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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2010-2011

2090705

Benjamin L. Little

v.

Consolidated Publishing Company and Megan Nichols

Appeal from Calhoun Circuit Court
(CV-09-900147)

MOORE, Judge.

Benjamin L. Little appeals from a summary judgment entered by the Calhoun Circuit Court ("the trial court") in favor of Consolidated Publishing Company ("CPC") and Megan Nichols. We affirm in part and reverse in part.

Factual and Procedural Background

Little, a Christian minister and an African-American, serves as a councilman for the City of Anniston, a position in which he has served since he was first elected in 2000. In early 2007, Little, acting on the recommendation of Phillip White, then mayor of Uniontown, contacted Yolanda Jackson, a human-resource-management consultant, about possibly addressing what Little considered to be the substandard practices of the human-resources department of the City of Anniston. On February 10, 2007, Little drove to Uniontown, picked up Jackson, and then drove to Demopolis with her, where the two dined and conversed for one and a half to two hours, all at the expense of the City of Anniston. After dinner, Little drove Jackson back to Uniontown, dropped her at the city hall, and then drove back to Anniston. The next day, Jackson sent her résumé to Little, indicating her willingness to assist in developing new human-resources policies and procedures for the City of Anniston.

Little recommended Jackson to the other city-council members, but they were initially "cool about it." A year later, however, the city council renewed its interest in the

matter and Little, after meeting again with Jackson in Uniontown, arranged for her and Mayor White to attend a city-council meeting in April 2008. At that meeting, in which Jackson informed the council of her qualifications and Mayor White related the success of Jackson's efforts in helping Uniontown with its human-resources problems, the city council voted 5-0 to hire Jackson to perform an audit of the human-resources practices of the City of Anniston at a cost of $2,500. Following the council meeting, Little took Jackson and Mayor White to dinner in Anniston.

Jackson thereafter performed an audit of the human-resources practices of the City of Anniston. Jackson did not meet personally with Little during the auditing process; however, Little did talk with Jackson on the telephone several times. After the audit was completed, Little also drove to Uniontown and talked with Jackson about the audit for about 20 minutes. The record does not indicate any other interaction between Little and Jackson.

In November 2008, John Spain was elected to the Anniston city council. At a February 18, 2009, city-council meeting, Spain questioned the usefulness of the audit conducted by

Jackson and stated his intention to investigate the matter. Nichols, a reporter for The Anniston Star, which is a newspaper owned and published by CPC, interviewed Spain and Little after the meeting. Based on her notes from the meeting and her interviews, Nichols wrote a story that appeared on the front page of The Anniston Star on February 19, 2009, under the headline: "Spain wants Investigation into HR audit ordered by Little." In that story, Nichols related some facts and opinions of certain City of Anniston officials, including Spain, that indicated that the audit had been poorly performed and had yielded nothing productive. In addition, the story stated:

> "Spain also said there is a buzz in the city that Little had or has a personal relationship with Jackson and that's why he pushed for her hiring last year.
>
> "'If this is not the case, its very unfair to Councilman Little,' Spain said. 'If there is substance to it, it needs to be disclosed.'
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> "Little, who is not married, said he is not involved personally with Jackson.
>
> "'I know a lot of people,' he said. 'But I've never had a relationship with that girl. And if I did have a relationship with her, that wouldn't relate to the city anyway.'

> "Several attempts to reach Jackson this week failed."

Nichols submitted an affidavit in support of the motion for a summary judgment in which she stated that, in her interview with Spain, "Spain made statements to which he was attributed in the article." Nichols stated that it had been her understanding from statements made by Spain during that interview that "there were rumors in the community that Council member Little may have been dating a consultant hired by the City." In her deposition, Nichols clarified that Spain had also indicated to her that there was a "buzz" that Little had based his decision to "push" for Jackson's hiring due to their rumored personal relationship. In both her affidavit and her deposition testimony, Nichols attested that she had quoted Spain and Little accurately in the story. Bob Davis, the editor of The Anniston Star, testified in his deposition that he had contributed to the story by noting that Little was not a married man, in order to give the story "greater context."

Nichols stated in her affidavit that she did not write the story out of ill will, spite, or malice toward anyone, but, she stated, she was simply reporting the words of Spain

as told to her as part of her job as a reporter. Nichols further attested in her affidavit that she had no concerns or doubts about the accuracy of the information quoted in the story. In her deposition, however, Nichols clarified that she had not investigated whether, in fact, a rumor was circulating about Little and Jackson; she could verify only that Spain had asserted as much. As for checking the factual basis of the alleged rumor, Nichols testified that she had inquired of Little and had attempted to contact Jackson. Although Nichols and Davis both testified that they had no reason to doubt the veracity of Little's denial, and although Nichols had not been able to reach Jackson, Nichols decided to run the story anyway. Furthermore, despite the fact that Harry Brandt Ayers, the publisher of The Anniston Star, testified that he knew Spain did not like Little and that the newspaper had a policy of double-checking particularly divisive remarks, no editor or other person employed by the newspaper had attempted to ascertain the factual basis of Spain's statements.

On February 20, 2009, The Anniston Star ran an editorial authored by Davis, entitled: "Ben's greatest hits: A litany of crumbling plans." In that editorial, Davis stated:

> "Most recently we've learned more details about Councilman Ben Little's sweetheart HR audit deal. At Little's urging, Anniston paid Yolanda Jackson of Uniontown $2,500 to examine the city's human resources practices. Working for what city officials say is a few hours and she claims was several days, Jackson produced a report that is virtually useless. Not one recommendation has been implemented."

Davis then recounted several other endeavors Little had undertaken while he was a councilman that Davis considered to have been unsuccessful.

On February 24, 2009, counsel for Little wrote a letter to Ayers, requesting that the newspaper retract certain statements contained in the story and the entire editorial, both of which Little considered to be false and malicious.[1]

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[1]Section 6-5-186, Ala. Code 1975, provides:

> "Vindictive or punitive damages shall not be recovered in any action for libel on account of any publication unless (1) it shall be proved that the publication was made by the defendant with knowledge that the matter published was false, or with reckless disregard of whether it was false or not, and (2) it shall be proved that five days before the commencement of the action the plaintiff shall have made written demand upon the defendant for a public retraction of the charge or matter published; and the defendant shall have failed or refused to publish within five days, in as prominent and public a place or manner as the charge or matter published occupied, a full and fair retraction of such charge or matter."

Specifically, Little's counsel maintained that Little had not ordered the audit or hired Jackson but, rather, that the Anniston city council had voted 5-0 to retain Jackson. Little's counsel also asserted that the story had repeated false gossip provided by Spain, who was described in the letter as "a well known opponent of Mr. Little on the city council," to the effect that Little had "pushed" for Jackson's hiring because Little had a personal relationship with Jackson. Little's counsel further objected to the characterization of the audit in the editorial as a "sweetheart" deal that Little had "urged" the council to make.

On February 26, 2009, Little's counsel sent a proposed retraction to counsel for CPC. On February 27, 2009, in an article entitled "For the Records" that was printed on page two of that day's edition of The Anniston Star, the following appeared:

> "A headline for a Feb. 19 article in The Anniston Star mischaracterized Anniston City Councilman Ben Little's role in hiring a contractor to audit the city's human resources practices. In fact, the council as a whole ordered the audit. The Star apologizes to Councilman Little for this error.

Little asserts that he asked for the retraction in order to comply with the statute.

> "Furthermore, the article quoted another city councilman concerning the existence of rumors circulating that Little had some type of personal relationship with the contractor hired by the entire council. In context, it was clear that the person quoted was not stating whether or not the rumors were true and the person was expressly quoted as saying that if the rumors were untrue, those spreading the rumors would be unfair to both Little and the contractor. The Anniston Star wishes to make absolutely clear that it has not and is not alleging that such a relationship exists or that such rumors have a factual basis. In fact, Little has vehemently denied such a relationship exists."

Later that day, Little's counsel wrote CPC's counsel, objecting because he had not reviewed or approved the foregoing article before it was published and demanding different wording to appear on the front page of the newspaper. No further correction appeared in the pages of The Anniston Star.

On March 24, 2009, another editorial appeared in The Anniston Star in which it was recounted that some individuals had taken copies of past editorials that were critical of Little and had "penned threats to Little's life in the margins." That editorial quoted Little as blaming the editorial board of The Anniston Star for provoking the death threats through its "vicious and incorrect" editorials. That editorial then stated:

> "Little has so far proven no major inaccuracies in the editorials. In fact, the paper did run a minor correction and an apology on a news story, after the mistake was brought to the paper's attention. But Little has presented no evidence of 'viciousness' or 'incorrectness' to the newspaper, even though he has been invited to."

That editorial ended with an invitation for Little to use space in the newspaper for any rebuttal. In a letter dated March 27, 2009, Little's counsel objected to the characterization of the earlier "For the Records" article as a "minor correction" and asked for another retraction, which request was not granted.

Little filed a complaint against CPC and Nichols, as well as several fictitiously named defendants, on May 18, 2009. In that complaint, Little alleged that CPC and Nichols had maliciously published false and defamatory statements about Little in the February 19 story and in the February 20 editorial that had not been effectively retracted. Little further asserted:

> "[Little] avers that [CPC] has waged a long campaign to libel and vilify Little in the Anniston community calling him names such as 'a crank.' The object of the campaign was racial in nature and was intended to make [Little] an object of scorn and hatred in the Anniston, Alabama community because of [Little's] efforts to aid the African-American community to have a fair voice in Anniston community

> affairs, even if that voice is not pleasing to the Anniston white community. The effect of the campaign of [CPC] has been to create an atmosphere of hatred of Little in which [CPC's] views of the good of the community was believed to require the elimination of Little from the affairs of the City of Anniston."

Little averred that, as a direct result of the "campaign of vilification" committed by CPC, death threats written in the margin of The Anniston Star editorials had been placed in public places throughout Anniston. Little asserted claims of libel and the tort of outrage and sought compensatory and punitive damages.

CPC and Nichols filed an answer and a counterclaim under the Alabama Litigation Accountability Act. See § 12-19-270 et seq., Ala. Code 1975. After taking the deposition of Little, CPC and Nichols filed a motion for a summary judgment on September 4, 2009. See Rule 56, Ala. R. Civ. P. Little responded with a brief in opposition to the motion, but he also requested to postpone a hearing on the motion in order to complete discovery. See Rule 56(f), Ala. R. Civ. P. After completing much of that discovery, Little filed a second response to the summary-judgment motion. The trial court heard arguments on the motion on February 22, 2010. The trial court entered a summary judgment in favor of CPC and Nichols

as to both claims set out in the complaint. Little then timely appealed to the Supreme Court of Alabama; that court transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.[2]

Issues on Appeal

Little maintains that the trial court erred in granting the summary-judgment motion on his libel and the tort-of-outrage claims. Little contends that he presented sufficient evidence indicating that Nichols and CPC maliciously published a false and defamatory rumor about him so that they are not protected from an action for damages by the First Amendment to the United States Constitution. See New York Times v. Sullivan, 376 U.S. 254 (1964). Little also contends that he produced substantial evidence indicating that CPC committed acts of outrageous conduct by publishing racially motivated

[2]The trial court did not rule on the counterclaim filed by CPC and Nichols; however, "[o]ur caselaw has ... clarified that the failure of a trial court to specifically reserve jurisdiction over an [Alabama Litigation Accountability Act] claim in a summary-judgment order impliedly disposes of the claim and renders the summary judgment final. See Gonzalez, LLC v. DiVincenti, 844 So. 2d 1196, 1201 (Ala. 2002). Accordingly, we hold that the summary judgment is a final judgment that will support an appeal." McGough v. G & A, Inc., 999 So. 2d 898, 903 (Ala. Civ. App. 2007).

attacks on Little that caused him to be subjected to death threats and that the trial court erred in concluding that his tort-of-outrage claim was subsumed in his libel claim.

Analysis

A. The Libel Claim

In order for a public figure, like Little, see Mobile Press Register, Inc. v. Faulkner, 372 So. 2d 1282 (Ala. 1979), to recover compensatory or punitive damages for libel, that public figure must prove that the defendant, with actual malice, published to another written or printed material containing a false and defamatory statement concerning the public figure, which is either actionable without having to prove special harm (per se) or actionable upon proof of special harm (per quod). See Ex parte Crawford Broad. Co., 904 So. 2d 221, 225 (Ala. 2004). In this case, CPC and Nichols moved for a summary judgment on the grounds that the statements upon which Little predicated his libel claim were not false or defamatory, that they enjoy qualified immunity from liability for publishing those statements, and that the statements were not published with actual malice. On appeal, Little challenges each of those grounds as being insufficient,

either factually or legally, to support the summary judgment entered by the trial court.

1. The "Truth" Argument

In his complaint, Little alleged that CPC and Nichols libeled him in the February 19, 2009, story by stating: "Spain also said there is a buzz in the city that Little had or has a personal relationship with Jackson and that is why [Little] pushed her for hiring last year." Little further essentially asserts that CPC and Nichols reiterated those facts in the editorial published on February 20, 2009, in which Davis, after referring to "Little's sweetheart HR audit deal," wrote: "At Little's urging, Anniston paid Yolanda Jackson of Uniontown $2,500 to examine the city's human resources practices."[3] CPC and Nichols asserted in their summary-judgment motion that all the allegedly offensive statements were "substantially true." See 1 Alabama Pattern Jury

[3]Little arguably claimed in the trial court that he had also been defamed by other statements contained in editorials published in The Anniston Star; however, on appeal, Little does not argue that the trial court erred in entering a summary judgment as to any libel claim based on those other statements. Hence, we do not address those claims on appeal. See Rogers & Willard, Inc. v. Harwood, 999 So. 2d 912, 923 (Ala. Civ. App. 2007) ("This court will not consider on appeal issues that are not properly presented and argued in brief.").

Instructions: Civil 23.04 (2d ed. Supp. 2009) ("In determining whether the statement was true or false, you must not consider whether the statement was absolutely and in all respects accurate, but rather whether the statement was substantially accurate and accurate in all material respects with regard to the plaintiff.").

CPC and Nichols initially argue that Little admitted that he had a personal relationship with Jackson. It is clear, however, that Little did not admit to any personal relationship with Jackson. Little actually denied the existence of such a relationship both in his interview with Nichols and in his deposition testimony. Little testified that he had never even heard of Jackson before Mayor White recommended her as a human-resources consultant. Thereafter, Little met with Jackson several times, dined with Jackson on two occasions, once with Mayor White in attendance, and talked with her over the telephone on four or five occasions. CPC and Nichols did not present any evidence indicating that Little and Jackson discussed anything other than the official business for which Jackson was ultimately engaged. The record certainly does not indicate that Little engaged in a "personal

relationship" as opposed to a business relationship with Jackson. Hence, we reject the factual argument that Little admitted to a personal relationship, either expressly or impliedly, and we conclude that CPC and Nichols did not produce any evidence indicating that Little and Jackson did, in fact, engage in a personal relationship of any kind.

CPC and Nichols admitted that Little did not, as the headline to the February 19 story alleged, order the human-resources audit. CPC and Nichols also did not argue in their summary-judgment motion that the evidence showed that Little had "pushed" or otherwise exhorted the city council to hire Jackson because of Little and Jackson's alleged personal relationship. Little testified that he had recommended Jackson solely on the basis of his conversations with Mayor White and the perceived need for Jackson's consulting services. CPC and Nichols presented no evidence to the contrary. Thus, the undisputed evidence in the record shows that Little did not recommend that Jackson perform the audit because of his and Little's alleged personal relationship.

Despite the foregoing, CPC and Nichols argue that Little did not present any evidence indicating that they disseminated

a falsehood. Basically, CPC and Nichols maintain, as asserted in the February 26 "correction" printed in the "For the Records" article, that they did not print a story stating that Little and Jackson actually had engaged in a personal relationship or that, based on that relationship, Little had, in fact, pushed for Jackson to be retained for the audit. They contend that they published a story that only reported that Spain had said that there was a rumor to that effect circulating around Anniston. They contend that, because they accurately quoted Spain, along with Little's denial of the rumor, they truthfully reported the events occurring during and after the February 18 city-council meeting.[4] The trial

[4]Little takes issue with that argument. Little contends that, in her affidavit, Nichols stated only that Spain had told her that he had heard a rumor that Little was or had been involved personally with Jackson, but that, later, in her deposition, Nichols added that Spain had also stated that the rumor accused Little of pushing for the audit due to that personal relationship. We disagree. In her affidavit, Nichols stated generally that Spain had made all the statements that she had attributed to him in the story, which would include the statement that it was rumored that Little had pushed for the audit due to his alleged personal relationship with Jackson. In her affidavit, Nichols did not address that particular allegation made by Spain further, but the fact that she did not further discuss the allegation does not render her later, more specific, deposition testimony inconsistent with her affidavit. Hence, we conclude that the record contains essentially undisputed evidence indicating

court noted that, regardless of the falsity of the rumor, Little had failed to prove that there was not a rumor floating around Anniston as described by Spain to Nichols. CPC and Nichols argue that, without such evidence, they cannot be liable for merely circulating Spain's statements.

That argument has long been rejected in libel actions against a newspaper publisher.

> "The fact that the publication of the scandalous matter purports to be based on rumor is no defense. Publication of libelous matter, although purporting to be spoken by a third person, does not protect the publisher, who is liable for what he publishes. Stephens v. Commercial News Co., 164 Ill. App. 6 [(1911)]; Cooper v. Lawrence, 204 Ill. App. 261-270 [1917)]; O'Malley v. Illinois Publishing & Printing Co., 194 Ill. App. 544 [(1915)]. Very pertinent to this point is the comment in Newell on Slander and Libel, 4th Ed., § 300. 'A man cannot say there is a story in circulation that A. poisoned his wife or B. picks C.'s pocket in the omnibus, or that D. has committed adultery, and relate the story, and when called upon to answer say: "There was such a story in circulation; I but repeated what I heard, and had no design to circulate it or confirm it"; and for two very plain reasons: (1) The repetition of the story must in the nature of things give it currency; and (2) the repetition without the expression of disbelief will confirm it. The danger--an obvious one--is that bad men may give currency to slanderous reports, and then find in that currency their own

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that, in the story, Nichols simply reproduced the statements made by Spain.

> protection from the just consequences of a repetition.'"

Cobbs v. Chicago Defender, 308 Ill. App. 55, 31 N.E.2d 323, 325 (1941). See also Davis v. Macon Tel. Publ'g. Co., 93 Ga. App. 633, 639-40, 92 S.E.2d 619, 625 (1956) ("The fact that the charges made were based upon hearsay in no manner relieves the defendant of liability. Charges based upon hearsay are the equivalent in law to direct charges.").

In Martin v. Wilson Publishing Co., 497 A.2d 322 (R.I. 1985), a newspaper published an article about a local real-estate developer in which the newspaper scolded local residents for spreading a rumor that the developer had caused or profited from a rash of arsons in areas he was developing. The developer sued the newspaper publisher arguing that

> "the newspaper essentially reported the existence ... of false, defamatory rumors circulating about town connecting [the developer] with a rash of incendiary fires, despite the fact that the newspaper had no belief in the underlying truth of such rumors."

497 A.2d at 325. The lower court instructed the jury that the burden was on the developer to prove that no such rumors existed. "In essence, the trial justice ruled as a matter of law that if such rumors were current at or before the time of

publication, the newspaper could republish such rumors with impunity." 497 A.2d at 327. The Supreme Court of Rhode Island disagreed with that proposition of law. The court stated:

> "It has long been recognized in respect to the law of defamation that one who republishes libelous or slanderous material is subject to liability just as if he had published it originally. Cianci v. New Times Publishing Co., 639 F.2d 54, 60-61 (2d Cir. 1980); Metcalf v. The Times Publishing Co., 20 R.I. 674, 678, 40 A. 864, 865 (1898); Folwell v. Providence Journal Co., 19 R.I. 551, 553-54, 37 A. 6, 6 (1896); Rice v. Cottrel, 5 R.I. 340, 342 (1858); 3 Restatement (Second) Torts § 578 (1977); Prosser and Keeton, Torts § 113 at 799 (5th ed. 1984).
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> "A good statement of this rule is set forth in Olinger v. American Savings and Loan Association, 409 F.2d 142, 144 (D.C. Cir. 1969):
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> > "'The law affords no protection to those who couch their libel in the form of reports or repetition. ... [T]he repeater cannot defend on the ground of truth simply by proving that the source named did, in fact, utter the statement.'
>
> "The republication rule applies to the press as it does to others. Cianci, 639 F.2d at 61.
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> "....
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> "Consequently, the appropriate inquiry to be submitted to the triers of fact in the instant case was not whether such rumors existed but whether the rumors were based upon fact or whether they were false. ..."

497 A.2d at 327. Thus, even in a case in which the newspaper decried the rumor, it could not avoid liability on the basis that it was merely reporting its existence. See also Bishop v. Journal Newspaper Co., 168 Mass. 327, 47 N.E. 119 (1897) (imposing liability for libel on publisher even though it included information contradicting rumor in story); accord Restatement (Second) of Torts § 548 comment e (1976).[5]

The parties have not directed this court to any binding Alabama cases on point, and our research has not yielded any definitive statement of Alabama law on the issue. However, Alabama courts generally are required to follow the common law in making decisions. § 1-3-1, Ala. Code 1975. Hence, we hold, consistent with the foregoing statements of the common law of libel, that a newspaper reporter or publisher cannot

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[5]Several other authorities have reached the same or similar conclusions. See Dun & Bradstreet, Inc. v. Robinson, 233 Ark. 168, 172, 345 S.W.2d 34, 37 (1961) (defendant must prove truth of substance of rumor even though report included disclaimer "it is currently reported"); Hope v. Hearst Consol. Publ'ns, Inc., 294 F.2d 681, 682 (2d Cir. 1961) (upholding jury award in libel suit based on gossip-column item that began "Palm Beach is buzzing with the story ...."); and Thackrey v. Patterson, 157 F.2d 614, 614 n.1 (D.C. Cir. 1946) (reversing dismissal of complaint in libel suit based on article reporting "conjectures" and "saucy little rumors" about plaintiffs).

avoid liability for publishing a false and defamatory statement on the ground that the newspaper reporter or publisher accurately quoted the rumormonger, even if the newspaper story clearly identified the statement as an unverified report and even if the newspaper story contains a denial of the rumor by its subject. See Connaughton v. Harte Hanks Commc'ns, Inc., 842 F.2d 825, 837 n.6 (6th Cir. 1988), aff'd, 491 U.S. 657 (1989) ("[I]t is clear that 'mere publication of a denial by the defamed subject does not absolve a defendant from liability for publishing knowing or reckless falsehoods.'" (quoting Tavoulareas v. Piro, 759 F.2d 90, 133 (D.C. Cir. 1985))).

2. The "Defamatory Meaning" Argument

CPC and Nichols argue next that the statement that Little had a "personal relationship" with Jackson is not reasonably capable of defamatory meaning. "Generally, any false and malicious publication, when expressed in printing or writing, or by signs or pictures, is a libel [if it] charges an offense punishable by indictment[] or ... tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society." McGraw v. Thomason, 265

Ala. 635, 639, 93 So. 2d 741, 744 (1957). "The test to be applied in determining whether a newspaper article makes a defamatory imputation is whether an ordinary reader or a reader of average intelligence, reading the article as a whole, would ascribe a defamatory meaning to the language." Drill Parts & Serv. Co. v. Joy Mfg. Co., 619 So. 2d 1280, 1289 (Ala. 1993) (citing Loveless v. Graddick, 295 Ala. 142, 148, 325 So. 2d 137, 142 (1975)). "The question of '[w]hether the communication is reasonably capable of a defamatory meaning is a question, in the first instance, for the court,' and 'if the communication is not reasonably capable of a defamatory meaning, there is no issue of fact, and summary judgment is proper.'" Drill Parts & Serv. Co., 619 So. 2d at 1289-90 (quoting Harris v. School Annual Publ'g Co., 466 So. 2d 963, 964-65 (Ala. 1985)).

Taken in isolation, the term "personal relationship" does not necessarily carry with it any pejorative connotation. However, Nichols stated that she used that term after receiving information from Spain that led her to believe that Little and Jackson had a dating relationship. Davis placed that phrase "in greater context" in the story by referring to

Little as being unmarried, thereby, at least arguably, implying the relationship was romantic in nature. The February 20 editorial furthered that notion by referring to the audit as "Little's sweetheart" deal, since that term had no other obvious meaning considering no one had alleged Little had gained any pecuniary advantage from the audit. See Hale v. Kroger Ltd. P'ship I, 28 So. 3d 772, 776 (Ala. Civ. App. 2009) (holding that, in ruling on a summary-judgment motion, record evidence must be viewed in a light most favorable to nonmovant). When coupled with the statements that Little had "ordered" the audit and that the audit had produced nothing of value for the $2,500 spent, the entirety of the statements implies that Little used his office to benefit his romantic interests at the expense of the City of Anniston.

In moving for a summary judgment, the movant bears the burden of proving that he or she is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. In this case, CPC and Nichols argued in their summary-judgment motion solely that they were entitled to a judgment as a matter of law because the reference to a "personal relationship" between Little and Jackson alone could not be considered defamatory in

meaning. They did not argue to the trial court that a statement that asserts that a public official had used his public office to direct public funds to a person with whom the public official was involved in a romantic relationship without the public receiving any corresponding benefit is incapable of defamatory meaning. On appeal, they assert in their brief to this court that "whether an elected city official recommends someone they have a 'personal relationship' with to do work for the city is not something that is illegal or rises to the level to meet the definition of a defamatory statement as a matter of law." However, even that argument misses the full point of Little's claim. Moreover, CPC and Nichols did not cite any legal authority to support their argument. See Rule 28(b), Ala. R. App. P. When a movant fails to establish that he or she is entitled to a judgment as a matter of law on the claim asserted by the nonmovant, "'then he [or she] is not entitled to judgment. No defense to an insufficient showing is required.'" Horn v. Fadal Machining Ctrs., LLC, 972 So. 2d 63, 69 (Ala. 2007) (quoting Ray v. Midfield Park, Inc., 293 Ala. 609, 612, 308 So. 2d 686, 688 (1975)). Thus, although Little argues that

this court should hold that the statements defamed him both as a city councilman and as a minister by imputing to him dishonesty and self-dealing, we need not address that argument. We instead hold that CPC and Nichols did not sufficiently prove that they were entitled to a judgment as a matter of law on the basis that the statements of which Little complains were incapable of being considered defamatory in nature.

3. "Qualified Privilege" and "Actual Malice" Arguments

In Wilson v. Birmingham Post Co., 482 So. 2d 1209 (Ala. 1986), the supreme court construed § 13A-11-161, Ala. Code 1975, which makes the publication of certain public information conditionally privileged, as codifying a common-law privilege as reflected in the Restatement (Second) of Torts § 611 (1977): "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence

reported."[6] Under § 13A-11-161, "a fair and impartial report" of a statement made by a public officer during a public meeting "shall be privileged, unless it be proved that the same was published with actual malice ...."

In their summary-judgment motion, CPC and Nichols argued that, because Spain made the statements at a public meeting about a matter of public concern and because they fairly reported those statements, the publication of those statements is qualifiedly privileged. The evidence indicates that the statements attributed to Spain of which Little complains were not made in the course of a public meeting, but in an interview following the conclusion of a public meeting; however, Little does not argue that point as a basis for avoiding a summary judgment. Little also does not argue that CPC and Nichols failed to fairly report the substance of the

[6]In Wilson v. Birmingham Post Co., 482 So. 2d at 1213-14, the supreme court arguably adopted the so-called "neutral-reporting privilege" that was created in Edwards v. National Audubon Society, 556 F.2d 113, 120 (2d Cir. 1977). Nichols and CPC did not, however, raise that privilege in their summary-judgment motion, so we do not decide whether that privilege applies to relieve them of liability in this situation.

statements made by Spain. Hence, we assume the qualified privilege applies.[7]

Ordinarily, in order to overcome the qualified privilege, a plaintiff must present substantial evidence of "common-law malice"; however, when that person is a public official and the alleged defamatory statement relates to his or her conduct as a public official, the plaintiff must establish "constitutional malice" by clear and convincing evidence. Gary v. Crouch, 923 So. 2d 1130, 1138 (Ala. Civ. App. 2005)

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[7]Section 602 of the Restatement (Second) of Torts provides:

> "One who upon an occasion giving rise to a conditional privilege publishes a defamatory rumor or suspicion concerning another does not abuse the privilege, even if he knows or believes the rumor or suspicion to be false, if
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> "(a) he states the defamatory matter as rumor or suspicion and not as fact, and
>
> "(b) the relation of the parties, the importance of the interests affected and the harm likely to be done make the publication reasonable."

See Stockton Newspapers, Inc. v. Superior Court, 206 Cal. App. 3d 966, 254 Cal. Rptr. 389 (1988). Nichols and CPC did not argue in their summary-judgment motion or in their appellees' brief that Alabama law should adopt the foregoing provision or that it would apply in this instance. Hence, we do not rule on that point of law.

(citing Wiggins v. Mallard, 905 So. 2d 776 (Ala. 2004); and Smith v. Huntsville Times Co., 888 So. 2d 492 (Ala. 2004)). "Constitutional malice" refers to the standard set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1984). "This standard is satisfied by proof that a false statement was made '"with knowledge that it was false or with reckless disregard of whether it was false or not."'" Smith, 888 So. 2d at 499 (quoting Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 659 (1989), quoting in turn New York Times v. Sullivan, 376 U.S. at 279-80).

In their summary-judgment motion, CPC and Nichols asserted that the evidence shows that they did not have any knowledge that anything they published was false and that they did not act with reckless disregard of the falsity of the statements they published. The evidence in the record indicates that, at the time the statements were published, neither Nichols nor CPC had any actual knowledge regarding the falsity of the alleged rumor Spain related. However, the evidence shows that CPC knew that Spain disliked Little, that Spain related to Nichols that any information about Little and

Jackson he had was founded totally on rumor,[8] that Little flatly denied any personal relationship, and that CPC and Nichols had no reason to doubt that denial. Although that information raised serious doubts as to the veracity of the rumor, neither Nichols nor anyone else at The Anniston Star attempted any investigation to determine the truth of the matter before publishing Spain's statements despite the general policy of the newspaper to double-check such inflammatory remarks.

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[8]"The characteristic that distinguishes rumor from other types of reports is its lack of a solid factual basis." Note, Libel and the Reporting of Rumor, 92 Yale L.J. 85, 86 (Nov. 1982). Hence, "a rumor, by its very nature, should raise doubts in the publisher's mind about its veracity." Id. at 102. That is especially true in the present context because, despite the absence of any factual foundation, rumors have often "provided the mechanism for political manipulation." Id. at 87. Even if a public official ordinarily would be considered a reputable source of information, when that public official informs a newspaper reporter of a defamatory rumor about a political rival, specifically identifying it as such, the newspaper reporter should realize that the public official is conveying information of a dubious and unreliable nature, possibly for political gain. In a case in which a newspaper reporter or newspaper publisher learns of a rumor under the foregoing circumstances, and fails to investigate the substance of that rumor before publishing it, "[p]rofessions of good faith will be unlikely to prove persuasive," see St. Amant v. Thompson, 390 U.S. 727, 732 (1968), to a fact-finder, so summary judgment would be inappropriate.

> "Malice can be shown by circumstantial evidence showing, for example, 'that the story was ... "based wholly on" a source that the defendant had "obvious reasons to doubt,"' .... McFarlane[v. Sheridan Square Press, Inc.], 91 F.3d [1501,] 1512-13 [(D.C. Cir. 1996)] (quoting St. Amant[v. Thompson], 390 U.S. [727,] 732, 88 S.Ct. 1323 [(1968)]. However, malice cannot be 'measured by whether a reasonably prudent man would have published, or would have investigated before publishing.' St. Amant, 390 U.S. at 731, 88 S.Ct. 1323 (emphasis added). Indeed, the failure to investigate does not constitute malice, unless the failure evidences '"purposeful avoidance,"' that is, 'an intent to avoid the truth.' Sweeney v. Prisoners' Legal Servs., 84 N.Y.2d 786, 793, 647 N.E.2d 101, 104, 622 N.Y.S.2d 896, 899 (1995) (quoting [Harte-Hanks Commc'ns, Inc. v.] Connaughton, 491 U.S. [657,] 693, 109 S.Ct. 2678 [(1989)]); see Gertz v. Robert Welch, Inc., 418 U.S. 323, 332, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)."

Smith, 888 So. 2d at 500.

> "It is well established that evidence that a publisher failed to investigate prior to publication does not, by itself, prove actual malice. ... However, when an article is not in the category of 'hot news,' that is, information that must be printed immediately or it will lose its newsworthy value, 'actual malice may be inferred when the investigation for a story ... was grossly inadequate in the circumstances.'"

Hunt v. Liberty Lobby, 720 F.2d 631, 643 (11th Cir. 1983) (citations omitted); see also Pemberton v. Birmingham News Co., 482 So. 2d 257 (Ala. 1985). In this case, information that Little had urged the Anniston City Council to pay Jackson $2,500 to perform a worthless audit because of his romantic

relationship with her would have remained newsworthy regardless of whether it was published the day after Spain spread the rumor to Nichols or days or weeks later after Nichols or some other person employed by CPC had thoroughly investigated the facts underlying the rumor. A jury could infer that Nichols and CPC acted with actual malice or recklessly in printing the story despite the total absence of any investigation of the truthfulness of the rumor.

"The United States Supreme Court has explained:

> "'[W]here the New York Times [Co. v. Sullivan] "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a New York Times [Co. v. Sullivan] case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.'

"Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (footnote omitted). The Supreme Court of Alabama has reiterated that '[a] trial judge is not required "to weigh the evidence and determine the truth of the

> matter but to determine whether there is a genuine issue for trial."' Camp v. Yeager, 601 So. 2d [924,] 927 [(1992)] (quoting Anderson, 477 U.S. at 249, 106 S.Ct. 2505)."

Gary v. Crouch, 923 So. 2d at 1138-39. On appeal from a summary judgment, this court reviews the case de novo, applying the same standards as the trial court. See id.

We conclude that the trial court erred in entering a summary judgment in favor of CPC and Nichols on Little's libel claim. Based on the evidence in the record, a jury could be clearly convinced that Nichols and CPC published a false and defamatory rumor about Little with actual malice or in reckless disregard of the truth or falsity of that rumor.

B. The Tort-of-Outrage Claim

Alabama law recognized the tort of outrage or, as our court system refers to it, intentional infliction of emotional distress, Stewart v. Matthews, 644 So. 2d 915, 918 (Ala. 1994), in American Road Service Co. v. Inmon, 394 So. 2d 361 (Ala. 1980), when the supreme court held:

> "[O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress. The emotional distress thereunder must be so severe that no reasonable person could be expected to endure it. Any recovery must be

> reasonable and justified under the circumstances, liability ensuing only when the conduct is extreme. ... By extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society."

394 So. 2d at 365. That tort has since been limited by caselaw to only a few factual situations. See Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law 23.0 (2d ed. 1996). Little argues that this court should now expand the cause of action to encompass situations in which a newspaper publisher, motivated by racial bias, issues libelous denunciations of a public official that cause unknown third persons to issue death threats to that public official. Little also argues that the claim should not be considered to be subsumed in the tort of libel.

Some caselaw cited by Little indicates that courts of other jurisdictions have recognized that a defendant may be liable for outrageous conduct in allowing a hostile work environment in which a plaintiff is forced to endure racial taunts or slurs. See Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 736, 565 P.2d 1173, 1174 (1977); Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 496, 86 Cal. Rptr. 88, 89-90, 468

P.2d 216, 218 (1970); see also Gomez v. Hug, 7 Kan. App. 2d 603, 604, 645 P.2d 916, 918 (1982); and Jones v. Fluor Daniel Servs. Corp., 959 So. 2d 1044, 1045 (Miss. 2007). The holdings of those cases do not readily translate to the situation in this case because Little has not presented any evidence indicating that the editors of The Anniston Star used any racial epithets against Little while exercising a position of authority over him. Nevertheless, Little argues that, based on those cases, we should hold that a newspaper commits the tort of outrage when it wrongfully or falsely criticizes a public official based on improper racial motivations.[9]

We need not decide that question, however, because Little has not presented substantial evidence to support his theory. When viewed in a light most favorable to Little, the evidence shows that, since he became a councilman, many editorials printed in The Anniston Star have criticized Little's leadership, policy choices, and effort. It appears that Little has taken positions on several subjects of political

[9]Little did not cite to the trial court or to this court any case directly on point.

interest that conflict with the stance of the editorial board of the newspaper, particularly regarding a dispute as to the best and highest use of Fort McClellan, a topic of much public debate in Anniston. Little testified that he believed that those editorials stemmed not from legitimate public debate, but from the fact that he is an African-American and refuses to "kowtow" to the wishes of the ownership of The Anniston Star. To support his opinion, Little presented evidence indicating only that his name had appeared in the newspaper a disproportionate number of times when compared to his Caucasian counterparts. CPC countered that it had printed more stories about Little due solely to his outspokenness on topics of public interest. That evidence hardly constitutes substantial evidence indicating that CPC has instituted a campaign against Little based on improper racial motivations. See § 12-21-12(a), Ala. Code 1975 (requiring proof of "substantial evidence" in order "to submit an issue of fact to the trier of the facts"); and West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989) (defining "substantial evidence" as "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment

can reasonably infer the existence of the fact sought to be proved").[10]

We also need not decide whether, absent an improper racial motivation, a newspaper can be held liable for outrageous conduct when its readers instigate death threats against a public official based on false or misleading information contained in editorials. Little has couched his entire argument regarding his tort-of-outrage claim specifically to include the racial component. This court cannot make and address legal arguments for an appellant. See Dunlap v. Regions Fin. Corp., 983 So. 2d 374, 378 (Ala. 2007).

Because Little has not presented substantial evidence to support his tort-of-outrage claim, the trial court properly entered summary judgment on that claim. Hence, we need not

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[10]In another context, the Alabama Court of Criminal Appeals has stated that "'statistics and opinion alone do not prove a prima facie case of [racial] discrimination.'" Banks v. State, 919 So. 2d 1223, 1230 (Ala. Crim. App. 2005) (quoting Woods v. State, 845 So. 2d 843, 845 (Ala. Crim. App. 2002)). We need not discuss at any length the type of evidence that would suffice to prove that a defendant acted with racial animus in an outrageous manner. We simply hold that the evidence presented in this case does not amount to substantial evidence of an improper racial motivation.

consider Little's argument that his claim was not subsumed in his libel claim.

Conclusion

For the foregoing reasons, we reverse the summary judgment as to the libel claim and remand the case for further proceedings consistent with this opinion. We affirm the judgment as to the tort-of-outrage claim.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Pittman and Thomas, JJ., concur.

Thompson, P.J., concurs in part and dissents in part, with writing, which Bryan, J., joins.

THOMPSON, Presiding Judge, concurring in part and dissenting in part.

Because I believe the trial court properly entered a summary judgment in favor of Consolidated Publishing Company and Megan Nichols on all claims, I must respectfully dissent as to that portion of the opinion reversing the summary judgment on Little's claim of libel.

Bryan, J., concurs.