

ORIGINAL

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM FAIRFIELD COUNTY  
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

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Case No. 2012-CP-20-099  
Appellate Case No. 2013-001257

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David Michael Hollis.....Appellant,

v.

Fairfield County, Philip Hinely, Davis Anderson and  
David Brown, in their individual capacities.....Respondents:

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**FINAL REPLY BRIEF OF APPELLANT**

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS ..... II

TABLE OF AUTHORITIES ..... IV

STANDARD OF REVIEW ..... 1

ARGUMENT ..... 2

    I. THE APPELLANT IS NOT A *NEW YORK TIMES V. SULLIVAN* PUBLIC OFFICIAL. .... 2

        A. *State Administrative Titles, Potential Immunity, and Broad State Police Powers Are Not Dispositive in This Case.* ..... 3

        B. *There Is No Basis in Governing Precedent to Declare Appellant a Public Official.* ..... 6

    II. THE *ANGUS* CASES DO NOT BAR APPELLANT’S CIVIL CONSPIRACY CLAIM. .... 7

        A. *Angus I Does Not Bar the Appellant’s Civil Conspiracy Claim.* ..... 7

        B. *Angus II Does Not Bar the Appellant’s Civil Conspiracy Claim.* ..... 8

    III. THE RESPONDENT COUNTY DOES NOT HAVE THE AUTHORITY TO CHALLENGE THE STATEMENTS GIVING RISE TO APPELLANT’S DEFAMATION CLAIM, AT THIS JUNCTURE; MOREOVER EVEN IF IT DID THOSE STATEMENTS ARE ACTIONABLE ..... 9

    IV. REGARDLESS OF *ANGUS I*, APPELLANT COULD MAINTAIN IS CIVIL CONSPIRACY CLAIM AGAINST DEFENDANT BROWN ..... 11

    V. THE CONSPIRACY HERE WAS FOR THE PURPOSE OF HARMING THE APPELLANT; THAT THE CONSPIRATORS HAD A MOTIVE IN SO DOING IS NOT DISPOSITIVE. .... 12

    VI. THE APPELLANT PROPERLY ALLEGED SPECIAL DAMAGES ..... 13

CONCLUSION.....15

CERTIFICATE OF COUNSEL.....15

## TABLE OF AUTHORITIES

### **Cases**

<i>Angus v. Burroughs &amp; Chapin Co.</i> , 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004).....	7, 8, 9, 11
<i>Angus v. Burroughs &amp; Chapin Co.</i> , 368 S.C. 167, 628 S.E.2d 261 (2006).....	7, 8, 9
<i>Baltimore Police Dep't v. Cherkes</i> , 140 Md. App. 282, 450 A.2d 410 (2001).....	4
<i>Barbier v. Connolly</i> , 113 U.S. 27, 5 S. Ct. 357 (U.S. 1885).....	5
<i>Benidict College v. National Credit Systems, Inc.</i> , 400 S.C. 538, 735 S.E.2d 518 (S.C. Ct. App. 2012).....	12, 13
<i>Brockbank v. Best Capital Corp.</i> , 341 S.C. 372, 534 S.E.2d 688 (2000).....	2
<i>Daniel v. City of Morganton</i> , 125 N.C. App. 14, 479 S.E.2d 263 (1997).....	4
<i>Demby v. English</i> , 667 So. 2d 350 (Fla. 1 <sup>st</sup> DCA 1995).....	6
<i>Eubanks v. Smith</i> , 292 S.C. 57, 354 S.E.2d 898 (1987).....	10
<i>Faile v. Lancaster County, SC</i> , 2013 WL 786447 (D.S.C. Mar. 1, 2013) ( <i>unpublished</i> ).....	8
<i>Falk v. Sadler</i> , 341 S.C. 281, 533 S.E.2d 350, (S.C. Ct. App. 2000).....	1
<i>Firemen's Ins. Co. v. Cincinnati Ins. Co.</i> , 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990).....	1
<i>Hackworth v. Greywood at Hammett, L.L.C.</i> , 358 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009)....	13
<i>Hansson v. Scalise Builders of South Carolina</i> , 374 S.C. 352, 660 S.E.2d 68 (2007).....	14
<i>Holtzscheiter v. Thomson Newspapers, Inc.</i> , 332 S.C. 502, 506 S.E.2d 497 (1998).....	10
<i>Kitchin v. Halifax County</i> , 192 N.C. 559, 665 S.E.2d 760 (2008).....	4
<i>Kuznik v. Bees Ferry Assocs.</i> , 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000).....	13, 14
<i>Lee v. Chesterfield Gen. Hosp., Inc.</i> , 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986).....	12
<i>Lynch v. Toys "R" Us-Delaware</i> , 375 S.C. 604, 654 S.E.2d 541 (Ct.App. 2007).....	10
<i>McClain v. Arnold</i> , 275 S.C. 282, 270 S.E.2d 124 (1980).....	3; 6
<i>Mell v. Edge</i> , 68 Ga. App. 314, 22 S.E. (2d) 738 (1942).....	14
<i>New Orleans Gas Co. v. Louisiana Light Co.</i> , 115 U.S. 650 (U.S. 1885).....	5
<i>New York Times v. Sullivan</i> , 376 U.S. 254, 84 S. Ct. 710 (1964).....	passim
<i>Pridgen v. Ward</i> , 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010).....	7, 8
<i>Progressive Max Ins. Co. v. Floating Caps, Inc.</i> , 405 S.C. 35, 747 S.E.2d 178 (2013).....	2
<i>Pye v. Estate of Fox</i> , 369 S.C. 555, 633 S.E.2d 505 (2006).....	12
<i>Reed v. Town of Williston</i> , 2009 WL 821013 (D.S.C. Mar. 27, 2009) ( <i>unpublished</i> ).....	8
<i>Rosenblatt v. Baer</i> , 383 U.S. 75, 86 S. Ct. 669 (1966).....	3, 5, 6
<i>Russell v. City of Columbia</i> , 305 S.C. 86, 406 S.E.2d 338 (1991).....	1
<i>Scepurek v. Municipality of Anchorage</i> , 1985 WL 1077799 (Alaska Ct. App. Jan 23, 1985) ( <i>unpublished</i> ).....	4
<i>Todd v. South Carolina Farm Bureau Mut. Ins. Co.</i> , 276 S.C. 284, 278 S.E.2d 607 (1981).....	14
<i>Tyler v. Macks Stores of South Carolina, Inc.</i> , 275 S.C. 456, 272 S.E.2d 633 (1980).....	7, 10, 11
<i>Vaught v. Waites</i> , 300 S.C. 201, 387 S.E. 2d 91 (Ct. App. 1989).....	12, 13
<i>Walker v. Prince George's County, MD</i> , 2008 WL 7555247 (D. Md. Mar. 31, 2008) ( <i>unpublished</i> ).....	4
<i>Walker v. Prince George's County, MD</i> , 575 F.3d 426 (4 <sup>th</sup> Cir. 2009).....	4
<i>Wardlaw v. Peck</i> , 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984).....	14
<i>Williams v. Streb</i> , 270 S.C. 650, 243 S.E.2d 926 (1978).....	7
<i>Woodward v. South Carolina Farm Bureau Ins. Co.</i> , 277 S.C. 29, 282 S.E.2d 599 (1981).....	11

### **Constitutional Provisions**

U.S. Const. amend. I.....3

**Statutes**

S.C. Code Ann. § 8-17-150 .....8

**Rules**

Rule 1, SCRCF .....2  
Rule 12(c), SCRCF..... passim  
Rule 201(b)(2), SCRE .....1  
Rule 220, SCACR..... passim  
Rule 268, SCACR.....4, 8  
Rule 56, SCRCF ..... passim  
Rule 59(e), SCRCF .....2, 9  
Rule 9(g), SCRCF.....14

**Other Authorities**

Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure, Civil 2d § 1367 (1990).....1  
Restatement (Second) of Torts § 46 .....14

## STANDARD OF REVIEW

The standard of review here is *de novo* and applies the South Carolina Rules of Civil Procedure Rule 12(c) standard of review for a motion for judgment on the pleadings. *See, Falk v. Sadler*, 341 S.C. 281, 286-287, 533 S.E.2d 350, 353 (S.C. Ct. App. 2000). When considering a motion for Judgment on the Pleadings, “the court must regard all properly pleaded factual allegations as admitted.” *Id.* at 286; *citing, Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991). “On review of the motion, the court may not consider matters outside the pleadings<sup>1</sup>.” *Id.* at 286; *citing, Firemen's Ins. Co. v. Cincinnati Ins. Co.*, 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990).

A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. . . . When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties.

*Id. quoting; Russell*, 305 S.C. at 89. “Furthermore, ‘a judgment on the pleadings is considered to be a drastic procedure by our courts.’ *Id.*”

The Respondents argue that the Appellant controverted the Rule 12(c) into a Rule 56 motion by submitting an affidavit of the Plaintiff containing statements and opinions about the nature of his work. *See*, (R. pp. 44-46); *see also*, (Respondent Brief pp. 5-8). The Appellant in introducing the Affidavit specifically requested judicial notice be taken; and if not, in the

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<sup>1</sup> However, when reviewing a rule 12 Motion a Court may consider sources and materials subject to judicial notice. *See*, Rule 201(b)(2), SCRE; *see also*, SA Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure, Civil 2d* § 1367 (1990) (motion to dismiss may be decided by reviewing the “formal pleadings and what is subject to judicial notice”); *and* (R. p. 52, fn. 2).

alternative, that it be considered as illustrative that further evidence requiring factual adjudication is necessary before a dispositive determination could be made on the novel issues presented. (R. p. 108, fn. 3). The Circuit Court, Judge Goldsmith presiding, denied the motion to reconsider, without a hearing, and his prior order decided within the confines of Rule 12(c); and in his determination Judge Goldsmith did not reference materials outside of the pleadings<sup>2</sup>. Therefore, the motion at bar was never controverted into a Rule 56 motion for summary judgment.<sup>3</sup>

However, *assuming arguendo*, that the motion were converted into a Rule 56 motion the Appellant is still entitled to have all evidence and inferences viewed in the light most favorably to the Appellant as the non-moving party and the standard of review is *de novo*. Rule 56(c), SCRPC; *see also*, *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 42, 747 S.E.2d 178, 181-82, (2013); *citing*, *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000).

## ARGUMENT

### I. THE APPELLANT IS NOT A *NEW YORK TIMES V. SULLIVAN* PUBLIC OFFICIAL.

Governing precedent demonstrates that the Appellant is not a *New York Times* public official. *See*, *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964). Moreover, whether or not the Appellant is a public official, required to show actual malice on a claim for

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<sup>2</sup> The Respondents, on brief, seem to assert that the Appellant waived objections to their introduction of evidence outside of the pleadings and not subject to judicial notice; however, there being no hearing on Appellant's Rule 59(e) motion to reconsider and no reply required by Rule 59, the Appellant has not had occasion to waive such and here asserts that the appropriate standard of review is *de novo* and within the confines of Rule 12(c).

<sup>3</sup> Furthermore, to convert the motion here from a Rule 12(c) to a Rule 56 motion, discovery not being complete, would result in an injustice to the plaintiff and undermine the intent of the South Carolina Rules of Civil Procedure; specifically that the rules be "construed to secure the *just*, speedy, and inexpensive determination of every action. Rule 1, SCRPC. (emphasis added).

defamation, is a First Amendment inquiry that owes deference to the governing precedent decided within the First Amendment context. U.S. Const. Amend. I.; *see also*, *Rosenblatt v. Baer*, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966) That is, the question here is whether or not Appellant held such a position that his right to his reputation is diminished by the public's interest in free speech. *See*, *Rosenblatt*, 86 S. Ct. 669, at 680 (J. Stewart, *concurring*). The Respondent Fairfield County's ("Respondent County") assertions that Appellant held certification as a limited duty law enforcement official, was potentially entitled to public official immunity, and held duties amongst the state's broad "police power" are not relevant to and have no influence upon the present inquiry. (Respondent Brief pp. 8-13). Furthermore, the assertion that Appellant is a *New York Times* public official has no basis in governing law or precedent and in fact would undermine the analysis that the South Carolina Supreme Court applied in concluding that regular police officers were public officials. *See*, *McClain v. Arnold*, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980).

*A. State Administrative Titles, Potential Immunity, and Broad State Police Powers Are Not Dispositive in This Case.*

"States have developed definitions of 'public official' for local administrative purposes, not the purposes of a national constitutional protection . . . [i]f existing state-law standards reflect the purposes of *New York Times*, this is at best accidental." *Rosenblatt*, 86 S.Ct. at 675. The Appellant's limited duty law enforcement certification is irrelevant to public official status. *See*, *Id.* That the Appellant had a limited duty law enforcement certification is of no incident to this inquiry and need not be addressed by the Court. Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit."); *see also*, (Respondent Brief pp. 8-9).

Likewise, the analysis invoked by a determination that a public employee is entitled to official immunity is different from the analysis prescribed here; therefore, the out of state case law relied on by Respondent County to draw an analogy to this case is superfluous. *See*, (Respondent Brief p. 10). In attempting to analogize the public official analysis here with an immunity analysis, the Respondent County cites to an intermediate appellate decision from North Carolina which held that a lead animal control officer was entitled to public official immunity among other things<sup>4</sup>. *See, Kitchin v. Halifax County*, 192 N.C. 559, 568, 665 S.E.2d 760, 766 (2008). The criterion employed by the North Carolina Court of Appeals for the immunity analysis in *Kitchen* focused on a position's basis in statute, its power, and its discretionary functions. *See, Id. at 766* ("Animal control officer is a position created by statute, exercises a portion of sovereign power, and exercises discretion"). The factors in *Kitchen* are wholly distinct from the constitutional standard espoused by *New York Times* and its progeny.<sup>5</sup>

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<sup>4</sup> For this premise the Respondent County likewise relies on *Walker v. Prince George's County, MD* an unpublished decision of the Maryland District Court and the Fourth Circuit Court of Appeals decision in the same case (neither case dealt with whether or not an animal control officer/supervisor was a *New York Times* public official or was a public official for immunity purposes (though it was presumed)); two other Maryland and North Carolina cases not dealing with animal enforcement officials); and an unpublished case from the intermediate appellate court in Alaska determining that Animal Control Officers could execute warrants. *Walker*, 2008 WL 7555247 (D. Md. Mar. 31, 2008) (*unpublished*); *Walker*, 575 F.3d 426 (4<sup>th</sup> Cir. 2009); *Daniel v. City of Morganton*, 125 N.C. App. 14, 479 S.E.2d 263 (1997) (school officials); *Baltimore Police Dep't v. Cherkes*, 140 Md. App. 282, 450 A.2d 410 (2001) (police officers/commissioner); *Scepurek v. Municipality of Anchorage*, 1985 WL 1077799 (Alaska Ct. App. Jan 23, 1985) (*unpublished*; ability to execute warrants). It is necessary to note, with regard to the district court decision in *Walker* and the Alaska *Scepurek* case, that "memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268 (d)(2), SCACR.

<sup>5</sup> "The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both

*See, Rosenblatt*, 86 S.Ct. at 677. The relevant inquiry involves the interest in public discussion and the particularized importance of the position at issue weighed against the Appellant's right to be protected from defamatory communications. *Id.* The factors implicated in the official immunity analysis fall outside of and are irrelevant to the *New York Times* analysis; whether or not, the Appellant would be entitled to official immunity is of no concern, is not before the Court and should be disregarded. *See*, Rule 220(b)(2), SCACR.

For the same reasons stated above regarding immunity, whether or not animal control is amongst a state's broad police power does not matter here. *See, Rosenblatt*, 86 S.Ct. at 667 (stating the applicable balancing test). The Respondent County appears to contend that because animal control may well be within a state's constitutional "police power" that the Appellant was a *New York Times* public official. (Respondent Brief, pp. 11-13). The term 'police power' refers to those powers of government reserved as the constitutional prerogative of the individual states. *See, New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 661 (U.S. 1885). A state's police power is inherently broad; "In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government." *Id. citing; Barbier v. Connolly*, 113 U.S. 27, 31, 5 S. Ct. 357, 359-60 (U.S. 1885). That animal control is or is not a police power (no governing law has determined the issue) has no effect whatsoever on whether or not Appellant held such a position that it involved the interests of the public discussion and whether a particularized import to that discussion existed by nature of his position. *See, Rosenblatt*, 86 S.Ct. at 667; *see also*, Rule 220(b)(2), SCACR.

Administrative titles, entitlement to immunity, and a state's police power are not relevant to the *New York Times* inquiry. Furthermore, the Respondent County has not and cannot, at this

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elements we identified in *New York Times* are present and the *New York Times* malice standards apply." *Rosenblatt*, 86 S.Ct. at 677.

junction, demonstrate that Appellant held a position where the “interests in public discussion are particularly strong” and that his position in and of itself fostered an “independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees.” *Rosenblatt*, 86 S.Ct. at 677. The Respondent County’s assertions to the contrary contradict the proper standards of review under both Rules 12(c) and 56 of the South Carolina Rules of Civil Procedure, and require inferences to be drawn in the Respondents’ favor. *See*, Rule 12(c) & Rule 56(c), SCRCPP. For these reasons, the Appellant is not a public official, and the lower court’s decision should be reversed and remanded.

*B. There Is No Basis in Governing Precedent to Declare Appellant a Public Official.*

The South Carolina Supreme Court held that regular police officers were *New York Times* public officials by "join[ing] the majority of jurisdictions which have denominated police officers as 'public officials' within the meaning of the New York Times doctrine". *McClain v. Arnold*, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980). The Respondent asks this Court to join, solely, the Florida First District Court of Appeals, in denominating that animal control supervisors are “‘public officials’ within the meaning of the New York Times doctrine.” *Id*; *see also*, *Demby v. English*, 667 So. 2d 350, 354 (Fla. 1<sup>st</sup> DCA 1995). Because the Respondent County has not shown Appellant to be a *New York Times* public official its argument fails. *See*, *Rosenblatt*, 86 S.Ct. 677. Furthermore, because this is a novel issue of law it should not be decided until a jury fully adduces and decides the facts.<sup>6</sup> *Tyler v. Macks Stores of South*

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<sup>6</sup> The Respondent County on Brief does not appear to oppose Appellants argument that this matter was novel and warranted a jury trial prior to a dispositive legal determination. (Respondent Brief pp. 8-13).

*Carolina, Inc.*, 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980), citing, *Williams v. Streb*, 270 S.C. 650, 243 S.E.2d 926 (1978).

## II. THE *ANGUS* CASES DO NOT BAR APPELLANT'S CIVIL CONSPIRACY CLAIM.

The Circuit Court held and Respondents Hinely and Anderson assert on brief that *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004) ("*Angus I*") bars the Appellants claim for civil conspiracy. The Circuit Court held and Respondents Hinely, Anderson and Brown ("Individual Respondents") assert on brief that *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 170, 628 S.E.2d 261, 262 (2006) ("*Angus II*") also bars the Appellant's claim for civil conspiracy. *Angus I & II* do not bar Appellant's civil conspiracy claim because it is not brought against his employer for the loss of his job, and because he is not a public official.

### A. *Angus I Does Not Bar the Appellant's Civil Conspiracy Claim.*

The Respondents Hinely and Anderson assert that *Angus I* bars Appellant from a civil conspiracy action "against his employer or employees authorized to terminate his employment." (Respondent Brief p. 14). *Angus I* does not stand for this proposition. See, *Angus I*, 358 S.C. at 503. The Plaintiff in *Angus* was employed by a contract which "stated that she was 'employed at the will' of the Horry County Council." *Id.* at 501. The Court concluded that *Angus* could not maintain an action in civil conspiracy against County Council members for the loss of her job because her contract stated that she served at their will. *Id.* at 503; see also, *Pridgen v. Ward*, 391 S.C. 238, 246 705 S.E.2d 58, 63 (Ct. App. 2010) ("This court noted that *Angus*' employment agreement specified that she served "at the will" of the Council"). Conversely, the Appellant has not sued his employer, the Respondent County or the Respondent County's Council, for civil conspiracy; but rather he has sued his co-employees in their individual capacities for actions

occurring outside of the course and scope of their employment.<sup>7</sup> (Compl. ¶¶ 19-22). Respondents Hinely and Anderson seek to expand the holding in *Angus I* without a basis at law for the same.<sup>8</sup> As in *Pridgen*, Appellant may maintain an action against supervisory co-employees in their individual capacities for civil conspiracy. *See, Pridgen* at 246.

Furthermore, Appellant has not brought an action, in civil conspiracy, to recover damages for the loss of his job; instead, he seeks damages for “severe and continuing emotional distress and loss of reputation.” (R. p. 15). Even if the Court were to find that *Angus I* applies to Appellant and co-employee Respondents Hinely and Andersons’ relationship; it still does not conceivably apply to this matter where the damages sought are not for the loss of Appellant’s job, but rather are for continuing emotional distress and loss of reputation. That is, the Respondents Hinely and Anderson did not have the right to inflict continuing emotional distress and loss of reputation on the Appellant. *See, Angus I*, 358 S.C. at 508. Appellant does not bring his civil conspiracy claim against his employer and for the loss of his job; therefore *Angus I* does not bar his claim.

*B. Angus II Does Not Bar the Appellant’s Civil Conspiracy Claim.*

The Court in *Angus II* held, narrowly, that an at-will public official cannot maintain an action for civil conspiracy against a newspaper, its publisher and a developer. *Angus II*, 368 S.C. at 170-171. The Appellant is not a *New York Times*, public official for the reasons stated above. (*See, Supra* 2-7). Because, Appellant is not an at-will public official her claim for civil

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<sup>7</sup> The Individual Respondents assert that Appellant concedes he was an at-will employee; he has not; in fact Appellant was a county employee with grievance rights; however, for the reasons stated herein whether or not Appellant was employed at-will is irrelevant and not dispositive. *See*, S.C. Code Ann. § 8-17-150; *see also*, (Respondent Brief p. 15).

<sup>8</sup> The Individual Respondents further rely on two unpublished South Carolina District Court cases *Faile v. Lancaster County, SC* and *Reed v. Town Williston* to support its premise, however these cases hold no precedential value. Rule 268(d)(2), SCACR; *Faile*, 2013 WL 786447 (D.S.C. Mar. 1, 2013); *Reed*, 2009 WL 821013 (D.S.C. Mar. 27, 2009).

conspiracy is not barred by *Angus II*, and the Lower Court's holding to the contrary was reversible error.

III. THE RESPONDENT COUNTY DOES NOT HAVE THE AUTHORITY TO CHALLENGE THE STATEMENTS GIVING RISE TO APPELLANT'S DEFAMATION CLAIM, AT THIS JUNCTURE; MOREOVER EVEN IF IT DID THOSE STATEMENTS ARE ACTIONABLE.

The Appellant here appeals the order granting the Respondent's Rule 12(c) Motion for Judgment on the Pleadings and the order denying reconsideration of the same. *See*, (R. pp. 1 - 3). The Lower Court's decision was clearly within the confines of Rule 12(c). *See Id.* Accordingly, the Respondents' 12(c) motion was not converted into a Rule 56 motion. (*See, supra* at 1-3).

Furthermore, under the Appellate Court rules the Court may affirm a decision only upon grounds appearing in the Record on Appeal. Rule 220(c), SCACR. The Respondents' Motion for Judgment on the Pleadings raised four grounds: (1) that Appellant's defamation claim was barred because he was a *New York Times* public official, (2) that his civil conspiracy claim was barred by *Angus I*, (3) that his civil conspiracy claim was barred by *Angus II*, and (4) that his civil conspiracy claim was barred for want of special damages. (R. pp. 47 - 48). The Respondents' Memoranda in Support of that motion echoed those grounds. (*See*, R. pp. 49 - 57). The Individual Respondents did raise an additional ground for judgment, by way of their reply to Appellant's Memorandum in Opposition to Judgment on the pleadings, that the purpose of the civil conspiracy alleged precluded Appellant's claim. Lastly, in its Response to Appellant's Rule 59(e) motion, Respondents asserted that Appellant's alternative motion to amend his claim for failure to file a proposed amended complaint as an attachment to his Motion.<sup>9</sup> (Respondent

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<sup>9</sup> By way of this final ground, the Respondent did at least tangentially raise challenges toward the evidentiary sufficiency of Appellant's defamation claim; therefore, Appellant, without waiving

Memorandum In Opposition to Motion for Reconsideration, pp. 122 -136). None of these grounds raised by the Respondents directly seeks to challenge Appellant's claim within the context of a Civil Procedure Rule 56 motion. For this reason, pursuant to Appellate Rule 220(c) the Respondent County may not properly challenge the evidentiary sufficiency of the Appellant's defamation claim here.

However, even if the Respondent County could raise such an argument, which the Appellant contends they may not, the Appellant's defamation claim is actionable. Actionable defamation has occurred under South Carolina Law where a plaintiff can show: (1) a false and defamatory statement about plaintiff was made; (2) the 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. *Lynch v. Toys "R" Us-Delaware*, 375 S.C. 604, 619-20, 654 S.E.2d 541, 550 (Ct.App. 2007), citing *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 518, 506 S.E.2d 497, 506 (1998). Defamation need not be accomplished in a direct manner. *Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (1987); *Tyler v. Macks Stores*, 275 S.C. 456, 272 S.E.2d 633 (1980). A mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain. *Id.* That is, in South Carolina, defamation can occur not only by word but also by act and insinuation. *Tyler*, 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980).<sup>10</sup> Furthermore where a person is accused of unfitness in

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his argument that Rule 56 is not the standard at bar and that the Appellant has not preserved the present argument, responds to the same *infra*.

<sup>10</sup> In *Tyler*, an employee was forced to take a polygraph examination along with his manager. *Id.* at 456. After he and the manager took the examination, the manager was terminated. The employee was terminated soon thereafter. *Id.* The employee sued for defamation, arguing that his termination shortly after the polygraph examination and the manager's discharge created the impression and insinuation that the employee was terminated for some wrongful activity. *Id.* The Court agreed and held, in part, that words and actions can be defamatory and that "it is not necessary that the false charge be made in a direct, open and positive manner." *Id.* at 458.

their trade or profession it is *per se* defamatory. *Woodward v. South Carolina Farm Bureau Ins. Co.*, 277 S.C. 29, 282 S.E.2d 599 (1981). Appellant has sufficiently pled, and there is sufficient evidence of record, that he was accused of unfitness in his profession, publically, by agents of the Respondent County. (R. p. 13); (R. P. 37).<sup>11</sup> Furthermore, Appellant's termination by the Respondent County in the midst of such *per se* defamatory comments and insinuations is legally cognizable defamation by act. *See, Tyler*, 275 S.C. at 458.

The Respondent County may not properly challenge the evidentiary validity of Appellant's defamation claim here; because, such an argument is outside of the context of civil procedure Rule 12(c), and was not preserved pursuant to Appellate Rule 220(c). Rule 12(c), SCRCF; Rule 220(c), SCACR. Furthermore, even if the Respondent could state such a challenge, the Appellant's defamation claim is actionable.

#### IV. REGARDLESS OF *ANGUS I*, APPELLANT COULD MAINTAIN HIS CIVIL CONSPIRACY CLAIM AGAINST DEFENDANT BROWN.

*Angus I* does not bar Appellant's claim for Civil Conspiracy against any of the Individual Respondents. (*See, Supra* 7-8). However, *assuming arguendo*, that *Angus I* did bar Appellant's claims against Respondents Hinely and Anderson, the claim could continue against Respondent Brown. The Appellant has asserted that Respondent Brown conspired with others (Respondents Hinely and Anderson) to cause him harm. (R. pp. 14). Respondent's Brown assertion on brief, as an additional sustaining ground, that if Appellant's claims against Respondents Hinely and Anderson were not actionable the conspiracy alleged against him would be controverted into an invalid "conspiracy of one" is legally unsound. (*See, Respondent Brief* pp. 20-21). The law solely requires that a plaintiff plead a (1) combination of two or more, (2) for the purpose of

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<sup>11</sup> The Respondents referenced Appellant's affidavit on Brief (see, p. 20) the Appellant opposes the Respondents' attempt to controvert the standard of review; however, notes that if the standard is so controverted that he did testify to defamatory conduct.

harming, that (3) results in special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E. 2d 91, 95 (Ct. App. 1989). There is no requirement that a plaintiff name every conspirator in a civil conspiracy action; moreover, that a civil conspiracy claim is not actionable against some conspirators does not foreclose on the liability of a remaining conspirator. *See, Id*

V. THE CONSPIRACY HERE WAS FOR THE PURPOSE OF HARMING THE APPELLANT; THAT THE CONSPIRATORS HAD A MOTIVE IN SO DOING IS NOT DISPOSITIVE.

Conspirators to an actionable civil conspiracy may have a motive for harming a plaintiff. “In a civil conspiracy claim, injury to the plaintiff need not be the only purpose behind the tortfeasor's conduct; many conspiracies will be at least partly motivated by the tortfeasor's desire to protect or benefit the tortfeasor's own lot.” *Benedict College v. National Credit Systems, Inc.*, 400 S.C. 538, 545, 735 S.E.2d 518, 522 (S.C. Ct. App. 2012. “[T]o be actionable, therefore, a conspiracy's ‘primary purpose or object’ must be ‘to injure the plaintiff.’” *Id*; quoting, *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986); citing, *Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006). The Respondents on brief, as an additional sustaining ground, asserts that because Appellant alleged that the Individual Respondents were motivated to get ‘Appellant fired so that Respondent Brown could assume his job,’ the primary purpose of the conspiracy was not to harm Appellant and his civil conspiracy claim is barred. (Respondent Brief p. 21-22); quoting, (Brief of Appellant p. 5).

This argument mirrors the failed argument raised by Benedict College in this Courts recent holding *Benedict College v. National Credit Systems, Inc. Benedict College*, 400 S.C. at 545. In *Benedict College* this Court determined:

although it is clear that Williams and Ford may have signed the Addendum at least partly to protect the College from a claim by Radian, the specific intent alleged by NCS's pleading explicitly

states they acted to ‘harm NCS by way of purportedly binding’ NCS to terms the company had not agreed to.

*Id.* Likewise here the Appellant has properly alleged that the intent of the civil conspiracy was to harm him, albeit motivated by a desire to replace him with Respondent Brown. (R. p. 14). The Respondents’ argument on this point contradicts the governing law of this court and confounds reason. If the Respondents’ argument were sustained, it would require that only conspiracies by sociopathic conspirators who conspired to harm a plaintiff without any motivation for their “own lot” could be actionable. *See, Id.* That the Respondents had a self-interested motivation for harming the Appellant does not preclude his claim for civil conspiracy.

#### VI. THE APPELLANT PROPERLY ALLEGED SPECIAL DAMAGES.

The third element, that a plaintiff suffered special damages, must be satisfied to prevent a double recovery. *See, Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000). Therefore to establish special damages, “the damages alleged must go beyond the damages alleged in the other causes of action.” *Hackworth v. Greywood at Hammett, L.L.C.*, 358 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009); citing *Vaught*, 300 S.C. at 209, 387 S.E.2d 95. A properly pled civil conspiracy requires distinct special damages; “[i]f a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed.” *Hackworth*, 682 S.E.2d 871 at 875.

The Individual Respondents assert on brief, as an additional sustaining ground, that the Appellant has failed to properly plead special damages. However, the damages pled for Appellant’s civil conspiracy claim against the Individual Respondents are distinct in both word and nature from those pled for his defamation claim against the Respondent County. (R. pp. 14-15). Importantly, civil conspiracy is the sole claim alleged against the Individual Respondents

thus they are logically precluded from the allegation that any damages sought from them are redundant, and the threat of a double recovery is not here. *See, Kuznik v. Bees Ferry Assocs.*, 342 S.C. at 610; (“Where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong.”) *quoting, Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607 (1981).

Even if the Individual Respondents could point to the damages sought from the Respondent County to undermine Appellant’s special damages, which they cannot, Appellant has pled damages particular to his Civil Conspiracy claim. (R. p. 15). Specifically Appellant has pled that he has suffered “continuing emotional distress;” emotional distress includes “all highly unpleasant mental reactions, such as *fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.*” *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 359, 660 S.E.2d 68, 72 (2007); *quoting*, Restatement (Second) of Torts § 46 cmt. j; (*emphasis* supplied to all highlight all words omitted from Respondents citation, on Brief, at pp. 23-24). Thus the, damages alleged by Appellant for civil conspiracy are distinct in both word and nature from his defamation damages, and they constitute specifically stated special damage.<sup>12</sup>

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<sup>12</sup> The Individual Respondents also assert that pursuant to a defamation case, *Wardlaw v. Peck*, emotional distress is not a recoverable special damage in civil conspiracy. *Wardlaw*, 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984). Special Damage for defamation purposes are unique from ordinary rule civil procedure 9(g) special damage; in defamation cases “special damage must consist of some provable material loss to the plaintiff as a *result of the injury to his reputation.*” *Id.* at 205; *citing, Mell v. Edge*, 68 Ga. App. 314, 22 S.E. (2d) 738 (1942); *conversely*, Rule 9(g), SCRPC (“When items of special damage are claimed, they shall be specifically stated”).

CONCLUSION

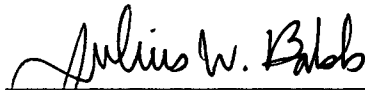
For the foregoing reasons, Appellant respectfully asks this Honorable Court to Reverse the holding of the Circuit Court and Remand this case for trial.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully Submitted,

J. LEWIS CROMER & ASSOCIATES, LLC



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January 27, 2014

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM FAIRFIELD COUNTY  
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

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Case No. 2012-CP-20-099  
Appellate Case No. 2013-001257

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David Michael Hollis.....Appellant,

v.

Fairfield County, Philip Hinely, Davis Anderson and  
David Brown, in their individual capacities.....Respondents.

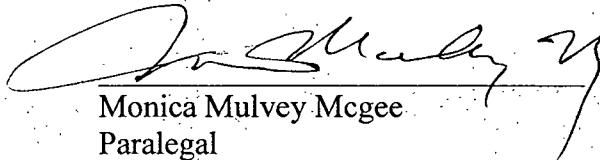
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**PROOF OF SERVICE**

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I certify that I, the undersigned employee of J. Lewis Cromer & Associates, L.L.C., did cause to have served copies of the Supplemental Record on Appeal, Appellant's Final Brief & Appellant's Reply Brief on Respondents Fairfield County, Philip Hinely, Davis Anderson and David Brown by hand delivering a copy of it, on January 30, 2014, addressed to their attorney of record, Derwood L. Aydlette, III, with the law firm of Gignilliat, Savitz & Bettis, L.L.P., 900 Elmwood Avenue, Suite 100, Columbia, South Carolina 29201.

January 30, 2014



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