THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS

THE HONORABLE R. FERRELL COTHRAN, JR., CIRCUIT COURT JUDGE

Docket No. 2021-CP-10-00426

Kevin Dion Hollinshead, Senior,..... Appellant,

v.

Thomas J. Bell, individually and as Executive Director of Charleston Coalition for Kids, Charleston Coalition for Kids, a nonprofit Organization, Angelica M. Colwell, Lee P. Deas, Godfrey A. Gibbison, Eric P. Strickland, Loren R. Ziff, Courtney S. Waters, Leeza D. Steward, and Teach for America, Inc.....Respondents.

FINAL BRIEF OF APPELLANT

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I. **DID THE TRIAL COURT ERR IN DETERMINING THAT THE SECOND AMENDED COMPLAINT FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION?**

STATEMENT OF THE CASE

This is an action for defamation, civil conspiracy, and outrage. *R.*, pp. 036 - 050. This matter arises out of a libelous campaign advertisement in which Respondents, Thomas J. Bell (hereinafter referred to as "Bell"), Charleston Coalition for Kids (hereinafter referred to as "Coalition"), Angelica M. Colwell (hereinafter referred to as "Colwell"), Lee P. Deas (hereinafter referred to as "Deas"), Godfrey A. Gibbison (hereinafter referred to as "Gibbison"), Eric P. Strickland (hereinafter referred to as "Strickland"), Loren R. Ziff (hereinafter referred to as "Ziff"), Courtney S. Waters (hereinafter referred to as "Waters"), Leeza D. Steward (hereinafter referred to as " Steward"), and Teach for America, Inc. (hereinafter referred to as "TFA"), acting in concert, conspired to and in fact did liable Appellant, Kevin Dion Hollinshead, Senior (hereinafter referred to as Hollinshead"). *R.*, pp. 036 - 050.

Hollinshead initiated this action on January 29, 2021, by filing a Summons and Complaint with the Clerk of the Charleston County Court of Common Pleas. *R.*, pp. 012 - 023. The Complaint was amended four days later on February 2, 2021, and again on August 12, 2021[1]. *R.*, pp. 024 - 035; 036 - 050. In response, the Respondents each filed motions to dismiss this action for failure of the Second Amended Complaint to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6), S.C.R.Civ.P.[2] *R.*, pp. 253 - 430. Additionally, Steward filed a motion for summary judgment as on separate grounds[3]. *R.*, pp. 362 - 430.

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1 *See R.*, pp. 001 - 005.

2 The Respondents, likewise, filed motions to dismiss the Amended Complaint filed February 2, 2021. However, since the motions were rendered moot and still pending when the Second Amended Complaint was filed on August 12, 2021, they are not germane to the issues involved in this appeal and will, therefore, not be discussed and are not being included by Hollinshead in his *Designation of Matter to be Included in the Record on Appeal* of even date herewith.

3 Steward also filed an Answer in which she denied the material allegations of the Second Amended Complaint and raised thirteen affirmative defenses not pertinent to the issues involved in this appeal. *See R.*, pp. 051 - 062. Stewart is the only Respondent to have filed an answer in this matter so far.

A hearing on the motions to dismiss was held on December 16, 2021. *R.*, pp. 469 - 503. The motions to dismiss were granted April 26, 2021. *R.*, pp. 006 - 011. This appeal followed. *R.*, pp. 504 - 512.

STANDARD OF REVIEW

As Steward filed a motion for summary judgment pursuant to Rule 56(b), S.C.R.Civ.P., in addition to a motion to dismiss pursuant to Rule 12(b)(6), S.C.R.Civ.P., both standards shall be discussed.

RULE 12(B)(6), MOTION TO DISMISS

Rule 12(b)(6) permits a party to move to dismiss a case if the complaint fails "to state facts sufficient to constitute a cause of action." "An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, ___, 674 S.E.2d 524, 528 (Ct. App. 2009)(discussing standard for motion to dismiss based on Rules 12(b)(6)). "Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action." *Brazell v. Windsor*, 376 S.C. 83, 83, 655 S.E.2d 736, 737 (Ct. App. 2007). "Rule 12(b)(6) permits the trial court to address the sufficiency of a pleading stating a claim; it is not a vehicle for addressing the underlying merits of the claim." *Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (2019). "A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (*cited with approval Skydive Myrtle Beach, Inc. v. Horry Cty., supra* at 180, 826 S.E.2d at 587).

"In considering a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the circuit court must base its ruling solely upon the allegations set forth on the face of the complaint." *Charleston Cty. Sch. Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011); *accord Brown v.*

Leverette , 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) ("... solely upon the allegations set forth on the face of the complaint").

> If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. In deciding whether . . . [to grant a] motion to dismiss, the . . . court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. . . [A] complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.

Spence v. Spence, 368 S.C. 106, ___, 628 S.E.2d 869, 874 (2006) (citations omitted).

"The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory." *Capital City Ins. Co. v. BP Staff, Inc.*, *supra* at ___, 674 S.E.2d at 528. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929, 940-41 (2007) (internal quotations omitted) (*cited with approval Skydive Myrtle Beach, Inc. v. Horry Cnty.*, *supra* at 180, 826 S.E.2d at 588). A case "should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Capital City Ins. Co. v. BP Staff, Inc.*, *supra* at ___, 674 S.E.2d at 528. "[P]leadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties." *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005) (*citing Stroud v. Riddle*, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973))."At the Rule 12 stage, therefore, the first decision for the trial court is to decide only whether the pleading states a claim.

. . [A] plaintiff is—entitled to litigate the validity of its original pleading without having to convince the trial court of the merits of its underlying claim." *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, *supra* at 180, 826 S.E.2d at 588. "The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." ." *Capital City Ins. Co. v. BP Staff, Inc.*, *supra* at ___, 674 S.E.2d at 528.

RULE 56(B)

"Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Nelson v. Chas. Co. Parks & Recreation Comm.*, 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Hedgepath v. AT&T*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001). "In determining whether a genuine issue of fact exists, a court must consider everything in the records, pleadings, depositions, interrogatories, admissions on file, affidavits, etc." *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986).

In determining whether to grant summary judgment, the Court must view the facts and inferences in the light most favorable to the non-moving party. *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. *Id.* A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the non-moving party. *Id.* The judge is not to weigh the evidence himself but rather to determine if there is a genuine issue for trial. *Id.* The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

FACTS[4]

In 2020 Hollinshead and Waters were both candidates seeking election to the same seat on the Charleston County School Board. *R.*, p. 040, ¶¶17 and 18. The Coalition was a supporter of Waters. *R.*, p. 041, ¶19.

Prior to the election, the Coalition funded the creation of a political ad entitled 'Kevin Hollinshead Lied About Stealing From an HBCU – We Deserve Leaders We Can Trust, (hereinafter referred to as the 'Ad'). *R.*, p. 041, ¶20. Bell, Colwell, Deas, Gibbison, Strickland, and Ziff, individually, and as members of the board of directors for and agents of the Coalition, authored the content of the Ad and authorized the funding of the Ad and the Ad's publication and dissemination on the Coalition's YouTube channel and various television networks in the Greater Charleston County, South Carolina Area. *R.*, p. 041, ¶¶22 - 26. As of January 29, 2021, the Ad has been viewed one-hundred and thirty-nine times (135) on CCFK's YouTube Channel. *R.*, p. 045, ¶71.

The Ad features Stewart who, at Waters direction, appears in the Ad and narrates a portion of it. *R.*, p. 042, ¶¶35 & 36. At the time of the Ad's creation and publication Waters and Stewart were both employed by TFA. *R.*, p. 042, ¶¶27 & 30. Waters, who at the time, was Steward's supervisor at TFA directed and/or requested Steward appear in the Ad. *R.*, p. 042, ¶¶33, 34 & 37. Waters and Stewart were acting as TFA's agent at the time Stewart appeared in the Ad. *R.*, pp. 041 - 042, ¶¶28 – 31.

An anonymous voiceover in the Ad states "Kevin Hollinshead is using our money to help himself. Hollinshead was successfully sued for stealing one-hundred fifty thousand dollars from a

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[4] The facts are taken from the Second Amended Complaint, the only source from which they may be taken for purposes of this appeal. No facts outside of the four corners of the Second Amended Complaint can be considered for purposes of a Rule 12(b)(6) motion to dismiss.

local HBCU and lied to cover it up." *R.*, p. 042, ¶38. "Hollinshead was successfully sued for stealing one-hundred fifty thousand dollars ($150,000) from Benedict College." *R.*, p. 042, ¶39. Stewart then says: "We can't have someone like that managing the tax dollars for our schools." *R.*, p. 042, ¶40.

The statements in the Ad are false. In fact, Hollinshead and Hollinshead Group Insurance LLC were defendants in a lawsuit (hereinafter referred to as the 'Lawsuit') brought against them by Student Assurance Services, Inc., (hereinafter referred to as 'SAS') arising out of a commission suit. *R.*, p. 042, ¶41. Benedict College was not a party to the Lawsuit. *R.*, p. 042, ¶42. The Lawsuit alleges, among other things, that (1) Hollinshead and Hollinshead Group Insurance LLC breached a contract between Hollinshead and Hollinshead Group Insurance LLC and SAS by cashing premium checks paid by Benedict; (2) Hollinshead and Hollinshead Group Insurance LLC breached a contract between Hollinshead and Hollinshead Group Insurance LLC and SAS by misappropriating insurance premium checks paid by Benedict; (3) Hollinshead and Hollinshead Group Insurance LLC's breach of the contract between Hollinshead and Hollinshead Group Insurance LLC and SAS was accompanied by false statements to be relied upon by SAS so that Hollinshead would have opportunity and time to convert premiums paid and funds belonging to SAS; (4) Hollinshead stole and unlawfully converted $144,677.75 of insurance premiums paid to Hollinshead for the benefit of SAS; Hollinshead employed a scheme to defraud SAS of $144,677.75 of insurance premiums; and, (5) Hollinshead made false statements and false representations to SAS. *R.*, p. 043, ¶¶43, 44, 46, 47, 49, 51 and 52. The Lawsuit refers to these insurance premiums as "SAS's funds." *R.*, p. 043, ¶¶44 & 46. Hollinshead and Hollinshead Group Insurance LLC denied these allegations in their Answer. *R.*, p. 043, ¶¶45, 48, 50 & 53. The Lawsuit

does not allege Hollinshead and/or Hollinshead Group Insurance LLC stole or misappropriated money from Benedict College. *R.*, p. 044, ¶58.

On May 24, 2007, Hollinshead and Hollinshead Group Insurance LLC confessed judgment to SAS in the amount of $144,677.75, admitting liability to SAS and authorizing entry of judgment in that amount (hereinafter referred to as the 'Confession of Judgment'). *R.*, p. 044, ¶¶59 - 61. Benedict College is not mentioned or referred to in the Confession of Judgment. *R.*, p. 044, ¶62.

ARGUMENT

THE TRIAL COURT CLEARLY ERRED IN GRANTING THE MOTIONS TO DISMISS.

Because the Orders granting the motions to dismiss are Form 4 Orders, issued months after the hearing, and because the trial judge gave no indication at the hearing as to how he intended to rule, the lower court provides no insight as to its basis for granting the motion. Nevertheless, it is clear that the Amended Summons and Complaint does in fact, "state facts sufficient to constitute a cause of action" and, thus the Circuit Court erred as a matter of law.

> A party asserting a claim of defamation must prove the following elements: '(1) a false and defamatory statement was made; (2) the unprivileged publication of the statement to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm.'. . 'The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'

Harris v. Tietex Int'l Ltd., 417 S.C. 533, 540, 790 S.E.2d 411, 415 (Ct. App. 2016) (citations omitted) (*quoting Williams v. Lancaster Cty. Sch. Dist.*, 369 S.C. 293, 302–03, 631 S.E.2d 286, 292 (Ct. App. 2006) and *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002)).

A communication is defamatory if it tends "'to impeach the honesty or integrity or reputation, or publish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or obloquy, or to cause him to be shunned or avoided, or to injure him in his office, business, or occupation.'" *Smith v. "Bradstreet Co,* 41 S.E. 763, 764, 63 S.C. 525, ___ (1902) (*quoting* "18 AM. & ENG. ENC. LAW, at page 861).

> The defamatory character of the words complained of is for the jury if the language is susceptible of two meanings, one defamatory and the other innocent; but if the language is unambiguous the question is for the court. The court determines whether the language is capable of the meaning ascribed to it, and the jury determines whether the language had the meaning ascribed to it.
>
> The South Carolina rule goes further and holds that a demurrer to a complaint (and inferentially a motion for summary judgment) 'will only be

> sustained where the court can affirmatively say that the publication is incapable of any reasonable construction which will render the words defamatory.' Our courts also hold that any words which raise a strong suspicion of the plaintiff's guilt in the minds of the hearers are sufficient upon which to base a cause of action for slander or libel. And even stronger, our courts hold that if the words are capable of the offensive meaning attributed to them, then an action for libel or slander lies.

Adams v. Daily Tel. Printing Co., 356 S.E.2d 118, 122, 292 S.C. 273, 279 (Ct. App. 1986), *aff'd as modified*, 367 S.E.2d 702, 295 S.C. 218 (1988) (*quoting* 53 C.J.S. *Libel and Slander* § 223(a) (1983) and *citing Flowers v. Price*, 192 S.C. 373, 6 S.E.2d 750 (1940)).

To establish a cause of action for civil conspiracy:

> a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff.

Paradis v. Charleston Cnty. Sch. Dist., 433 S.C. 562, ___, 861 S.E.2d 774, 780 (2021).

Quoting with approval the following language from *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148 (Me. 1979), our Supreme Court explained:

> [I]n order to recover for the intentional infliction of emotional distress, a plaintiff must establish that (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community,'; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was 'severe' so that 'no reasonable man could be expected to endure it. Although 'severe' emotional distress is usually manifested by 'shock, illness or other bodily harm,' such objective symptomatology is not an absolute prerequisite for recovery of damages for intentional ... infliction of emotional distress.

Ford v. Hutson, 276 S.C. 157, 162, 276 S.E.2d 776, 778 -779 (1981)

The allegations of the Second Amended Complaint - which must be accepted as true for purposes of a Rule 12(b)(6) motion to dismiss and construed in a light most favorable to Hollinshead - constitute a textbook liable. The crux of the libelous statements as alleged in the

Second Amended Complaint are that: (1) "Kevin Hollinshead is using our money to help himself. Hollinshead was successfully sued for stealing one-hundred fifty thousand dollars ($150,000) from a local HBCU and lied to cover it up." (2) "Hollinshead was successfully sued for stealing one-hundred fifty thousand dollars ($150,000) from Benedict College." (3) "We can't have someone like that managing the tax dollars for our schools." *R.*, pp. 038 - 050. As alleged in the Second Amended Complaint, which must be accepted as true and construed in a light most favorable to him, Hollinshead, of course, did no such thing. *R.*, pp. 038 - 050. As the Second Amended Complaint alleges, Hollinshead was involved in a commission dispute with SAS relating to commissions earned as a result of sales of health insurance to students enrolled in Benedict College. *R.*, pp. 038 - 050. Benedict College itself was in no way involved in the commission dispute, was not an insured under any of the policies and was in no way involved in any of the transactions out of which the commission dispute lawsuit arose. *R.*, pp. 038 - 050. None of the students' policies involved in the suit between Hollinshead and SAS were cancelled for nonpayment of premiums. *R.*, pp. 038 - 050. The statements in question are irrefutably a lie fabricated by the defendants which tends "'to impeach the honesty or integrity or reputation'" of Hollinshead which "'expose him to public hatred, contempt, ridicule, or obloquy, or to cause him to be shunned or avoided, or to injure him in his office, business, or occupation.'" That was obviously the Respondents' intent. On this, reasonable minds cannot differ.

Further, the claim that Hollinshead is "using our[5] money to help himself" implies that Hollinshead is misappropriating and/or stealing taxpayer money. This is brought further into focus

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[5] The word "our" means "of or belonging to us or ourselves" or alternatively, "of or belonging to all people." THE DK ILLUSTRATED OXFORD DICTIONARY (1998), p.577. There is literally no way to construe, reasonably or otherwise, the term "our" in this context to include SAS or Benedict College. Clearly the term "our" as meaning the taxpayers whose taxes support the Charleston County School District.

when put into context with the later statement that "We can't have someone like that managing the tax dollars for our schools."

The statement that Hollinshead is "using our money to help himself" implies that Hollinshead is misappropriating and/or stealing taxpayer money. The statement that "We can't have someone like that managing the tax dollars for our schools" when coupled with and put in context with the statement that Hollinshead is "using our money to help himself" cannot be plausibly construed as an opinion: it is a statement to the effect that Hollinshead is misappropriating and/or stealing taxpayer money. This is unquestionably defamatory.

> [D]efamation need not be accomplished in a direct manner.
>
> To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain.

Tyler v. Macks Stores of S.C., Inc., 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980).

The clear and unequivocable insinuation is that Hollinshead is misappropriating taxpayer money to his own use; in other words stealing. Yet, there is no suggestion or evidence of any kind, in the Lawsuit or otherwise – or even a rumor - that Hollinshead has ever stolen or misappropriated taxpayer dollars or funds designated for or allocated to a school district, any school or any governmental entity or agency. This representation is pure and simply a lie created by the Respondents out of whole cloth.

At no stage pf the proceedings, have Respondents argued that a representation that Hollinshead has stolen and/or misappropriated taxpayer money to his own use is not defamatory. *See R.*, pp. 316 – 503. They have not bothered to take the position that this representation is true and that it is not defamatory for the obvious reason that they have no basis upon which to argue

that this representation is not defamatory. Clearly it is. This failure is in and of itself a reason why this Court must reverse the lower Court's Order granting the motions to dismiss.

As the Second Amended Complaint makes clear that the Defendants acted with actual malice or, as it is sometimes referred to, constitutional malice. Given that the Lawsuit involved a commission dispute between SAS and Hollinshead which in no way involved Benedict Collage or anyone affiliated with Benedict Collage and that the statement that Hollinshead is "using our money to help himself" despite there being no allegation of this in the Lawsuit or any evidence to support this or even a rumor that he was doing so, when construed in a light most favorable to Hollinshead, there is no escaping the conclusion that Defendants knew the statements were false of acted in reckless disregard for their falsity. This is quintessential actual malice. *See, e.g., New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, (1964); *see also Scott v. McCain*, 272 S.C. 198, 250 S.E.2d 118 (1978)(public officials liable complaint alleging that liable was willful and malicious cured by amendment to add that publication was made "with wanton and reckless disregard for the truth").

The Second Amended Complaint alleges that statements were made in a television ad which was widely broadcast on various television networks in the eastern half of South Carolina and were published on the internet. The statements refer to Hollinshead by name. The statements in question state Hollinshead committed a crime - "stealing" money from Benedict College and misappropriating and/or stealing tax dollars and/or school board funds – and is unfit for business, trade profession or office and specifically claims he is unfit for office: "We can't have someone like that managing the tax dollars for our schools." *See Davis v. Niederhof*, 143 S.E.2d 367, 246 S.C. 192 (1965)(claim that plaintiff committed a crime -stealing – slander per se); *Flowers v. Price*, *supra* (charge of larceny when placed in context of circumstances slander per se); *Imerritt v. Great*

Atl. & Pac. Tea Co, 179 S.C. 474, 184 S.E. 145 (1936) (charge of larceny slander per se); *Moshtaghi v. The Citadel*, 314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994) (statements that infer impropriety or inadequacy in performing one's job, statements that conduct had been dishonorable, and statement that conduct was illegal are all actionable per se). Clearly, when taken in a light most favorable to Hollinshead, the allegations of the Second Amended Complaint state facts which constitute a cause of action for defamation.

Respondents make several arguments in support of their respective motions to dismiss, all of which are misplaced and ignore the standard by which this Court must consider their respective motions to dismiss under Rule 12(b)(6).

To begin with, Respondents have inappropriately submitted documents in support of their respective positions. Their reliance on these documents is misplaced.

It is well settled that this Court is not permitted to consider matters outside of the four corners of the Second Amended Complaint when passing on the Rule 12(b)(6) motions[6]. *See,*

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[6] *Citing Doe v. Bishop of Charleston*, 407 S.C. 128, 134 n.2, 754 S.E.2d 494, 497 n.2 (2014), Defendants content that "[a] trial court may take judicial notice of transcripts, court orders or other filings in related actions without converting a motion to dismiss into one for summary judgment." This argument is, of course, specious.

Doe v. Bishop of Charleston, supra, stands for the proposition that consideration of prior unchallenged orders does not convert a Rule 12(b)(6) motion to dismiss to a Rule 56, S.C.R.Civ.P., motion for summary judgment. As the Court explained, "interpretation of a judgment is a question of law for the court." *Id.* Because the order under consideration in *Doe v. Bishop of Charleston, supra*, was a judgment, its interpretation was a matter of law, and, therefore, its consideration in the context of a Rule 12(b)(6) motion permissible. Considering and interpreting a final judgment is no different than considering a statute or opinion of the South Carolina Supreme Court when passing on a Rule 12(b)(6) motion. Thus, the trial court in *Doe v. Bishop of Charleston, supra*, did not, as the Defendants contend, take judicial notice of anything, but rather interpreted the prior entered judgment as a matter of law to determine whether the facts as alleged in the complaint state a cause of action.

In contrast, consideration of matters outside of the complaint to supply or supplement facts not contained within the complaint when passing on a Rule 12(b)(6) motion to dismiss is impermissible. *Charleston Cty. Sch. Dist. v. Harrell, supra* ("In using the federal district court case to supply facts from outside the complaint, the circuit court impermissibly went beyond the proper parameters of a motion to dismiss."). In other words when passing on a Rule 12(b)(6) motion, the trial court is not permitted to take judicial notice of maters outside the complaint. Consequently, using factual allegations contained in the SAS Complaint, as the Defendants seek to do here, is improper.

e.g., Charleston Cty. Sch. Dist. v. Harrell, *supra* (reversing the trial court's order granting the defendants motion to dismiss because the trial court considered matters outside of the four corners of the complaint when deciding the motion). Rather, when considering the Respondents' motions, this Court may only consider the allegations contained in the Second Amended Complaint, which it must accept as true and all inferences drawn from the facts alleged in the Second Amended Complaint must be viewed in the light most favorable to Hollinshead. *See, e.g., Id.*; *Spence v. Spence*, *supra.* If the factual allegations entitle Hollinshead to relief on any theory – which is the case here - Respondents' motions must be denied. *Id.* Because the facts alleged and inferences reasonably deducible therefrom as alleged in the Second Amended Complaint entitle Hollinshead to relief, Respondents' motion must be denied. *Id.*

At the hearing, Coalition argued that:

> There's no need for the Court to let this case linger because on the face of the complaint, coupled with the public record, there's no doubt that there is no cause of action here, Your Honor. And I know we submitted -- some of the documents attached were part of the public record. I will submit that Your Honor can consider without converting this to a motion for summary judgment.

R., p. 476, l.8 – l.15. This is an obvious misstatement of the law. The only thing which can be considered is what is in the four corners of the Second Amended Complaint and nothing else.

All of the Respondents content that the statements they made – none, by-the-way deny that the statements were made – were true as a matter of law and therefore, not defamatory. Their positions in this regard are premised on the notion that because Hollinshead confessed judgment and entered into a promissory note and he admitted the allegations of the SAS Complaint since he

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Read together, *Doe v. Bishop of Charleston*, *supra*, and *Charleston Cty. Sch. Dist. v. Harrell*, *supra*, stand for the well settled proposition that the resolution of questions of law is for the court, whereas the resolution of questions of fact is for the trier of fact.

did not dispute the facts in either the Promissory Note or the Agreement and Confession of Judgment. Respondents, however, failed to note that Hollingshead, likewise, failed to admit the allegations of the SAS Complaint in the Promissory Note or the Agreement and Confession of Judgment either. The fact of the matter is that both the confession of judgment and promissory note are silent on the issue of whether Hollinshead admitted or denied the allegations of the SAS Complaint. Thus, Respondents' claim that the allegations are true as a matter of law is without merit

Furthermore, even if the factual allegations contained in the SAS Complaint are considered true – which they are not permitted to be – the motions to dismiss must be denied[7]. Because the arguments made by Respondents are virtually identical they will be addressed together.

Though they basically admit that the Lawsuit arose out of a commission dispute between SAS and Hollinshead[8], Respondents - impermissibly relying heavily on matters outside of the Second Amended Complaint - take the position that because SAS accused Hollinshead of stealing from Benedict College, the claim that Hollinshead "stole" from Benedict College is, therefore, true as a matter of law. Even if it were permissible to rely on the matters outside the Second Amended Complaint submitted by Respondents in support of their motions, a reading of the SAS Complaint belies their position in this regard.

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7 The "facts" set forth in the factual recitation section of Defendants' respective motions contains numerous factual assertions not contained in either the Second Amended Complaint or any of the attachments submitted there with, including inclusion of hyperlinks to websites. It goes without saying that none of this can be considered in passing on the Defendants' motions to dismiss, even if they are true, which many of them are not.

8 This admission in their respective motions to dismiss constitute a judicial admission and is binding on Defendants. *See, e.g., Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261 (4th Cir. 2004).

Respondents acknowledge that the Ad accuses Hollinshead of stealing $150,000.00 from Benedict College[9]. However, a close reading of the in the SAS suit against Hollinshead clearly demonstrates that nowhere does SAS allege that Hollinshead stole form Benedict Collage. Respondents simply made that up. A reading of the SAS Complaint demonstrates that SAS is alleging that Hollinshead withheld money which belongs to it.

A close reading of the SAS Complaint demonstrates that SAS does no claim that Hollinshead stole from Benedict College. Instead, the Complaint lays out an alleged scheme whereby SAS claims Hollinshead was allegedly diverting funds paid to SAS by Benedict College, and then goes on to allege in material part:

Paragraph 37 - "Hollinshead owes SAS the following amounts. . . $144,677.75."

Paragraph 38 - "Hollinshead owes SAS. . . $144,677.75."

Paragraph 40 - "By stealing ***the premiums paid to him for the benefit of SAS*** by Benedict . . . Hollinshead exercised unauthorized dominion and control over approximately $144,677.75 ***of SAS funds*** which were paid for SAS precuring the . . . policies. . . ."

Paragraph 41 – "Hollinshead converted SAS's funds for his own use. . . ."

Paragraph 42 - "[T]he premiums owed for the . . . policies were to be paid to SAS and Hollinshead was only entitled to receive his stated commissions. . . ."

Paragraph 43 - "As a direct and proximate result of the wrongful conversion, SAS is entitled to recover the sum of $144,677.75. . . ."

Paragraph 45 - "Defendants employed a scheme ***to defraud SAS*** which were billed to and paid by Benedict for the . . . policies."

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[9] This is yet another binding judicial admission. *See* footnote 1, *supra.*

Paragraph 51 - "As a direct and proximate result of the fraud, SAS has been damaged in the amount of $144,677.75. . . ."

Paragraph 51 - "As a direct and proximate result of the breach of contract set forth above, SAS is entitled to receive its actual damages in the amount of $144,677.75. . . ."

Paragraph 63 - "As a direct and proximate result of the breach of contract accompanied by a fraudulent acts by Hollinshead, SAS is entitled to recover actual damages in the amount of $144,677.75. . . ."

Paragraph 71 - "As a direct and proximate result, SAS is entitled to recover $144,677.75. . . ."

Paragraph 76 - "SAS permitted Hollinshead to collect the annual premiums for the policies and remit the premiums to SAS for division and distribution."

Paragraph 78 - "As a direct and proximate result, SAS is entitled to recover $144,677.75. . . ."

"When the language alleged to be libelous, or slanderous, is plain and unambiguous, and admits of but one reasonable construction, it becomes a matter of law for the action and determination of the court. If said language be ambiguous, or doubtful of meaning, it should be left to the jury to determine in what sense it was used, and what its meaning is." *Drakeford v. Dixie Home Stores*, 105 S.E.2d 711,714, 233 S.C. 519, 524 (1958). Dismissal of a complaint "'will only be sustained where the court can affirmatively say that the publication is incapable of any reasonable construction which will render the words defamatory.' . . . [A]ny words which raise a strong suspicion of the plaintiff's guilt in the minds of the hearers are sufficient upon which to base a cause of action for slander or libel. . . . [I]f the words are capable of the offensive meaning attributed to them, then an action for libel or slander lies." *Adams v. Daily Tel. Printing Co., supra.*

There is simply no way to construe the SAS Complaint as maintaining that Hollinshead stole $150,000.00 from Benedict College, which Respondents admit they said Hollinshead did in the ad. This is textbook defamation. The language used by Respondents is plain and unambiguous and clearly false. Even if the language used by Respondents can somehow be construed as ambiguous it becomes a question for the jury to decide if it is defamatory. Either way, the motions for summary judgment must be denied. *See Id.*

In the lower court, Respondents toke the position that:

> While he [Hollinshead] claims the SAS Lawsuit did not allege he 'stole or misappropriated money from Benedict College,' he admits that the SAS Lawsuit alleged he was 'misappropriating insurance premium checks paid by Benedict' and 'cashing premium checks paid by Benedict.' In other words, the SAS lawsuit alleged that Plaintiff was taking money that Benedict was entrusting to him to give to SAS and converting it to his own unlawful purposes. As such, the statements in the political ad that Plaintiff was sued for stealing $150,000 from Benedict are, at the very least, substantially true. Plaintiff is not alleging that the political ad claimed he was sued by Benedict.

R., p. 370. They further maintain that:

> As noted, the SAS Complaint alleged that Plaintiff was appointed as the agent on the insurance policy at issue. In that role, his duties included receiving premium payments from Benedict College and transmitting those payments to SAS. SAS alleged that Plaintiff received those payments from Benedict College but, rather than forward the money to SAS, Plaintiff stole that money and used it for his own purposes. In other words, Plaintiff improperly assumed control over funds belonging to Benedict College and its students, since he had no right to use the money or do anything more than submit it to SAS. Accordingly, the statement in the political ad that the SAS alleged that Plaintiff had stolen the money from Benedict College, an HBCU, is true, and Plaintiff cannot demonstrate otherwise.
>
> In the Second Amended Complaint, Plaintiff seems to suggest that the political ad was false because SAS did not allege that Plaintiff stole the money from Benedict College, but, rather, that he stole the money from SAS. This argument, however, is demonstrably false. The money at issue was Benedict College's money, which Benedict College entrusted to Plaintiff for the purpose of forwarding to SAS. Thus, the money at issue belonged to Benedict College. Even though it was SAS—and not Benedict College—that sued Plaintiff, SAS alleged that Plaintiff had stolen the money from Benedict College. Even more, the SAS Complaint alleges that Plaintiff "over-billed Benedict," i.e. took money from Benedict College above and

> beyond what was owed to SAS. There is no reasonable way to read the SAS Lawsuit such that it did not allege that Plaintiff stole from Benedict College and/or its students. Accordingly, the Second Amended Complaint coupled with the public record establishes that, as a matter of law, the statement in the political ad that the money at issue in the SAS Lawsuit belonged to Benedict College is true.

R., pp. 370 – 372. The cognitive dissonance needed to support this position is bewildering and belies the actual allegations of the SAS Complaint.

The last sentence of the first quoted paragraph is demonstrably false. Paragraph 39 of the Second Amended Complaint specifically alleges "[t]hat the Ad states 'Hollinshead was successfully sued for stealing one-hundred fifty thousand dollars ($150,000) from Benedict College.'"

There is nothing in the SAS Complaint or the law to support the Respondents' position that the funds belonged to Benedict. Throughout the SAS Complaint SAS clearly and unequivocally takes the position that the funds in issue belonged to it. Nowhere is SAS contending that the funds in any way belonged to Benedict College if they ever belong to it in the first place, as the funds initially belonged to its students.

Additionally, there is nothing in the law or public policy to support this unsupported conclusory assertion. The funds were paid by Benedict – or more aptly its students – as premiums for insurance and once paid, they were covered. Thus, once the premiums were paid, the premium dollars belonged to Hollinshead and/or SAS. If Respondents' position is accepted it will lead to the untenable situation whereby every customer who pays for and receives a good or service will be deemed the owner of the funds if a dispute subsequently develops between the owners of the business or an agent and principal. Such a result is preposterous.

Furthermore, this is only one interpretation of the situation involved in the Lawsuit albeit a strained one. It is for the trier of fact to interpret these allegations. *See Id.* Thus, Respondents motions must be denied on this ground too. *See Id.*

That Respondents are now having to engage in such post hoc mental gymnastics to legitimize their statements as not defamatory is proof positive that they acted with knowledge of the falsity of these statements, or, at the very least acted with reckless disregard for their falsity.

Respondents maintain that the statements which they admit making were mere matters of opinion. A reading the statements made by them shows that they were clearly statements of fact, not opinion.

Respondents contend that as a public official and public figure, Hollinshead has the burden of showing falsity of the alleged defamatory statements which he cannot do as a matter of law based on the undisputed facts contained in his own pleading." The burden of proof is an evidentiary standard. *See Jones v. Leagan*, 681 S.E.2d 6, 384 S.C. 1 (Ct. App. 2009). Respondents' position would, therefore, necessarily require this Court to consider the evidence in this case to reach such a conclusion. It is well settled that the Court is to consider only the allegations of the complaint under consideration when passing on a motion to dismiss under Rule 12(b)(6). Factual considerations are not permitted.

Respondents contend that the ad at issue here is protected speech under the fair comment doctrine and is subject to a qualified privilege. This position is without merit.

"In a defamation action, the defendant may assert ***the affirmative defense*** of conditional or qualified privilege." *Swinton Creek Nursery v. EFC*, 334 S.C. 469, 484, 514 S.E.2d 126, ___ (1999) (emphasis added). As a consequence, the burden of establishing the defense of qualified

privilege is on the party asserting it. *Duckworth v. First Nat. Bank*, 176 S.E.2d 297, 254 S.C. 563 (1970).

> One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. "'The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.''. An abuse of the privilege occurs in one of two situations: (1) a statement made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement made in reckless disregard of the victim's rights.

Fountain v. First Reliance Bank, 730 S.E.2d 305, 310, 398 S.C. 434, 444 (2012) (*quoting Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987) *quoting Conwell v. Spur Oil Co. of W.S.C.*, 240 S.C. 170, 178, 125 S.E.2d 270, 274–75 (1962)). "Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." *Swinton Creek Nursery v. EFC*, *supra* at 485, 514 S.E.2d at ___.

As the parties asserting the affirmative defense of conditional privilege, Defendants have the burden of proving it. That, of course, would necessitate the consideration of evidence outside of the Second Amended Complaint, which is not permitted. Further, in paragraph 80 of the Second Amended Complaint it is specifically alleged that "[t]hat Bell, CCFK, Colwell, Deas, Gibbison, Strickland, [and] Ziff['s] . . . statements were made with constitutional malice." For purposes of a 12(b)(6) motion, this allegation must be accepted as true. Thus, at the Rule 12(b)(6) stage Hollinshead has established actual malice. *See, e.g., New York Times Co. v. Sullivan, supra*; *see also Scott v. McCain*, *supra.* Accordingly, at this stage, reliance on the affirmative defense of conditional privilege is misplaced.

Respondents request that this Court dismiss the Second Amended Complaint with prejudice. Though the Second Amended Complaint obviously should not be dismissed at all pursuant to Rule 12(b)(6),

> [a] circuit court does not have 'discretion' to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) without at least considering whether to allow leave to amend under Rule 15(a). Under Rules 12(b)(6) and 15(a), ***the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint***, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted."

Skydive Myrtle Beach, Inc. v. Horry Cnty., *supra* at 189, 826 S.E.2d at 592. Accordingly, this court cannot grant the relief requested without first allowing Hollinshead an opportunity to amend the Second Amended Complaint.

Stewart argues that she should be dismissed from this action because she was acting in her individual capacity and not within the course and scope of her employment with TFA as alleged. Stewart's reliance on this position is misplaced.

If Stewart committed the tort of defamation, it matters not whether she was acting in an individual capacity, within the scope and course of her employment with TFA or otherwise. *See Flexi v. Chritophedes*, Opinion No. 97-MO-097 (filed October 9, 1997). Stewart is responsible for her own actions irrespective of what capacity she is acting in. *Id.* The key thing here is that it is alleged that Stewart committed defamation. *Id.* Accordingly, Stewart's claim that she was acting in an individual capacity is not a basis for granting her Rule 12(b)(6) motion to dismiss or her Rule 56(b) motion for summary judgment. Furthermore, if this were a legitimate argument, the remedy is to permit Hollinshead the opportunity to amend the Second Amended Complaint. *See Skydive Myrtle Beach, Inc. v. Horry Cnty.*, *supra*.

Finally Respondents take the position that the causes of action for outrage and civil conspiracy fail because the statements which they admit making in concert are true rather than false. This issue has been adequately addressed. They further seem to miss the point that once one is engaged in a conspiracy, the acts of one are the acts of all if made in furtherance of the conspiracy. Thus, the fact that one or more of the particular defendants did not actually make the statement in the d does not absolve him or her from liability for civil conspiracy. As the statements are clearly false, the Respondents' positions with regard to outrage and civil conspiracy are without merit.

A civil conspiracy cause of action presents a question of fact "'so long as there is a possibility that the jury can infer from the circumstances' that the defendants conspired to injure the plaintiffs." *Williams v. Brown*, 269 F.Supp.2d 987, 995 (N.D. Ill. 2003)(holding that the plaintiff's conspiracy claim presented a jury question because plaintiffs offered circumstantial evidence suggesting a conspiracy)(quoting *Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir.1979)). The question presented in this appeal is solely whether the Second Amended Complaint presents sufficient allegations to state a cause of action for civil conspiracy when such allegations are accepted as true and viewed in a light most favorable to Hollenshead. Clearly, the Second Amended Complaint does so.

The same is true of the outrage cause of action. The question presented in this appeal is solely whether the Second Amended Complaint presents sufficient allegations to state a cause of action for outrage when such allegations are accepted as true and viewed in a light most favorable to Hollenshead. Clearly, the Second Amended Complaint does so.

With regard to Stewart's motion for summary judgment, she does not address it in her *Motion of Leeza D. Steward to Dismiss and for Summary Judgment* filed December 6, 2021, but

rather only argues that the Second Amended Complaint is deficient. She does touch on it at a the hearing, but never really distinguishes her motion from summary judgment, but rather attacks the allegations of the Complaint throughout. Stewart does attach an affidavit to her *Motion of Leeza D. Steward to Dismiss and for Summary Judgment* filed December 6, 2021, but all she says of relevance is that she is in fact employed by TFA, that she was not paid for appearing in the Ad, or and that she did not inform TFA that she would be appearing in it. None, of this, of course, absolves her of her actions regarding her labeling of Hollinshead, her engaging in a civil conspiracy and her participation in an outrage. That Stewart was not paid to liable Hollinshead is irrelevant. If anything, by stating under oath that she was contacted by Bell to appear in the Ad and that she agreed to do so, Stewart creates an inference that she engaged in a conspiracy. That Stewart may not have advised TFA that she was appearing in the AD does not mean that TFA did not know about it or that Waters did not inform it of the same. Further, an inference can be drawn as much from what she failed to say much as what she did say. Nowhere in the affidavit does Stewart say she did not discuss her appearance in the Ad with Waters, and by omitting this, the presumption s that she did in fact do so.

Stewart argued at the hearing that Hollinshead is essentially libel proof based on some of Hollinshead's past conduct. This essentially goes to the question of what Hollinshead's damages are, not whether Stewart is liable for defamation, civil conspiracy, or outrage. Thus this argument is specious in the context of the motions presented for review by this court.

CONCLUSION

Without question the trial Circuit Court erred in dismissing this action. Clearly the Second Amended Complaint states facts sufficient to constitute a cause of action. Accordingly, the Court's Orders dismissing the case must be reversed and this matter must be remanded for further proceedings.

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July 14, 2023
Charleston, South Carolina

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS

THE HONORABLE R. FERRELL COTHRAN, JR., CIRCUIT COURT JUDGE

Docket No. 2021-CP-10-00426

Kevin Dion Hollinshead, Senior,..... Appellant,

v.

Thomas J. Bell, individually and as Executive Director of Charleston Coalition for Kids, Charleston Coalition for Kids, a nonprofit Organization, Angelica M. Colwell, Lee P. Deas, Godfrey A. Gibbison, Eric P. Strickland, Loren R. Ziff, Courtney S. Waters, Leeza D. Steward, and Teach for America, Inc.....Respondents.

CERTIFICATE OF RULE 211(A), SCACR, COMPLIANCE

I hereby certify that the *Final Brief of Appellant* complies with Rule 211(b), SCACR.

PRITCHARD LAW GROUP, LLC

Edward K. Pritchard, III, Esq.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a complete and accurate copy of the foregoing *Final Brief of Appellant* was served upon all counsel of record, as listed below, on July 14, 2023, via e-mail as follows:

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