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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.

AMENDED INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SOUTH CAROLINA

OTHER JURISDICTIONS

STATUTES

SOUTH CAROLINA

FEDERAL

COURT RULES

OTHER

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 FACTS[1]

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 Fairfield County. (R. p. __). She resides in the same district that Appellant provides water services to 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, 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).

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[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.

[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.").

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 memorandum, Appellant included a chart citing to eight news articles or media sources[3] 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. (R. pp. ___; App. MSJ and Memo). In fact, Appellant did not

[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).

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 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).[4]

[4] The majority of the statements complained of, while considered by the circuit court, have not been included as part of this appeal. *See* discussion *infra* Section I.

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 Ms. Goins's Motion for Summary Judgment as to Appellant's cause of action for defamation (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 Fairfield 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.[5]

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.").

[5] Judge Gibbons, in his April 28, 2023 Order, granted in part and denied in part Appellant's Motion for Summary Judgment as to counterclaims brought by Respondent. (R. pp. __). These rulings have not been appealed by Appellant and therefore should not be considered by the Court in this appeal. *See* Rule 208(b)(1)(B) (stating that points not set forth in the statement of the issues on appeal will not be considered).

Summary judgment is appropriate when "there is no genuine issue as to any material fact." Rule 56(c), SCRCP.

> 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 alleged 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), SCRCP ("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....").

In its appeal, Appellant now limits its argument to focus solely upon Ms. Goins' statement regarding boil water notices. (App.'s Br. 4–5).[6] No other statements alleged to be defamatory in either the Complaint or Appellant's Motion for Summary Judgment have been addressed by Appellant in its appeal. A mere list of statements that Respondent has allegedly made without any reference to the record or related back to an issue on appeal does not quantify as an argument to be considered on appeal. App. C., Form 13, SCACR (stating that "the brief must contain references to where the salient facts can be found in the Record on Appeal" and those references must be made in accordance with requirements set out in Rules 208(b)(4) and 211(b)(1)). Furthermore, it is required in appellate briefs that for an argument to be considered on appeal, it must be supported by discussion and citations to authority. Rule 208(b)(1)(E) (requiring that each issue argued must be supported by discussion and citations); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App.

[6] As discussed directly above, this statement was not included in Appellant's Complaint.

2004) ("Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal.").

Therefore, any alleged defamatory statements not pertaining to Respondent's alleged comments regarding boil water notices has been abandoned by Appellant and the circuit court's ruling concerning such statements is now the law of the case. *Ellie*, 358 S.C. at 99, 594 S.E.2d at 496; *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). Furthermore, Appellant's vague reference to unknown statements made before Ms. Goins became a member of the Fairfield County Council or any statements made after she left office likewise cannot be considered by this Court as such statements were not complained of in the Complaint or presented to the circuit court. Rule 210, SCACR ("[T]he appellate court will not consider any fact which does not appear in the record."). The only statement alleged to be defamatory now on appeal is Respondent's comments regarding boil water notices.[7] Appellant has claimed Ms. Goins made those comments at a Fairfield County Council meeting on October 14, 2019.[8] App.'s Br. 4. These comments made by Ms. Goins were neither willfully nor maliciously false.

a. Respondent's statements at 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

[7] Respondent maintains that Ms. Goins was not properly on notice from Appellant's Complaint that it alleged it was entitled to relief on its defamation claim due to such comments because the statement regarding boil water notices was not included as a basis for Appellant's claim even though it was available to Appellant at the time it filed its Complaint in March 2020. *See* Rule 8(a), SCRCP.

[8] 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*.

supply as part of a response to 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 meeting, 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. R. p. __; Goins Mot. Summ. J. Ex. K, October 14, 2019). Her comments at this County Council meeting were not only relevant to recent public discourse and 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 not only de minimis, but Appellant has failed to produce any evidence that this statement was false or that Ms. Goins knowingly or recklessly acted in disregard as to whether the statement was true when she spoke. Ms. Goins stated in her deposition that she had not seen any boil water notices issued in the past twenty years. (R. p. __; Goins Mot. Summ. J. Ex. 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. p. __; Goins Mot. Summ. J. Ex. P, Goins Dep. 40:4). 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.[9] 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.

In their appeal, Appellant argues there is evidence in the record to support their position that this statement is defamatory yet has failed to reference or produce any such evidence. App.'s Br. 4.[10] The only source Appellant has presented to allegedly support its conclusion, is a statement made by Respondent's counsel during oral argument. However, these arguments cannot constitute evidence to support Appellant's claims. "Arguments of counsel are not evidence." *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.C.2d 511, 513 (Ct. App. 2003) (citing *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933)). Appellant has, quite simply, failed to present any evidence to this Court to support its allegations of defamation, let alone that there remains some genuine issue of material fact on that point.

To the contrary, the record supports the conclusion that Respondent's statement was not defamatory, and Appellant failed to meet its burden to prove otherwise. It is apparent from the record that the quality and safety of Appellant's water was a matter of public concern to which Appellant

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

[10] Reference is made and a quote is cited from the minutes of the October 14, 2019 Fairfield County Council meeting. App.s' Br. 3–4. Notably, the minutes of this Council meeting have been stricken from the record pursuant to this Court's Order dated June 7, 2024, as this document was never presented to the circuit court. What was before the circuit court was the video recording of this Council meeting, presented as part of Exhibit K to Respondent's Motion for Summary Judgment.

must provide actual proof as to the falsity of the statement. Simply saying it's not true is insufficient.

Not only was the quality of Appellant's water an item of discussion in the media and amongst the public of Fairfield County at the time of Ms. Goins's comments, it is unquestionable that access to safe drinking water is an inalienable right afforded to everyone. *See Hoyler v* State, 428 S.C. 279, 291–92, 833 S.E.2d 845, 851–52 (Ct. App. 2019) (recognizing South Carolina's adoption of the public interest doctrine and that water quality falls within the purview of the edicts of that doctrine); *Trinity Am. Corp. v. United States Envtl. 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); *see also* 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").

Because Ms. Goins's comments alleged to be defamatory are centered upon issues of public concern, Appellant bears the burden of proving their falsity, rather than Ms. Goins's bearing the 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 failed to prove there is a genuine issue of material fact.

Throughout her time as a member of the Fairfield County Council, Ms. Goins continuously advocated for and encouraged her constituents to educate themselves on the safety and quality of their drinking water. For instance, many of Ms. Goins's comments made during the October 14, 2019 meeting served as a call for the community to do its own research concerning the Appellant. 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, there is evidence in the record to support the need for Ms. Goins's advocacy and public comments. 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. __; 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. Ms. Goins's statement regarding boil water notices was the truth as she understood it to be at that time and was guided by her personal knowledge and understanding of Appellant's history of violations. Appellant did not present any evidence to support their claims that the statement was defamatory. Therefore, the circuit court correctly found that no genuine issue of material fact existed as to the truthfulness of this statement.

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. __; Order 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. 5). Appellant does not inform the Court of any record citations to show actual malice. Instead, Appellant generally refers to what it terms "lies" without providing evidence showing the statements were false, or evidence supporting its assertion that Ms. Goins knew the statements were false when she made them. (App. Br. 6–7). 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 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 expect 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 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.

RESPECTFULLY SUBMITTED,

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