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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No.: 2022-000674

Unpublished Opinion No. 2025-UP-252
(Ct. App. filed July 23, 2025, withdrawn, substituted, and refiled October 29, 2025)

Kevin Dion Hollinshead, Senior,.....Respondent,

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. .....Petitioners.

JOINT PETITION FOR A WRIT OF CERTIORARI

Matthew T. Richardson (SC Bar #15647)
Kaye G. Hearn (SC Bar #2891)
R. Brian Critzer (SC Bar #103159)
WYCHE, P.A.
807 Gervais St., Suite 301
Columbia, SC 29201
803-254-6542
mrichardson@wyche.com
khearn@wyche.com
bcritzer@wyche.com
Attorneys for Petitioners Thomas J. Bell and Charleston Coalition for Kids

Joseph M. McCulloch (SC Bar #3760)
Kathy R. Schillaci (SC Bar #17248)

McCulloch & Schillaci, Attorneys at Law
1116 Blanding Street
Columbia, SC 29201
Telephone: 843-779-0005
joe@mccullochlaw.com
kathy@mccullochlaw.com
Attorneys for Petitioner Leeza D. Steward

Brittany T. Bihun (SC Bar #102496)
Gordon Rees Scully Mansukhani LLP
677 King Street, Suite 450
Charleston, SC 29403
Telephone: 843-278-5900
bbihun@grsm.com
Attorneys for Petitioners Thomas J. Bell, Charleston Coalition for Kids, Angelica M. Colwell, Lee P. Deas, Godfrey A. Gibbison, Eric P. Strickland, and Loren R. Ziff

Dwayne Green (SC Bar #9559)
Green Law Offices
720 Magnolia Road, Suite 24
Charleston, SC 29407
Telephone: 843-266-2626
Dwayne@greenlawsc.com
Attorneys for Petitioner Courtney Waters

R. Hawthorne Barrett (SC Bar #16973)
Turner Padget Graham & Laney, P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 227-4219
tbarrett@turnerpadget.com

David S. Cobb (SC Bar #66569)
Turner Padget Graham & Laney, P.A.
P.O. Box 22129
Charleston, SC 29413
(843) 576-5805
dcobb@turnerpadget.com

Attorneys for Petitioner Teach for America, Inc.

Other Counsel of Record:

Edward K. Pritchard, III, Esq.
Pritchard Law Group, LLC
8 Cumberland Street, Suite 200 (29401)
Post Office Box 630
Charleston, SC 29402
Telephone: 843-722-3300
epritchard@pritchardlawgroup.com
Attorneys for Respondent Kevin D. Hollinshead

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioners 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. certify that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on October 29, 2025.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in reversing the dismissal of Respondent's defamation claim when the political ad is true, substantially true, and protected by the First Amendment?

II. Did the Court of Appeals err in misreading or otherwise impermissibly expanding this Court's decision in *Skydive Myrtle Beach v. Horry Cty.*, 426 S.C. 175, 180, 826 S.E.2d 585, 588 (2019), by reversing the circuit court's dismissal and instead permitting Respondent a fourth attempt to amend his complaint?

STATEMENT OF THE CASE

In the 2020 general election, Petitioner Courtney Waters challenged the incumbent Respondent Kevin Dion Hollinshead, Sr. for a seat on the Charleston County School District North Area School Board. (R. p. 16). Respondent lost that election but, rather than accept defeat, went on the offensive and sued Petitioners[1] for defamation, civil conspiracy, and intentional infliction of emotional distress because of statements and opinions made in a political advertisement created by Petitioner Charleston Coalition for Kids ("the Coalition"), which endorsed Waters. (R. p. 41 ¶ 19.)

[1] The Coalition is a non-profit organization focused on improving public education in the community. In addition to suing the non-profit, its board members, and then-executive director; Respondent sued Petitioner Leeza Steward, an individual citizen, her employer, Petitioner Teach for America, and another employee, Petitioner Courtney Waters, who ran against Respondent for a position on the school board, for the same statement made in the advertisement.

In support for Waters' candidacy, the Coalition funded the creation of the political ad that criticized Respondent. The ad aired on various television networks and was uploaded to the Coalition's YouTube channel. (*Id.* ¶¶ 20-22). As relevant here, the ad opened with Petitioner Leeza Steward speaking about the election, and then in an anonymous voiceover, stated:

> [B]ut Kevin Hollinshead is using our money to help himself. Hollinshead was successfully sued for stealing [nearly] one-hundred fifty thousand dollars ($150,000) from a local HBCU and lied to cover it up.

(R. p. 42 ¶ 38). During the voiceover, the ad displayed the following text: "Hollinshead was successfully sued for stealing [nearly] one-hundred fifty thousand dollars ($150,000) from Benedict College." (*Id.* ¶ 39).[2] At the bottom of the text, the ad referenced the case number of the lawsuit in question ("Case 2006-CP-10-3980, Charleston County 10/9/06"). The ad then returned to Steward, who opined: "We can't have someone like that managing the tax dollars for our schools." (*Id.* ¶ 40). The ad contained two critical components: (1) it included statements that accurately reflected publicly filed documents in a prior lawsuit against Respondent, and (2) it contained constitutionally protected statements of opinion, which included the words spoken by Petitioner Steward.

Respondent filed his original complaint on January 29, 2021; an amended complaint shortly thereafter; and then yet another amended complaint, his third effort to state causes of action ("Operative Complaint") (R. pp. 12, 24, 36). Respondent quoted the prior lawsuit repeatedly in all three filed versions of his complaint. In the prior lawsuit, the plaintiff alleged that Respondent stole $144,677.75 in insurance premiums paid by Benedict College to Student Assurance Services, Inc. ("SAS"), a company that procures health and accident insurance for various colleges and school

[2] The Operative Complaint omits the word "nearly" before the $150,000 figure from the text of the ad, but the ad contains the word "nearly." An electronic copy of the ad was provided to the circuit court and included in the record on appeal.

systems across the country. ("SAS Lawsuit") (R. p. 340). The SAS Lawsuit involves Respondent's dealings with SAS and Benedict College. Under the business arrangement between SAS and Respondent, Benedict would write premium checks payable to the order of SAS and send them to Respondent to distribute to SAS, and SAS would pay Respondent a commission after receiving full payment. (R. pp. 266-67 ¶¶ 8, 13-14).

The SAS Complaint stated that Respondent began depositing Benedict College's premium payment checks directly to his own accounts and then writing smaller checks to SAS. (R. p. 268 ¶ 25-26; *see also* R. p. 43 ¶¶ 49, 51). In other words, he was taking Benedict College's money—money that was meant for SAS—and using it for his own purposes. SAS alleged that Respondent had failed to remit to SAS a total of $144,677.75 in premiums paid by Benedict College. (R. p. 270 ¶ 37; *see also* R. p. 44 ¶ 56). When SAS questioned Respondent about outstanding unpaid premiums, Respondent allegedly misrepresented the facts, informing SAS that Benedict College was having "severe cash problems," despite that Benedict College submitted to him all premiums owed. (R. p. 269 ¶ 28; *see also* R. p. 43 ¶¶ 47, 52).

Ultimately, the SAS Lawsuit resulted in a promissory note and a confession of judgment wherein Respondent admitted that he owed SAS $144,677.75; agreed to pay it back; and authorized the entry of judgment against himself and in favor of SAS. (*See* R. pp. 307-08 ¶¶ 1.1, 2.1; R. pp. 313-14 ¶¶ 2-3, 5; *see also* R. p. 44 ¶¶ 59-60). Importantly, Respondent did not dispute the facts alleged in the SAS complaint neither in the promissory note nor in the confession of judgment.

Petitioners moved to dismiss the amended complaint and then the Operative Complaint.[3] The circuit court held a hearing, where Petitioners argued that the statements in the ad were true

[3] Petitioner Steward moved to dismiss and alternatively for summary judgment.

or substantially true because the ad accurately recited allegations and outcome in the SAS Lawsuit and that the ad included the case number for public review. Petitioners also noted that the ad informed the public about a prior lawsuit against Respondent but did not even say the allegations in that lawsuit were true. Instead, the ad merely stated that Respondent was successfully sued, which is demonstrably true because he confessed judgment. Finally, Petitioners asserted the fair comment doctrine made the allegedly objectionable statements privileged because individuals have a right to express opinions about a political candidate's fitness for public office.

Judge Cothran granted Petitioners' motions to dismiss, and Respondent appealed. The Court of Appeals reversed in an unpublished decision and without oral argument. Petitioners filed a petition for rehearing, which the Court of Appeals denied.[4]

ARGUMENTS

This case presents several important issues warranting review. First, the Court of Appeals erred in reversing the seasoned trial judge's decision, which occurred after extensive briefing and a hearing, and resurrected Respondent's defamation claim when the third iteration of his complaint does not state sufficient facts to support a defamation claim. The Court of Appeals reversed in an unpublished decision, without oral argument, and in a summary fashion that does not mention the SAS Lawsuit, which Petitioners relied on, Respondent repeatedly cited in his Operative Complaint, and which formed the basis of the political ad's statement that Respondent alleges is defamatory.

Second, this lawsuit seeks to impose civil liability on Petitioners for exercising their First Amendment rights to speak about matters of public interest in a public election. Because the SAS

[4] While the case was pending before the Court of Appeals, Respondent was elected to the same position he lost in the 2020 election that is the subject this lawsuit. *Summary Results Report* (last visited Nov. 25, 2025), https://www.charlestoncounty.org/departments/bevr/files/10110524-ElectionResults.pdf?v=23.

Lawsuit clearly demonstrates that the political ad does not contain any false statements and the opinions expressed therein are privileged, Respondent's defamation claim cannot survive.

Third, while the Court of Appeals correctly held that Respondent's civil conspiracy and intentional infliction of emotional distress claims failed, the Court erred in remanding these claims to allow Respondent to file an unprecedented *fourth* complaint under circumstances where amendment would be clearly futile. The Court of Appeals erroneously relied on this Court's decision in *Skydive Myrtle Beach v. Horry Cty*., 426 S.C. 175, 180, 826 S.E.2d 585, 588 (2019), extending that decision far beyond its limits. This unduly generous and unwarranted extension of *Skydive* presents an additional reason to grant certiorari. *See* Rule 242(b)(3), SCACR. Indeed, nothing in *Skydive* suggests that a litigant should receive a fourth "bite at the apple" to file a viable complaint.

I. The Court of Appeals erred in reversing the dismissal of Respondent's defamation claim when the political ad is true, substantially true, and protected by the First Amendment.

The Court of Appeals erred in reversing the dismissal of this action because the facts alleged, even when accepted as true, fail to assert a defamation claim. "The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief." *Williams v. Condon,* 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001). Based "solely upon the allegations set forth on the face of the complaint," that answer is no. *See Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

To prove defamation, generally a plaintiff must show: "(1) a false and defamatory statement concerning another, (2) an unprivileged publication to a third party, (3) fault on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Fountain v. First Reliance Bank*, 398 S.C.

434, 447, 730 S.E.2d 305, 312 (2012). "[T]o prove fault in a defamation action, a plaintiff who is a public official or public figure must prove by clear and convincing evidence that the defendant acted with actual malice in publishing a false and defamatory statement about plaintiff." *Erickson v. Jones St. Publishers, LLC,* 368 S.C. 444, 467, 629 S.E.2d 653, 665 (2006).

The context of this lawsuit matters. Respondent, as a candidate for public office, filed suit against his challenger and those supporting her, based on a political ad that accurately portrayed a publicly filed previous lawsuit against Respondent that seriously called into question his fitness for office. Both this Court and the United States Supreme Court have reinforced the sanctity of free and open debate in a political election. *George v. Fabri*, 345 S.C. 440, 454, 548 S.E.2d 868, 875 (2001) ("The considerations which led to the formulation of the *New York Times* rule 'apply with special force to the case of the candidate.'" (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971))). Accordingly, "anything which might touch on an official's fitness for office is relevant." *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)).

Further, when the alleged defamatory statement involves matters of public concern, the Free Speech Clause of the First Amendment to the United States Constitution abrogates the common law presumption of falsity, and "the ***plaintiff*** must prove the statement was false." *Parker v. Evening Post Pub. Co.*, 317 S.C. 236, 243, 452 S.E.2d 640, 644 (Ct. App. 1994) (emphasis added) (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)).

Here, Respondent appears to allege the following statements were defamatory[5]:

- [B]ut 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.

[5] Petitioners do not concede these were the verbatim statements published and adopt them only for purposes of this Petition.

- Hollinshead was successfully sued for stealing one hundred fifty thousand dollars ($150,000) from Benedict College.

- We can't have someone like that managing the tax dollars for our schools.

(R. p. 42, ¶¶ 38-40).

Even presuming all well-pled facts to be true at this stage, Respondent has failed to set forth a valid claim for defamation sufficient to survive a 12(b)(6) motion. Petitioners request this Court focus on paragraphs 41, 43, 47, 51, 52, 54, 56, and 59 of Respondent's Operative Complaint. (R. pp. 42-44). Specifically:

- Paragraphs 41 and 43 state that Respondent was sued by SAS [Student Assurance Services, Inc] in a lawsuit alleging Respondent "stole and unlawfully converted $144,677.75 of insurance premiums paid to [Respondent] for the benefit of SAS." (R. p. 42).

- Paragraph 47 states the lawsuit alleged Respondent made "false statements and false representations to SAS." (*Id.*).

- Paragraph 51 states the lawsuit alleged Respondent was "**misappropriating insurance premium checks paid by Benedict.**" (R. p. 43).

- Paragraph 52 states the lawsuit alleged Respondent made "false statements to be relied upon by SAS so as that [Respondent] would have opportunity and time to convert premiums paid and funds belonging to SAS." (*Id.*).

- Paragraph 54 states the lawsuit alleged Respondent was engaging in "deceptive acts which were then repeated on numerous occasions, constituting a violation of the South Carolina Unfair Trade Practices Act." (*Id.*).

- Paragraph 56 states the lawsuit alleged Respondent was "misappropriating $144,677.75 of insurance premiums due to SAS." (R. p. 44).

- Paragraph 59 states Respondent "confessed judgment to SAS for a total amount of $144,677.75" (i.e., for the same amount of money alleged by SAS to have been stolen and unlawfully converted). (*Id.*).

Assuming these allegations to be true (i.e., that Respondent was sued by SAS for "misappropriating insurance premium checks paid by Benedict" and then confessed judgment), the statement in the political ad that Respondent was successfully sued for stealing money from

Benedict is not defamatory as it is true or substantially true. Under the substantial truth doctrine, "slight inaccuracies . . . are immaterial provided the defamatory charge is true in substance." Restatement Second, Torts § 581A, cmt. f (1977)); *see Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976) (interpreting South Carolina law and holding that minor inconsistencies in the alleged defamatory statements did not defeat the defense of substantial truth). Respondent's weak argument that the political ad used the words "nearly $150,000" also easily falls within the substantial truth doctrine.[6] Thus, Respondent has failed to allege facts demonstrating the political ad was false, and the trial court correctly dismissed this case. *See Parker*, 317 S.C. at 243, 452 S.E.2d at 644.

The Court of Appeals ostensibly determined that these statements were not true or substantially true; but the allegations in the Operative Complaint, the publicly filed documents in the SAS Lawsuit, and the political ad all clearly demonstrate otherwise.[7] Even at the Rule 12(b)(6) stage, courts across the country recognize that dismissal is appropriate where a plaintiff asserts a statement that is true or substantially true is nevertheless defamatory. *See, e.g.*, *Tannerite Sports, LLC v. NBC Universal News Grp.*, 864 F.3d 236, 247 (2d Cir. 2017) ("[S]everal courts of appeals have affirmed dismissals of defamation claims because the material in the complaint cannot be reasonably understood except as being true or substantially true."); *Bell v. Smith*, 281 So. 3d 1247, 1256 (Ala. 2019) (affirming 12(b)(6) dismissal where a journalist accurately quoted comments by a school board member and then offered his opinion); *Mooneyham v. State Bd. of Chiropractic Exam'rs*, 802 So. 2d 200, 203 (Ala. 2001) (affirming 12(b)(6) dismissal of defamation claim and

[6] Respondent conveniently omitted the word "nearly" in his Operative Complaint. (R. p. 42, ¶ 38).
[7] The trial court and the Court of Appeals properly reviewed these documents because "a court may consider documents incorporated by reference . . . when considering a Rule 12(b)(6) motion." *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009).

noting "[b]ecause [the plaintiff's] defamation claim alleges a truthful communication, he cannot prevail even if we accept his allegations as true").

Finally, the statement "[w]e can't have someone like that managing the tax dollars for our schools" is an opinion that falls well within the confines of constitutionally protected speech. As this Court has noted, the constitutional right to express one's opinion on matters of public interest in a political contest is a "value [that] must be protected with special vigilance." *George*, 345 S.C. at 455, 548 S.E.2d at 875 (emphasis in original) (quoting *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 687 (1989)). An opponent "cannot 'Cry Foul!'" when challenged about his fitness for political office. *Harte-Hanks*, 491 U.S. at 687. The SAS Lawsuit alleged that Respondent "stole and unlawfully converted $144,677.75 of insurance premiums paid to [Respondent] for the benefit of SAS." Stealing money is "universally regarded as conduct which reflects adversely on a man's honesty and integrity." *State v. Al-Amin*, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct. App. 2003), *overruled on other grounds by State v. Broadnax*, 414 S.C. 468, 476, 779 S.E.2d 789, 793 (2015). The political ad did not assert the allegations in the SAS Lawsuit were true; instead, the ad correctly stated that Respondent was "successfully sued," which is a true statement because Respondent executed a promissory note and confession of judgment for $144,677.75 and did not dispute therein the allegations that he stole money.[8] Respondent's attempt to take a position contrary to his own actions in confessing judgment should not be countenanced.

To be sure, one does not enjoy absolute immunity simply because an allegedly defamatory statement is made within an election campaign. But the context certainly matters. *See, e.g.*, *Arthur v. Offit*, Civil Action No. 01:09-CV-1398, 2010 U.S. Dist. LEXIS 21946, at *10 (E.D. Va. Mar.

[8] In other words, neither the promissory note nor the confession of judgment contained any language that Respondent refuted the allegations in the SAS Lawsuit or that his agreement to confess judgment was not an admission of liability.

10, 2010) (noting courts in "the Fourth Circuit routinely dismiss at the outset defamation claims" based on statements that implicate the First Amendment). The Court of Appeals' decision to reverse and allow this case to proceed rather than address Petitioners' arguments that the allegedly objectionable statements are true, substantially true, and protected by the fair comment doctrine is the very reason some jurisdictions apply heightened pleading standards for defamation claims. *See, e.g.*, *Edwards v. Schwartz*, 378 F. Supp. 3d 468, 500 (W.D. Va. March 19, 2019) ("[B]ecause the defense of baseless defamation claims imposes an additional cost, in the form of potentially deterred speech, federal courts have historically given close scrutiny to pleadings in libel actions.") (citing 5B Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure 3D* § 1357); *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 457 (S.D.N.Y. 2012) ("[T]here is 'particular value' in resolving defamation claims at the pleading stage, 'so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms.'" (quoting *Armstrong v. Simon & Schuster, Inc*., 649 N.E.2d 825, 828 (1995))).

Respondent's Operative Complaint fails regardless of whether a different standard should apply, but the point is that during a political election, the constitutional right to free speech is of paramount importance.[9] *Oswalt v. State-Record Co*., 250 S.C. 429, 435, 158 S.E.2d 204, 207

[9] Even if the statements here were false (and they were not), Respondent's claims fail under the fair comment doctrine, *Oswalt v. State-Rec. Co*., 250 S.C. 429, 435, 158 S.E.2d 204, 207 (1967), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and is subject to a qualified privilege, see *Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012) (statement is not defamatory if subject to qualified privilege). Contrary to Respondent's assertion below, a privilege defense can properly be decided on a motion to dismiss, especially where the text / video / audio of the actual allegedly defamatory statements and the underlying public records are available for review, as they are here. *See Cobin v. Hearst-Argyle Television, Inc*., 561 F. Supp. 2d 546 (granting a motion to dismiss defamation claim based on the fair report privilege after review of the news reports and public records attached to the motions); *Spence v. Spence*, 368 S.C. 106, 124, 628 S.E.2d 869, 878 (2006) (noting "[m]ost courts allow [affirmative] defenses to be raised in a motion to dismiss under Rule 12(b)" when the complaint fully discloses the necessary facts). Respondent is a citizen holding public office and is therefore subject to criticism. *Oswalt*,

(1967) (noting "any citizen . . . is privileged to criticize his acts, fitness and qualifications for the office he holds and discuss his work without being liable for damages so long as the criticism is fair and honest, and made without malice"). Thus, the trial court's dismissal of this lawsuit at the 12(b)(6) stage was correct and should be reinstated.

II. Allowing Respondent to file a fourth complaint against Petitioners is not required by the interests of justice and would be clearly futile.

As to the IIED and civil conspiracy claims, the Court of Appeals correctly held that "[Respondent] failed to put forth sufficient facts to support his civil conspiracy and IIED claims." (Order, p. 3.) However, the court then held, "the circuit court erred when it did not allow [Respondent] to amend his complaint . . . before granting a 12(b)(6) motion." (*Id.*, p. 4).

This Court has exhibited a clear reluctance to afford litigants more than one bite of the proverbial apple. *See, e.g.*, *Landry v. Landry*, 430 S.C. 153, 164, 843 S.E.2d 491, 496 (2020) ("Normally, we are not inclined to provide litigants with another 'bite at the apple' in presenting their case."). However, the Court of Appeals' decision affords Respondent an unprecedented *fourth* attempt to plead his case.[10]

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250 S.C. at 435, 158 S.E.2d at 207. Again, based on the allegations in the Operative Complaint, any criticism of Respondent's acts, fitness, and qualification for the office of Charleston County School District North Area, therefore, are privileged as a matter of law.

[10] The record shows the only request by Respondent to amend the Operative Complaint is on page 22 of Respondent's December 14, 2021, Memorandum in Opposition wherein Respondent includes a general paragraph about leave to amend but only requests the ability, if necessary, to amend the complaint in the *defamation* action as to Respondent Steward on whether she was acting in her individual capacity or within the scope of employment. (R. p. 307). This requested amendment appears to have *already occurred* by way of amendments in the Operative Complaint and, regardless, would not change the argument on defamation, *supra.* (R. p. 42, ¶¶ 31-32). The merit of this request is seriously undermined by the fact that Respondent spent only <u>one paragraph</u> of his 23-page opposition brief summarily addressing the conspiracy and IIED causes of action. (R. p. 308).

The Court of Appeals relied heavily—and improperly—on this Court's decision in *Skydive Myrtle Beach, Inc. v. Horry County*, but that case concerns materially different facts. Unlike *Skydive*, Respondent has already been permitted to file three complaints. *Cf. Skydive Myrtle Beach v. Horry Cty*., 426 S.C. 175, 180, 826 S.E.2d 585, 588 (2019) ("Skydive was—any 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." (emphasis added)). Granting Respondent the right to file a fourth complaint goes far beyond the parameters of *Skydive* and should prompt this Court to clarify to the bench and the bar that *Skydive* should not be read as affording litigants carte blanche to continue to try to properly plead their case when they have already been afforded multiple opportunities to do so.

Further, not only did the Court of Appeals err by extending *Skydive* to permit a plaintiff to file a fourth complaint, but the court also failed to conduct *any* analysis regarding whether the proposed amendment would be clearly futile. This was error. *Skydive*, 426 S.C. at 183 n.3, 826 S.E.2d at 589 n.3 ("[A]n appellate court *must* consider the merits of an amendment to a complaint that in fact failed to state a claim, but was improperly dismissed 'with prejudice' without granting leave to amend, in determining whether to remand to permit the plaintiff to amend." (citing *Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 881-82 (2006) (emphasis added))). The Court of Appeals' decision directly conflicts with this Court's precedent and provides another basis for granting certiorari. *See* Rule 242(b)(3), SCACR.

This Court should grant certiorari to perform the analysis that the Court of Appeals failed to do because there is no question that an amendment would be clearly futile. First, Respondent never provided any new allegations supporting his claims, and therefore, remand was improper. *Spence*, 368 S.C. at 131, 628 S.E.2d at 882 (upholding 12(b)(6) dismissal with prejudice when the

plaintiff failed to present any new factual allegations to show amendment would not be clearly futile).[11]

Second, this lawsuit is remarkable in what it is about versus what it is not. There is no question that Respondent confessed judgment for $144,677.75, which is the exact amount that SAS claimed he stole and misappropriated. Respondent's quarrel is *not* over that he was sued for stealing and confessed judgment but rather that he was sued for stealing by SAS and not by Benedict. The sole factual allegations in support of Respondent's IIED and civil conspiracy claims are the very same facts he asserts in support of his defamation claim, and there is no reason to conclude that amending his complaint for a fourth time would alter that. (R. pp. 47-49).

Further, Respondent cannot establish a civil conspiracy or IIED claim as a matter of law. The Court of Appeals correctly determined that Respondent "failed to assert an overt act that was separate and independent from the defamation claim itself; and thus, his claim for civil conspiracy must fail as a matter of law." (Order, p. 4 (citing *Cricket Cove v. Ventures, LLC, v. Gilland*, 390 S.C. 312, 324-325, 701 S.E.2d 39, 46 (Ct. App. 2010); *see also Paradis v. Charleston Cnty. Sch. Dist*., 433 S.C. 562, 573, 861 S.E.2d 774, 779-80 ("[P]laintiff's repetition of the same acts as the prior claims was insufficient to salvage [a conspiracy] claim.")). This is now the law of the case. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case[.]").

Permitting Respondent to amend his IIED claim also is clearly futile because this tort is not available where "an action for defamation, the usual remedy to be employed against one who

[11] Indeed, before the circuit court, Respondent only requested leave to amend in a single, conclusory paragraph, and Respondent never filed a Rule 59(e) motion. On appeal, Respondent never addressed futility. *Spence*, 368 S.C. at 131, 628 S.E.2d at 882 (concluding an amendment would be clearly futile when a plaintiff raised the same allegations in her Rule 59(e) motion and on appeal as in her complaint).

has [allegedly] published falsehoods, is available to [the plaintiff]." *Todd v. S.C. Farm Bureau Mut. Ins. Co*., 283 S.C. 155, 173, 321 S.E.2d 602, 613 (Ct. App. 1984), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985). Additional facts are irrelevant because Respondent's claim would fail as a matter of law even with an amendment. *See Skydive*, 426 S.C. at 191 n.8, 826 S.E.2d at 593 n.8.

But even if the Court disagreed, it would be impossible for Respondent to allege facts that support an IIED claim. This Court has noted "the widespread reluctance of courts to permit the tort of outrage to become a panacea for wounded feelings rather than for reprehensible conduct." *Hansson v. Scalise Builders* of S.C., 374 S.C. 352, 357, 650 S.E.2d 68, 71 (2007) (citation omitted). As a result, an IIED claim requires in part that the defendant's conduct be "'extreme and outrageous' as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community'" and that the plaintiff's emotional distress was so severe that "no reasonable man could be expected to endure it." *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981) (quoting Restatement (Second) of Torts § 46). Quite clearly, the factual scenario here falls monumentally short of this high bar.

Respondent asserts a political ad that states he was successfully sued for stealing nearly $150,000—which is demonstrably true—is conduct that is "utterly intolerable in a civilized community" and has caused emotional distress that no reasonable person could be expected to endure. However, the alleged conduct is far from being intolerable; rather, it is constitutionally protected. Regardless, the allegations here are well shy of other conduct likewise found insufficiently extreme or outrageous as a matter of law. *See Gattison v. S.C. State Coll*., 318 S.C.

148, 152–55, 456 S.E.2d 414, 416–17 (Ct. App. 1995) (surveying cases).[12] Where, as here, "physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious." *Hansson*, 374 S.C. at 356, 650 S.E.2d at 71 (citation omitted). Even at the 12(b)(6) stage, leave to amend would be clearly futile.

Accordingly, the circuit court properly dismissed the complaint, and, recognizing the two prior amendments, acted well within its discretion in refusing to allow yet another amendment. Even the game of baseball only allows three strikes. For the reasons set forth herein, affording Respondent a fourth attempt to plead a viable action would be clearly futile and not in the interest of judicial economy. It is patently unfair to, in effect, punish Petitioners for successfully pointing out the deficiencies in Respondent's pleading by allowing him an unprecedented fourth attempt to validly state his claims. South Carolina jurisprudence does not support providing a plaintiff multiple opportunities to file a proper pleading in response to deficiencies in a motion to dismiss.[13]

[12] For example, in *Ford*, the plaintiff alleged "a home buyer subjected the plaintiff, a realtor, to repeated public brow beatings, obscenities, and threats over a two-year period. In fact, he even entered her home without permission and verbally attacked her in front of guests." *Gattison*, 318 S.C. at 152, 456 S.E.2d at 416 (citing *Ford*, 276 S.C. at 162, 276 S.E.2d at 778). As discussed in *Gattison*, even false criminal allegations and lying, which Petitioners vehemently contest occurred here, do not support an IIED claim. *See Folkens v. Hunt*, 290 S.C. 194, 204, 348 S.E.2d 839, 845 (Ct. App. 1986) (holding allegations that the plaintiff owed hundreds of thousands of dollars in taxes and filed fraudulent tax returns were insufficient to support an IIED claim); *Todd*, 283 S.C. at 173, 321 S.E.2d at 613 (noting violation of a state statute "does not import turpitude or outrageousness. Nor is lying, in and of itself, outrageous conduct"). Respondent does not dispute that he confessed judgment for $144,677.75 in money from Benedict College that he failed to provide to SAS.

[13] Petitioners filed two motions to dismiss in this case, first after Respondent's amended complaint and then again following Respondent's Operative Complaint. Respondent has had ample opportunity to adequately plead civil conspiracy and IIED, and the Court of Appeals erred by granting him yet another opportunity.

CONCLUSION

This Court should grant certiorari because the Court of Appeals erred in determining that Respondent sufficiently alleged facts supporting a defamation claim. The political ad accurately reflected that Respondent had been successfully sued for stealing money. Accordingly, the alleged defamatory statements are true or substantially true, and the opinions are constitutionally protected speech. Additionally, the Court of Appeals erred in expanding the reach of this Court's opinion in *Skydive* to permit Respondent to file an unprecedented fourth complaint. This Court should grant certiorari, reverse the Court of Appeals, and end this litigation.

Respectfully submitted,

/s/ *Matthew Richardson*
Matthew T. Richardson (SC Bar #15647)
Kaye G. Hearn (SC Bar #2891)
R. Brian Critzer (SC Bar #103159)
WYCHE, P.A.
807 Gervais St., Suite 301
Columbia, SC 29201
803-254-6542
mrichardson@wyche.com
khearn@wyche.com
bcritzer@wyche.com
Attorneys for Petitioners Thomas J. Bell and Charleston Coalition for Kids

Joseph M. McCulloch (SC 3760)
Kathy R. Schillaci (SC 17248)
McCulloch & Schillaci, Attorneys at Law
1116 Blanding Street
Columbia, SC 29201
Telephone: 843-779-0005
joe@mccullochlaw.com
kathy@mccullochlaw.com
Attorneys for Petitioner Leeza D. Steward

Brittany T. Bihun (SC 102496)
Gordon Rees Scully Mansukhani LLP
677 King Street, Suite 450
Charleston, SC 29403
Telephone 843-278-5900
bbihun@grsm.com
Attorneys for Petitioners Thomas J. Bell, Charleston Coalition for Kids, Angelica M. Colwell, Lee P. Deas, Godfrey A. Gibson, Eric P. Strickland, and Loren R. Ziff

Dwayne Green (SC 9559)
Green Law Offices
720 Magnolia Road, Suite 24
Charleston, SC 29407
Telephone: 843-266-2626
E-mail: Dwayne@greenlawsc.com
Attorneys for Petitioner Courtney Water

R. Hawthorne Barrett (SC Bar #16973)
Turner Padget Graham & Laney, P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 227-4219
tbarrett@turnerpadget.com

David S. Cobb (SC Bar #66569)
Turner Padget Graham & Laney, P.A.
P.O. Box 22129
Charleston, SC 29413
(843) 576-5805
dcobb@turnerpadget.com

Attorneys for Petitioner Teach for America, Inc.

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