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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons
Circuit Court Judge

Civil Action No. 2022-CP-20-00104

Appellate Case No. 2023-001451

Bertha Goins, Respondent,

v.

Jenkinsville Water Company Inc., Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court properly find there was no genuine issue of material fact as to defamation where the statements were truthful, made about a public figure with no actual malice, and made by an elected official within the scope of her duties as a Fairfield County Councilwoman?

STATEMENT OF THE CASE AND FACTS¹

Appellant Jenkinsville Water Company, Inc. (“Appellant”)—a public water system servicing residents of Jenkinsville in Fairfield County, South Carolina—initiated this action against Respondent Bertha Goins (“Ms. Goins” or “Respondent”) on March 4, 2020, alleging defamation against Ms. Goins for statements she made during her tenure as the Vice Chairwoman of the Fairfield County Council. In the Complaint, Appellant alleged Ms. Goins made the following statements: (1) “the water produced by [Appellant] is substandard,” (2) “there is sediment in the water,” (3) “there is a causal connection between her husband’s medical conditions and the water he drinks that is provided by [Appellant],” (4) “the age of [Appellant’s] pipes are causing a degradation in the quality of the water it provides.” (R. p. __; Compl. at ¶¶ 7, 14). Appellant alleged these statements were defamatory and damaged Appellant’s “good reputation.” (R. p. __; Compl. at ¶ 17).

Ms. Goins is a lifelong resident of Jenkinsville County. (R. p. __). She resides in the same district that Appellant provides with water and was elected by her constituents to represent this district on the Fairfield County Council in 2017. (R. p. __; Goins Mot. Summ. J. 2). She is a member of the Jenkinsville Water Company and even served on the Jenkinsville Water Company Board from 2012 to 2014. (R. p. __). She has vehemently denied Appellant’s accusations of defamation and brought counterclaims against Appellant for abuse of process, breach of contract,

¹ Respondent combines the statement of the case and the statement of facts to eliminate repetition due to considerable overlap between the procedural history and the facts in this case.

violations of the South Carolina Freedom of Information Act (“FOIA”), breach of implied warranty of fitness for a particular purpose, outrage and harassment, and violations of the South Carolina Unfair Trade Practices Act (“SCUTPA”).² (R. pp. __; Answer).

Appellant’s cause of action for defamation centers around statements made by Ms. Goins between April 8, 2019, and January 13, 2020, during the time Ms. Goins served in her role as the duly elected Vice Chair of Fairfield County Council. (R. pp. __; App.’s Br. 3–5; Comp. ¶ 7). Several of these statements involved Respondent voicing her concern regarding the quality of water provided by the Appellant to its customers, which included her constituents. (R. pp. __ Exhibit K, April 8, 2019; October 14, 2019). Respondent also urged the public to review violations issued by the South Carolina Department of Health and Environmental Control (“DHEC”) against Appellant as well as Appellant’s compliance history with the United States Environmental Protection Agency (“EPA”). (R. p. __ Exhibit _K_, April 8, 2019).

On August 8, 2022, and December 7, 2022, respectively, Appellant and Ms. Goins filed motions for summary judgment. Each party sought the entry of an order in its favor as to all claims and counterclaims involved in this action. (R. pp. __). The parties filed memoranda on the motions for summary judgment on March 22, 2023. (R. pp. __). In its memorandum, Appellant raised three new statements it alleged constituted defamation in addition to the four statements specifically alleged in its Complaint. Namely, Appellant alleged Ms. Goins stated at an October 14, 2019 County Council meeting that: (1) “there is criminal activity going on at [Appellant],” (2) Appellant has not “issued boil water notices in the past 20 years,” and (3) Appellant does not “bill for water” or “provid[es] water without metering or billing for it.” (R. pp. __; App. MSJ Memo pp. 2–3). In the

² These counterclaims are not the subject of this appeal. *See* Rule 208(b)(1)(B), SCACR (“[N]o point will be considered which is not set forth in the statement of the issues on appeal.”).

memorandum, Appellant included a chart citing to eight news articles or media sources³ as well as the minutes of Fairfield County Council meetings on April 8, 2019, April 22, 2019, October 14, 2019, and January 13, 2020. (R. p. ___; App. MSJ Memo p. 3). However, Appellant did not submit these materials to the circuit court.⁴ (R. pp. ___; App. MSJ and Memo). In fact, Appellant did not submit any evidence into the record in support of its summary judgment motion or in opposition to Ms. Goins’s summary judgment motion. (R. pp. ___; App. MSJ and Memo).

Ms. Goins, on the other hand, submitted over a hundred pages of materials in support of her motion for summary judgment, including minutes from Appellant’s board meetings, videos of County Council meetings, various news articles, excerpts from depositions, Environmental Protection Agency documents showing violations reported to the federal Safe Drinking Water Information System database for Appellant, and an excerpt from Appellant’s website answering questions about discolored water, water that contains debris, and water that “tastes, looks, and smells funny.” (R. pp. ___).

The overwhelming majority of the materials published in the news articles referenced by the Appellant were in reference to Ms. Goins’s remarks at the four County Council meetings. These statements were made by Ms. Goins while acting as the Vice Chair of the Fairfield County Council and largely consisted of comments which urged the public to do their research on the Jenkinsville

³ One of the articles is from April 8, 2019, four are from April 9, 2019, one is from March 8, 2020, and two are undated. (R. p. ___; App. MSJ Memo p. 3).

⁴ Appellant has attempted to designate these materials and others to be included in the Record on Appeal despite the fact that these materials were not presented to the circuit court. Ms. Goins is filing a motion to strike these materials and requests the Court ignore and/or strike the portions of Appellant’s brief that reference these materials. *See* Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”); *S.C. Dep’t of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (“Arguments made by counsel are not evidence.”). !!

Water Company. Specifically, Ms. Goins stated her belief that the public should do research on the record of DHEC violations against Appellant and how the Rural Water Association determines awards, that the taste of water and its safety are not the same, and that the water system was old and in need of repair. (R. pp. ___; Ex. K). The comments Ms. Goins made were made in the service of the public, and she repeatedly stated her desire for her constituents to have access to clean, healthy, and safe drinking water. (R. pp. ___; Ex. K). Additional comments made by Ms. Goins to the press outside of County Council meetings concerned her reactions to the cease-and-desist letter she received from Appellant threatening legal action if she continued criticizing Appellant and the subsequent defamation suit Appellant filed. (R. pp. ___; Goins Mot. Summ. J. Ex. F, H).

The Honorable Brian Gibbons held a hearing on the motions for summary judgment on March 23, 2023. (R. pp. ____). Judge Gibbons entered a Form 4 order on March 29, 2023, granting in part and denying in part Appellant's Motion for Summary Judgment. (R. pp. ____). Judge Gibbons issued a formal order on April 28, 2023, granting in part and denying in part Ms. Goins's Motion for Summary Judgment. (R. pp. ____). Judge Gibbons found no genuine issue of material fact as to Plaintiff's claim for defamation and granted summary judgment in favor of Ms. Goins. (R. pp. ____). Specifically, Judge Gibbons held Ms. Goins's statements were truthful and she was acting within the scope of her official capacity as Vice Chairwoman of the Fairfiled County Council, and she did not act with actual malice. (R. pp. ____). Judge Gibbons ruled in Appellant's favor as to Ms. Goins's counterclaims for breach of contract, breach of implied warranty of fitness for a particular purpose, violations of FOIA, and SCUTPA. However, Judge Gibbons held a genuine issue of material fact existed as to outrage and abuse of process and, therefore, those claims could proceed.

Appellant timely filed a motion to alter or amend the April 28, 2023 Order pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, and the circuit court denied the motion on September 8, 2023. (R. pp. ____). Appellant filed a Notice of Appeal from the circuit court's

September 8, 2023 Order on September 11, 2023. (R. pp. ____).

STANDARD OF REVIEW

An appellate court conducts a *de novo* review of a grant of summary judgment. *See David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) (“When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court.”). Summary judgment is appropriate when “there is no genuine issue as to any material fact.” Rule 56(c), SCRCF.

Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.

Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003); *see also Kitchen Planners, LLC v Friedman*, 440 S.C. 456, 460–63, 892 S.E.2d 297, 300–01 (2023) (clarifying that the standard for a decision under Rule 56(c) is not the mere scintilla standard and holding that the proper standard under Rule 56(c) is the genuine issue of material fact standard). An appellate court may affirm a lower court’s “ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR.

ARGUMENT

The circuit court correctly held Appellant failed to provide specific facts showing there is a genuine issue for trial. Therefore, the Court should affirm the decision of the circuit court in favor of Ms. Goins as to Appellant’s defamation claim.

“The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant’s communications to others of a false message about the plaintiff.” *Parrish v. Allison*, 376 S.C. 308, 320, 656 S.E.2d 382, 388 (2007). Defamation can occur as either libel or slander, libel being the publication of defamatory material by written or printed word, and slander

being defamation by spoken word. *Id.* To prove defamation, a plaintiff must establish that “(1) a false and defamatory statement was made; (2) the unprivileged statement was published 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.” *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

I. THE CIRCUIT COURT CORRECTLY HELD APPELLANT’S CLAIM FAILS AS A MATTER OF LAW BECAUSE MS. GOINS’S STATEMENTS ARE TRUTHFUL AND PLAINTIFF HAS FAILED TO PROVE THEIR FALSITY.

This Court should affirm the circuit court’s grant of summary judgment on Appellant’s defamation claim because the circuit court correctly found Ms. Goins’s statements were truthful and Plaintiff failed to meet its burden to prove their falsity. The truth of a matter published is a defense to a cause of action for defamation. *Parrish*, 376 S.C. at 326, 656 S.E.2d at 392. In cases where the statements published are of private concern, a defendant has the burden of pleading and proof that the statements are truthful in order to establish an affirmative defense of truth against allegations of defamation. *Id.* at 326–27, 656 S.E.2d at 392. However, when the matters published are of public concern, a plaintiff has the burden of proving the alleged defamatory statements are false. *Id.*; *see also* F. Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 468, 478 (2d. ed. 1997) (stating that a defendant to a defamation claim would not have the burden of pleading and proof where the statement involves a constitutional issue).

The record in this case shows that the statements made by Ms. Goins were true, upon her information and belief. Furthermore, the evidence before the circuit court, including numerous DHEC violations, deposition testimony, and news articles, show that Ms. Goins was speaking as a Fairfield County Council Member seeking to alert the public of a matter of public importance.

Initially, Ms. Goins notes Appellant alleged only four specific statements in the Complaint—

(1) “the water produced by [Appellant] is substandard,” (2) “there is sediment in the water,” (3) “there is a causal connection between her husband’s medical conditions and the water he drinks that is provided by [Appellant],” (4) “the age of [Appellant’s] pipes are causing a degradation in the quality of the water it provides.” (R. p. __; Compl. at ¶¶ 7, 14). Appellant then attempted to expand upon the statements at issue in this defamation case in its memorandum supporting its motion for summary judgment. In the memorandum, Appellant alleges three additional statements—(1) “there is criminal activity going on at [Appellant],” (2) Appellant has not “issued boil water notices in the past 20 years,” and (3) Appellant does not “bill for water” or “provid[es] water without metering or billing for it.” (R. pp. __; App. MSJ Memo pp. 2–3). Appellant alleged these newly added statements were made at a County Council meeting on October 14, 2019. (*Id.*). These statements were available to Appellant at the time it filed its Complaint in March 2020 but were not included as a basis for Appellant’s claim. Thus, Ms. Goins was not on notice from Appellant’s Complaint that it alleged it was entitled to relief on its defamation claim due to these three additional statements. *See* Rule 8(a) (“A pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain ... a short and plain statement of the facts showing that the pleader is entitled to relief...”).

Appellant has asserted that there are eight news articles containing Ms. Goins’s alleged defamatory statements. (R. p. __; App.’s Br. 4–5). Additionally, Appellant has claimed Ms. Goins made defamatory statements at four Fairfield County Council meetings. *Id.* None of the statements made by or attributed to Ms. Goins were willfully or maliciously false.

a. Associated Press article (undated).

The alleged defamatory statements from the Associated Press article are in reference to news articles published by The State newspaper. (R. p. __; Goins Mot. Summ. J. Ex. H JWC00818). In a video accompanying one of the State’s online articles published on March 12, 2019, both Ms. Goins

and Ms. Evelyn Pauling, a Jenkinsville Water customer, discussed the issues with Appellant and the discoloration of the water. (R. p. __; Goins Mot. Summ. J. 5 n. 2). There is no defamation in this video or in the related content referenced in the Associated Press. Ms. Goins was speaking as a member of the Fairfield County Council, regarding her concerns for her constituency and her experiences with the water in her own home as well as the complaints she hears from her constituents.

A separate article published by the State provides several statistics regarding the quality of the water provided by Appellant as well as other small water systems in South Carolina. (R. p. __; Goins Mot. Summ. J. Ex. I). The article describes some of the specific issues that small water systems experience, as well as the trouble with infrastructure and the health concerns for the rural communities they service. *See id.* Although Respondent is not mentioned in this article—and therefore the article cannot be an alleged source of defamation—the article illustrates the truth of many of the same concerns Respondent has called attention to in the alleged defamatory statements.⁵ As this article describes, small water systems struggle to meet the required standards for safety, quality, and reporting. *Id.* Between 2012 and 2019 when the article was published, 88% of the drinking water violations issued in South Carolina were issued against small utilities. *Id.* The article goes on to state that “[d]isease-carrying bacteria, cancer-causing chemicals, toxic nitrates and brain-damaging metals have shown up in small water systems from the foothills to the coast, according to government records reviewed by The State during the past year.” *Id.* It is evident that the State’s articles referenced in the Associated Press article function to alert the public, including Ms. Goins’s constituents, about the issues relating to small water systems and Appellant’s issues with repeated violations. *See id.* (reporting that Jenkinsville Water Company had failed to tell the public of an e-

⁵ These articles, Appellant’s numerous violations noted by regulatory agencies, and multiple complaints by other citizens further call into question whether Appellant has been harmed in any way due to Ms. Goins’s statements.

coli contamination for four days and that the utility has had multiple problems with radioactivity in its water in addition to having multiple other DHEC violations issued against it).

Concerning the Associated Press's article, there are no defamatory statements contained within it. It appears that Appellant is asserting that Ms. Goins commenting that she has experienced discoloration and sediment in her water is defamatory. It is not. Based upon Ms. Goins's own experience at her residence, the complaints of Ms. Goins's neighbors, and the widespread reporting of these issues by respected news agencies, it would stand to reason that there is truth to any assertions by Ms. Goins that Appellant's water has at times been discolored or contained sediment. Additionally, the Frequently Asked Questions (FAQ) section of Appellant's own website answers questions—presumably frequently asked questions—like, “Why is my water discolored?”, “My water tastes, looks, and smells funny. Is it safe to drink?”, and “Why does debris come out of the faucet when running hot water?”. (R. p. __; Goins Mot. Summ. J. Ex. E). The inclusion of questions about discolored water and sediment-containing water on Appellant's frequently asked questions page shows that Ms. Goins's statements are true and that Appellant was aware that their water at times has been discolored and contained sediment. If the Respondent were the only one with these types of questions, these questions would not appear on the Company's FAQ page.

Furthermore, Appellant's water operator, James Green, stated in his deposition that he would not be surprised if someone said debris or sediment was coming out of their tap. (R. p. __; Green Dep. 62:19–63:13). The fact that the Appellant's own water operator would not be surprised to see sediment in the water and that this issue is a common complaint discussed in the press by other Jenkinsville Water customers shows that Ms. Goins's expressed concern over discolored, sediment-containing water is not defamatory. Not only does the evidence in the record show that the statements about sediment and discoloration are true in their own right, but this issue is a matter of public importance, touching on the very lives and health of Respondent's constituency. As such, Appellant

had the burden of proving these statements were false and failed to do so.

b. Fairfield County Council Meeting of April 8, 2019.

The comments made by Ms. Goins at the Fairfield County Council meeting on April 8, 2019, are not defamatory because they are true.⁶ At the April 8 meeting, Mr. Jeff Schaffer, a citizen of Fairfield County who receives water service from the Appellant, spoke about a letter sent to members by Appellant on March 28, 2019. (R. p. __; Goins Mot. Summ. J. Ex. K, April 8, 2019 (statement of Jeff Schaffer, 30:20–32:53)). During his comments, Mr. Schaffer made a reference to the “brown sludge some have complained about” in describing the water that members receive from Appellant. (*Id.* at 30:54–31:02). He further stated he had a video of a water truck refilling with water from a fire hydrant without a meter and questioned how that water was being billed. (R. pp. __). He requested the council look into the legality this practice. (*Id.* at 32:00–32:43).

Ms. Goins, appearing by phone for the meeting, addressed the same letter referenced by Mr. Schaffer and spoke directly about The State’s article published March 15, 2019. *See id.* (statement of Bertha Goins, 43:58–54:24). Throughout her comments, Ms. Goins urged the citizens to “do their homework” regarding the claims made in the March 28, 2019 letter and to “do their research” regarding how many DHEC violations Appellant had in past years and how potential violations might affect the health and welfare of the community. *See id.* This type of information is readily available at the U.S. Environmental Protection Agency’s (EPA) website. *See* R. p. __ (Goins Mot. Summ. J. 7 (ENVIRONMENTAL PROTECTION AGENCY, DETAILED FACILITY REPORT, Jenkinsville Water Company (SC2020001), https://echo.epa.gov/detailed-facility-report?fid=110008545654#Consumer_Confidence_Rule_07/01/2022_Other)). Ms. Goins went on

⁶ Respondent maintains and reasserts that her statements made during Fairfield County Council meetings are protected under qualified privilege as a Fairfield County Councilmember speaking about matters of public importance. *See* Section III, *infra*.

to urge the community to do their research into the process the Rural Water Association uses when it gives awards like the ones repeatedly mentioned by the Appellant. (R. p. __; 4-8-19 statement of Bertha Goins). Ms. Goins also questioned the ownership claims made in the March 28 letter and stated her understanding that Appellant is a public utility service, which would not be a “minority owned” business as claimed in the letter. *Id.*

Ms. Goins stated that a water company should be continuously improving, and it is up to the community to demand that the people should ask for the best, clearest water possible with the best technology possible. *See id.* She questioned when they receive boil water notices and spoke about her personal experience with her hot water tank and the “mud and crud” she had in her lines. *See id.* at 48:48–49:32. She made reference to her husband’s recent illness and that the doctors have not been able to determine the cause, but she stated she intended to ask DHEC to test the water at her house and request information from the CDC as to the health consequences of repeated exposure to contaminants. *See id.* at 53:32–59. Notably, these comments did not contain any actual statement by Ms. Goins asserting that her husband’s illness was caused by the water provided by the Appellant. Instead, she mentioned her husband’s illness and her intent to have her water tested. Ms. Goins also read from the March 28, 2019 cease and desist letter which was sent to her personally by Appellant’s attorney. (R. p. __; Goins Mot. Summ. J. Ex. F). She maintained that “the citizens in this county deserve better” and that “nobody can even fathom how much [she] care[s] about the people in this community.” (R. p. __; Goins Mot. Summ. J. Ex. K, April 8, 2019 (statement of Bertha Goins, 52:58–53:32)).

This continued advocacy and encouragement for her constituents is what Appellant alleges is defamation. First, many of the comments made in this meeting were a call for the community to do its own research concerning the Appellant and its claims made in the March 28 letter. These comments were not presented as a matter of fact, but rather as political speech intended to persuade

a constituency to educate themselves on the issues before them. Secondly, in response to an inquiry by Appellant's own attorney, the EPA issued a letter on July 17, 2019, confirming the twenty-one violations issued to the Jenkinsville Water Company which were reported on the federal Safe Drinking Water Information System (SDWIS) available on the EPA's website. (R. p. __; *See* Goins Mot. Summ. J. Ex. B). Ms. Goins has also personally experienced and witnessed how Appellant operates for years. While on Appellant's Board, she saw article after article published about the mismanagement of the company. (R. p. __; Goins Mot. Summ. J. Ex. M). In one report by the EPA, Appellant was found to be a "serious violator" and was in non-compliance for nine of the past twelve months at the time of the report. (R. p. __; Goins Mot. Summ. J. Ex. N).

There is clear evidence of a history of violations of varying types related to Appellant and its water. It is therefore not outside the realm of truthfulness for a sitting councilwoman to opine on her concerns for her community where her constituency's water provider has been issued numerous violations, particularly where these violations are public knowledge and are of public concern. Furthermore, the recording of the April 8, 2019 County Council meeting shows yet another example of a citizen of Fairfield County voicing the same types of concerns Ms. Goins has raised. Ms. Goins's comments at this meeting are supported by public records, repeated concerns raised by the community at large, and her own personal experience. These statements are therefore true and not defamatory.

c. News & Observer (Charlotte) article dated April 9, 2019.

The April 9, 2019 article published in the News & Observer mostly referenced comments Ms. Goins made at the April 8 County Council meeting, as well as The State's investigation and March articles into the issues plaguing small water systems in South Carolina. (R. p. __; Goins Mot. Summ. J. Ex. H Bates JWC00819–21). The article discusses Ms. Goins's comments relating to the cease and desist letter she received and her concerns about Appellant's infrastructure. (*See id.*). As

Ms. Goins referenced in her April 8, 2019 comments, The State reported that aging infrastructure can cause issues because the small water systems have a lack of resources to make major repairs. The statements of Ms. Goins in this article are not malicious or willfully false; her statements as reported are both true and of public concern. Additionally, many of Ms. Goins's comments are merely comments of an elected official voicing her concern for her constituents and cannot be reasonably understood to be statements for the purposes of defamation. Such comments cannot be defamatory where they don't purport to state something as true or false; encouraging another to act, voicing one's concern, or the mere questioning of a fact are not statements which can be proved or disproved. These comments are therefore not only true but constitute constitutionally protected speech.

d. 106.3 The Word dated April 9, 2019.

This one-page article is merely a summary of previous articles addressed above. (R. p. __; Goins Mot. Summ. J. Bates JWC00827). The reported comments of Ms. Goins involving muddy and sediment-filled water are reiterations of her own previous comments, as well as the comments of others in the community. Ms. Goins reiterated that she believed the March 28, 2019 cease and desist letter she received was an unlawful attempt to stop her from speaking about her concerns about the quality of water being used by the citizens of Fairfield County. (*See id.*). Ms. Goins's personal opinion regarding the cease-and-desist letter is not at issue in this case. The other statements reported in this article are neither willfully nor maliciously false. As discussed at length above, the record shows Ms. Goins's comments relating to sediment, discoloration, and general water quality are well-founded and truthful. These comments are based upon Ms. Goins's personal experience, the experiences of her constituents, and the widely publicized and publicly available information and reporting on Appellant. As such, the record in this case proves that the statements alleged to be defamatory in this article are, in fact, true, not defamatory.

e. SC NOW article dated April 9, 2019.

This one-page article is an exact copy of the 106.3 The Word article. *See* R. p. __ (Goins Mot. Summ. J. Ex. H Bates JWC00828). Therefore, Ms. Goins craves reference to the above arguments and asserts that there are no defamatory statements in this article.

f. The Voice of Blythewood & Fairfield County article dated April 9, 2019.

The April 9, 2019 articles also contains many of the same comments and statements contained in the prior articles and does not contain any willful or malicious statements. (R. p. __; Bates JWC00829–31, 00845–47). As to the online article, a news organization’s own characterization of Ms. Goins as a “frequent critic” of Appellant cannot be a defamatory statement by Ms. Goins. (R. p. __; JWC00829–31). Even if it could be considered a statement by Ms. Goins, speaking the truth on multiple occasions does not make those statements defamatory. Similarly, questioning whether the water her husband was consuming might have possibly been related to his unexplained illness is not the same as a statement of truth or falsity—it is simply a question, and a reasonable one at that. As Ms. Goins described in her April 8, 2019 comments at the Fairfield County Council meeting, her husband was stricken with an illness, his doctors had not yet found a cause, his symptoms were similar to those described in the article published by The State in March 2019 as being linked to certain water contaminants, and it was known that Appellant had prior violations involving water contaminants such as E. coli. (R. pp. __; Sammy Fretwell, *Thousands exposed to dangerous drinking water across South Carolina*, THE STATE (last updated Mar. 15, 2019), <https://www.thestate.com/article224595555.html>); Goins Mot. Summ. J. Ex. N). It is not unreasonable to view these facts together and state an intent to have her water tested. In that sense, Ms. Goins’s comments about her husband’s illness are based upon truthful facts.

As Attorney Jay Bender elaborated in this article, “it’s not illegal to take public bodies like the Jenkinsville Water Company to task over issues of public importance.” (R. p. __; Bates

JWC00830). All the allegations made by the Appellant center around Ms. Goins's comments about the clean, safe, and healthy drinking water for the citizens of Fairfield County. It is unquestionable that access to safe drinking water is an inalienable right afforded to everyone. *See Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 127, 456 S.E.2d 397, 402 (1995) (adopting the expanded list of rights under the public trust doctrine); *see* G.A. Res. 64/292 (July 28, 2010) (affirmatively stating that “the right to safe and clean drinking water and sanitation [is] a human right that is essential for the full enjoyment of life and all human rights”); *see also Trinity Am. Corp. v. United States Env'tl. Prot. Agency*, 150 F.3d 389, 394–95 (4th Cir. 1998) (recognizing that Congress deemed safe drinking water of such public importance that it intentionally reserved emergency powers for the EPA to regulate, mandate, and enforce clean drinking water standards, even where state law or agencies may ordinarily exercise primary control, in order to protect the health of those who use a public drinking water system).

The other April 9, 2020 article from the Voice likewise contains issues of public importance but is largely a report on public filings relating to this case. (R. p. __; Bates JWC00845–47). This article does not contain any of the statements which Appellant has claimed are defamatory and is wholly about public filings. This article therefore does not contain any defamatory statements.

g. The State article dated March 8, 2020.

The article published by The State on March 8, 2020, largely is a report on this lawsuit Ms. Goins is not cited as making any statements in it. (R. p. __; Bates JWC00848–49). However, several other individuals are cited as making statements regarding the chilling effect this lawsuit could have on free speech and the importance of being able to speak out about concerns regarding matters of public health. (*See id.*). Attorney Bender is quoted in this article as well, saying that this case amounts “the government suing a citizen for speech” and that such an action is “entirely inconsistent with democracy.” (*Id.*). Appellant's counsel is quoted as saying Ms. Goins has “no basis for

badmouthing us.” (*Id.*). However, there is a basis for Ms. Goins’s criticisms of the Appellant. A review of the EPA’s ECHO report shows that Jenkinsville Water Company is a “serious violator.” (R. p. __; Goins Mot. Summ. J. Ex. N).

Furthermore, Appellant filed this lawsuit before looking into her claims or, apparently, having knowledge of their own violations. *See* R. p. __ (Goins Mot. Summ. J. Ex. B). This is evidenced by the EPA’s letter dated July 19, 2019, which confirmed that the twenty-one violations included in the EPA’s online report were all true and accurate reports of the Jenkinsville Water Company’s violations, even though Appellant’s Attorney had alleged they were inaccurate. *See id.* Since the date of this letter, the Appellant has incurred additional violations, including those reported in 2019 and 2022. *See* R. p. __ (Goins Mot. Summ. J. 12 n. 6). Notably, the most recent violation issued in 2022 was for a violation of the Consumer Confidence Rule, which requires public water systems to prepare and distribute an annual report on water quality, including a summary of information regarding source water, detected contaminants, compliance, and educational information. *See id.*; 40 C.F.R. pt. 141 (1998).

The article continues to restate the well-reported issues of the small water systems such as aging and failing infrastructure and lack of ability to fund repairs. (R. p. __; Bates JWC00848–49). The article notably does not contain statements made by Ms. Goins, but rather, reiterates issues which had been mentioned in some of Ms. Goins’s prior comments. As thoroughly shown by the record, the statements made are based upon truth and are not defamatory.

h. The State article dated April 9, 2019.

This article is also reporting in reference to the April 8, 2019 Fairfield County Council meeting. (R. p. __; Bates JWC00835–38). Ms. Goins again voiced her concerns regarding the infrastructure, including the pipes of Appellant. In this case, Appellant says they are not trying to prevent Ms. Goins from voicing her general concerns, but do not want her to raise specific issues,

such as that the water has sediment. *See id.* However, as she stated in the April 8 County Council meeting, Ms. Goins has experienced sediment in her water. Therefore, her statements are true, and they are not defamatory.

i. News article dated April 9, 2019.

This article as produced by Appellant is an undated reference to several other articles. (R. p. __; App.'s Disc. Produc. Bates JWC00816–17). The only statement made by the Respondent in this article is rereported from The State's April 9, 2019 article, regarding her reaction to receiving the cease and desist letter from Appellant's attorney. There are no statements attributed to Ms. Goins in this article which are untrue, nor are there any statements which are included in the Appellant's Complaint as being allegedly defamatory. Thus, this article therefore does not contain any defamatory statements.

j. Fairfield County Council Meeting of April 22, 2019.

At the April 22, 2019 Fairfield County Council Meeting, Ms. Goins spoke in her capacity as Vice Chair of the County Council and representative of District Four of Fairfield County. (R. p. __; Goins Mot. Summ. J. 13 n. 8; 19:10–24:53). She advocated for the importance of safe, healthy, and accessible water to everyone. (*Id.* at 21:29–22:05). She addressed the age of the water lines and her concern with the resistance to upgrading and improving the infrastructure to provide better quality water. (*See id.* at 22:05–42). She went on to explain that many places in South Carolina are experiencing a crisis, not just an issue, when it comes to water quality and that it “should be a priority” and needs to be addressed. (*See id.* at 24:05–28). She stated that “water and sewer in Fairfield County are gonna always be my priority” and reiterated “what it takes to help people help themselves is gonna always be my priority.” (*See id.* at 24:37–53).

Ms. Goins's comments at this meeting only serve to continue to advocate for her constituency and to share some of her own experiences. None of her comments included defamatory statements.

Appellant's accountant stated that underground pipes like the ones Appellant's use have a limited lifespan of up to fifty years and the pipes used by Jenkinsville Water Company were placed in the ground around 1970: over fifty years ago. (R. p. __; Jones Dep. 34:9–12).

Ms. Goins's comments at this council meeting are not untrue. Her statements were truthful and based upon her own experiences as well as widespread reporting and public discourse. Furthermore, her comments were made from a position of advocacy as an elected representative. Her comments regarding water quality and the functions of a public water supplier are not only of public concern but constitute protected speech and cannot be defamatory.

k. Fairfield County Council Meeting of October 14, 2019.

On October 14, 2019, Ms. Goins spoke at the scheduled County Council meeting regarding recent events involving Appellant. (R. p. __; Goins Mot. Summ. J. Ex. K, October 14, 2019, 1:16:45–27:40). Throughout this meeting, community members voiced their concerns about their water supply because of a proposed community development project. Ms. Goins said she understood the community's concerns with their water and held up a sample of water that she collected from a faucet at her house following a recent water shut-off; the water was visibly discolored. (*See id.* at 1:19:42–20:01). Notably, just the week before, Mr. Clemart Camack, a member of the community, spoke at the October 7, 2019 Jenkinsville Water Company Board meet, and complained that he had “dirty, foul smelling water” while others in the community were posting on Facebook about their cloudy and murky water. (R. p. __; Goins Mot. Summ. J. Ex. O).

At the County Council meeting, Ms. Goins also spoke about the importance of a community working together rather than just arguing and being negative towards each other. She also commented on some of prior experiences while on the Board of Appellant and issues trying to get water to a certain road in Fairfield County. This led to her comments about prior business practices of the Appellant, including mishandling of funds and allegations from prior board members. (R. p.

___; Jenkinsville Water Co. Dep., November 4, 2021, 133:1–135:21). At no point did Ms. Goins state that there was criminal activity going on. Her comments were not only based in fact but were made in such a way as to imply only that the community should be holding Appellant accountable for its actions and its failure to act when it had a duty to do so.

Ms. Goins’s comments relating to her belief that Appellant failed to issue boil water advisories were inadvertent. She stated in her deposition that she had not seen any boil water notices issued in the past twenty years. (R. p. ___; Goins Dep. 39:16–19). In her deposition, Ms. Goins’s testified she did not do any independent investigation before stating boil water notices had not been issued. (R. pp. ___). If boil water notices were issued in the twenty years preceding Ms. Goins’s statement, any mistake on her part was unintentional and in no way can be viewed as malicious.⁷ In cases involving public figures, even extreme deviations from professional standards or the publication of a story solely for the sake of increasing circulation, are insufficient to provide a basis for finding actual malice in a defamation action. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666–67 (1989). At the time of her statement, Ms. Goins believed her comments to be true and did not willfully act to make false statements. Further, Appellant did not suffer any harm from Ms. Goins’s statement that she did not believe boil water notices had been issued.

Similarly, Ms. Goins’s comments about the use of water without metering can reasonably be related back to the community’s concern involving trucks using fire hydrants to refill seemingly without a meter which was brought up at the April 8, 2019 County Council meeting. (R. p. ___). This is clearly a matter of public concern to which Appellant must provide actual proof as to the falsity of the statement. Simply saying it’s not true is insufficient.

⁷ The heightened standard for public figures in defamation actions is discussed in detail in Section II, *infra*.

Further, as discussed above, Ms. Goins's statements involving boil water notices, the failure to bill for water, and criminal activity were not alleged to be the basis of Appellant's claim for defamation in its Complaint. The subject statements were all made prior to the filing of this action and were clearly known to Appellant. Therefore, Ms. Goins was not properly put on notice under Rule 8(a) of Appellant's intent to rely on these statements to support its claim for defamation. The only alleged statements to be considered under Appellant's claim for defamation are the four statements set forth in the Complaint.

I. Fairfield County Council Meeting of January 13, 2020.

On January 13, 2020, Ms. Goins gave a response to Councilman Trapp and Councilman Bell's congratulations to Appellant regarding the award they mentioned for the best tasting water. (R. p. __; Goins Mot. Summ. J. Ex. K, January 13, 2020, 2:05:26–10:24). Ms. Goins stated that she lives in Jenkinsville and is subject to the issues Appellant has and that the system is old and in need of repair. (*Id.* at 2:05:26–48). She further stated that the Rural Water Association does not test the water and that the award for best tasting water does not factor in contamination. (*Id.* at 2:05:49–06:06, 06:17–27). She stated, “you cannot taste e-coli, ...salmonella, ... [or] bacteria” and that taste and contamination are not mutually exclusive. (*Id.* at 2:06:28–42). She advocated for the regional water service which would supply the entire County, which has been in progress for years. (*See id.* at 2:06:55–07:13). Regarding the award, she advised the community again that all they had to do was research it. (*See id.* at 2:07:21–46). Upon being questioned by Councilman Trapp whether there was going to be a takeover of Appellant, both Chairman Robinson and Ms. Goins stated that the authority is not looking to take over any entity. (*See id.* at 2:08:17–35). Ms. Goins simply advised the public to do their research. Her statements were not defamatory; they were truthful and were centered upon matters of public concern.

Because all of Ms. Goins's comments alleged to be defamatory are centered upon issues of

public concern, Appellant bears the burden of proving their falsity, instead of Ms. Goins's burden to prove the truth. *See Parrish v. Allison*, 376 S.C. 308, 326–27, 656 S.E.2d 382, 392 (2007). As the circuit court properly found, Appellant failed to make any evidentiary showing that Ms. Goins's allegedly defamatory statements were false and therefore has failed to prove there is a genuine issue of material fact.

II. THE CIRCUIT COURT CORRECTLY FOUND APPELLANT CANNOT ESTABLISH DEFAMATION AS A MATTER OF LAW BECAUSE APPELLANT IS A PUBLIC FIGURE AND HAS FAILED TO PROVE ACTUAL MALICE.

This Court should affirm the circuit court's holding because Appellant is a public figure and has failed to meet its burden to prove Ms. Goins acted with actual malice. For a public figure to recover damages for a defamatory statement, they must prove that the statement was made with actual malice, meaning the publisher "had knowledge the statement was false or acted with reckless disregard as to whether or not it was false." *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Whether there was a reckless disregard for the truth is a high bar, one which requires more than a mere departure from reasonably prudent conduct. *Fleming*, at 495, 567 S.E.2d at 861.

"The presence or absence of actual malice is a constitutional issue." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 86, 874 (2001) (quoting *McClain v. Arnold*, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980)). At the summary judgment stage, a Plaintiff must prove actual malice by clear and convincing evidence. *Id.* at 453–54, 548 S.E.2d at 875. If the trial court finds that the Plaintiff cannot meet this standard, it should grant summary judgment for the defendant. *Id.* at 454, 548 S.E.2d at 875.

The question of whether or not an entity is a public entity is largely dependent upon whether that entity is "supported in whole or in part by public funds or [is] expending public funds." *Weston v. Carolina Research and Dev. Found.*, 303 S.C. 398, 400–01, 401 S.E.2d 161, 163 (1991) (citing S.C. Code Ann. § 30-4-20); *see also* R. p. ___ (Goins Mot. Summ. J. Ex. D). Additionally, Appellant

is a “public water system” under federal law. *See* 42 U.S.C.A. § 300f(4) (2016).

Ultimately, whether a party is a “public figure” for the purposes of defamation, is a matter of law to be decided by the court: it is not a question of fact. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 468–69, 629 S.E2d 653, 666 (2006) (reiterating the findings of the United States Supreme Court from *New York Times v. Sullivan* in finding that an individual, or entity’s, place in the hierarchy or government is not by itself the factor establishing the figure as public, but rather it is the public interest in that figure’s activity in a particular context). The public very clearly has a strong interest in Appellant’s conduct while carrying out its duties. The delivery of clean and safe drinking water is essential to the community and is shown by the record to be a topic of public conversation. For all these reasons above, the circuit court found that the Appellant is a public figure for the purposes of defamation. R. p. __ (Order 4). Respondent agrees with the circuit court’s finding and would assert there is no evidence in the record to support a contrary determination.

Although Appellant attempted to claim it is a private company to the circuit court, it has conceded this issue on appeal. The circuit court properly found both Appellant and Ms. Goins were public figures for the purposes of defamation. (R. p. __; Or. p. 4). Appellant does not challenge these findings on appeal and, therefore, the holding that Appellant and Ms. Goins are public figures are the law of the case. *See Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970) (holding an unappealed ruling is the law of the case).

Because Appellant is a public figure for the purposes of defamation, it must prove by clear and convincing evidence that Respondent acted with actual malice when she made her statements. Whether there is sufficient evidence to establish actual malice is a question of law, not one of fact. *Elder v. Gaffney Ledger*, 341 S.C. 108, 113, 533 S.E.2d 899, 901–02 (2000). Appellant has failed to present evidence to support a finding of actual malice and the circuit court properly granted summary judgment to the Respondent on this matter. Again, the bar for establishing the existence of actual

malice in a defamation case is extremely high. The plaintiff must show that the defendant's conduct was more than a mere deviation from the standard of conduct. This is in keeping with the purpose of the First and Fourteenth Amendments to the United States Constitution in requiring recognition of conditional privilege for honest misstatements of fact and expressions of opinion. *See New York Times*, at 279–81, 285–86. In a defamation claim where public figures are concerned or where public matters are involved, any “doubts should be resolved in favor of freedom of expression rather than against it.” *New York Times*, at 301–02 (J. Goldberg, concurring in the result).

Ultimately, Appellant's assertion that there is some question of fact as to whether Respondent was acting with actual malice is a legal fiction. Appellant does not cite to any evidence in the record to show that Ms. Goins acted with actual malice. Instead, Appellant's argument on actual malice is entirely conclusory. Appellant states: “There is sufficient evidence in the record to give rise to a fact question as to . . . whether [Ms. Goins] was acting with actual malice.” (App. Br. p. 9). Appellant does not inform the Court of any record citations to show actual malice. Instead, Appellant generally refers to what it terms “lies” without making specific arguments as to the contents of the statements, evidence showing the statements were false, and evidence supporting its assertion that Ms. Goins knew the statements were false when she made them. (App. Br. 10–11). Appellant wholly fails to meet its burden, let alone to meet it by clear and convincing evidence.

Respondent did not act with actual malice, but rather voiced her concerns as an elected representative regarding a matter of public concern. Her concerns were based upon the truth as she understood the truth to be at the time she made the statements. In no way did she recklessly disregard the veracity of her statements, especially not in a manner that was so egregious so as to rise to the level of actual malice. Additionally, even if there were any doubt on these points, those doubts must be resolved in favor of free speech rather than against it. For all these reasons, the circuit court correctly found Appellant has not and cannot prove actual malice and therefore cannot establish a

cause of action for defamation as a matter of law. This Court should affirm.

III. THE CIRCUIT COURT CORRECTLY FOUND THAT MS. GOINS IS ENTITLED TO IMMUNITY PURSUANT TO THE SOUTH CAROLINA TORT CLAIMS ACT.

The circuit court properly found Ms. Goins was acting within the scope of her official duties as a Fairfield County Councilmember at all times relevant hereto and is therefore entitled to immunity pursuant to the South Carolina Tort Claims Act (“SCTCA”). The SCTCA acts to shield the State, its political subdivisions, and employees from liability and suit for any tort except as waived by the Act. S.C. Code Ann. § 15-78-20(b). An “employee” includes “any officer, employee, agent or court appointed representative of the State or its political subdivisions, *including elected or appointed officials*, law enforcement officers, and persons acting on behalf or in the service of a governmental entity in the scope of official duty.” S.C. Code Ann. § 15-78-30(c) (emphasis added). The SCTCA is “the exclusive civil remedy available in an action against a government entity or its employees.” *Flateau v. Harrelson*, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (2003). Section 15-78-60 of the South Carolina Code of Laws sets forth exceptions to the government’s waiver of sovereign immunity contained within the SCTCA. These provisions are to be liberally construed in favor of limiting the government’s liability. S.C. Code Ann. § 15-78-20(e); *Strother v. Lexington Recreation Comm’n*, 332 S.C. 54, 62–63, 504 S.E.2d 117, 122 (1998).

At the time the alleged defamatory statements were made, Ms. Goins was an elected official for the County of Fairfield, South Carolina. It is the responsibility of elected officials to represent their constituency in the body of government to which they were elected. Part of that responsibility includes acting as the voice of those constituents and protecting their rights. Ms. Goins’s alleged defamatory statements were made while she was the Vice Chair of the Fairfield County Council. She was elected by the voters of District Four to represent their rights and needs. The record indicates the community had concerns over the quality and safety of their drinking water provided by the

Jenkinsville Water Company. Ms. Goins gave a voice to those community members when speaking at County Council meetings and giving interviews to the press. It is commonplace for elected officials to speak to the press on matters of public concern as this is another way for such officials to spread a public message or provide a voice to those whom they represent about an issue that concerns them. This type of conduct is precisely the type of conduct intended to be protected by the SCTCA.

Appellant argues Ms. Goins was not acting in her official capacity because she “was making similar statements about [Appellant] prior to becoming a County Council member and continued after she lost her re-election bid for the County Council.” (App. Br. 10). This is immaterial to the question before the Court, which is whether the specific statements Ms. Goins made at County Council meetings during her tenure as Vice Chair of the Fairfield County Council were within the scope of her official duties. Any statements she allegedly made prior to or after that time are entirely irrelevant, not at issue in this appeal, and not in the record before the Court.

Elected officials acting within the scope of their official duties should not be liable in tort for giving a voice to their constituents and speaking on their behalf. If an elected official cannot speak about the safety of her community’s drinking water, there would not be much an elected official could speak to without the threat of litigation. Such a result is not only offensive to the purpose of the SCTCA but would also act to chill political speech to such an extent as to void the freedoms guaranteed by the Constitutions of South Carolina and the United States. As such, Ms. Goins must be afforded the immunity enacted by the General Assembly to protect her from Appellant’s frivolous cause of action for defamation. Her words were in service to her constituents, and she was acting within the scope of her official duties when the statements were made.

CONCLUSION

Appellant has attempted to assert there is some question of material fact as to whether the alleged defamatory statements are true, whether Ms. Goins was acting within the scope of her official duties when

the alleged defamatory statements were made, and whether she acted with actual malice when she made the allegedly defamatory statements. However, summary judgment was properly granted by the Circuit Court as it found there was no genuine issue of material fact as to any of these points.

As the circuit court found and the record establishes, Ms. Goins's statements were truthful and were based upon her own experience, the experiences of others in her community, and publicly available information. Additionally, because the alleged statements involve matters of public concern, the burden is on the Appellant to prove the statements are false, which it has failed to do. Furthermore, the Appellant is a public figure, and it has failed to provide evidence that Respondent's statements were made with actual malice. Lastly, it is clear from the record that Ms. Goins was acting within the scope of her official duties and is therefore immune from this suit.

Therefore, for the reasons set forth herein, this Court should affirm the order of the circuit court granting summary judgment in favor of Ms. Goins as to Appellant's claim for defamation.

(Signature page follows)

RESPECTFULLY SUBMITTED,

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