informants were not completely reliable, the summaries also indicated that plaintiffs' associations with the informants raised suspicions with investigators. Thus, plaintiffs were investigated. Again, the purpose of the article was to determine whether or not the investigations were legitimate.

Plaintiffs claim defendants "purposely avoided the truth" by failing to interview plaintiffs and others. It is well established that "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688, 105 L. Ed. 2d 562, 589 (1989). In *Varner*, the Court rejected "plaintiff's contention that 'actual malice' may be shown by evidence that defendants failed to avail themselves of available means for ascertaining the falsity of the statements." 113 N.C. App. at 705, 440 S.E.2d at 300. In *Lewis*, the plaintiff was a judicial candidate and this Court recognized that while the defendant perhaps "should have known that she was a candidate" and that he "could have conducted some research before making his false assertions," the plaintiff failed to show that the defendant had

actual knowledge of the falsity of his statement or made the statement with reckless disregard for the truth. *Lewis*, \_\_ N.C. App. at \_\_, \_\_ S.E.2d at \_\_.

In the instant case, Bledsoe testified that he did not interview plaintiffs because he believed that "there was an official gag order in place by the City of [Greensboro], prohibiting police officers from talking about the subject matter of which [he] was writing." Plaintiffs claim that no such gag order existed, and therefore Bledsoe should have interviewed plaintiffs. However, Bledsoe had no obligation to interview plaintiffs or others prior to writing the series in *The Rhino Times*. See *id.* Bledsoe already knew that James and Fulmore believed they were racially targeted. The purpose of the series was to determine if there were legitimate reasons to instigate those investigations, apart from race. Defendants based the allegedly defamatory statements on legitimate sources and had no duty to further investigate prior to publishing, absent "serious doubts as to the truth of [the] publication." *Harte-Hanks*, 491 U.S. at 667, 105 L. Ed. 2d at 576 (internal quotations and citation omitted). Plaintiffs have failed to show defendants published the allegedly defamatory statements with knowledge that the statements were false or made them with

reckless disregard as to their falsity. Therefore, plaintiffs have failed to present evidence "sufficient to allow a jury to find that actual malice [was] shown with convincing clarity." *Varner*, 113 N.C. App. at 704, 440 S.E.2d at 299.

### III. Discovery of Additional Evidence

Plaintiffs allege that the trial court erred by denying their motion to compel discovery. We disagree.

Plaintiffs allege they would have been able to prove actual malice if they had had access to all of Bledsoe's research for all of the articles that comprised the series. There were a total of ninety-two articles, but Bledsoe's alleged defamatory statements were only published in ten parts of the series. Defendants complied with discovery regarding the alleged defamatory statements but refused to turn over all of Bledsoe's research. The trial court concluded that plaintiffs were not entitled to information with regard to any other statement or allegation made in the articles, apart from the twenty-four statements the upon which the defamation claims were based.

#### A. Journalist's Privilege

Plaintiffs claim that the trial court erred in denying their motion to compel discovery based on defendants'

journalist's privilege because the privilege was not properly asserted in writing. We disagree.

"Whether or not to grant a party's motion to compel discovery is in the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." *Belcher v. Averette*, 152 N.C. App. 452, 455, 568 S.E.2d 630, 633 (2002). "An abuse of discretion occurs only when a court makes a patently arbitrary decision, manifestly unsupported by reason." *N.C. State Bar v. Gilbert*, 151 N.C. App. 299, 306, 566 S.E.2d 685, 689 (2002) (quoting *Buford v. General Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994)).

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." N.C. Gen. Stat. § 1A-1, Rule 26 (2011). The journalist's privilege is governed by statute in North Carolina. "[A] journalist has a qualified privilege against disclosure in any legal proceeding of any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist." N.C. Gen. Stat. § 8-53.11(b) (2011).

(c) In order to overcome the qualified privilege provided by subsection (b) of this

section, any person seeking to compel a journalist to testify or produce information must establish by the greater weight of the evidence that the testimony or production sought:

(1) Is relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought;

(2) Cannot be obtained from alternate sources; and

(3) Is essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought.

N.C. Gen. Stat. § 8-53.11(c) (2011).

Plaintiffs do not dispute that defendants would be entitled to the journalist's privilege if it was properly asserted. However, plaintiffs allege that defendants failed to properly assert the privilege and therefore the trial court erred in denying their motion to compel discovery based on the journalist's privilege. In their answer, defendants asserted as a defense that "plaintiffs' defamation claims are barred, in whole or in part, by the doctrine of qualified or conditional privilege" and also that plaintiffs' claims are barred "because to the extent any of the statements set out in paragraph 12 of plaintiffs' complaint are inaccurate, which defendants deny, these statements are protected by the First Amendment to the

United States Constitution and Article I, Section 14 of the Constitution of North Carolina."

On 22 February 2008, defendants responded to plaintiffs' first set of interrogatories and request for production of documents. Defendants' responses included a general objection that stated, in part,

[t]his lawsuit, therefore, concerns only the alleged defamatory statements in paragraph 12 of plaintiffs' [c]omplaint. Much of the information and documents sought by plaintiffs in their First Set of Interrogatories and Request for Production of Documents to all defendants are grossly overbroad and do not seek information relevant to this lawsuit, and are not reasonably calculated to lead to the discovery of admissible and relevant evidence. Furthermore, much of the information and documents sought by plaintiffs would require an undue burden and/or expense to produce, and are calculated merely to annoy, embarrass, and oppress defendants. Defendants therefore object to these overbroad and irrelevant requests, and will answer the Interrogatories and Document Requests based upon the allegations in plaintiffs' [c]omplaint.

The general objection was repeated in response to individual interrogatories and requests for production of documents. On 2 April 2008, plaintiffs made a motion to compel discovery seeking, *inter alia*, production of all documents regarding the entire series, not just those relating to the twenty-four

statements included in plaintiffs' complaint. The parties agreed the trial court would only determine whether defendants must provide documents with regard to the entire series.

An initial hearing on the matter was held on 19 May 2008. At that time, defendants claimed the protection of the journalist's privilege. Plaintiffs objected to this claimed privilege, asserting that they had no prior notice. At a second hearing, defendants again asserted the journalist's privilege. The trial court found that "defendants' assertion of the claim of qualified privilege in their Answer allowed the assertion of the privilege to the Motion to Compel even though not formally asserted in the General Objection." In addition, it found that defendants' failure to assert the privilege in their discovery responses did not prejudice plaintiffs. Based on counsel's arguments and the testimony presented at the hearing, the trial court found that plaintiffs had failed to meet their burden under N.C. Gen. Stat. § 8-53.11, as they did not show that the information they sought was relevant, that they could not obtain information from other sources or that the information sought was essential to maintain their claim of defamation. Therefore, the trial court denied plaintiffs' motion to compel discovery.

We find that, based upon the record before us and the testimony presented at the hearing, the trial court did not abuse its discretion in denying plaintiffs' motion to compel discovery. In the instant case, plaintiffs have failed to show that the additional materials they seek are relevant and material to their claims.

B. Waiver of Privilege

Plaintiffs claim that defendants waived the journalist's privilege by providing information concerning their sources in the answer to interrogatories. Specifically, plaintiffs claim that because defendants indicated that Wray and Brady were the sources for some of the alleged defamatory statements, defendants waived the journalist's privilege. However, there is no evidence in the record that plaintiffs raised the issue of waiver before the trial court. While plaintiffs claimed that defendants waived the privilege because they failed to assert the privilege during discovery, there is no mention of waiver by the disclosure of Wray and Brady as sources in the supplemental interrogatories. This waiver issue was not mentioned at the hearing nor in the trial court's order denying plaintiffs' motion to compel discovery. Therefore, plaintiffs have failed to preserve this issue on appeal.



IV. Conclusion

The trial court did not err when it granted defendants' motion for summary judgment because plaintiffs failed to forecast evidence to support their claims of defamation *per se*. In addition, the trial court did not abuse its discretion in denying plaintiffs' motion to compel discovery, as defendants were protected by the journalist's privilege.

Affirmed.

Judges ERVIN and THIGPEN concur.

Report per Rule 30(e).