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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

The Honorable G.D. Morgan, Jr., Circuit Court Judge

Appellate Case No.: 2021-001463

Anthony Wise, ...Appellant,

-v-

Kenneth W. Leap, Newberry Hospital, LLC d/b/a
Newberry County Memorial Hospital, and
West Fraser, Inc.,

Of Whom, West Fraser, Inc. is .....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

For the reasons demonstrated more fully herein, Appellant Anthony Wise's ("Wise") Petition for Writ of Certiorari ("Petition") should be denied. For starters, the Petition was not timely filed pursuant to Rule 242(c), SCACR. Second, the Petition fails to identify any of the circumstances listed in Rule 242(b), SCACR, as having "the character of reasons which will" support certiorari review. In fact, the Petition concedes Wise's unpreserved defamation by innuendo argument does not involve novel questions of law. Third, the alleged errors Wise points to as committed by the Court of Appeals, and in some instances the Circuit Court, are based almost entirely on evidence or arguments never presented to the Circuit Court prior to entering its summary judgment Order. Finally, even if Wise's improper new evidence is considered, summary judgment and the Court of Appeals' Opinion still should be affirmed. Indeed, the Court of Appeals' analysis and holdings concerning West Fraser's truth defense and statements protected by the qualified privilege apply equally to Wise's new evidence.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Petition should be dismissed as untimely?

2. Whether the Petition should be denied because it does not present novel questions of law or any other circumstance supporting certiorari review under Rule 242(b), SCACR?

3. Whether the Court of Appeals properly determined Wise failed to preserve his argument based on defamation by innuendo because he did not make the argument to the Circuit Court and raised the argument, including filing new evidence, for the first time in his Rule 59(e) Motion to Reconsider?

4. Whether the Court of Appeals' Opinion should be affirmed because Respondent established the truth of the Safety Director's alleged defamatory statement to a coworker?

COUNTER-STATEMENT OF THE CASE

The Statement of the Case included in Wise's Petition omits certain facts concerning the procedural history and misstates the evidence presented to the Circuit Court in entering its October

11, 2021 Order granting Respondent West Fraser's ("West Fraser") Motion for Summary Judgment ("Motion").

I. Additional Relevant Procedural History

On June 8, 2021, West Fraser filed its Motion on Wise's sole claim for defamation on the grounds that: (i) the only statement Safety Director Keith Nelson ("Nelson") made to co-worker George Wilson (i.e., that Wise had an infection and received an antibiotic) was true; (ii) Nelson's statement to Wilson could not reasonably be construed as inferring Wise had a sexually-transmitted disease ("STD"); and (iii) the separate statement Nelson made to Plant Manager Russell in a private meeting was both true and moreover, subject to a qualified privilege that was not exceeded. (App. 36 - 37). West Fraser's Motion was set for hearing on August 11, 2021 before the Honorable G.D. Morgan ("Judge Morgan"). (App. 122 - 152). Prior to the hearing, Wise did not file a written opposition to West Fraser's Motion. (App. 944). During the August 11 hearing, Wise made oral arguments and offered certain documents in an effort to oppose summary judgment but pointed only to Nelson's statements to coworker Wilson and Plant Manager Russell. (App. 133 – 152). After the hearing adjourned, Wise requested a meeting in chambers to ask permission to file the complete transcripts from depositions Wise referenced during the hearing, which the Circuit Court permitted. (App. 15 at n.2; App. 697 (Sept. 1, 2021 correspondence confirming submission of nine deposition transcripts)).

The additional alleged defamatory statements Wise urges this Court to consider and rely on to find error below, including Nelson's alleged statements to Human Resources ("HR") Manager Melody Jepson ("Jepson") and supervisor Mike Shealy ("Shealy"), were not mentioned during oral argument or presented to the Circuit Court at any time before the Circuit Court entered its Form 4 Order granting West Fraser's Motion on August 27, 2021. (App. 4 - 6. *See generally*

App. 122 - 152 (Aug. 11, 2021 Tr.)). They also were not presented to the Circuit Court before it entered its final written Order on October 11, 2021. (App. 7 - 24).

Instead, on October 14, 2021, Wise filed his Rule 59(e) Memorandum supporting his Motion for Reconsideration and made new arguments, supported by new evidence, concerning why summary judgment should be denied. (App. 103 – 121). Wise's new evidence included an internal memo prepared by Jepson that summarizes information learned over a roughly ten (10)-day period during the investigation of Wise's worker's compensation claim based on the forklift incident and his simultaneous complaints about the alleged rumors about him. (App. 695). Wise's Rule 59(e) Motion argued for the first time that Jepson's memo created a fact issue concerning the credibility of Nelson's testimony. Wise's argument concerning Shealy was never raised to the Circuit Court, including in Wise's Rule 59(e) Motion, and Wise's argument that Shealy's testimony concerning what Nelson told him was raised for the first time in Wise's Initial Brief. (App. 826 – 827).

II. Additional Material Facts and Correction of Wise's Improper Facts

Wise's Petition improperly relies on facts based on evidence not presented to the Circuit Court and that appropriately was not considered by the Court of Appeals. West Fraser has separated its discussion below by identifying the facts considered by the Circuit Court and those that were not presented to or considered by the Circuit Court and are not properly considered now.

A. Facts Established to the Circuit Court

1. Wise's November 7, 2017 Workplace Injury

On November 7, 2017, Wise was assigned to work in the shipping department and arrived at work shortly before his shift was scheduled to begin at 6:00 A.M. (App. 251, line 21 – 252, line 5). Wise got to the mill at or around the same time as other employees scheduled to work the day

shift, which begins at 6:00 A.M. (App. 253, lines 3-10). As Wise and other day shift employees were preparing to begin their shift, the night shift employees were finishing and leaving the mill. (App. 253, lines 11-13). Shortly after clocking in on November 7, Wise began his pre-work inspection of the forklift he would be operating, and as he attempted to raise the hood, he "felt something give . . . [and] could feel everything swelling up." (App. 253, line 24 – 254, line 16). As Wise described in his deposition, his testicles were swollen and he was "hurting something terrible." (App. 254, line 17 – 255, line 6). Wise reported his injury to several superintendents, who provided Wise first aid while they to reach Nelson. (App. 254, line 23 – 255, line 17). While Wise waited for Nelson to arrive, two co-workers leaving the night shift, Anthony Cannon ("Cannon") and Robert Johnson ("Johnson"), saw Wise holding his groin in obvious pain. (App. 442, line 15 – 443, line 2). Cannon testified they approached Wise and Johnson jokingly said to Wise, "[a]in't nothing wrong with you, he's probably been with, you know … [some woman]." (App. 440, lines 4 -16; App. 443, lines 3 - 20).

Nelson arrived at the mill between approximately 6:30-7:00 A.M.[1] (App. 263, lines 9-12). As West Fraser's Safety Director, Nelson was responsible for overseeing all on-the-job injuries, including ensuring employees receive necessary medical care and reporting injuries or diagnoses that are compensable under West Fraser's workers' compensation plan to management. (App. 460, line 16 – 461, line 4; App. 463, lines 16-20). After meeting with Wise, Nelson agreed that Wise needed to go to the emergency room and prepared to drive him to Newberry County Memorial Hospital ("NCMH"). (App. 264, lines 8-21).

[1] Cannon and Johnson were leaving the mill at approximately 6:05 A.M. (App. 441, line 24 – 442, line 9). Nelson did not arrive at the mill until 6:30 A.M. or later. (App. 263, lines 9-12). Clearly, nothing Nelson said was the basis for the sexual joke made before got to the mill.

2. Wise and Nelson Arrive at the NCMH Emergency Room

Wise and Nelson walked in to the hospital together and then Wise signed in and was taken to an exam room. (App. 265, line 24 – 266, line 14). Wise testified that Nelson "floated around," walking inside and outside the hospital, periodically coming back and "peeping in" the doorway of the exam room. (App. 267, line 11 – 268, line 22). According to Wise, when Dr. Kenneth Leap came to the exam room, he made the following two statements: "I don't see anything to cause me to believe that you have a hernia," and "[l]ooks like somebody's been changing sexual partners." (App. 284, lines 2-9). Wise does not recall Dr. Leap saying anything else before he left the exam room. (App. 286, lines 18-22). Wise testified Nelson left the room at the same time as Dr. Leap and he could see them speaking, but Wise not hear what they discussed. (App. 303, lines 13-20).

Nelson testified that he talked with Dr. Leap to discuss Dr. Leap's diagnosis. (App. 463, lines 8-15). Nelson explained he needed the information to determine whether Wise had suffered an on-the-job injury for workers' comp and OSHA reporting purposes. (App. 463, lines 16 - 20). Nelson testified that Dr. Leap told him that Wise had an infection and that he wrote Wise a prescription which Dr. Leap provided to Nelson. (App. 463, lines 8 – 15 (Nelson); App. 300, lines 10-12 (Wise)).

While Nelson was speaking with Dr. Leap, Wise and his wife were alone in the exam room. (App. 300, lines 17-20). Wise testified that he and his wife were upset by the comment Dr. Leap allegedly made about changing sexual partners and that Mrs. Wise was in shock. (App. 300, line 21 – 301, line 8). Wise and Mrs. Wise said to each other, "[l]et's get the hell out of here" and prepared to leave. (App. 300, line 24 –301, line 12). The next time Wise spoke to Nelson was in the hospital parking lot outside the emergency room exit as Wise waited on Mrs. Wise to get her car so that she and Wise could follow Nelson to the pharmacy to get Wise's prescription filled.

(App. 303, line 21 –304, line 23). According to Wise, he was still trying to get over the "initial shock" of the alleged comment Dr. Leap made about changing sexual partners. (App. 305, lines 1-5). Wise testified that Nelson approached him as he was waiting outside and asked him if maybe Mrs. Wise had an infection. (App. 305, lines 12-20). Wise responded to Nelson, "[y]ou out of your mother-fucking mind?" and Nelson could tell Wise was "about to lose all my composure." (App. 306, lines 2-20). Nelson denies asking Wise if his wife may have had an infection but agrees that Wise was "very upset" and "pretty ticked off" that Dr. Leap allegedly accused Wise of having multiple sexual partners.[2] (App. 465, lines 3-17). After leaving the hospital, Wise did not return to work for the next several days. (App. 307, lines 16-20; App. 311, lines 1-9).

3. <u>Nelson Returns to the Mill</u>

Nelson returned to the mill immediately after leaving the pharmacy where he filled the prescription written by Dr. Leap. (App. 469, lines 11-12). He parked his vehicle in the mill parking lot and was walking toward the office when one of Wise's co-workers in the shipping department, George Wilson ("Wilson"), greeted Nelson. (App. 469, line 13 –470, line 13). Nelson and Wilson were asked in their depositions to describe exactly what was said during their encounter after Nelson returned to the mill. Nelson testified as follows:

> So, George [Wilson] asked me, he said 'How's Hop [referring to Wise's nickname]?' And I said, 'He's doing fine. He has an infection so he got a prescription, or he's doing fine, he got a prescription because he has an infection.' And then that was the end of the conversation with George.

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[2] Nelson testified he was not in the exam room when Dr. Leap allegedly made the comment to Wise and the first time he heard of Dr. Leap's alleged comment was during the discussion in the parking lot. (App. 462, line 13 – 463, line 3; App. 464, line 15 – 465, line 2). While Nelson's and Wise's recollections differ concerning when Nelson first heard about Dr. Leap's comment, this dispute is immaterial. Nelson does not deny he heard about the alleged comment, and whether he heard them in the parking lot or the exam room has no bearing on any issue in Wise's appeal.

(App. 470, lines 9 - 13).

Wilson's recollection of the conversation was identical to Nelson's in all material respects:

> … I seen Keith [Nelson] and I asked, Keith, what happened to Anthony [Wise]? I said, how was he doing? The only thing he said was that Anthony – the doctor said he [Wise] had an infection. And that's all he said. And then when he mentioned that and I stepped back in the shipping department and the guys asked me how is Anthony. I said, well, I just seen Keith and Keith said he has an infection. And I mentioned that and then I went on and went to do whatever I need[ed] to do.

(App. 531, lines 13 - 23).

Wilson testified that prior to seeing Nelson, he had learned from other shipping department employees that Wise had been injured that morning, but contrary to Wise's characterization of the facts, ***Wilson testified he did not know the details or nature of Wise's injury***. (*Cf.* App. 530, line 19 – 531, line 23 *with* Wise's Petition at p. 7 (stating word had spread to Wilson that Wise had suffered a groin injury and Wilson believed Wise had pulled a muscle)). Wilson explained the only reason he asked Nelson about Wise's condition was because Wilson was genuinely concerned if Wise was okay. (App. 534, lines 8 - 14). No one was in the parking lot where Nelson and Wilson were talking, and no one else overheard their conversation. (App. 536, lines 14-17 (Wilson). Both Nelson and Wilson testified unequivocally that Nelson never used the term STD or any other word that could imply a sexually-related condition. (App. 474, lines 3 - 15 (Nelson); App. 530, line 19 –533, line 10 (Wilson)). Importantly, Wilson did not *interpret* Nelson's statement as suggesting anything sexually related or derogatory or to imply anything beyond the fact that Wise was not injured and just had some type of infection. In fact, Wilson testified repeatedly that the only person he ever heard mention that Wise had an STD, or rather did not have an STD, was Wise after Wise returned to the mill and persistently complained to Wilson and many other employees about Dr. Leap's alleged comment. (App. 531, lines 5-8; App. 533, lines 2-10; App. 536, lines 3-8). Wilson further testified that Wise talked about Dr. Leap's comment and his

STD comment so often it became tiresome, and Wilson began avoiding Wise because that was all he talked about. (App. 535, line 4 – 536, line 8).

Nelson testified he understood Wilson's reason for asking to be just as Wilson described – a sincere concern about the wellbeing of a co-worker he believed to have been injured on the job. (App. 469, line 19 – p. 570, line 8). Nelson explained the shipping department is a small department with about ten (10) employees. (App. 469, line 23 –470, line 1). He testified it is not uncommon for employees to inquire about an employee after a workplace accident occurs and testified, "I mean, it's just human nature." (App. 570, lines 4 – 8). Nelson further testified that when he told Wilson that Wise had an infection he did not consider himself to be revealing sensitive medical information and did not intend to harm Wise or suggest anything disparaging about him. (App. 516, line 3 – p. 517, line 6).

4. <u>Wise's Testimony Concerning Nelson's Statement to Wilson</u>

Wise admitted in his deposition he has no personal knowledge of anything Nelson said about him from the time Nelson returned to the mill on November 7, 2017 and when Wise returned on or about November 13, 2017 because Wise was not there. (App. 290, lines 16 - 25; App. 293, lines 4 - 10). Nonetheless, Wise believes Nelson was the source of the rumor based on the statement Nelson made to Wilson during their conversation in the parking lot. (App. 291, lines 6-11; App. 428, line 22 – 429, line 5). Wise confirmed his allegations about statements Nelson allegedly made to Wilson are based solely on conclusions he formed based on hearsay (or double hearsay) from co-workers. (App. 290, lines 16 - 25; App. 293, lines 7 - 10). However, even Wise's second-hand knowledge based on conversations he alleges his co-workers overheard and relayed back to Wise do not support that anyone personally heard Nelson state that Wise had an STD or had been changing sexual partners: "I can't sit here and say that they [co-workers] heard it directly

from him [Nelson], but it went through the plant like a wild fire." (App. 293, line 11 – 294, line 10). Notably, Wise acknowledged in his deposition the statements he was told Nelson made about him stated only that Wise had received an antibiotic and had an infection. (App. 290, lines 11-25; App. 326, lines 7-23). Nevertheless, according to Wise, stating that he "has an infection" is the same as stating Wise "has an STD." (App. 327, line 11 –328, line 11; App. 345, lines 17-24). Wise explained that because he is a black man, anyone who heard that he had an infection would naturally assume it was a sexually transmitted infection: "[**w]hen you a black man, that's all people think that you supposed to do. You got to be some kind of little whore or something like that.**" (App. 317, lines 11-14 (emphasis added)). Wise further testified that when a man says infection he means STD because "**when mens [*sic*] talk like that, that's what they talking about, sex. They ain't talking about no just plain infection.**" (App. 328, lines 9-11 (emphasis added)).

None of the co-workers Wise identified in his discovery responses as having heard the alleged rumors testified that their opinions of Wise changed or that they actually believed Wise had an STD. (*See, e.g.*, App. 532, lines 5-10 (Wilson); App. 614, lines 4-17 (Praylow); App. 546, lines 13-15 (Neal); App. 603, lines 13-19 (Maybin); App. 632, line 23 – 633, line 2 (Shealy)). Throughout his Petition, Wise makes the unsupported assertion that immediately after the forklift incident, "the prevailing belief" among Wise's co-workers was that Wise had only pulled his groin muscle. As purported record support, beginning at the top of page 20, Wise's Petition cites to the transcripts of Jeremy Neal and Mrs. Wise, neither of whom were even at the mill on the day of the incident. (App. 542, line 23 – 543, line 21 (Neal); App. 671, lines 17-23 (Mrs. Wise)). Wise cites additional transcripts from other coworkers, none of whom testified they initially believed Wise had pulled his groin muscle or that any initial belief changed. (Pet. 20).

5. Wise Complains to Multiple Managers and Nelson is Reprimanded for Sharing Wise's Medical Information with Wilson.

When Wise returned to work six (6) days after the forklift incident, he complained to Russell, Jepson, and several other West Fraser managers about Dr. Leap's alleged comments in the emergency room and that a rumor was going around the mill that Wise had an STD that Wise believed started with Nelson's statement to Wilson on the day of the forklift incident. (App. 329, line 12 – 330, line 17 (Wise); App. 339, line 11 –340, line 14. *See also* App. p. 561, lines 10-17 (Russell); App. 578 – 580, 584 – 585 (meeting notes)). During a November 13, 2017 meeting, Wise told Russell he was unhappy with how he was treated by the doctor West Fraser took Wise to for treatment and stated Dr. Leap was "a quack and showed racism." (App. 572, lines 16-25; App. 578). In another meeting on November 17, 2017, Wise told Russell the rumor "had ruined his good name" and that "he was going to do what he had to do" about it. (App. 579). Russell assured Wise he would investigate and take corrective action to address the issue and also encouraged Wise to identify the co-workers who allegedly were teasing him so that Russell could "take care" of it. (App. 558, lines 10-13; App. 561, lines 10-17). Wise refused to identify anyone. (App. 358, line 1 – p. 359, line 4 (Wise); App. 561, lines 10-17 (Russell)).

Having no other information to go on, Russell focused his investigation on Nelson's communication to Wilson and determined it was inappropriate for Nelson (a salaried manager) to share information about Wise's on-the-job injury with Wilson (an hourly employee). (App. 563, lines 15-24). Russell explained that per West Fraser's practices, any personnel matter involving an hourly employee only should be discussed among salaried employees (i.e., management). (App. 563, line 15 – 564, line 8. *See also* App. 560, line 17 – 561, line 9 (testifying the "salary team" only discusses issues related to hourly employees in private). On November 17, 2017, Russell met with Nelson (with Jepson attending) to counsel Nelson against discussing personnel

matters with hourly employees and provided Nelson with a written letter of reprimand. (App. 562, lines 8-18 (Russell); App. 581 – 582 (reprimand letter)). Russell testified this was the only reason Nelson was reprimanded. (App. 562, lines 15 - 18 (testifying Nelson was reprimanded "[f]or the incident that occurred talking to the hourly employee about another hourly employee. ***Strictly that and nothing else.***") (emphasis added)).

6. Nelson's Statements to Wilson Were True

Wise failed to produce a single witness or other form of admissible evidence to establish Nelson told Wilson anything other than that Wise had an infection and was prescribed an antibiotic. It is undisputed the statement Wise had an infection and was prescribed an antibiotic is true. (App. 298, line 3 – 299).

7. Nelson's Statements to Russell Were Privileged and Also True

Wise's Petition does not challenge the Court of Appeals' finding that Nelson's statement to Russell was both true and subject to the qualified privilege, and instead, argues that finding has no impact on the non-privileged discussion between Nelson and Wilson. (Pet. 10). As such, West Fraser will not belabor the facts concerning the Nelson – Russell discussion other than to correct assertions in the Petition concerning exactly what Nelson told Russell and Russell's recollection of the discussion. Wise's Petition states that during the private conversation with Russell, Nelson "testified that he informed Russell of the doctor's accusation that Wise had been with multiple sexual partners." (Pet. 8). To be clear, Nelson's actual testimony concerning what he told Russell was: "I said, [Wise] is *very upset because he reported to me* that the doctor told -- asked him or told him about the multiple sexual partner thing." (App. 470, lines 18-24 (emphasis added)). As the Court of Appeals determined, "there is no dispute in the record that Wise himself let other employees

know the doctor's comment upset him." (App. 943). Thus, the statement to Russell, in addition to being subject to the qualified privilege, was true. (App. 942 – 943).

B. Wise's Facts Based on Evidence Not Presented to the Circuit Court

1. HR Manager Jepson's Notes

In the Petition at pages 6 and 8, Wise asserts that when Nelson returned to the mill after the forklift incident, according to the "statement" by Jepson, Nelson told Jepson and others Wise had a "long–worded infection" that possibly originated from sexual history. What Wise describes as Jepson's "statement" are actually Jepson's internal investigation notes titled "Anthony Wise W/C Incident," signed on November 17, 2017.[3] While Jepson's notes were not timely provided to the Circuit Court and were properly disregarded by the Court of Appeals, for context, West Fraser will briefly discuss the facts surrounding Jepson's notes.

As Wise testified, Jepson was one of several individuals Wise complained to about the alleged STD rumor. (App. p. 329, lines 12-25). She also was Wise's point of contact for the short-term disability and worker's compensation claim Wise attempted to file following the forklift incident. (*See* App. 695). As Jepson's notes and Wise's testimony confirm, after the forklift incident, Wise provided his medical records to Jepson and had several conversations with her concerning his claim for benefits and his concerns about the alleged rumors. (App. p. 695; App. 329, line 12 – 330, line 17 (Wise).

[3] As demonstrated in Respondent's Final Brief, Jepson's notes are inadmissible hearsay. (App. 882 – 883). Also, while her notes were signed on November 17, they reference later events, including on November 20, and contain other ambiguous references. (App. 695 at ¶ 4)/

Wise's Petition misinterprets Jepson's notes, presumably because he conducted no discovery whatsoever to ascertain the meaning of them.[4] To be clear, the references in Jepson's notes to Dr. Leap's diagnosis and the possible origin "(including past sexual history)," which phrase is placed in parentheticals in Jepson's notes indicating that information came from another source, are not describing statements Nelson made to Jepson on the date of the forklift incident (November 7, 2017). Jepson's notes are describing information gathered during her review of Wise's medical and other information based on his alleged on-the-job injury days after the forklift incident; this is evidenced by the date her notes were signed (November 17, 2017) and the references to the diagnosis Wise received (Epididymo-orchitis) and other information learned after Wise returned to the mill a week later. (App. 695).

While Jepson's notes were properly disregarded by the Court of Appeals, even if they are considered, the notes do not establish an actionable defamatory statement. Communications between two managers charged with investigating a workplace accident discussing whether an injury is work-related are subject to the qualified privilege, just as the Court of Appeals held Nelson's statements to Russell were. (App. 943 – 944; *See* discussion, *infra*, at p. 24).

2. <u>Nelson's Statement to Supervisor Mike Shealy ("Shealy")</u>

Wise's factual summary also relies on testimony concerning Nelson's statement to Wise's supervisor, Shealy, who was responsible for entering Wise's time, including missed work time for an on-the-job injury. (Pet. 8). Wise never once, even in his Rule 59(e) Motion, argued to the

[4] Wise did not depose Jepson during discovery, none of the West Fraser employees who were deposed were questioned about Jepson's notes, and her notes were not introduced as exhibits in any deposition taken in the underlying case. While Wise's briefing portrays Jepson's notes as smoking gun evidence casting doubt on the credibility of Nelson's testimony, Wise did not find Jepson's notes significant enough to explore them in discovery or even mention to the Circuit Court in opposing summary judgment. Jepson's notes are equally insignificant now.

Circuit Court that Nelson's statement to Shealy is a separate defamatory statement. (*See generally* App. 122 – 152 (Aug. 11 2021 Hearing Tr.) and App. 103 – 121 (Rule 59(e) Memorandum)). While Wise's new argument related to statements made to Shealy is improper, the only record evidence of what Nelson told Shealy is Shealy's testimony. Shealy testified that all Nelson told him was that Wise had an infection and would be out a couple days. (App. 630, lines 16-23). Nelson did not say or communicate anything to Shealy to suggest the infection was sexually related, and Shealy did not know or form a belief as to what type infection Wise had. (App. 630, line 24 – 631, line 4). Nelson's statement to Shealy is virtually the same as his statement to Wilson. For the same reasons the Courts of Appeals determined Nelson's statement to Wilson was true, Nelson's statement to Shealy also was true. (App. 942).

ARGUMENT

I. The Petition for Writ of Certiorari Is Untimely.

The Court of Appeals denied Wise's petition for rehearing on July 17, 2024. (App. 940 - 945). Wise's Petition for Writ of Certiorari was due within 30 days of this ruling, *i.e.*, by August 16, 2024. Rule 242(c), SCACR. Wise filed nothing with this Court until five days *after* this deadline – August 21, 2024 – when he moved for an extension. Since the deadline set by Rule 242(c) had already passed by the time Wise filed his extension motion, as explained below, the Petition for certiorari review was not timely filed.

The Court of Appeals issued its initial decision on June 20, 2024, affirming the Circuit Court's Order granting summary judgment to West Fraser. (App. 919 – 924). On June 27, 2024, Wise filed his first petition for rehearing, asserting that the Court of Appeals had overlooked an argument presented in his briefs. (App. 925 – 939). On July 17, 2024, the Court of Appeals *denied* rehearing and issued a substituted opinion ("Opinion"), adding a brief statement confirming the

argument addressed in Wise's petition for hearing was unpreserved. (App. 940 – 945). On July 23, 2024, Wise filed a second petition for rehearing, seeking rehearing of the Court of Appeals' denial of his first petition for rehearing. (App. 946 - 952). The Court of Appeals denied Wise's second petition for rehearing on August 13, 2024. Following an extension of time granted by this Court, Wise filed his instant Petition seeking certiorari review on September 19, 2024.

Under Rule 242(c), SCACR, a certiorari petition must be filed "within thirty (30) days after the petition for rehearing . . . is finally decided by the Court of Appeals." That Rule 242(c) refers to "*the* petition for rehearing" rather than "*a* petition for rehearing" indicates that there should be only a single petition for rehearing. This is confirmed by Rule 221(c), SCACR, which explicitly prohibits a second petition for rehearing except under very narrow circumstances not applicable here: "[t]he appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." Because the Court of Appeals denied Wise's first petition for rehearing, his second petition for rehearing is barred by Rule 221(c). Much like successive Rule 59(e) motions to reconsider do not toll the deadline for filing a notice of appeal, an improperly filed petition for rehearing does not toll the time for filing a petition for writ of certiorari. *See Rhame v. Charleston Cty. Sch. Dist.*, 399 S.C. 477, 483, 732 S.E.2d 202, 205 (Ct. App. 2012), *rev'd on other grounds*, 412 S.C. 273, 772 S.E.2d 159 (2015) (dismissing appeal as untimely because an improperly filed petition for rehearing does not toll the time for filing a notice of appeal).

The Court of Appeals denied Wise's first petition for rehearing on June 20, 2024. Under Rule 242(c), therefore, Wise was required to file his Petition for Writ of Certiorari (or a motion seeking an extension of time) no later than August 16, 2024. Because Wise's second petition for rehearing was explicitly prohibited by Rule 221(c), its filing had no effect on the Rule 242(c)

deadline. As of August 21, 2024, the day Wise filed his motion for extension, the August 16 deadline had already passed. Accordingly, Wise's Petition for certiorari review should be dismissed as untimely.

II. None of the Circumstances in Rule 242(b) Are Present Here.

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Rule 242(b) provides a non-exhaustive list of circumstances that "indicate the character of reasons" that may support certiorari review, including "where there are novel questions of law." Rule 242(b)(1), SCACR. As Wise's Petition candidly acknowledges, "[t]he issue of whether a statement is defamatory by innuendo is ***not*** a novel issue under South Carolina law…" (Pet. 11) (emphasis added). Yet, in the next breath and without citation to the cases he is referencing, Wise urges that South Carolina case law on defamation by innuendo is "confusing, antiquated, and out of touch with the modern trend of framing such statements as defamation by implication." (*Id.*) Wise's Petition makes no attempt to explain his semantical argument or how it demonstrates a "special and important reason" for granting his Petition. To the contrary, for the most part, Wise's Petition merely cuts and pastes arguments from his Initial Brief filed in the Court of Appeals. Likewise, the Court of Appeals' Opinion does not identify any novel legal issue. That the Court of Appeals affirmed in an unpublished, per curiam opinion strongly suggests there is no novel question of law.

Moreover, while it is unclear from the Petition what antiquated case law Wise believes needs clarifying, this Court succinctly articulated statements that do and do not constitute defamation by innuendo in *Fountain v. First Reliance Bank*, 398 S.C. 434, 441-42, 730 S.E.2d 305, 309 (2012), a case cited throughout West Fraser's Motion, the Circuit Court's Order, and the Court of Appeals' Opinion. The Petition fails to identify any proper ground under Rule 242(b) for granting review, and respectfully, the Petition should be denied.

III. The Court of Appeals Appropriately Determined Wise Failed to Preserve His Argument Based on Defamation by Innuendo.

The Opinion confirms that to preserve an issue for appellate review, " '[t]he issue must have been (1) raised to and ruled upon by the trial court, (2) raised *by the appellant*, (3) raised in a timely manner, and (4) raised to the trial court *with sufficient specificity*.' " (App. 944) (quoting *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007)) (emphasis added). As the Opinion aptly explains, in addition to not filing any written response to West Fraser's Motion, Wise made no argument at the August 11 summary judgment hearing that Nelson's statement was defamatory by innuendo and raised this argument for the first time in his Rule 59(e) Motion and supporting Memorandum filed October 14, 2021 – after the Circuit Court entered its written Order granting summary judgment. (App. 6 - 23; App. 103 - 120). While the Circuit Court's Order addresses defamation by innuendo, that was based on arguments made by West Fraser, not Wise. (App. 54 – 54; App. 128, line 9 – 131, line 10).

During the summary judgment hearing and throughout the underlying case, Wise argued Nelson was the only possible source of the rumors. (App. 143, line 23 – 144, line 20). To rebut that argument, in West Fraser's Motion and during the summary judgment hearing, West Fraser pointed to evidence showing the visible nature of Wise's injury and the sexual joke made to Wise before he ever left for the hospital. (App. 40; App. 125, line 10 – 13, line 1). This evidence was offered to show the fallacy in and speculative nature of Wise's theory that based on "circumstantial evidence," Nelson was the only possible source of the rumors.

As purported support that Wise properly raised his defamation by innuendo argument and preserved the issue for appeal, the Petition points to and quotes an isolated and fleeting reference Wise's counsel made during the summary judgment hearing. (Pet. 12 (citing counsel's statement "All you have to have is an inference.")). That argument is disingenuous and mischaracterizes the

arguments Wise actually advanced to the Circuit Court. As the August 11 transcript reflects, the only argument Wise made was that since Nelson and Wise were the only West Fraser employees who heard Dr. Leap's comment and only Nelson immediately returned to the mill, a jury could reasonably infer that (i) Nelson had to be the source of the STD rumors; and (ii) despite the sworn testimony by both Nelson and Wilson denying Nelson said anything other than Wise has an infection and got a prescription, "[o]bviously people deny things all the time that aren't [*sic*] true." (App. 134, lines 5-6; App. 148-149).

Wise did not raise his defamation by innuendo argument, and he certainly did not do so with "sufficient specificity," at any point prior to the Circuit Court granting summary judgment. For the reasons and authorities cited by the Court of Appeals, "[a]fter a scrupulous review of the record," Wise failed to preserve this argument and it should not be considered now. (App. 944).

IV. Nelson's Statement Was True and Not Defamatory by Innuendo.

Wise's Petition argues both lower courts erred in finding Nelson's Statement to Wilson was true and not defamatory by innuendo. In support, the Petition outlines five (5) reasons the Circuit Court found that Nelson's statement to Wilson was not defamatory and argues the Court of Appeals erred in affirming because it: (i) focused only on Nelson's testimony concerning what he told Wilson in deciding the statement was facially true; and (ii) did not consider "extrinsic facts" Wise contends made Nelson's statement defamatory by innuendo. (Pet. 14 – 15). Wise is wrong on both points.

A. Both Lower Courts Considered the Only Proper Evidence of Nelson's Statement to Wilson and Correctly Determined It Was True.

Wise's assertion that either court erred by focusing only on Nelson's testimony glosses over the undisputed fact that Nelson and Wilson "are the only two people with personal knowledge of the pertinent conversation" and also, is inaccurate. (App. 942). Both lower courts examined

the testimony by both Nelson *and* Wilson and determined "[t]heir testimonies are nearly identical in recounting that [Nelson] stated only that Wise *had an infection* and was prescribed an antibiotic." (App. 942 (Opinion); App. 8 –9, 13 (Circuit Court Or.)). As both courts properly held, Nelson's statement to Wilson was true. (App. 942 – 943; App. 13 – 14). To the extent there is any doubt, Wise himself testified he has no knowledge, firsthand or otherwise, that Nelson said anything to Wilson other than what Nelson and Wilson described. (App. 293, lines 4 – 23 ("I don't know who all done said what. …I was out of work a week.")).

B. Even if Wise's Unpreserved Defamation by Innuendo Argument Is Considered, Summary Judgment Still Should be Affirmed.

Even if Wise's unpreserved argument is considered (it should not be), that does not change the outcome, and summary judgment still should be affirmed. The Circuit Court's Order accurately states the proper analysis in determining whether a statement is reasonably capable of having a defamatory meaning, which is a decision for the trial court. (App. 12 – 13). The Circuit Court correctly determined Nelson's statement to Wilson was not. (App. 14). Even if the statement "he has an infection" was ambiguous, and it is not, above all, "***what matters is how those who heard the statement understood it***." 20 S.C. JUR. *LIBEL AND SLANDER* § 19 (Nov. 2024) (citing *Davis v. Niederhof*, 246 S.C. 192, 197, 143 S.E. 2d 367, 369 (1965) (emphasis added). Wise's Petition acknowledges as much in agreeing that a triable issue exists only if there is doubt about how the recipient of the statement understood it. (Pet. 18).

Here, there is no doubt. The only person who actually heard Nelson's statement, Wilson, did not interpret Nelson's statements as communicating or implying anything of a sexual or defamatory nature, and as Wilson testified, the only person he heard relate Wise's infection to a *sexual* infection was Wise. (App. 532, lines 5-10). Moreover, even Wise's second-hand knowledge based on conversations he alleges his co-workers overheard and relayed back to him,

fails to support that anyone heard Nelson state anything suggesting Wise had an STD or that the rumors started with Nelson. (App. 47 at ¶ 44; App. 293, line 11 – 294, line 10 (Wise testifying he cannot confirm whether coworker's accounts were based on Nelson's statement)).

Wise's argument that Nelson's statement to Wilson was defamatory by innuendo overlooks, and asks this Court to overlook, that there is no evidence that anyone interpreted Nelson's statement to Wilson, which indisputably was heard only by Wilson, as implying Wise had an STD. Indeed, according to Wise, both lower courts erred because they ignored "evidence in the record demonstrating that Wilson, and other coworkers of Wise understood the meaning of Nelson's statement to be that Wise had a sexually transmitted infection." (Pet. 18). Tellingly, Wise does not cite record support for his assertion. There is none. Wise has not identified a single person who heard the STD rumor who testified the rumor was based on any statement by Nelson, and Wise has nothing beyond unsupported facts and conjecture to support his defamation by innuendo argument.

The Circuit Court considered the only other "circumstantial evidence," including Wise's testimony concerning the reason he believed Nelson's statements inferred that he had a sexual infection based on his stereotypes about black men and his equally speculative argument that Nelson was the only possible source of the rumor. (App. 15 – 16). The Circuit Court properly declined to adopt Wise's offensive stereotype, instead construing the common and ordinary meaning of Nelson's actual statements in the context they were made. (App. 16). Likewise, the Circuit Court considered the testimony by multiple coworkers that the only person they heard state Wise had an STD was Wise (in repeating or complaining to his fellow workers about the comment by Dr. Leap) and properly concluded "based on the evidence of record, Nelson's statements were not the only possible source of the rumors." (App. 15).

1. Wise's Reliance on Russell's Reprimand Letter to Nelson

Having no testimonial evidence to support that a single person understood Nelson's statement to be defamatory, Wise next asserts Russell's reprimand letter to Nelson somehow establishes Nelson's statement to Wilson was defamatory and was the source of the rumors. In making his argument, Wise cherry picks select verbiage from the letter, plainly mischaracterizing what the letter actually states. (Pet. 19). While the Court of Appeals' Opinion does not discuss the letter, the Circuit Court's Order does.[5] The Circuit Court properly rejected that the letter could reasonably be understood as an admission that Nelson made slanderous statements:

> At best, the letter of reprimand establishes West Fraser considered Nelson's statements to be inappropriate and contrary to company procedure. It does not support that Nelson's statements to Wilson implied a defamatory meaning. *See Fountain*, 398 S.C. at 443, 730 S.E.2d at 310 (banker's testimony that statements were inappropriate and not something a banker should say "falls far short of establishing an implied defamatory meaning.")

(App. 16).

The Circuit Court was not misled by Wise's mischaracterization of Russell's letter, and Wise's Petition advances the same distorted and false characterization of what the letter actually states. To be clear, in the opening paragraph of the letter, Russell admonishes Nelson for discussing Wise's medical information with a coworker and states "[i]n turn" the medical information, i.e., that Wise had an infection and received an antibiotic, was communicated to others. (App. 581). The letter does not state and Russell did not determine Nelson's statement was the source of the STD rumors. (App. 581). Likewise, Wise's insistence that paragraph 3 of the letter is an "admission" that West Fraser determined Nelson's statement to Wilson was slanderous is a blatant mischaracterization. (Pet. 21). Based on Wise's complaints to Russell claiming Nelson

[5] "The Court of Appeals need not address a point which is manifestly without merit." Rule 220 (b)(2), SCACR.

slandered him, the letter cautions Nelson, "[v]erbally disclosing medical information about an employee *can be considered by the employee as slanderous.…*" (App. 581 at ¶ 3 (emphasis added)). Wise's self-serving interpretation of the letter is patently unreasonable. In considering summary judgment, the Circuit Court was not required to construe inferences in the non-movant's favor that are either nonexistent or not reasonable.

2. Wise's reliance on "extrinsic facts" including the location of Wise's injury.

Last, Wise argues the visible nature and location of Wise's injury and the workforce's awareness of it are "extrinsic facts" showing that Nelson's statement to Wilson was defamatory by innuendo. (Pet. 18 – 19). As the Court of Appeals held, this argument was not timely presented to the Circuit Court. (App. 944). Moreover, Wise's argument based on the location of his injury is unsupported by the record facts because Wilson testified he did not know the location or nature of Wise's injury when he asked Nelson if Wise was okay. (App. 530, line 19 –531, line 18 (Wilson)). It also contradicts Wise's assertion that before Nelson returned from the hospital, "the prevailing belief" among employees was that Wise only had pulled a muscle. (Pet. 19). Additionally, Wise's argument confuses the relevancy of the evidence West Fraser, *not Wise*, offered concerning the visible nature of Wise's injury and the sexual joke made to Wise by a co-worker before Wise ever left for the hospital. (*See* discussion, *supra*, at pp. 17 – 18).

The evidence of other possible sources of the rumor also was not the basis for the Court's finding that Nelson's statement could not reasonably be construed as defamatory by innuendo. To the contrary, the Circuit Court reviewed the testimony by Nelson and Wilson and correctly concluded there could be no dispute concerning the conclusions that could be drawn from Nelson's statements to Wilson when the only two parties to the conversation, Nelson and Wilson, both testified consistently concerning what Nelson said and how it was interpreted. (App. 13 – 15).

Wise urges that reasonable minds could differ concerning the meaning of Nelson's statement to Wilson, but this is just more conjecture, not evidence. Wise has not identified reversible error committed by either lower court, and the Court of Appeals' Opinion properly affirmed summary judgment. [6]

V. Wise's Final Point of Error Relies on Evidence and Argument the Court of Appeals Properly Held Was Not Preserved, and Otherwise Fails to Identify a Factual Dispute Concerning the Truth of Nelson's Statement.

Much like in his Initial Brief to the Court of Appeals, in his Petition, Wise relies heavily on Jepson's notes and to a lesser extent, Nelson's statement to supervisor Shealy. As already established, the Court of Appeals properly held, "[a]ny arguments regarding the supervisor (Shealy) and human resources manager (Jepson) are not preserved." (App. 941. *See also* App. 944 ("any arguments regarding the human resources manager, including arguments relying on her notes are not properly before this court and we cannot consider them.")).

Even if the new evidence is considered, summary judgment should be affirmed because the Court of Appeals' analysis in finding West Fraser established its truth defense and that Nelson's statements made in good faith and in the ordinary course of business are subject to the qualified privilege apply equally to Wise's new evidence.

A. Any Alleged Statements Nelson Made to the HR Manager Are Subject to the Qualified Privilege.

Even assuming Jepson's notes can be read to state that Nelson told her Wise's infection could be sexually-related, statements between two managers investigating a potential on-the-job injury for the purposes of determining whether worker's compensation benefits are owed fall

[6] Pursuant to Rule 220, SCACR, this Court may affirm for any reason that appears in the record. To the extent Wise resorts to innuendo or "extrinsic facts" to prove a defamatory meaning, the statement cannot be actionable as defamation *per se.* As such, Wise is required to prove the additional elements of malice and special damages, which for the reasons West Fraser established in its Motion and Final Brief, Wise cannot do. (App. 898 – 900).

within the qualified privileged. Under South Carolina law, communications between agents of the same corporation made in the course of normal business are generally regarded as subject to a qualified privilege. C*onwell v. Spur Co. of Western South Carolina*, 240 S.C. 170, 179, 125 S.E.2d 270, 275 (1962). *See also Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 560-61, 459 S.E.2d 315, 317 (Ct. App. 1995) (trial court did not err in finding statements made during employer's investigation of potential harassment claim were protected by qualified privilege); *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506-07 (Ct. App. 1989) (employer's statements made about employee's job performance in meeting to discuss employee's termination were qualifiedly privileged)).

In considering the statements Nelson made to Plant Manager Russell, the Court of Appeals held Nelson's statements were true, but moreover, "the conversation between the safety director and the plant manager would fall squarely within the applicable qualified privilege." (App. 943). To the extent Wise's strained reading of Jepson's notes supports Nelson told Jepson about Dr. Leap's comments indicating Wise's infection was sexually-related rather than work-related, the same privilege analysis applies, and Wise still has not identified evidence of an actionable defamatory statement made by Nelson.

B. Nelson's Statement to Shealy Is Not Defamatory Because It Was True.

Wise argues Nelson's statement to Shealy is evidence of a separate defamatory statement to which the qualified privilege would not apply. In addition to being improper because it was not made to the Circuit Court, Wise's argument misses the point. Whether a truthful statement falls within the qualified privilege is irrelevant because truth is a complete defense to defamation. It is undisputed the only statement Nelson made to Shealy was that Wise had an infection, which, as already established, was true. (App. 630, line 14 – 631, line 4).

CONCLUSION

Wise's Petition is neither timely nor does it identify any special or important reason why this Court should grant certiorari review. Wise has utterly failed to identify any actual point of error made by the Court of Appeals, or for that matter, by the Circuit Court. For any or all of the above reasons, West Fraser respectfully submits Wise's Petition for Writ of Certiorari should be denied and the Court of Appeals' Opinion should be affirmed.

Respectfully submitted on this 12th day of November 2024,

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