THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas J. Russo, Sr., Circuit Court Judge

Case No.: 2012-213008

Akim A. Anastopoulo.....Appellant,

v.

Edward R. Cole; Turner Padget Graham & Laney, P.A.;
and Nationwide Mutual Insurance Company,.....Respondents.

FINAL BRIEF OF RESPONDENTS

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II. Did the trial court properly dismiss any claims based on an e-mail the Respondent Cole sent to the Appellant, where the Appellant's attorney withdrew those allegations at the motions hearing and there was no publication of the e-mail?

III. Was dismissal of the Appellant's claims proper, where the allegedly defamatory statements were constitutionally protected opinions?

STATEMENT OF THE CASE

This appeal arises from the dismissal of a Complaint in a purported defamation action. The Appellant Akim Anastopoulo represents a plaintiff in a bad faith action against the Respondent Nationwide Insurance Company ("Nationwide") in the United States District Court for the District of South Carolina. The Respondent Edward Cole is Nationwide's attorney in that case.[1]

After taking offense at some terms used in court submissions filed by Cole in the underlying case, Anastopoulo filed a Summons and Complaint in the Court of Common Pleas for Florence County. (R. p. 1). The Complaint purported to state a cause of action for defamation based on the statements in the court submissions. (R. pp. 6-15). The Respondents all responded with timely motions to dismiss the Complaint. (R. pp. 54-59).

The motions came before the Honorable Thomas J. Russo on August 15, 2012. (R. p. 73). At that hearing, the Appellant's attorney withdrew any allegations based on the contents of an e-mail the Respondent Cole sent to the Appellant during the underlying case. (R. p. 90, lines 16-18; R. p. 97, lines 17-20). Judge Russo heard arguments and received submissions from all parties before deciding to grant the Respondents' motions to dismiss. (R. p. 149). As set forth in the Order filed on August 27, 2012, Judge Russo concluded the challenged statements in Cole's court submissions were absolutely privileged under South Carolina law. (R. p. 152). Therefore, the Complaint failed to state facts sufficient to constitute any claim for relief. (R. pp. 149-52). The Appellant responded to the Order by filing a Notice of Appeal on September 24, 2012. (R. p. 153).

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[1] Cole practices with the firm of Turner Padget Graham & Laney, P.A., which is also a named Defendant and Respondent in these proceedings.

STATEMENT OF THE FACTS

The alleged defamatory statements at issue were made during the course of underlying litigation in which Appellant represents Carlotta Motsinger, the plaintiff in the underlying action. Respondent Cole represents Nationwide in the action, which is currently still pending in federal court in South Carolina. In that case, Carlotta Motsinger, whom the Respondent Nationwide insured under two policies of automobile insurance, was involved in an automobile accident while a riding as a passenger in a car driven by William Workman. Motsinger claimed UIM benefits under her Nationwide policies. As a result of that claim, an issue arose over whether Motsinger was Workman's common law wife and thus able to stack the UIM coverages under the two policies. (R. p. 78, lines 19-23).

Nationwide brought a declaratory judgment action in circuit court, seeking a determination as to its obligations to Motsinger. This necessarily involved the question of whether Motsinger was Workman's common law wife. The Appellant filed a motion to dismiss on behalf of Motsinger, asserting the family court had exclusive jurisdiction to determine Motsinger's marital status. (R. p. 79, lines 1-9). Nationwide voluntarily dismissed the circuit court action and brought its declaratory judgment complaint in family court. The Appellant moved to dismiss on the grounds that Nationwide lacked standing to raise this issue. (R. p. 79, lines 17-23).

On behalf of his client, the Appellant then filed a separate action in family court, naming the putative husband as the defendant but not joining Nationwide as a party. The family court judge first issued an order in this second action finding there was a common law marriage but subsequently vacated the order. (R. p. 80, line 1-p. 81, line 3).

The Appellant next filed the action against the Respondent Nationwide in the Court of Common Pleas for Horry County. Nationwide removed the case to federal court, where it was assigned case number 4:11-cv-01734-RBH. (R. p. 7, ¶ 8). In that action, Motsinger alleged Nationwide breached its contract and acted in bad faith in denying UIM coverage. (Appellant's Br., p. 1).

Respondent Cole filed a Motion for Protective Order and three briefs in *Motsinger*. (R. pp. 10-14, ¶¶ 30, 32, 39, 41, 43, 45, 47, 49, 51, 55, 57, 59 and 61). Statements in that motion and those briefs form the basis of the Appellant's Complaint in the present case.

The Complaint also cites an e-mail from Cole to Anastopoulo. (R. p. 13, ¶ 53). While the Appellant's brief also mentions the e-mail, the Appellant's attorney clearly withdrew any reliance on the e-mail during the hearing on the motion to dismiss and therefore, the issue of the email is not before this Court. (R. p. 90, lines 16-18; R. p. 97, lines 17-20). Thus, all of the language upon which the Appellant relies is contained in documents filed in the *Motsinger* federal court action, as the Appellant's counsel conceded in oral argument. (R. p. 94, lines 4-19). As the trial court properly concluded that the statements are protected by the judicial proceedings privilege this Court should affirm the decision of the trial court.

STANDARD OF REVIEW

In reviewing a decision on a motion to dismiss, the appellate court applies the same standard of review as the trial court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper." *Id.* "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.* at 395, 645 S.E.2d at 247-48. However, "[q]uestions of law may be decided with no particular deference to the trial court." *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012).

ARGUMENT

South Carolina has long recognized "[t]he common law rule protecting statements of judges, parties and witnesses offered in the course of judicial proceedings from a cause of action in defamation ...." *Crowell v. Herring*, 301 S.C. 424, 429, 392 S.E.2d 464, 466 (Ct. App. 1990). "The privilege affords absolute protection upon a bipartite showing that the statements were issued as part of a judicial proceeding and the alleged defamation is relevant to a matter at issue in the case." *Id.* at 429, 430, 392 S.E.2d at 467. South Carolina's courts have decreed that this privilege should be broadly construed. *The Texas Co. v. C.W. Brewer & Co.*, 180 S.C. 325, 327, 185 S.E. 623, 623-24 (1936).

The Appellant does not dispute the viability or validity of this absolute privilege. Rather, the Appellant contends the privilege does not apply in this case because: (1) the challenged statements did not appear in a "pleading;" (2) the statements were not relevant

to the case; (3) the challenged statements were made by an attorney, not a party; and (4) applying the privilege would not promote public policy. The Appellant's argument fails because it reflects an unduly narrow interpretation of the "judicial proceedings" privilege. The privilege is much broader in scope than the Appellant asserts and, in fact, this litigation is precisely the type of scenario to which it is intended to apply. Therefore, the circuit court properly granted the Respondents' motions to dismiss, and this Court should affirm.

I. The privilege applies to the court submissions involved in this case.

The Appellant attempts to frame this appeal as one presenting a novel issue – i.e. whether the judicial proceedings privilege applies to documents other than pleadings as the South Carolina Rules of Civil Procedure define that term. Actually, though, our courts have already addressed this question – and answered in the affirmative – several times before. Thus, the Court does not have to break new legal ground in this appeal. It need only look to well established precedent.

Seizing upon the use of the word "pleadings" in some of the cases addressing the judicial proceedings privilege, the Appellant argues the privilege applies only to a very limited and specific type of court document. This assertion misses the proverbial forest for the trees. As a review of the case law demonstrates, the type of document involved has never been the focus of the inquiry, and the privilege applies to a wide range of court submissions and other materials relating to cases in litigation, including the memoranda of law submitted to the court that are at issue here.

This Court addressed the applicability of the privilege to materials other than "pleadings" in *Crowell v. Herring*, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990) and

held that the privilege applies to any utterance arising in a judicial proceeding. There, the plaintiff was the commander of a Veterans of Foreign Wars ("VFW") post, and the primary defendants were the principals of a company that leased video machines to the post. Those defendants later submitted affidavits to the remaining defendants, who were other VFW officers investigating allegations of financial improprieties by the plaintiff. At least one of the affidavits contained statements that, if false, would have been defamatory. After a VFW court martial proceeding exonerated the plaintiff, he sued all of the defendants for defamation. The trial judge granted summary judgment to the defendants based on the judicial proceedings privilege, and this Court affirmed.

The Court began its analysis by stating: "[t]he common law rule protecting statements of judges, parties and witnesses offered in the course of judicial proceedings from a cause of action in defamation is well recognized in this jurisdiction." 301 S.C. at 429, 392 S.E.2d at 466 (emphasis added). After noting the plaintiff had not challenged the trial court's conclusion that the VFW court martial was a judicial proceeding, the Court turned its attention to the specific types of materials involved in the case. As the Court explained:

> Previous decisions of our Supreme Court have afforded the privilege to pleadings, affidavits sworn before a magistrate and letters between counsel in litigation. There have been, however, no decisions pertaining to depositions, briefs or informal affidavits sworn to before someone other than an officer of the court. We hold the absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial action of any official nature provided those steps bear reasonable relation to it.

Id. at 430, 392 S.E.2d at 467 (emphasis added). Based on that reasoning, the Court concluded the privilege applied to the affidavits submitted by the video machine

company defendants, as well as to live and deposition testimony by the VFW defendants. *Id.* at 431-32, 467-68.

The Court relied upon its reasoning in *Crowell* when it addressed a similar issue in *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002). Although the facts of *Pond Place* are not significant for present purposes, the case contains language that reiterates the expansive scope of the privilege. Specifically, the Court stated:

> The [absolute] privilege covers anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court.
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> * * *
>
> Any communication, oral or written, uttered or published in the due course of a judicial proceeding is absolutely privileged and cannot form the basis for a cause of action in libel or slander.

Id. at 22-24, 567 S.E.2d at 892-93 (emphasis added) (quoting *Kropp v. Prather*, 526 S.W.2d 283, 286 (Tex. Civ. App. 1975). As these passages demonstrate, this Court has not limited the privilege to a narrow concept of "pleadings" for which the Appellant argues.[2]

The United States District Court for the District of South Carolina has similarly applied the privilege to materials other than "pleadings." *See, e.g., Corbin v. Washington Fire & Marine Ins. Co.*, 278 F. Supp. 393 (D.S.C.), *aff'd* 398 F.2d 543 (4th Cir. 1968). There, the federal court applied the privilege to statements made in a written submission

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[2] The Supreme Court has also implicitly declined to limit the privilege in that manner. *See Rodgers v. Wise*, 193 S.C. 5, 7 S.E.2d 517 (1940) (concluding that a letter from one attorney to another containing allegedly defamatory statements was absolutely privileged because it related to a legal action in which both attorneys were involved).

to an arbitration panel containing a party's legal and factual arguments. Although the primary issue in dispute was whether the privilege operated in arbitrations, the court also made it clear that the privilege covered a wide range of communications and materials. As the court noted:

> [t]he absolute privilege attaching to judicial proceedings embraces communications between counsel ..., statements made by counsel to a prospective witness ...arguments or statements by counsel in the course of [a] proceeding ..., any statements made by witnesses in the course of the proceedings ... and even statements in the course of negotiating a settlement.

278 F. Supp. at 398 (internal citations omitted). The court never considered, let alone held, that only "pleadings" enjoyed the absolute privilege.

The federal court again applied the privilege to a document that was not a "pleading" in *Woodward v. Weiss*, 932 F. Supp. 723 (D.S.C. 1996), *aff'd* 1997 U.S. App. LEXIS 27095 (4th Cir. 1997). Both of the parties in that case were doctors. The plaintiff had treated a person injured in an automobile accident, and the defendant evaluated that treatment in a report submitted to the insurer for the at-fault driver. The defendant's report criticized the treatment and diagnoses the plaintiff provided, and the plaintiff sued for defamation. The court granted summary judgment because it believed the defendant's statements were protected opinions. However, the court also held the report qualified for the judicial proceedings privilege because the defendant prepared it for purposes of upcoming litigation. *Id.* at 727-28. In reaching that conclusion, the court relied in part of this Court's decision in *Crowell v. Herring*, *supra*.

As these cases demonstrate, courts in South Carolina have never limited the judicial proceedings privilege to a specific type of document technically called a

"pleading." Instead, the courts have applied the privilege to numerous types of written submissions and other statements at various stages of judicial and quasi-judicial proceedings. The briefs at issue in the present case fall squarely within that spectrum. Respondent Cole drafted the briefs for the sole purpose of supporting his client's positions in the underlying litigation, and he filed them with the federal court. Consequently, this Court can simply look to precedent and does not need to break any new legal ground to reach the proper conclusion: the judicial proceedings privilege protects the briefs at issue.

A. The statements were relevant to the underlying litigation.

Under South Carolina law, the inquiry into whether statements are relevant to a judicial proceeding for purposes of the absolute privilege "is a matter for the determination of the Court and not for the jury." *The Texas Co. v. C.W. Brewer & Co.*, 180 S.C. 325, 327, 185 S.E. 623, 623-24 (1936). *See also McKesson & Robbins, Inc. v. Newsome*, 206 S.C. 269, 33 S.E.2d 585 (1945); *Corbin v. Washington Fire & Marine Ins. Co.*, 278 F. Supp. 393 (D.S.C.), *aff'd* 398 F.2d 543 (4th Cir. 1968).[3] Furthermore, courts making this inquiry should use "a liberal interpretation" and "all doubt should be resolved in favor of relevancy." *The Texas Co.*, 180 S.C. at 327, 185 S.E. at 624. Thus, the only real question facing this Court is whether the circuit court, using a liberal interpretation and resolving all doubts in favor of relevancy, properly concluded the

[3] This rule effectively discredits the Appellant's assertion repeated in every argument section of his brief that the circuit court could not conclude the privilege applied in the context of a Rule 12(b)(6) motion because the Complaint alleged the statements were not privileged. Those conclusory allegations were not sufficient to defeat a finding of privilege, which was a legal question for the circuit court. Otherwise, such motions could almost never be granted.

statements were relevant to the underlying case. As discussed below, this Court should answer that question in the affirmative.

In his brief, the Appellant suggests South Carolina has never addressed the question of whether statements about a party's attorney (rather than the party itself) can be relevant for purposes of the judicial proceedings privilege. This assertion overlooks the South Carolina federal district court's decision in *Corbin v. Washington Fire & Marine*, *supra*. *Corbin* is closely analogous to the present case, and the Court should apply its reasoning here.

Corbin involved a dispute between two insurance companies over the alleged failure of one to preserve the other's subrogation rights. In its written submission to an arbitration panel, one of the insurers accused the attorney for the other company of deceitful conduct. Specifically, the submission stated the opposing attorney had made a representation that was a "falsehood," and it then added: "As you know, it is a legal maxim, that false in one thing is false in all things." 278 F. Supp. at 395. Thus, the statements directly challenged the veracity of the plaintiff's counsel.

Nevertheless, the district court in *Corbin* concluded the statement was relevant to the litigation. The court first acknowledged the rule that all doubts should be resolved in favor of relevancy. The court then found the statements were related to the propriety of the adverse insurer's actions in the underlying factual scenario, which was one of the issues involved in the arbitration. Consequently, the statements were relevant for purposes of the absolute privilege.[4]

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[4] Although *Corbin* was decided nearly 45 years ago, courts still cite it for the application of the absolute privilege in quasi-judicial settings. *See*, *e.g.*, *Katz v. Odin, Feldman & Pittleman, P.C.*, 332 F. Supp. 2d 909 (E.D. Va. 2004) (relying on *Corbin* as

The *Corbin* analysis applies to the statements in this case. One of the issues in the underlying bad faith action was the manner in which the Appellant had obtained a family court determination of whether a common law marriage existed. That decision impacted the existence, or non-existence, of insurance coverage. The Respondents, through Cole's briefs filed with the court, criticized the Appellant's tactics and challenged their validity. Cole admittedly used strong language in those briefs, and other attorneys might have used milder terms. Be that as it may, as the trial court correctly observed, the determinative issue is not whether alternative language could have been used, but rather, whether the statements at issue were relevant and the trial court properly concluded that they were. Although Appellant takes issue with the trial court having made this determination early on in the proceedings on a motion to dismiss, the court had sufficient information from which to assess the issue of relevance and properly applied the absolute privilege to grant the motion to dismiss. The court's ruling on the motion to dismiss is consistent with prior rulings upheld by the appellate courts in which the privilege has been applied early on in the proceedings where, as here, the basis for dismissal was clear. *See, e.g.*, *McKesson & Robbins, Inc. v. Newsome*, 206 S.C. 269, 33 S.E.2d 585 (1945) (decided on a motion to strike); *Rodgers v. Wise*, 193 S.C. 5, 7 S.E.2d 517 (1940) (decided on a demurrer); *The Texas Co. v. C.W. Brewer & Co.*, 180 S.C. 325, 327, 185 S.E. 623, 623-24 (1936) (decided on a demurrer). If courts could not apply the privilege at this early dismissal stage, the Supreme Court could not have affirmed in those three cases.

Although the Appellant's Complaint set forth the statements without placing them in context, the parties' attorneys provided the procedural posture of the underlying case.

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authority for dismissing a defamation action arising from submissions in an arbitration proceeding).

They explained the nature of the underlying bad faith action and provided sufficient background information about the briefs containing the allegedly defamatory statements. (R. pp. 77-84). Those explanations, which the Appellant's attorney never objected to or challenged, gave the circuit court the context it needed to consider whether the statements were relevant to the underlying action.

The circuit court dismissed the Appellant's Complaint because the applicable precedent as set forth in *Corbin* guides courts to liberally interpret the bounds of "judicial proceeding" and resolve all doubts in favor of relevancy. With this liberal interpretation standard in mind, the court only needed to determine whether the statements in issue were somehow relevant to the underlying bad faith case. Therefore, it was not necessary for the court conduct an exhaustive investigation into the minute details of the underlying bad faith case or the facts leading to it. The court only had to know enough about the issues in the bad faith action to see that the statements in the briefs were at least arguably relevant. As long as an arguable basis for relevance existed, the court was not required to look any further. At that point, the court was obligated to resolve any doubts in favor of relevancy, which is precisely what the court did. In other words, the court did not need to know everything about the issues in the underlying action or to conclude that the statements in the briefs were inextricably linked to those issues. Once the court had a sufficient basis to conclude the statements were at least conceivably relevant, its proper role in this inquiry was fulfilled.

The Appellant suggests the statements in the briefs could not possibly have been related to the bad faith action, but that position assumes a far too rigorous standard for relevance. It also overlooks the "liberal construction" rule as laid out in *Corbin and*

Texas Co. and discussed above. As long as the statements related in some sense to the discussion of the issues in the case, they were relevant for purposes of the privilege. Any other approach would subvert established precedent and would create an impossibly high hurdle for those asserting the privilege. That is not the law of South Carolina.

The briefs in the underlying case set forth the Respondents' belief that the Appellant used questionable tactics in order to create a bad faith claim. The Respondents' forceful argument centered on Appellant's questionable tactics and, while harsh, the statements were clearly relevant to the bad faith action. The fact that the Appellant took offense at those comments, or considered them to be a personal affront, did not make them irrelevant. Simply put, even if the statements were overly hyperbolic or in poor taste, they had enough connection to the issues involved in the bad faith action to pass the lenient relevance test for the judicial proceedings privilege. Only statements with no connection whatsoever to those issues would have failed that test, and no such statements appeared in the Respondents' briefs.

A brief hypothetical might be useful to illustrate this point. Suppose Smith is an attorney representing a plaintiff in a "foreign substance" premises liability case, and Jones is the attorney for the defendant store. Jones files a summary judgment motion based on the absence of notice. Smith responds with a brief that presents snippets of deposition testimony taken out of context and relies on case law that is distinguishable and/or no longer valid. If Jones files a reply questioning Smith's honesty and candor to the court based on the misinformation in the plaintiff's brief, those statements fall within the privilege. Even if Jones phrases those arguments as personal affronts to Smith, the privilege still applies because they relate to an issue in the case (*i.e.* whether there really

is sufficient evidence and/or case law to prevent summary judgment). On the other hand, if Jones stated in the reply brief that "Smith is a well-known adulterer who also cheats on his taxes," the privilege would not apply because those statements would not have any conceivable relation to any issues in the case.

Despite the fact that some statements in the Respondents' briefs were harsh, the Appellant's subjective sensibilities do not alter the judicial proceedings privilege. While the Appellant may have disputed their accuracy in terms of his methods in the events leading up to the bad faith action, he cannot credibly deny that those events had at least some relevance to the bad faith claim's validity or lack thereof. Thus, the statements fall squarely within the protection of the privilege.

Although the Appellant attempts to rely upon several decisions from the courts of other states on this issue, all of those cases are readily distinguishable. The Appellant cites *Sussman v. Damian*, 355 So.2d 809 (Fla. Ct. App. 1977), for the proposition that a statement by one attorney about another's professional integrity is not absolutely privileged. However, the Appellant's brief fails to mention that *Sussman* actually involved two defamation claims: one claim arose from a statement made during a deposition and the other claim stemmed from a heated confrontation in a courthouse elevator after a hearing. While the Florida Court of Appeals did find the statements made during the "elevator incident" were only qualifiedly privileged, the court also concluded that the deposition statement ("You, sir, are a damned liar") came within the absolute privilege. The difference was the setting: the deposition dispute occurred during a judicial proceeding, whereas the argument in the elevator did not. Thus, the diminished protection for the statements in the "elevator incident" had nothing to do with one lawyer

questioning the other's integrity. Rather, the statements received a lower level of protection because they did not occur "in" the course of the litigation.

The challenged statements in the present case all appeared in legal briefs filed with the federal court.[5] Thus, the statements are analogous to the deposition dispute in *Sussman* and are distinguishable from the elevator argument. Based on that distinction, it is likely the statements in the Respondents' brief would be absolutely privileged in Florida, the *Sussman* case notwithstanding. For that reason, *Sussman* does not support the Appellant's position and in fact, compels the same conclusion reached by the trial court, *i.e.,* that the statements at issue are protected by the judicial proceedings privilege.

Similarly, the context of the defamatory statement, not its actual content, lay at the heart of the court's decision in *Post v. Mendell*, 507 A.2d 351 (Pa. 1986), also relied upon by Appellant. There, the defendant attorney wrote a letter to the plaintiff, who had been opposing counsel in a recently completed case. The letter accused the plaintiff of dishonesty and unethical conduct during the case, and the defendant sent copies of it to the trial judge, a witness from the trial, and the state disciplinary board. A trial court dismissed the plaintiff's defamation lawsuit, but the Pennsylvania Supreme Court reversed. The court's decision had nothing to do with what the defendant said, however. The court based its decision on when he said it – *i.e.* in a letter drafted and sent after the case was over. In short, it was the extra-judicial nature of the communication that made the privilege inapplicable. As previously discussed, the statements in this case appeared

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[5] At the motion hearing, the Appellant's attorney withdrew any allegations relating to an e-mail that the Respondent Cole sent to the Appellant. (R. p. 90, lines 16-18; R. p. 97, lines 17-20). Consequently, the only statements at issue are those found in the Respondents' federal court submissions and this Court need not address Appellant's claims regarding the referenced e-mail.

in court filings and were thus not extra-judicial. This fact makes *Post* distinguishable and again supports the application of the privilege to the statements at issue here.

The defamatory statement involved in *Demopolis v. Peoples Nat'l Bank*, 796 P.2d 426 (Wash. App. 1990), was also extra-judicial and therefore distinguishable. In *Demopolis*, during a break in a trial, an attorney accosted an upcoming witness, whom he falsely said had been convicted of perjury. The Washington Court of Appeals held the statement was not privileged because it occurred off the record and was not part of the trial. That fact was dispositive because under Washington law, the absolute privilege could only apply to "situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct." *Id.* at 430. Since the statement did not occur in front of the judge, it could not be privileged under Washington law.

South Carolina does not require that statements be made in front of a judge to be privileged. *Demopolis* is distinguishable from the instant case for two main reasons. First, as previously discussed, the statements at issue here appeared in filed briefs and were not extra-judicial in nature, unlike the incident in *Demopolis*. Second, *Demopolis* makes it clear that Washington applies the privilege "sparingly" and does not favor it. *Id.* at 430. No similar pronouncements appear in South Carolina case law, which supports a much more liberal application of the privilege. Therefore, *Demopolis* does not aid the Appellant's cause.

Finally, the Appellant relies upon *Bradley v. Hartford Acc. & Indem. Co.*, 106 Cal. Rptr. 718 (Cal. App. 1973), for the proposition that the Respondents' statements were "without the bound of relevancy and the public policy for which the privilege was

established." (Appellant's Br., p. 13). The court in *Bradley* did criticize the privilege and impose a requirement that the defamatory statement "promote the interest of justice" in order to be privileged. However, such a requirement is not applicable to the instant case. First, there is no South Carolina law imposing such an "interest of justice" requirement. Second, even California no longer recognizes that requirement. In *Silberg v. Anderson*, 786 P.2d 365 (Cal. 1990), the California Supreme Court expressly rejected such a requirement as being inconsistent with the absolute nature of the litigation privilege and its underlying purposes. *Id.* The court went on to call the privilege "the backbone of an effective and smoothly operating judicial system" and said it should be given a "broad application." *Id.* at 368. Therefore, *Bradley* is no longer good law in its state of origin, and this Court should not consider it.

As the previous discussion demonstrates, the Appellant has failed to present any authority to support his argument that the statements in the Respondents' briefs were not relevant to any issue in the underlying litigation. Appellant erroneously suggests the type of language in those statements can never be relevant, and that is not the law in South Carolina. As long as the statement has at least something to do with an issue in the case, or the presentation of that issue to the court, the absolute privilege applies. Here, given the nature of the underlying bad faith action and this State's "liberal construction" rule, the circuit court properly concluded the privilege bars any defamation claim. This Court should affirm that decision.

B. The judicial proceedings privilege applies to statements by and about an attorney.

The Appellant contends the privilege cannot apply in this case because it covers only statements by and about parties, not their attorneys. That assertion draws a distinction that does not appear in the case law. Courts in both South Carolina and other jurisdictions have applied the privilege in situations involving statements by and about attorneys, even when those attorneys were not parties to the underlying litigation. Therefore, the Appellant's argument on this issue does not provide any basis for reversing the circuit court's decision.

In *Corbin v. Washington Fire & Marine Ins. Co.*, 278 F. Supp. 393 (D.S.C.), *aff'd* 398 F.2d 543 (4th Cir. 1968), the South Carolina District Court addressed a situation involving allegedly defamatory statements about an opposing attorney. In a written submission to an arbitration panel, the defendant said the opposing attorney had been false and dishonest in certain conduct leading to the dispute that was in arbitration. The court concluded the absolute privilege barred any defamation claim. The fact that the defamed person was an attorney, and not a party, was of no apparent consequence to the court's decision.

Similarly, in *Sussman v. Damian*, 355 So.2d 809 (Fla. Ct. App. 1977), the Florida Court of Appeals found that the privilege defeated a claim by an attorney whose opposing counsel called him a "damned liar" during a deposition of a witness in the underlying case. Again, the plaintiff's status as an attorney, as opposed to a party or witness, had no bearing on the court's ruling.

By the same logic, the challenged statements in the present case fall within the privilege regardless of the fact that the Appellant was acting as an attorney. The focus should not be on the Appellant's role in the litigation, but on whether the statements were somehow related to some issue in the bad faith action. As discussed above, the statements were related to the Appellant's conduct in the events leading up to the bad faith claim, which was an important issue in the underlying case. Furthermore, the statements in the brief in opposition to the Appellant's motion to amend his client's Complaint were intended to persuade the court that allowing the amendment would not promote "justice" and would prejudice the Respondent Nationwide. Thus, the statements were relevant to issues in the bad faith litigation, and it simply makes no difference whether those statements were about an attorney rather than a party.

The out-of-state case the Appellant cites for support on this issue is distinguishable and, if anything, actually supports the Respondents' argument. In *Edelman v. Hinshaw & Culbertson*, 788 N.E.2d 740 (Ill. App. 2003), there were two allegedly defamatory communications at issue. One was a document sent to a bankruptcy trustee, and the other was a document sent to attorneys who had no connection to the underlying case. Both of the communications concerned the plaintiff, who was an attorney adverse to the defendants in other legal actions, and both questioned the plaintiff's professional integrity.

Although the Illinois Court of Appeals held the privilege did not apply to the communication to the lawyers not involved in the underlying case, it found the privilege did apply to the communication to the bankruptcy trustee. The different conclusions stemmed from the fact that the trustee was involved in the underlying case, whereas the

other lawyers were not. Thus, the key to application of the privilege was the involvement of the recipients in the case, and the court's decision not to apply the privilege in one instance had nothing to do with the plaintiff's status as a lawyer (rather than a party). Indeed, the same defamatory statements were privileged when made to a person with some connection to the case. For this reason, *Edelman* does not support the Appellant's position on this issue; if anything, *Edelman* refutes it.

As previously discussed, the Court's focus should be on the context and relevance of the statements, not the person about whom they were made. All that matters is whether the statements appeared in some sort of judicial (or even quasi-judicial) proceeding and whether they had at least some conceivable relevance to an issue in that case. The statements in the present case satisfy both of those conditions. Thus, the circuit court properly applied the absolute privilege.

C. Applying the privilege does not offend public policy.

In *Corbin v. Washington Fire & Marine*, *supra*, the federal district court set forth the following rationale behind the absolute privilege:

> "This rule reflects the prevailing common law view that the public interest in freedom of expression by participants in judicial proceedings, uninhibited by any risk of resultant suits for defamation, outweighs the interest of the individual in the protection of his reputation from defamatory impairment in the judicial forum."

278 F. Supp. at 398 (quoting *Petty v. General Acc. Fire & Life Assurance Corp.*, 365 F.2d 419, 421 (3rd Cir. 1963) (emphasis added)). This Court expressed a similar view in *Pond Place Partners, Inc. v. Poole*, noting "the overriding public interest that persons should speak freely and fearlessly in litigation, uninfluenced by the possibility of being brought to account in an action for defamation." 351 S.C. 1, 23, 567 S.E.2d 881, 892 (Ct.

App. 2002). The Court also quoted with approval the following passage from a New York case:

> The interest of society requires that whenever men seek the aid of courts of justice, either to assert or to defend rights, of person, property or liberty, speech and writing therein must be untrammeled and free. The good of all must prevail over the incidental harm to the individual. So the law offers a shield to the one who in a legal proceeding publishes a libel, not because it wishes to encourage libel, but because if men were afraid to set forth their rights in legal proceedings for fear of liability to libel suits greater harm would result, in the suppression of the truth.

Id. (quoting *Kraushaar v. LaVin*, 39 N.Y.S.2d 880, 883 (N.Y. Sup. Ct. 1943)). Thus, the public policy behind the privilege supports a broad interpretation of it. Public policy also requires courts to err on the side of applying the privilege.

Here, the Appellant has not offered any explanation as to why the circuit court's decision offends this public policy. The Appellant obviously thinks the statements in the federal court briefs were untrue, but his belief does not alter the stated public policy. That policy supports full freedom of expression for everyone participating in a legal action. As the courts have recognized, even maliciously defamatory statements are tolerated under this policy because that result is preferable to the chilling effect that threats of liability for defamation would create. The Appellant has failed to show how imposing liability in this case would promote that established public policy.

The only explanation the Appellant offers concerns the civility oath taken by attorneys in South Carolina. *See* Rule 402(k), SCACR. The Appellant alleges the Respondent Cole violated that oath in his federal court filings. The Respondents most certainly do not believe or concede that any violation of that oath occurred in this case. The Respondents instead contend that the briefs, though harshly worded in parts,

complied with the applicable rules. Even if a violation did occur, however, that would not diminish the judicial proceedings privilege or impose liability for defamation where none would otherwise exist. In fact, it would play no role whatsoever in determining whether the privilege applies. If a violation occurred, that would be an ethical issue that the appropriate authorities would address. It would not result in absolutely privileged statements suddenly losing that shield. Thus, the Appellant's reliance on an alleged civility oath violation is not relevant to the issues in this appeal.

This Court might not like or approve of the language and terminology the Respondent Cole used in his federal court filings. That is perhaps understandable. But hindsight disapproval should not affect the determination of whether the absolute privilege applies. Regardless of how they were worded, the statements listed in the Complaint appeared in federal court briefs, and they related to issues involved in that action. Under the established law of South Carolina, therefore, the judicial proceedings privilege protected the Respondents from any liability for those statements, and this Court should affirm.

II. Any claim based on the e-mail from the Respondent Cole to the Appellant fails as a matter of law.

In his brief, the Appellant bases his arguments at least in part on allegedly defamatory statements in an e-mail he received from the Respondent Cole during the underlying litigation. The stated grounds for the circuit court's decision to dismiss the Complaint applied to the statements in the e-mail as well as to those found in the federal court briefs. *See Rodgers v. Wise*, 193 S.C. 5, 7 S.E.2d 517 (1940) (concluding that a letter from one attorney to another containing allegedly defamatory statements was absolutely privileged). However, there are also two additional bases for dismissing any

cause of action based on statements in the e-mail. Although the circuit court did not specifically address those grounds in its order, this Court can affirm for any basis appearing in the record. *See* Rule 220(c), SCACR.

First, the Appellant withdrew or abandoned any claim based on the e-mail at the hearing on the Respondents' motion. When questions about the viability of that claim arose, the Appellant's attorney stated the Appellant was not relying on statements contained in the e-mail. (R. p. 90, lines 16-18; R. p. 97, lines 17-20). Therefore, the Appellant effectively consented to the dismissal of any claim that relied upon the statements in the e-mail.

Second, the e-mail could not serve as the basis for any defamation claim because there was no publication to a third party. "In order to prove defamation, a party must show: (1) a false and defamatory statement was made; (2) the unprivileged publication of the statement to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm." *Williams v. Lancaster Co. Sch. Dist.*, 369 S.C. 293, 302-03, 631 S.E.2d 286, 292 (Ct. App. 2006) (emphasis added). Without an unprivileged publication of the defamatory statement to a third party, a defamation claim fails as a matter of law. *Id.* at 304, 631 S.E.2d at 292-93.

Here, there is no allegation that the Respondent Cole (or the other Respondents) sent the e-mail to anyone but the Appellant. This means there was no publication to a third party. Indeed, this was apparently the reason the Appellant's attorney withdrew any allegations concerning the e-mail at the hearing in the circuit court. Therefore, any defamation claim purportedly based on the e-mail fails as a matter of law. Even if the

Court were to reverse as to any other allegations, it should affirm the dismissal of the Appellant's allegations and claims based on the e-mail.

III. All of the allegedly defamatory statements were constitutionally protected opinions.

Due to its application of the judicial proceedings privilege, it was not necessary for the circuit court to address the real nature of the statements listed in the Appellant's Complaint. Thus, the circuit court made no ruling on whether the challenged statements were constitutionally protected opinions. Even a brief examination of the statements demonstrates they fall into that category, however, and this Court should also affirm the result below on this ground. *See Jones v. Lott*, 379 S.C. 285, 290, 665 S.E.2d 642, 645 (Ct. App. 2008) (an appellate court "may consider any ground present in the record to affirm the circuit court's judgment"), *aff'd* 387 S.C. 339, 692 S.E.2d 900 (2010).

The United States Supreme Court has held that the First Amendment to the United States Constitution protects certain types of opinion statements from liability for defamation. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). As the Court explained:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Id. at 340. Thus, an "opinion statement" can lead to defamation liability only if it can be reasonably interpreted to declare or imply facts that are objectively provable as false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990). Whether a statement qualifies for this constitutional protection is a question of law for the courts to decide. *Id.* *See also CACI Premier Tech, Inc. v. Rhodes*, 536 F.3d 280, 294 (4th Cir. 2008).

To make this determination, courts must look to the type of language used and the context in which it appears. *Milkovich*, 497 U.S. at 20-21. Specifically, the courts should examine the statement to see if it employs "loose, figurative, or hyperbolic language." *Id.* at 21. As a matter of law, the use of that kind of language negates the impression that the writer was trying or intending to convey objective facts. *Id.* Similarly, the context in which the statement appears can prevent any reasonable interpretation that it attempts to attempts to communicate facts. *Id. See also Potomac Valve & Fitting, Inc. v. Crawford Fitting*, 829 F.2d 1280, 1287-88 (4th Cir. 1987) (noting that "the word 'blackmail' taken out of context might easily appear to refer to a specific criminal activity. Read as a whole, however, the article at issue [may provide] the reader enough background information to realize that the term blackmail has only been used to criticize the Plaintiff's bargaining position.").

The statements involved in the current case fall squarely within the protections of the First Amendment. In his primary brief, the Appellant and relies upon cites the following language from the Respondent Cole's federal court briefs:

- "attempting to force Nationwide into capitulation by bluster, threats, outright trickery, and ill-conceived lawsuit"
- "nefarious scheme"
- "sham proceeding"
- "villainous band of thieves"
- "blatant, shameful exercise in deceit"
- "completely disregarded his professional obligations"
- "absurd"
- "dishonest"
- "nothing short of shameful"
- "blatantly attempted to use the fruit of the poisonous tree to bludgeon Nationwide"
- "witches' brew"
- "perfidious"
- "harassing"
- "oppressing"

- "campaign of deceit and subterfuge"
- "intentionally misled the Family Court"
- "scurrilous conduct to extort monies from a Defendant."

(Appellant's Br., pp. 3-4). The Appellant also refers to the e-mail he received from Cole, which referred to the Appellant's conduct as "silly and juvenile." (Appellant's Br., p. 3).

It would be difficult to argue that these statements are anything other than "loose, figurative, or hyperbolic language." *Milkovich*, 497 U.S. at 21. The statements use intentional exaggeration as a rhetorical device, which is the very nature of hyperbole. They also employ well-known figurative terms (*e.g.* "villainous band of thieves," "witches' brew," "poisonous tree") to express the author's opinions. This kind of language cannot reasonably be interpreted as stating facts because nothing in the statements is capable of being proven objectively true or false. Thus, these are precisely the kinds of statements the Supreme Court has found to enjoy constitutional protection.

Furthermore, the Court must also consider the context in which the statements appear.[6] Unlike their presentation in the Complaint, the statements did not appear in a vacuum. They were part of federal court briefs in which the Respondent Cole set forth – and advocated – his client's positions. This involved presenting an argument that the Appellant had used questionable tactics in an attempt to obtain a ruling on his client's marital status. To do that, Cole used charged, forceful terminology, and he was clearly of the opinion that the Appellant had pushed the envelope of propriety on that front. But this is the crucial point – they were Cole's arguments and opinions. No objective, reasonable reader would see the statements in context and believe they were intended to

[6] In some ways, this inquiry is similar to the "relevance" prong of the test for applying the judicial proceedings privilege.

convey facts. Rather, such a reader would see the statements for what they were: arguments intended to persuade the federal judge to rule in favor of the writer's clients.

It is also significant to note that the public policy interests supporting First Amendment protections are practically identical to those served by the judicial proceedings privilege. Both protections encourage the free exchange of ideas, and both place a premium on a writer's (or speaker's) ability to voice his or her opinions without fear of liability. Most importantly, both protections embody the principle that the law would rather allow potentially offensive comments go unchecked than stifle freedom of expression.

The case of *Woodward v. Weiss*, 932 F. Supp. 723 (D.S.C. 1996), *aff'd* 1997 U.S. App. LEXIS 27095 (4th Cir. 1997), discussed above in section I(A), demonstrates the manner in which the two protections often go hand-in-hand. In *Woodward*, the defendant was a doctor hired by an insurance company, who submitted reports critical of the work performed by the treating physician of a plaintiff in a wreck case. The federal judge concluded all the challenged statements fell within the judicial proceedings privilege because the doctor prepared them for the insurer in anticipation of litigation. However, the judge also held the statements were constitutionally protected opinions under the reasoning of *Milkovich*. Thus, both the common law privilege and the constitutional protection warranted dismissal of the defamation claims.

The same reasoning applies in the present case. The judicial proceedings privilege applies because the statements appeared in court submissions and were related to issues involved in the litigation. Yet, even if this Court were to conclude the privilege did not apply, the result in the circuit court would still be proper because the challenged

statements were constitutionally protected opinions. Therefore, the First Amendment to the United States Constitution, as interpreted and applied in *Milkovich*, serves as an alternative sustaining ground and provides another basis for this Court to affirm the result below.

CONCLUSION

As the circuit court correctly perceived, the Appellant's Complaint, no matter how liberally construed, could not state any claim for defamation against the Respondents. The allegedly defamatory statements qualified for the judicial proceedings privilege, and they also come within the protections of the First Amendment. Therefore, this Court should affirm the circuit court's decision.[7]

Respectfully submitted,

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[7] The trial court summarily dismissed Appellant's claim of negligent hiring and negligent supervision against Respondent Turner, Padget and his claim of conspiracy against all Respondents, concluding that these claims were contingent upon survival of the defamation claim, which was dismissed. In so doing, the trial court properly disposed of the remaining claims.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas J. Russo, Sr., Circuit Court Judge

Case No.: 2012-213008

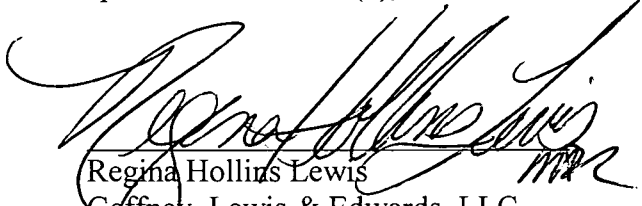
Akim A. Anastopoulo.....Appellant,

v.

Edward R. Cole; Turner Padget Graham & Laney, P.A.;
and Nationwide Mutual Insurance Company,.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief complies with Rule 211(b), SCACR.



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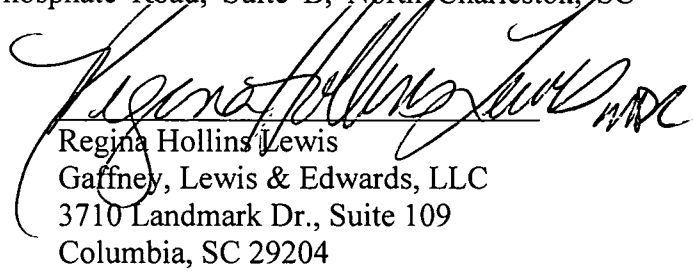
PROOF OF SERVICE

I do hereby certify, on this 13th day of May, 2013, that a copy of the foregoing Final Brief of Respondents was served via electronic mail and by depositing a copy of the same in the United States Mail, first-class, postage prepaid, addressed to: Eric M. Poulin (eric@akimlawfirm.com), Anastopoulo Law Firm, LLC, 2850 Ashley Phosphate Road, Suite B, North Charleston, SC 29418.



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