THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

RECEIVED
OCT 08 2014
SC Court of Appeals

Case No 2011-CP-42-2538
Appellate Case No. 2014-000902

Gary G. Harris, ... Appellant,

v

Tietex International, Ltd., ... Respondent

INITIAL BRIEF OF RESPONDENT

Fred W. Suggs, Jr (S.C Bar No. 5423)
Lucas J. Asper (S.C. Bar No. 77902)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street, Suite 500
Greenville, South Carolina 29601
(864) 271-1300 (telephone)
(864) 235-4754 (facsimile)
fred.suggs@ogletreedeakins.com
lucas.asper@ogletreedeakins.com

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Table of Authorities iv

Statement of Issues on Appeal 1

Statement of the Case 1

A Harris Files Initial Lawsuit against Tietex in 2008 1

B. Federal Court Grants Summary Judgment to Tietex in First Action 2

C. Harris Files Present Action against Tietex in 2011 2

D. Like the Federal Court, the South Carolina Circuit Court Grants Summary Judgment to Tietex 4

E. Harris' Appeal to this Court 5

Facts 5

A. All Relevant Facts were Fully and Finally Litigated in the First Action, and the Federal Court's Findings of Fact are Entitled to Preclusive and Binding Effect 5

B. Harris' Work Hours were Erratic and His Work Practices Unsafe 6

C. Tietex Accommodated Harris' Unsubstantiated Complaint about Mold .. 8

D. Tietex Documented Harris' Work-Related Issues 9

1. Tietex Attempted to Accommodate Harris' Complaints of being Overwhelmed 9
2. Tietex Allowed Harris to do His Work Outside the Lab 10
3. Harris Complained about His Environmental Reporting Duties ... 10
4. Harris Disregarded the Chain of Command. 11
5. Wallace's March 5, 2007 Memorandum Accurately Recorded Harris' Performance-Related Deficiencies 11
6. Wallace's June 18, 2007 Memorandum Accurately Recorded Harris' Project Failures 12

a. Harris' Poor Performance on the C237 Project .... .12

b. Harris' Poor Performance on the T602 Project...... 13

7. Harris' Performance Deteriorated and He Used Poor Judgment, Ultimately Leading to the Termination of His Employment.........14

a. Harris Continued to Work Erratically and Ignore Wallace's Directives 14

b. Harris Concealed His Failure to Meet with a Customer. ..14

c. Harris Lied about his Whereabouts 15

d. Tietex Terminated Harris' Employment for Unsatisfactory Performance....................... 17

Arguments 18

I STANDARD OF REVIEW 18

II. SUMMARY JUDGMENT WAS PROPER BASED ON THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT REGARDING THE SUBSTANTIAL TRUTH AND PRIVILEGED NATURE OF ALL ALLEGEDLY DEFAMATORY STATEMENTS AND THE ABSENCE OF ANY ACTUAL MALICE 20

A. Each of the Allegedly Defamatory Written Communications was Substantially True and Gave Rise to a Qualified Privilege, and Harris Presented No Credible Evidence to Overcome the Privilege 23

1. February 9, 2007 E-Mail from Wallace to Wilson 23

2. March 5, 2007 Memorandum from Wallace to Wilson.................25

3. June 18, 2007 Memorandum from Wallace to Harris......... .... .26

4. July 18, 2007 Memorandum from Wallace to Harris. 27

B. Public Policy Mandates the Affirmation of Summary Judgment in Favor of Tietex on Each of the Four Internal, Performance-Related Communications that Harris Alleges to be Defamatory. 28

C. Harris Failed to Present Any Credible Evidence to Support his Three Unclear and Ill-Defined Allegations of Non-Written Defamation 32

1. "Rumors in the Industry" 33

2. Harris' July 2007 Suspension with Full Pay 33

3. Harris' February 2007 Ban from the Laboratory...............................34

III. SUMMARY JUDGMENT WAS PROPER UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL BASED ON THE FINAL, BINDING, AND CONCLUSIVE FINDINGS IN A PRIOR LAWSUIT BETWEEN THE SAME PARTIES INVOLVING THE SAME FACTUAL ALLEGATIONS... ..35

IV. SUMMARY JUDGMENT WAS PROPER UNDER THE DOCTRINE OF *RES JUDICATA* AND THE STATUTE OF LIMITATIONS WITH RESPECT TO THE DEFAMATION CLAIMS HARRIS COULD HAVE RAISED BUT DID NOT RAISE IN HIS PRIOR LAWSUIT AGAINST TIETEX 39

Conclusion 41

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).. 18

Baughman v. AT&T, 306 S C. 101, 410 S.E.2d 537 (1991) 19, 29

Bell v. Bank of Abbeville, 211 S.C. 167, 44 S.E.2d 328 (1947).... .... 21, 22

Carolina Renewal, Inc v S.C. Dep't of Transp., 385 S.C. 550,
684 S.E.2d 779 (Ct. App 2009)......... .... .35, 38

Cox & Floyd Grading, Inc. v. Kajima ConsDep. Svcs., Inc ,
356 S.C. 512, 589 S.E.2d 789 (Ct App. 2003)...................... 20

D.R. Horton, Inc. v Wescott Land Co , 398 S.C. 528,
730 S.E.2d 340 (Ct. App. 2012)........... . ...18, 19

Fountain v. First Reliance Bank, 398 S.C 434, 730 S.E.2d 305 (2012)....... .20, 21, 23, 32

George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001) 22

Haulbrooks v. Overton, 295 S.C. 380, 368 S.E.2d 676 (Ct. App. 1988)... .. .. 20, 22

Jones v City of Folly Beach, 326 S.C. 360, 483 S.E 2d 770 (Ct. App. 1997)..... .... .40

McBride v School Dist. of Greenville County, 389 S.C. 546,
698 S.E.2d 845 (Ct. App. 2010) .... .22

Murray v. Holnam, Inc , 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001). 30, 31, 32

Pye v. Aycock, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997) 6, 37, 38, 41

Russell v Wachovia Bank, N.A , 353 S.C. 208, 578 S E.2d 329 (2003)...... 19

Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 734 S.E.2d 161 (2012) 19

Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S C 469,
514 S.E.2d 126 (1999) 21

Wright v. Sparrow, 298 S.C. 469, 381 S.E.2d 503 (Ct. App. 1989)..... ... . .21, 22

STATUTES

28 U.S.C. § 1367 40

S.C. Code Ann. § 15-3-550......... 40

Rule 56, SCRCP.......... 18

OTHER AUTHORITIES

Restatement (Second) of Torts § 581A... 20

Restatement (Second) or Torts § 619, cmt. b ... .21, 22, 32

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL PROPERLY GRANTED SUMMARY JUDGMENT BASED ON THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT REGARDING THE SUBSTANTIAL TRUTH AND PRIVILEGED NATURE OF ALL ALLEGEDLY DEFAMATORY STATEMENTS AND THE ABSENCE OF ANY ACTUAL MALICE?

2. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL BASED ON THE FINAL, BINDING, AND CONCLUSIVE FINDINGS IN A PRIOR LAWSUIT BETWEEN THE SAME PARTIES INVOLVING THE SAME FACTUAL ALLEGATIONS?

3 WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT UNDER THE DOCTRINE OF *RES JUDICATA* AND THE STATUTE OF LIMITATIONS WITH RESPECT TO THE DEFAMATION CLAIMS HARRIS COULD HAVE RAISED BUT DID NOT RAISE IN HIS PRIOR LAWSUIT AGAINST TIETEX?

STATEMENT OF THE CASE

A Harris Files Initial Lawsuit against Tietex in 2008.

Appellant Gary G. Harris ("Harris"), a former employee of Appellee Tietex International, Ltd. ("Tietex"), originally filed a lawsuit against Tietex in the Spartanburg County Court of Common Pleas on August 15, 2008—C A. No. 2008-CP-42-4316 ("First Action"). Harris' First Action included a claim for violation of the Age Discrimination in Employment Act ("ADEA"), and various state law claims.[1] All of Harris's claims in the First Action arose from allegations regarding his employment with Tietex and his separation therefrom.

[1] Harris' state law claims in the First Action included (1) breach of contract, (2) breach of contract accompanied by a fraudulent act, and (3) defamation (consisting of four separate allegations of defamation).

B. Federal Court Grants Summary Judgment to Tietex in First Action.

Tietex removed the First Action to the United States District Court for the District of South Carolina ("Federal Court") based on Harris's ADEA claim After engaging in discovery in the First Action, Tietex moved for summary judgment on all of Harris' claims. On October 28, 2010, the Federal Court granted Tietex's motion on Harris' ADEA claims but chose not to address Harris' remaining state law claims, dismissing them without prejudice. The Fourth Circuit Court of Appeals affirmed the Federal Court's decision, and later denied Harris' petition for rehearing.

C. Harris Files Present Action against Tietex in 2011.

Harris filed a *pro se* Complaint in the action now on appeal ("Second Action") on October 21, 2011. Harris' *pro se* Complaint asserted claims against Tietex for defamation and unspecified discrimination, relying on the same general facts alleged in the First Action.

On March 8, 2012, Harris' newly-employed counsel entered his appearance. On August 10, 2012, the Court granted Harris' motion to amend his Complaint. On September 5, 2012, Harris filed his Amended Complaint in the Second Action alleging identical claims to those alleged in the First Action (except his ADEA claim) and adding a new claim for intentional infliction of emotional distress ("outrage") based on the same facts.[2] As in the First Action, all of Harris' claims in the Second Action arose from allegations regarding his employment with Tietex and his separation therefrom

[2] Harris' *pro se* Complaint also added two new defamation claims that were not included in the First Action, and Harris identified a third new defamation claim during his deposition in the Second Action

On May 3, 2013, Tietex moved for summary judgment in the Second Action on the grounds that (1) Tietex was entitled to summary judgment on the merits because Harris failed to identify a genuine dispute of material fact as to any of his claims; (2) Harris' claims were barred as a matter of law based on the conclusive findings by the Federal Court in the First Action; and (3) Harris' outrage and three new defamation claims were barred by the statutes of limitation and the doctrine of *res judicata*. Harris opposed Tietex's motion, arguing in his brief and during the hearing that summary judgment was premature based on his inability to fully conduct discovery at that time.

On September 23, 2013, the lower court denied Tietex's motion for summary judgment. The September 2013 Order focused on Tietex's collateral estoppel argument but did not rule on the merits or address Tietex's arguments that Harris' outrage and new defamation claims were barred by the statute of limitations and *res judicata*. The September 2013 Order also permitted Harris to engage in additional discovery, specifically including the depositions of two Tietex executives.

Presumably, the lower court believed any ruling on the merits would be premature given the decision to allow Harris to engage in additional discovery—specifically including the depositions of Tietex executives Martin Wildeman and Reed Cunningham—which Harris' attorney insisted was necessary.[3] Notwithstanding Harris' reliance on his alleged need for additional discovery in arguing that summary judgment was premature, Harris failed to engage in <u>any</u> discovery after the September 2013 Order

[3] Harris' counsel argued during the hearing on Tietex's first motion for summary judgment: "It is clear that I have not had a full and fair opportunity to complete discovery I would simply argue that just on that record, the – the fact that – the fact that – that we have not been able to complete discovery, should preclude summary judgment on – any factual issue in this case." (Transcript, Aug. 30, 2013 Hearing, at 16.)

other than a site visit to Tietex's facility, which he was extremely dilatory in conducting. While Harris noticed the depositions of Wildeman and Cunningham to take place on January 16-17, 2014, he suddenly and voluntarily cancelled those depositions on January 14, explaining only that he was "going in a different direction"[4]

D. Like the Federal Court, the South Carolina Circuit Court Grants Summary Judgment to Tietex.

Harris' total lack of discovery after the September 2013 Order made clear that there were no additional facts on which Harris intended to rely in support of his claims. Accordingly, Tietex filed its Renewed Motion for Summary Judgment and supporting memorandum on January 27, 2014. On February 6, 2014, the lower court heard Tietex's Renewed Motion for Summary Judgment. On the record during the February 6, 2014 hearing, Harris voluntarily withdrew his claims for (1) breach of contract, (2) breach of contract accompanied by fraudulent act, and (3) outrage, leaving only his defamation claims before the lower court.

After considering the record, argument of counsel, memoranda, and submissions made, the lower court issued a Form 4 Order on February 18, 2014, granting Tietex's Renewed Motion for Summary Judgment and instructing Tietex's counsel to prepare a formal order for the lower court's consideration. The lower court entered its formal Order granting summary judgment on March 20, 2014.

---

[4] Rather than reciting the entire timeline demonstrating Harris' lack of diligence in conducting discovery, Tietex invites the Court's attention to Tietex's Memorandum Opposing Plaintiff's Second Motion for Continuance (Def.'s Mem. Opposing Pl.'s Second Mot. for Continuance) While much of Harris' brief focuses on the alleged "roadblocks" Tietex created in Harris' efforts to conduct discovery, he conveniently ignores his own dilatory actions in obtaining and participating in discovery. Additionally, given that summary judgment was granted during pre-trial hearings in the lower court on the literal eve of trial, a remand of this action would not result in Harris having the opportunity to conduct any additional discovery—it would result in the case being placed at the top of the trial roster and the parties proceeding to trial

In its March 20 Order, the lower court indicated that it was granting summary judgment based on all of the following: (1) the allegedly defamatory written statements on which Harris relied—the only statements he was able to identify with any degree of particularity—were substantially true based on Harris' admissions and the Federal Court's conclusive findings; (2) the allegedly defamatory written statements were all subject to a qualified privilege as a matter of law, and Harris failed to present any evidence that would permit a jury to conclude that Tietex had abused that privilege; (3) the doctrine of collateral estoppel precluded Harris' claims in their entirety, and (4) the statute of limitations and the doctrine of *res judicata* precluded Harris' three defamation claims that he first asserted in the Second Action.

E. Harris' Appeal to this Court

On April 15, 2014, Harris filed his Notice of Appeal. On May 9, 2014, Harris received the transcript from the February 6 hearing, creating a June 9, 2014 deadline to file and serve his initial brief and designation of matter to be included in the record on appeal under Rules 208 and 209, SCACR. Instead of complying with this deadline, Harris filed a motion to extend time on June 13, 2014—four days after his deadline had already passed. On June 20, 2014, Tietex filed and served its Motion to Dismiss Harris' appeal based on his failure to comply with the Appellate Court Rules. On August 6, 2014, the Court denied Tietex's Motion to Dismiss and ordered that briefing proceed.

FACTS

A. All Relevant Facts were Fully and Finally Litigated in the First Action, and the Federal Court's Findings of Fact are Entitled to Preclusive and Binding Effect.

The below statement of facts is essentially identical to (1) the Federal Court's findings of fact in the First Action, which the Federal Court based almost exclusively on

Harris' own testimony and described in the manner most favorable to Harris given all evidence in the record (these findings are entitled to preclusive and binding effect under the doctrine of collateral estoppel, as described below in Section II of the Argument); and (2) the lower court's findings of undisputed fact in the Second Action now on appeal, which, like the Federal Court's factual findings, relied almost exclusively on Harris' own testimony

B. Harris' Work Hours were Erratic and His Work Practices Unsafe

Harris began working at Tietex on July 13, 1994, as a Senior Research Chemist. (Mag. Order at 1[5]; Harris Dep 1 at 58-60, Exs 6-7; Harris Dep. 2 at 140, Ex. 7.) Harris' normal working hours were 8:00 a m to 5 00 p.m , but he claims he was often at work by 6:00 or 6:30 a.m. and stayed later than 5:00 p.m. (Mag. Order at 2; Harris Dep. 1 at 74-75) On occasion, Harris stayed until 8 00, 9:00, or 10.00 at night. (Mag. Order at 2; Harris Dep. 1 at 77)

Harris admits that he was told by his supervisor, Wade Wallace, not to work in the plant for safety reasons when it was not operating. (Dist. Judge Order at 5; Mag Order at 3-4, 17; Harris Dep. 1 at 124) Wallace told Harris he could work in the plant anytime the plant was operational, and he could come into the facility to do office work when the plant was down. (Mag. Order at 3; Harris Dep 1 at 123-24.) Wallace told

[5] The Order and Report of Magistrate Judge Kevin F. McDonald ("Magistrate Order") and the Opinion and Order of District Judge J. Michelle Childs ("District Judge Order") in the First Action are included in the Record on Appeal for ease of reference. In the District Judge Order, Judge Childs expressly adopted the Magistrate Order, in its entirety. (Dist. Judge Order at 1.) Tietex provides parallel cites throughout this statement of facts to the relevant pages of the Federal Court Orders to demonstrate that <u>all</u> of these facts were actually litigated and conclusively determined in the First Action. Under the doctrine of collateral estoppel, these facts are entitled to preclusive and binding effect. *See Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997).

Harris not to operate any lab equipment in a lab setting when the plant was down and no other employees were present. (Mag. Order at 3-4.) Wallace told Harris that if he had to do lab work after regular business hours he should do it on weekday evenings when the second shift was operating. (*Id* at 4) Harris admitted he ignored these directives because his own opinion was it was safe for him to work with chemicals when the plant was not operating. (Dist. Judge Order at 5; Harris Dep. 1 at 75-76, 124.) While Harris' erratic hours had been acceptable to his previous supervisor, they were not acceptable to Wallace. (Dist. Judge Order at 5; Harris Dep. 1 at 125.) Harris admits this was a new directive under Wallace's supervision. (*Id.*) Harris admits he was the only employee who did lab work after hours. (Mag Order at 2; Harris Dep 1 at 126-27.)

There are four sections in the technical building at Tietex: an office area, wet lab, physical testing; and an extension of the wet lab for chemists' work, with a burn room. (Harris Dep. 1 at 86.) Harris' former supervisor, Jake Butts, had difficulty keeping track of Harris due to Harris' erratic work hours, so Butts relocated his office from the plant to the office areas of the technical building (the lab—where Harris' office was situated) in order to more closely supervise Harris (Mag. Order at 2; Harris Dep. 1 at 83, 86.)

Soon after Butts relocated his office, Harris claimed he noticed a mold smell and had symptoms of congestion, sinus headache, and flu. (Mag. Order at 2, Harris Dep. 1 at 87.) Harris does not recall anyone else complaining about the alleged smell (Harris Dep. 1 at 88.) Harris claimed that the smell originated from Butts' clothing and the furniture Butts moved into his relocated office. (Mag. Order at 2, Harris Dep. 1 at 93-94.) After some time and several visits to doctors, Harris contended that the smell was the

source of his illness due to a mold allergy (Mag. Order at 2; Harris Dep. 1 at 88-89.) Harris reported his belief to Butts. (*Id.*)

C. Tietex Accommodated Harris' Unsubstantiated Complaint about Mold.

Based on Harris' allegation that mold in the lab was making him ill, Tietex hired a hygienist to perform testing. (Mag Order at 2; Harris Dep. 1 at 89.) The hygienist reported there was no mold contamination in the lab and the air in the lab was cleaner than the outside air. (Mag. Order at 2; Harris Dep. 1 at 91) Although Harris claims the testing was flawed, he admits he has no evidence of that. (Mag. Order at 2; Harris Dep. 1 at 89-92.) Harris does not know who performed the testing or what kind of testing was performed (*Id*) Harris admits he has no first-hand knowledge of how the testing was conducted. (Harris Dep 1 at 90-91) Harris' only specific complaint about the testing was that it tested all four sections of the lab rather than focusing solely on the office area. (Mag. Order at 2; Harris Dep. 1 at 92.)

At some time in late 2006, Harris established a second office in the main plant. (Mag. Order at 2, Harris Dep. 1 at 87-88.) Harris continued to do work in the lab until February 2007. (Mag. Order at 2; Harris Dep. 1 at 87.) Effective February 1, 2007, Harris was removed from Butts' supervision and placed under the supervision of Wallace. (Mag. Order at 3.) Tietex made this transition in part due to Harris' continued complaints about the odor associated with Butts. (*Id.*; Harris Dep. 1 at 101.)

Between February 2 and 5, Harris and Wallace discussed by e-mail whether Harris would be able to continue working in the lab because of Harris' continued complaints about the mold smell. (Mag Order at 3; Harris Dep. 1 at 94, Ex. 12.) Wallace agreed that Tietex would do whatever was necessary to shield Harris from any

further exposure to an environment that might negatively impact his health. (Mag. Order at 3, Harris Dep. 1 at 95, Ex. 12.) Wallace instructed Harris to wear a mask when he worked in the lab. (Mag. Order at 3, Harris Dep 1 at Ex. 12.) However, Harris decided the mask would not give him enough protection. (*Id.*) Wallace then told Harris not to enter the lab under any circumstances. (Mag. Order at 3; Harris Dep 1 at 101, Ex. 12.) Thereafter, Harris asked if he could work in the lab if he signed a waiver. (Mag. Order at 3; Harris Dep 1 at 122-23, Ex. 17.) Tietex rejected the waiver stating that a waiver was "unacceptable from an HR/liability perspective since [Tietex] would be allowing [Harris] to come in contact with an environment that might negatively affect [his] health." (*Id.*) Wallace's e-mail communications with Harris made clear that Tietex was more concerned about Harris' health than its own liability. (Harris Dep. 1 at Ex 12.)

Tietex purchased equipment to accommodate Harris' needs outside of the lab (Mag. Order at 3; Harris Dep. 1 at 112-13, Ex 14.) Tietex provided Harris with an alternative work area because Tietex wanted to protect Harris' health. (Harris Dep. 1 at Ex. 12.) Harris has no contradictory evidence. (*Id.* at 123.)

D. Tietex Documented Harris' Work-Related Issues.

1 *Tietex Attempted to Accommodate Harris' Complaints of being Overwhelmed.*

On February 7, 2007, Harris told Wallace he was overwhelmed by personal and emotional problems that had occurred in his personal life over the past year, and he was having difficulty functioning. (Mag Order at 4; Harris Dep. 1 at Ex 13.) Harris admits (1) his wife was ill during this time period, (Mag. Order at 4, Harris Dep. 1 at 106), (2) dealing with his wife's illness left him stressed with major sleep disturbances, (Mag. Order at 4; Harris Dep. 1 at 106-07, 111, Exs. 14, 44); and (3) he was a "wreck" because

of his wife's illness (Mag Order at 4; Harris Dep 1 at 107 & Ex 44). Wallace told Harris that Tietex "would support him if he felt he needed to utilize EAP," but Harris stated that was not necessary. (Mag. Order at 4; Harris Dep. 1 at 111, Ex 13.)

2. *Tietex Allowed Harris to do His Work Outside the Lab.*

On February 22, 2007, Harris left voice mail messages for Wallace and Tietex's Owner, Martin Wildeman, at 3:00 a.m. complaining about his inability to sleep and about unspecified work-related issues. (Mag. Order at 4; Harris Dep. 1 at 81, Ex. 14.) Harris expressed concern about being moved from the lab and that he was "still not set up to easily do his bench work." (Mag. Order at 4; Harris Dep 1 at Ex. 14.) Harris asked for a lab pad coater and a vented hood. (*Id.*) Wallace reiterated his commitment to obtaining the necessary equipment for Harris, which would take time. (Harris Dep. 1 at 111-13 & Ex 14.) Wallace stated that it would take time to locate, acquire, and install the equipment; however, Harris could use the equipment in the beam/dye area, and/or coordinate to use Robert Culbreth—a chemical technician—to perform work for him in the lab in the meantime (Mag. Order at 4; Harris Dep. 1 at 111-13, Ex. 14.) Harris believes Tietex was motivated to keep him out of the laboratory to avoid liability for any health problems he might experience rather than out of a real concern for his health. (Mag. Order at 5; Harris Dep. 1 at 123.) Harris never asserted Tietex was motivated to keep him out of the lab because of any unlawful reason. (*Id.*)

3. *Harris Complained about His Environmental Reporting Duties.*

Harris admits he complained about being required to stay involved with environmental reporting and stated he was concerned about completing an environmental report that was due on March 1, given his other projects. (Mag. Order at 5, Harris Dep 1

at 113, Ex. 15.) Wallace saw no reason that Harris' projects would interfere with his ability to get the environmental report done on time and made this clear to Harris. (*Id.*) Harris admits it was reasonable for Wallace to expect him to complete the environmental report on time. (*Id.*)

4 *Harris Disregarded the Chain of Command.*

Wallace also asked Harris to come to him directly with issues before going to Wildeman. (Mag. Order at 5; Harris Dep. 1 at Ex. 14.) Harris admits that, at times, he went directly to Wildeman rather than using the chain of command. (Harris Dep. 1 at 116.) Harris admits it was inappropriate for him to complain to Wildeman about having to do the environmental reporting. (*Id* at 115.)

5. *Wallace's March 5, 2007 Memorandum Accurately Recorded Harris' Performance-Related Deficiencies.*

On March 5, 2007, Wallace discussed several issues with Harris regarding his performance and documented the discussion at Harris' request in a memorandum to Human Resources Director David Wilson, with a copy to Vice President of Manufacturing Mark Isbell and Harris. (Mag Order at 5; Harris Dep. 1 at 117-18, Ex. 16.) Wallace noted that Harris made emotional and overly vocal accusations and statements without supporting research or data, was not honoring the chain of command, harbored grudges over past grievances toward management in general, and complained about ownership of environmental reporting duties. (*Id.*) The memorandum concluded with the statement, "As we discussed these issues are not sustainable and it is mandatory that Harris make significant progress towards resolving these issues within the next 30 days." (Mag Order at 5; Harris Dep. 1 at 120-21, Ex. 16.)

At the time, Harris did not protest any of the points in the March 5, 2007, memorandum or claim that Wallace's observations were not true. (Harris Dep. 1 at 122) Harris admits he was experiencing emotional stress (*id.* at 106-07, 111 & Exs. 14, 44), circumvented Wallace by going directly to Wildeman (*id.* at 116), and complained about environmental reporting tasks (*id.* at 113) Harris does not deny he harbored grudges, and admits he had unresolved issues that existed before he began reporting to Wallace and had discussed those issues with Wallace. (*Id.* at 119-20)

6. *Wallace's June 18, 2007 Memorandum Accurately Recorded Harris' Project Failures*

On June 18, 2007, Wallace had another discussion with Harris regarding his subpar performance. (Mag. Order at 5) Wallace documented the discussion in a memorandum to Harris, with a copy to Wilson and Isbell. (*Id* at 5-6; Harris Dep. 1 at 128, Ex. 18.) The discussion focused on two projects for which Harris was responsible. (Mag. Order at 6; Harris Dep. 1 at 130, Ex. 18.) The first was the development and qualification of a Tietex coating compound ("C237 Project"). (Mag. Order at 6; Harris Dep. 1 at 129, Ex. 18.) The second was the development of a finish formula and process ("T602 Project"). (Mag. Order at 6; Harris Dep. 1 at 129-30.)

a Harris' Poor Performance on the C237 Project.

Harris had been working on the C237 Project for about six months. (Mag Order at 6, Dist Judge Order at 4; Harris Dep. 1 at 131-32, Ex. 18.) Harris had predicted the C237 Project would result in significant cost savings for Tietex. (*Id.*) Harris claimed he had a successful trial before he began reporting to Wallace. (*Id.*) Despite Harris' characterization of the compound he created as a success, it was unacceptable to Tietex because it was much more complicated to produce commercially than Harris had initially

promised. (Mag. Order at 6; Dist. Judge Order at 4; Harris Dep. 1 at Ex. 16.) In February, Wallace began working separately on a parallel C237 Project because it appeared Harris would fail to achieve the cost savings he had predicted. (Mag. Order at 6; Harris Dep. 1 at 134, Exs. 16, 18.)

b. Harris' Poor Performance on the T602 Project

Because of the expense, a plant production trial is only done if laboratory production is successful. (Mag Order at 6.) Harris told Wallace the lab samples for the T602 project were promising, and Harris recommended a production trial (*Id*; Harris Dep. 1 at 135.) According to Harris, the first plant production trial showed mixed results with some samples that were "not good," but others that were "comparable," depending on the amount of finish. (Mag. Order at 6; Harris Dep. 1 at 136.) However, Harris told Wallace that, based on the results, another plant production trial was warranted. (Mag. Order at 6; Harris Dep. 1 at 137, Ex. 18.) On Harris' recommendation, a second plant production trial was performed, which was unsuccessful. (Mag. Order at 6, Harris Dep. 1 at 137, 295, Ex. 18.) A third trial was similarly unsuccessful. (Mag. Order at 6, Harris Dep. 1 at 137-38, 295, Ex. 18.) When the second and third trials failed, Wallace reviewed the results of the first plant production trial himself. (Mag Order at 6; Harris Dep. 1 at Ex. 18.) Wallace saw "that the results of the first trial had not been as [Harris] portrayed them, so the second and third trials were unwarranted based on the results of the first." (Mag. Order at 6-7, Harris Dep. 1 at Ex. 18.)

Wallace's June 18, 2007 memorandum cited Harris for his poor analytical practices and instructed him to improve his performance within 30 days (Mag. Order at

7; Harris Dep 1 at 141, Ex. 18.) Harris considered this his final written warning. (Mag Order at 7; Harris Dep 1 at 139, Ex. 18.)

7 *Harris' Performance Deteriorated and He Used Poor Judgment, Ultimately Leading to the Termination of His Employment*

a. Harris Continued to Work Erratically and Ignore Wallace's Directives

Despite being told and understanding that his job was in jeopardy if his performance failed to improve, Harris made insufficient effort to complete the C237 project (Mag. Order at 7; Harris Dep. 1 at Ex. 19.) Instead, Harris began taking multiple days of vacation immediately after being given the warning on June 18. (Mag. Order at 7; Harris Dep. 1 at 145-48.) These vacation days were frequently taken on short notice (Mag. Order at 7; Harris Dep. 1 at 145-46, Ex. 20.) Sometimes, Harris waited until the day before to notify Wallace. (*Id.*) Other than the environmental reporting, Wallace did not see that Harris improved on any of the issues cited in the March 5, 2007 memorandum (Mag. Order at 7; Harris Dep. 1 at Ex. 19) Gate records and management observation showed that Harris continued to ignore the directive not to work in the chemical lab areas at nights or on the weekends. (Mag. Order at 7; Harris Dep. 1 at Ex. 19.) The same records showed inconsistent work hours and erratic patterns of entry and exit to and from the facility. (*Id*) Harris' co-workers complained that he did not return calls or e-mails consistently, disrupting their work patterns. (*Id.*)

b. Harris Concealed His Failure to Meet with a Customer.

Harris was scheduled to fly to Indiana on June 14 to visit a customer and return on June 15. (Mag Order at 7; Harris Dep. 1 at 148-49, Ex. 19.) After flying the first leg of his trip, Harris turned around and came home because he had a headache. (*Id.*) Harris

never told Wallace he had not met with the customer in Indiana (Mag. Order at 7; Harris Dep. 1 at Ex. 19.)

c. Harris Lied about his Whereabouts.

On the evening of Monday, July 2, after work, Harris left a voicemail message for Wallace telling him he had an ant infestation at his house. (Mag. Order at 7, Harris Dep. 1 at 151-52.) Harris said he would take care of the ants first thing the following morning and then go to Hexion, a chemical facility, to work on a project. *(Id.)* Since Harris left this message after work hours, Wallace did not hear the message until the morning of Tuesday, July 3, 2007. (Mag. Order at 7-8; Harris Dep. 1 at 151-52, Ex. 19.)

Harris purchased pesticide chemicals at Lowe's on the morning of July 3, at approximately 7:30 a.m. (Harris Dep. 1 at 251.) Harris called Wallace and left a voicemail message around 9 00 a.m., saying he had resolved the ant problem and was going to work at Hexion. (Mag Order at 8) Harris did not arrive at Hexion until 1:30 p m (*Id.*, Harris Dep. 1 at 154, Ex 21) Harris could not enter Hexion because he could not contact anyone he knew there to gain entry. (Mag. Order at 8, Harris Dep. 1 at 152-53, 155-56.) Harris left without performing any work. (Harris Dep. 1 at 155-56.) There are no witnesses to establish how long Harris was allegedly at Hexion (*Id.* at 157.) Harris is vague about how long he was at Hexion trying to get in Harris estimates he was there between thirty and ninety minutes.[6] (Mag. Order at 8; Harris Dep. 1 at 157-58.)

[6] Harris previously testified to the South Carolina Employment Security Commission that he was at Hexion around thirty minutes (Harris Dep. 2 at 96-97.)

Harris claims that after leaving Hexion, he drove around for 30 to 45 minutes looking for Chemurgy, another chemical facility (Mag Order at 8; Harris Dep. 1 at 159-60.) When Harris located Chemurgy, no one was there, so he did not stay. (*Id.*)

Harris left a message for Hexion employee Pam Westmoreland, telling her that he could not get into the laboratory. (Mag. Ord. at 8.) Harris stated in his message that he needed a small sample of sulfuric acid, and he would return and pick it up. (*Id.*) Hexion employee George Henderson told Westmoreland that he would take the sample to [Harris] at Tietex on his way home. (*Id.*) Harris contends he told a Hexion employee to get the acid together so Harris could pick it up "at the guard house or something." (Harris Dep. 1 at 160.) Harris never accomplished this task (*Id*)

Harris did not call Wallace to tell him about being unable to get in at Hexion or about his intent to go to Chemurgy. (*Id.*) Harris admits it would have been reasonable for him to call Wallace to tell him his plans had changed. (Mag. Ord. at 8; Harris Dep. 1 at 165.) Harris understood he needed to let Wallace know his whereabouts, to let him know when he was away from the plant, and to keep his cell phone on so he could be reached. (Harris Dep. 1 at 117.) Harris acknowledges it was reasonable for his supervisor to expect to be informed of his whereabouts "at all times " (*Id.*)

During the afternoon of July 3, Henderson brought the sulfuric acid Harris needed to Tietex. (Mag Order at 8; Harris Dep 1 at 160.) Wallace was confused, as Harris was supposed to be at Hexion. Wallace called Henderson and asked if he had seen Harris that day. (Mag. Order at 8.) Henderson had not. (*Id*) Henderson said he had a voicemail from Harris saying he needed some sulfuric acid urgently because he was planning to do some work on July 4. (*Id.*) Wallace was troubled because Harris was not where he said

he would be and it appeared Harris planned to work with chemicals in the lab on a day the plant was to be closed. (*Id.*)

Harris admits Wallace had no idea what Harris was doing on July 3, or even if Harris was working. (Harris Dep 1 at 164-65.) Harris claims Wallace called him on his cell phone between 4.30 p.m and 5:00 p.m. and asked where he had been. (Mag. Order at 9; Harris Dep. 1 at 162) Harris told Wallace he had been at Hexion. (*Id.*) Wallace told Harris that Henderson had been to Tietex and said that Harris had not been at Hexion that day. (Mag. Order at 9.) Harris then admitted he had gone to Hexion, but had been unable to get in or find anyone, so he left. (*Id.*) Harris could not give Wallace an adequate explanation of his whereabouts for the day. (*Id.*; Harris Dep. 1 at 158-59, Ex. 19.)

Wallace told Harris he was suspended until Wallace returned from vacation. (Mag Order at 9, Harris Dep. 1 at 165) During the phone call, Harris and Wallace were disconnected, and Wallace could not reach Harris again by telephone. (Mag. Order at 9, Harris Dep. 1 at 165-66) Wallace talked to Wilson about what transpired and left a voicemail message for Harris reiterating that he was suspended with pay and should not return to work until contacted by Tietex (Mag. Order at 9.)

d. Tietex Terminated Harris' Employment for Unsatisfactory Performance.

Wallace conducted an investigation of the events of July 3 when he returned from vacation. (*Id.*) Wallace could not verify Harris' whereabouts for most of the hours between 9:00 a m and 4.00 p.m. on July 3. (Harris Dep. 1 at Ex. 19.) Wallace recommended the termination of Harris' employment. (Mag. Order at 9.) The decision to terminate Harris' employment was made by Wallace, Wilson, Wildeman,

Cunningham, and Isbell. (*Id.*) Harris was told he was not being terminated for one specific deficiency, but for many shortcomings that "added up," including the issues Wallace had addressed with him in the March 5, 2007 memorandum. (*Id.*; Harris Dep. 1 at 142, Ex. 16.) These issues were also documented in a memorandum dated July 18, 2007. (Mag. Order at 9; Harris Dep 1 at Ex. 19.) Harris' employment was terminated on July 19, 2007. (Mag. Order at 9; Harris Dep. 1 at 167, Ex 22.) Harris admits his employment was terminated for unsatisfactory performance. (Harris Dep 1 at 167, Ex, 22.)

ARGUMENTS

I. <u>STANDARD OF REVIEW</u>

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *D.R. Horton, Inc. v Wescott Land Co*, 398 S.C. 528, 541, 730 S E.2d 340, 347 (Ct App 2012) (citations omitted), *aff'd as modified and vacated in part on other grounds*, Op. No 27450 (S.C. Sup. Ct. filed Oct. 1, 2014) (Shearouse Adv. Sh. No. 39 at 25). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U S 242, 248 (1986). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party" *D.R Horton*, 398 S.C. at 541, 730 S.E 2d at 347 "Appellate courts

apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP when reviewing a grant of summary judgment." *Id.* (citing *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S E.2d 766, 769 (2011)).

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E 2d 537, 545 (1991). The moving party may discharge this responsibility "by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim." *D.R. Horton*, 398 S.C. at 542, 730 S.E.2d at 347. "Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings." *Id.* (citing *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545; Rule 56(e), SCRCP) "[T]he nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial '" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (quoting *Baughman*, 306 S.C. at 107, 410 S E.2d at 545)

"Where a verdict is not '*reasonably possible* under the facts presented, summary judgment is proper.'" *Id.* (quoting *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000)) (emphasis in original). While a party opposing summary judgment "'is only required to submit a mere scintilla of evidence'" to withstand the motion, *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 250, 734 S.E 2d 161, 163 (2012) (quoting *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)), Harris failed to present <u>any</u> evidence demonstrating the presence of a genuine issue for trial.

Accordingly, "[t]his case illustrates well the utility of summary judgment in disposing of a meritless claim " *Cox & Floyd Grading, Inc. v. Kajima ConsDep. Svcs., Inc.*, 356 S.C. 512, 517, 589 S E 2d 789, 792 (Ct. App. 2003).

II. <u>SUMMARY JUDGMENT WAS PROPER BASED ON THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT REGARDING THE SUBSTANTIAL TRUTH AND PRIVILEGED NATURE OF ALL ALLEGEDLY DEFAMATORY STATEMENTS AND THE ABSENCE OF ANY ACTUAL MALICE</u>.

Harris was required to "prove the following four elements to state a claim for defamation: '(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; 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, 441, 730 S.E.2d 305, 309 (2012) (quoting *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C 444, 465, 629 S E.2d 653, 664 (2006)).

The truth of an alleged defamatory statement "is a complete defense to an action based on defamation and evidence establishing a statement is substantially true is a sufficient defense." *Haulbrooks v. Overton*, 295 S C. 380, 383, 368 S.E 2d 676, 679 (Ct. App. 1988) (citing *Ross v. Columbia Newspapers, Inc.*, 266 S.C 75, 221 S.E.2d 770 (1976)). "It is not necessary to establish the literal truth of the precise statement made." Restatement (Second) of Torts § 581A (1977).

"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." *Fountain*, 398 S.C at 444, 730 S.E.2d at 310 (citing *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999)). "'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.'" *Id.* (quoting *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 32, 315 (Ct. App. 1987)) "There is a basis for applying a qualified privilege to situations in which an employee's job performance is properly evaluated." *Wright v. Sparrow*, 298 S C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989); *see also Bell v. Bank of Abbeville*, 211 S.C. 167, 44 S.E.2d 328 (1947) (attaching a qualified privilege to communications between an employer and employee during the employer's inquiry into the employee's alleged misconduct)

"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*, 334 S.C. at 484-85, 514 S E 2d at 134. To prove actual malice, Harris must show that Tietex was activated by ill will, intending to causelessly and wantonly injure Harris, or that the statements were published with such recklessness as to show a conscious disregard for Harris' rights. *Id.* at 485, 514 S E 2d at 134.

Whether an occasion gives rise to a qualified privilege is a question of law for the court *Id.* "'While abuse of privilege is ordinarily an issue for the jury, . **in the absence of a controversy as to the facts** . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.'" *Fountain*, 398 S.C at 444, 730 S E.2d at 310 (quoting *Woodward v. S.C Farm Bureau Ins Co.*, 297 S.C. 29, 32-33, 292 S.E 2d 599, 601 (1981)) (emphasis in original); *see also* Restatement (Second) of

Torts § 619, cmt. b (noting that the court should decide if the privilege has been abused where only one conclusion can reasonably be drawn).

While Harris' Amended Complaint included only one cause of action for defamation, he identified seven separate allegedly defamatory statements or incidents on which he was attempting to rely.[7] (Harris Dep. 2 at 27-30.) Separate allegations of defamation are analyzed as independent claims. *See, e.g* , *George v. Fabri*, 345 S.C 440, 456-61, 548 S.E 2d 868, 876-79 (2001) (analyzing defamation allegations separately in affirming grant of summary judgment); *McBride v. School Dist of Greenville County*, 389 S.C. 546, 559-63, 698 S.E.2d 845, 851-54 (Ct. App. 2010) (analyzing alleged defamatory statements individually)

The first four of Harris' claims are internal Tietex e-mails and memoranda discussing Harris' work performance Interpreting the facts in the light most favorable to Harris, the lower court correctly concluded that each of these communications was substantially true. (March 20, 2014 Order at 15-19.) This is an absolute defense to defamation, and summary judgment was proper on these claims *Haulbrooks*, 295 S C. at 383, 368 S.E.2d at 679 (citing *Ross*, 266 S.C 75, 221 S.E.2d 770).

As internal, performance-related communications, the lower court rightly found as a matter of law that these four communications gave rise to a qualified privilege. (March 20, 2014 Order at 15-19); *see Wright*, 298 S.C at 474, 381 S.E.2d at 506, *Bell*, 211 S.C. 167, 44 S.E 2d 328. Harris did not produce <u>any</u> evidence to support a finding of

[7] Given that the only allegedly defamatory statements identified in Harris' initial brief are the three internal memoranda Wallace prepared in March, June, and July 2007 (Initial Brief of Appellant at 15), Harris has apparently abandoned his defamation claims related to the other four allegedly defamatory statements However, out of an abundance of caution, Tietex will address each of Harris' seven defamation claims.

actual malice or other abuse of the qualified privilege. Accordingly, the trial court properly ruled that the qualified privilege stood as a matter of law and that Tietex was entitled to summary judgment for this reason as well. (March 20, 2014 Order at 15-19); *see Fountain*, 398 S C at 444, 730 S E 2d at 310 (citing *Woodward*, 297 S.C. at 32-33, 292 S.E.2d at 601).

The statements on which Harris relied in support of his fifth, sixth, and seventh defamation claims are less clear. Given the ill-defined nature of the alleged defamatory statements and the lack of evidence to support these claims, the lower court concluded correctly that Harris failed to create a triable issue of fact.

Harris failed to produce evidence sufficient to overcome Tietex's motion for summary judgment on any of his seven defamation claims. Summary judgment was thus proper, and the decision of the lower court should be affirmed

A <u>Each of the Allegedly Defamatory Written Communications was Substantially True and Gave Rise to a Qualified Privilege, and Harris Presented No Credible Evidence to Overcome the Privilege</u>.

1. February 9, 2007 E-Mail from Wallace to Wilson.

Harris' first defamation claim was based on a February 9, 2007 e-mail that his supervisor, Wallace, sent to Tietex's Human Resources Director, Wilson, with a copy to Wallace's supervisor, Isbell.[8] (Harris Dep 2 at 27-28, Ex. 13) In this <u>internal e-mail between managerial employees</u> at Tietex, Wallace summarized a discussion he had with Harris two days earlier regarding personal and emotional problems Harris was experiencing that were impacting his performance. (Harris Dep. 2 at Ex. 13.) Harris

[8] This is one of the defamation claims that Harris has apparently abandoned, as he does not <u>in any way</u> mention it in his Initial Brief.

claims this e-mail was defamatory because he alleges that it was false and that it "showed a definite disregard for [his] stability mentally and that kind of thing " (*Id.* at 27.)

The trial court properly found this defamation claim insufficient because the content of the February 9 e-mail was substantially true. (March 20, 2014 Order at 16-17.) Harris admitted as much on more than one occasion: during his unemployment hearing (Harris Dep. 2 at 38), and during his deposition in the First Action (*id.* at 34-37). (*See also* Facts Section D.1. *supra.*)

The lower court was also correct in concluding that the February 9 e-mail gave rise to a qualified privilege and that Harris failed to present any evidence showing that Wallace acted with actual malice. (March 20, 2014 Order at 16-17.) In fact, Harris admitted he has no evidence of malice on Wallace's part, stating he did not think Wallace was trying to "get rid of him" and had no idea about Wallace's motivation. (Harris Dep. 1 at 196, 337-38.)

Harris' sole allegations of "malice" in the Amended Complaint surround a contention that Tietex engaged in a conspiratorial campaign to "put forward false and defamatory reasons for the termination of [Harris] to achieve ulterior objectives " (Am. Compl. at ¶¶ 14-15, 23-25.) Namely, the alleged objective "to replace [Harris] with a much younger woman with whom Mr. Isbell [allegedly] had an ongoing personal relationship." (*Id*) This is merely an attempt to re-litigate the issues underlying his age discrimination claim in the First Action. Among other findings in its Orders in the First Action, the Federal Court specifically concluded (1) Tietex did not discriminate against Harris based on his age (Dist Judge Order at 3-6; Mag Order at 14-17), (2) Harris was not meeting Tietex's legitimate expectations at the time of his termination (Dist. Judge

Order at 3-5; Mag. Order at 14), and (3) Tietex did not replace Harris with a younger employee (Dist Judge Order at 5-6; Mag. Order at 14-15) As such, all allegations in the Amended Complaint that could support a finding of malice are precluded under the doctrine of collateral estoppel.

The undisputed facts also demonstrate Wallace did not exceed the scope of the privilege. Wallace's e-mail recounted his conversation with Harris to Wallace's own supervisor and Tietex's Human Resources Manager, both of whom Harris admits "had legitimate business need to know about and discuss" the issues in the e-mail. (Harris Dep. 2 at 55-56.)

Even assuming the content of the February 9 e-mail was false and not protected by the qualified privilege, though the record establishes otherwise, the e-mail was not defamatory and did not cause Harris any damages. The e-mail evidences that Wallace (and Tietex) cared about Harris' well-being and offered to support him if he needed to utilize the employee assistance program (EAP). (Harris Dep. 1 at Ex. 13) Harris admits that he rejected the offer to utilize the EAP. (*Id.* at 111.) This is far from defamatory.

2. *March 5, 2007 Memorandum from Wallace to Wilson.*

Harris' second defamation claim focuses on the March 5, 2007 memorandum Wallace sent to Wilson with copies to Isbell and Harris. (Harris Dep. 2 at 28, Ex. 16.) Like the February 9 e-mail, this memorandum simply documented a performance-related discussion Wallace had with Harris. (*Id.* at Ex. 16) <u>Harris admits that Wallace generated the March 5 memorandum only because Harris requested that he do so</u> (*Id* at 60.)

As determined by the lower court, this memorandum is not actionable as defamation because Harris has admitted that each of the points Wallace made in the

memorandum was substantially true. (March 20, 2014 Order at 17-18 (citing Harris Dep 1 at 106-07, 111, 113, 116, 119-20), *see also* Facts Sections D.1. – D.5. *supra.*) As with the February 9 e-mail, the trial court ruled that this memorandum is entitled to a qualified privilege as a matter of law. Harris failed to overcome that privilege because he did not produce any evidence from which a jury could conclude that Wallace acted with actual malice in drafting the memorandum (particularly since Harris himself specifically requested that Wallace prepare it) or that Wallace exceeded the scope of the privilege.

3. June 18, 2007 Memorandum from Wallace to Harris.

Harris' third defamation claim related to the June 18, 2007 memorandum Wallace provided to Harris, with copies to Wilson and Isbell, which Harris has described as his "final written warning" (Harris Dep 2 at 28, Ex. 18.) The June 18 memorandum focuses exclusively on Harris' poor performance on the C237 and T602 projects (*Id*)

Harris' own testimony precluded a finding that the June 18 memorandum was false and defamatory, as he admits the statements in the memorandum are substantially true.[9] Harris admitted he had been working on the C237 project for six month and projected significant savings for Tietex. (Harris Dep. 1 at 131-32, Ex 18.) Although Harris claimed he had a successful trial before reporting to Wallace, he admitted the direction of the project shifted. (Harris Dep. 1 at 132) Tietex was convinced Harris' compound was too complicated to produce commercially, and, therefore, unacceptable. (Harris Dep. 1 at Ex. 18.)

[9] In the First Action, the Federal Court concluded that Harris failed to meet Tietex's legitimate expectations on the C237 and T602 projects for the very reasons summarized in Wallace's June 18 memorandum. (Dist. Judge Order at 3-5; Mag. Order at 5-7, 14.) Thus, beyond the undisputed facts showing the substantial truth of the June 18 memorandum, the doctrine of collateral estoppel prevents Harris from asserting in this action that he performed up to Tietex's legitimate expectations on the C237 and T602 projects.

Harris admitted that Wallace began working separately on a parallel C237 project in February. (Harris Dep 1 at 134, Ex. 18.) Harris admitted his compound was never used by Tietex. (Harris Dep. 1 at 134.) Harris admitted the first trial of the T602 project was not completely successful, with mixed results, but he recommended a production trial anyway. (Harris Dep 1 at 135-37, Ex. 18.) Harris admitted the two subsequent trials, run on his recommendation, were unsuccessful. (Harris Dep. 1 at 137-38, Ex. 18.) The June 18 memorandum is thus substantially true, according to Harris' own testimony.

As an internal memorandum addressing employee performance, the June 18 memorandum was subject to a qualified privilege Harris produced no evidence of actual malice or other abuse of the privilege, as Wallace prepared and distributed the June 18 memorandum to a small group of Tietex managers who needed to be aware of the issues discussed therein.

4. July 18, 2007 Memorandum from Wallace to Harris.

The final specific statement on which Harris relied in making his defamation claims is the July 18, 2007 memorandum from Wallace to Wilson (with a copy to Isbell) in which Wallace summarized Harris' performance issues and recommended the termination of Harris' employment. (Harris Dep. 2 at 28-29, Ex. 19.) The trial court correctly found this claim deficient for reasons similar to Harris' first three defamation claims. (March 20, 2014 Order at 19)

The summary of Harris' performance deficiencies in the July 18 memorandum is substantially true based on Harris' own testimony. (Harris Dep. 1 at 106-07, 111, 113, 116-17, 119-20, 131-32, 134-38, 145-49, 151-60, 165; *see also* Facts *supra.*) An internal memorandum from an employee's supervisor to Human Resources recommending the employee's termination based on poor performance and poor judgment is entitled to a

qualified privilege. There is no evidence in the record to support a finding that Wallace acted with actual malice in publishing this memorandum, as with the other internal, performance-related communications on which Harris relied. Harris acknowledged that Wallace did not exceed the scope of the privilege or act unreasonably in providing the memorandum to Wilson and Isbell, as he admits that both Wilson and Isbell "would have had a need to know" about the subject matter of the memorandum. (Harris Dep. 2 at 100.)

B. Public Policy Mandates the Affirmation of Summary Judgment in Favor of Tietex on Each of the Four Internal, Performance-Related Communications that Harris Alleges to be Defamatory.

A consideration of the implications of permitting Harris' defamation claims based on Tietex's internal, performance-related communications to survive summary judgment demonstrates that public policy mandates affirmation of the lower court's decision. Referencing the March, June, and July 2007 memoranda, Harris contends in his brief that "[t]he record contains at least three memoranda [allegedly] constituting malicious personal attacks outside any privilege and impugning Harris's professional standards and abilities." (Appellant's Initial Brief at 15.) However, Harris failed to identify any evidence in the record from which a jury could reasonably conclude that (1) these memoranda are not substantially true, or (2) Wallace acted with actual malice or otherwise exceeded the scope of the qualified privilege in preparing these memoranda.

Instead, Harris relies on vague, blanket assertions that he "testified concerning the lack of veracity in the content of these memos," and "gave unequivocal testimony that Wallace fabricated reports about him, lied about conversations that he purportedly had with him." (*Id.*) Examining the deposition pages to which Harris cites in support of these conclusory statements, all of which come from his own deposition, reveals there are

simply no "specific facts showing that there is a genuine issue for trial." *Baughman*, 306 S.C. at 107, 410 S E 2d at 545. Rather, these deposition excerpts contain nothing more than Harris' own subjective assessment of why the memoranda did not accurately describe his performance. That's all. Harris does not point to a single document, the testimony of any witness, or any other type of evidence to support his personal and subjective disagreements. This is far from sufficient.[10]

Harris' defamation claims based on these performance-related memoranda can be summarized as follows:

- Employer believes employee's performance to be deficient;
- Employer documents employee's performance deficiencies and keeps the documentation confidential by informing only those management personnel who employee admits would have a need to know about the subject matter;
- Employee disagrees with employer's assessment of his performance, but bases his disagreement solely on his own subjective evaluation; and
- Employee files defamation claims based on the documentation of his performance deficiencies.

To permit such an employee's defamation claims to survive summary judgment would open the floodgates to litigation by every employee who is displeased with his

[10] Harris' reliance on his own subjective opinion regarding the quality of his performance was one of the key deficiencies the Federal Court identified in the First Action "The plaintiff attempts to contradict the defendant's dissatisfaction with his performance by his subjective assessment of himself as a valuable, outstanding, and exemplary performer. However, the plaintiff's subjective view of his performance does not establish a *prima facie* case." (Mag. Order at 14.) As the Federal Court aptly recognized, "The perception of the employer is critical, "'not the self-assessment of the plaintiff.'" (*Id.* (quoting *Hawkins v PepsiCo*, 203 F.3d 274, 280 (4th Cir 2000)).)

employer's confidential performance-related critiques. <u>This is a prime example of precisely what the qualified privilege is intended to protect against</u>.

Significantly, the <u>only</u> case on which Harris relies in support of his assertion that "an employer could be liable to a former employee for an allegedly defamatory statement made by the employee's supervisor" (Appellant's Initial Brief at 15) is easily distinguishable from Harris' situation. *Murray v. Holnam, Inc.*, 344 S.C 129, 542 S.E.2d 743 (Ct. App. 2001), involved (1) allegations of clearly defamatory statements that the plaintiff had committed a crime that went well beyond performance evaluations and critiques, (2) far more egregious allegations that the qualified privilege had been abused, and (3) <u>actual evidence</u> beyond the plaintiff's subjective assessments and conclusions.

In *Murray*, the plaintiff/former employee was accused by a co-worker, whom the plaintiff had recently confronted regarding an unexplained absence, of stealing company property including fuel, oil, and antifreeze. *Id.* at 134-36, 542 S.E.2d at 745-46. The accusing co-worker falsely reported that a second co-worker had also witnessed the theft and assisted in compiling evidence of the theft *Id.* at 134, 542 S.E 2d at 745. At his deposition, the second co-worker denied observing the plaintiff steal anything and acknowledged that he did not assist in compiling evidence of the theft. *Id.*, 542 S.E.2d at 746. The employer investigated but did not discipline the plaintiff based on the inability to substantiate the co-worker's allegations. *Id* at 135, 542 S.E.2d at 746.

After his first attempt failed at getting the plaintiff in trouble for the alleged theft, the co-worker in *Murray* again accused the plaintiff of theft one year later based on the same alleged incident together with four additional incidents. *Id.* This time, the employer informed the plaintiff "he was suspended for stealing company property." *Id.*

In response to the renewed allegations, the plaintiff "produced receipts for the fuel he purchased," documentary evidence that contradicted the allegation of theft, in addition to his denial of the theft. *Id.* at 136, 542 S E.2d at 746 The employer ultimately terminated the employee. *Id.* The accusing co-worker and the second co-worker "testified [that their supervisor] held a meeting of his employees, including at least six workers, and told them [the plaintiff] was fired for misappropriating or misusing company property." *Id.* The plaintiff's entire "appeal center[ed] on the statement made by [the supervisor] to the employees in the meeting " *Id.*

While Harris is correct in asserting that the Court of Appeals in *Murray* "held that an employer could be liable to a former employee for an allegedly defamatory statement made by the employee's supervisor," there is no comparison between the facts of *Murray* and Harris' situation: (1) while the allegedly defamatory memoranda on which Harris relies contained evaluations and critiques of his performance, the defamatory statement in *Murray* involved a blatant allegation that the plaintiff had been fired for theft; (2) while Harris openly admits that the allegedly defamatory memoranda regarding his performance were only circulated to management employees on a "need-to-know" basis, the supervisor in *Murray* informed <u>all</u> of his employees, at least six of the plaintiff's peers, that the plaintiff had been fired for theft; and (3) while Harris attempts to contradict the content of the allegedly defamatory memoranda regarding his performance by pointing to <u>his own subjective disagreements in his own deposition testimony</u>, the plaintiff in *Murray* presented both documentary evidence and third-party witness testimony contradicting the allegations of theft.

That there was a question of fact for the jury to determine in *Murray* regarding whether the supervisor abused the qualified privilege is obvious based on the clear factual disputes the plaintiff identified based on actual evidence [11] Conversely, Harris relies on nothing more than his own subjective assessment regarding the veracity of the performance-related memoranda This is not evidence from which a jury could reasonably conclude that Tietex abused the qualified privilege that inherently applies to these memoranda as a matter of law. Given Harris' failure to identify a legitimate question of fact, "'it is for the court to say . . . whether or not the privilege has been abused or exceeded.'" *Fountain*, 398 S.C. at 444, 730 S E.2d at 310 (quoting *Woodward*, 297 S.C. at 32-33, 292 S.E.2d at 601); *see also* Restatement (Second) of Torts § 619, cmt b (noting that the court should decide if the privilege has been abused where only one conclusion can reasonably be drawn).

C. Harris Failed to Present Any Credible Evidence to Support his Three Unclear and Ill-Defined Allegations of Non-Written Defamation.

As with Harris' defamation claim regarding the February 2007 e-mail discussed above, Harris appears to have abandoned each of his three remaining defamation claims, all of which were unclear and ill-defined to begin with. However, Tietex will briefly analyze each of these three claims below to ensure clarity regarding the meritless nature of the claims.

---

[11] Significantly, the *Murray* Court concluded that "the trial judge did not err in initially concluding [the supervisor] was protected by a qualified privilege" in making the statement to the plaintiff's co-workers regarding the plaintiff being fired for theft *Id.* at 141, 542 S.E.2d at 749. The Court simply held that there existed a jury question regarding whether the supervisor had abused that privilege based on the clear factual dispute—supported by documentary evidence and third-party testimony—regarding whether the supervisor made the statement in good faith. *Id.* Here, the qualified privilege applies as a matter of law to all of the internal, performance-related memoranda, and Harris presented no evidence that the privilege was abused

1. *"Rumors in the Industry."*

Harris' fifth defamation claim arose from his contention that there were "rumors in the industry that [he] w[as] terminated from Tietex for falsifying a test report." (Harris Dep. 2 at 29) Harris never identified an actual statement that Tietex made with respect to these "rumors." Rather, Harris simply contended that he spoke to two former Tietex employees who allegedly informed him that they had heard about rumors being spread about him. (*Id.* at 114-24.) Harris never alleged that Tietex was the actual source of these alleged rumors, and he never produced a witness to testify about what Tietex supposedly said.

In the absence of any such allegations or testimony, the trial court properly ruled that this defamation claim could not overcome Tietex's motion for summary judgment. Rule 56(e), SCRCP, requires a party desiring to oppose summary judgment with testimony to "set forth such facts as would be admissible in evidence." Harris' claim regarding "rumors in the industry" is based on inadmissible hearsay. Accordingly, Harris failed to establish there was a statement or that Tietex published the statement, let alone prove the remaining elements of this claim.

2. *Harris' July 2007 Suspension with Full Pay*

Harris' sixth defamation claim alleged that Tietex defamed him by suspending his employment, with full pay and benefits, in July 2007. (Harris Dep 2 at 29.) The only statements Harris identified for this claim were (1) Wallace's telephone call to Harris in which he informed Harris of the suspension, and (2) Wallace allegedly informing an individual at another company, Textile Rubber, that Harris was suspended (*Id.* at 124-30)

With respect to the telephone call between Wallace and Harris, there was no publication to a third party, as Harris admits that they were the only parties on the call. (*Id.* at 126-27.) Regarding Wallace's alleged statement to the Textile Rubber employee, Harris relies on inadmissible hearsay. Beyond being unable to specify any details about the alleged statement, Harris admits that "[t]he only information [he] h[as] is like second hand what George Henderson told [him]." (*Id.* at 129.) Thus, Harris cannot establish that any statement was published for the purposes of this motion. Even assuming Wallace had informed this individual Harris was suspended, that statement is wholly true and cannot be defamatory as a matter of law.

3. Harris' February 2007 Ban from the Laboratory.

Finally, Harris contended that being "banned from going to the laboratory building" in February 2007 was somehow defamatory. (Harris Dep. 2 at 29-30.) The only "statement" Tietex or the lower court have ever been able to infer from this allegation is when Wallace told Harris "not to enter the lab under any circumstances." (Harris Dep. 1 at 101, Ex. 12.) While Wallace did make that statement, Harris has never even attempted to explain how the statement could be defamatory to Harris.

First, the statement was not about Harris, it was a work directive. Second, Wallace made that statement, and Tietex prohibited Harris form entering the lab, after Harris complained that the work conditions in the lab were detrimentally impacting his health. (*Id.* at 87-94, Ex. 12.) Tietex and Harris jointly attempted to find a solution that would have allowed Harris to continue working in the lab without harming his health, but they were unable to do so. (*Id.*) After "banning" Harris from the lab, Harris admits Tietex made special purchases of equipment to allow him to set up a work area in a

different location that would be better for his health. (*Id.* at 111-13, Ex 14.) These circumstances do not support any allegation of defamation.

III. SUMMARY JUDGMENT WAS PROPER UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL BASED ON THE FINAL, BINDING, AND CONCLUSIVE FINDINGS IN A PRIOR LAWSUIT BETWEEN THE SAME PARTIES INVOLVING THE SAME FACTUAL ALLEGATIONS.

Placing aside the absence of any genuine dispute as to the material facts in this matter, the lower court properly determined that the doctrine of collateral estoppel is fatal to Harris' claims. (March 20, 2014 Order at 21-23.) "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits were the same." *Carolina Renewal, Inc. v. S.C Dep't of Transp.*, 385 S.C 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citing *Judy v Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)).

"The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id* (citing *Beall v Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984)). Tietex met its burden to establish the presence of these elements.

Harris' claims in the First Action and his claims in this matter all rely on the same factual allegations, his contentions (a) that he was performing his job at Tietex at a level that met Tietex's legitimate expectations; (b) that the internal memoranda describing his performance deficiencies were false and defamatory; (c) that Tietex did not have a legitimate reason for terminating his employment, and (d) that Tietex's stated reason for terminating his employment was pretextual. However, the Federal Court considered all

of these factual allegations in the First Action and made factual findings and conclusions that directly contradict Harris' version of the facts. (Mag. Order at 1-9, 14-17; Dist. Judge Order at 3-6, 8.)

The Federal Court's findings and conclusions were necessary and relevant for its determination of Harris' ADEA claims, and the same findings and conclusions are equally applicable to the following issues at the forefront of Harris' state law claims in the Second Action, among others: (a) whether Tietex was justified in terminating Harris' employment; (b) whether Tietex's internal memoranda regarding Harris' performance, on which Harris relies heavily to support his defamation claims, were substantially true, (c) whether Tietex exhibited any actual malice or otherwise exceeded the scope of the qualified privilege with respect to the internal memoranda regarding Harris' performance; (d) whether Tietex conspired to replace him with a younger employee, as alleged in the Amended Complaint; (e) whether Tietex engaged in a campaign to set up Harris for failure, as alleged in the Amended Complaint; (f) whether Tietex intentionally made it impossible for Harris to perform his job duties, as alleged in the Amended Complaint; (g) whether Tietex put forward false and defamatory reasons for the termination of Harris' employment, as alleged in the Amended Complaint; and (h) whether Tietex terminated Harris' employment based on pretextual reasons, as alleged in the Amended Complaint.

Harris "actually litigated" all of these issues in the First Action, in which he (a) submitted a brief in opposition to Tietex's motion for summary judgment; (b) submitted written objections to the Magistrate Order; (c) appealed to the Fourth Circuit Court of Appeals, which affirmed the Federal Court's decision; (d) filed a petition for re-hearing with the Fourth Circuit, which was denied; and (e) submitted a letter to the

Federal District Court requesting further review after exhausting all avenues with the Fourth Circuit, which was rejected

All of these issues were "directly determined" and were "necessary to support the prior judgment" in the First Action, as the Federal Court expressly relied on its findings and conclusions in granting Tietex's motion for summary judgment. Harris attempts to narrow the preclusive effect of the Federal Court's Orders by contending that (1) "[t]he only issue decided by the District Court was that Harris failed to prove age-based discrimination under the ADEA," and (2) none of the other facts summarized by the Federal Court and relied upon by the lower court here were "actually determined." (Appellant's Initial Brief at 7) These misplaced contentions evidence (1) an improperly narrow application of the doctrine of collateral estoppel, and (2) a misunderstanding of employment discrimination law.

With respect to Harris' first contention, it is simply inaccurate to allege that the only issue the Federal Court decided "was that Harris failed to prove age-based discrimination under the ADEA." This improperly narrow application of collateral estoppel ignores the clear case law holding that "collateral estoppel bars relitigation of <u>the same facts</u> or issues necessarily determined in the former proceeding " *Pye*, 325 S.C. at 436, 480 S E 2d at 460 (emphasis added) (citing *Liberty Mut. Ins. Co. v. Employers Ins of Wausau*, 284 S C 234, 325 S.E.2d 566 (Ct. App 1985)). Harris is essentially attempting to conflate the doctrines of collateral estoppel (<u>issue</u> preclusion) and *res judicata* (<u>claim</u> preclusion), as the "issue" he identifies is actually a "claim" the Federal Court decided. *See id.* ("*Res judicata* bars relitigation of the same cause of action while

collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding.").

A proper application of the doctrine of collateral estoppel demonstrates that all facts and issues the Federal Court necessarily determined in the First Action are entitled to preclusive and binding effect, which includes the facts set forth above that are fatal to Harris' defamation claims. Harris simply cannot overcome the fact that the statement of relevant facts set forth above is essentially a verbatim recitation of the Federal Court's findings of fact. (*Compare* Facts *supra*, *with* Mag. Order at 1-9, *and* Dist. Judge Order at 8 (adopting and incorporating entire Magistrate Order))

Harris' second inaccurate contention, that the facts summarized by the Federal Court and relied upon by the lower court here were not "actually determined" in the First Action, disregards what the Federal Court was obligated to determine to grant summary judgment on Harris' ADEA claim. The Federal Court expressly held that Harris "was not performing his job at a level that met [Tietex's] legitimate expectations."[12] (Mag. Order at 14; Dist. Judge Order at 3-5.)

---

[12] The lower court recognized this holding in its September 23, 2013 Form 4 Order denying Tietex's initial Motion for Summary Judgment (September 23, 2013 Order ("Specifically, the District Court found that the plaintiff was not performing his job duties at a level that met his employer's legitimate expectations at the time of the adverse employment action.").) However, the lower court then erroneously applied the collateral estoppel doctrine too narrowly, concluding that the Federal Court's findings "were applicable solely to the ADEA claim" (*Id.*) While the Federal Court did reach this conclusion—based on numerous findings of fact—in granting summary judgment on Harris' ADEA claim, that conclusion and the underlying findings of fact are binding against Harris with respect to any claim between these parties. *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782 ("Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits were the same." (emphasis added) (citing *Judy*, 383 S.C. at 7, 677 S.E.2d at 217)).

In order the reach this conclusion, the Federal Court had to make numerous findings of fact—based on evidence viewed in a light most favorable to Harris—regarding the facts and circumstances leading up to the termination of Harris' employment. The Federal Court did just that, summarizing its findings of relevant and necessary facts in the Orders. (Mag. Order at 1-9, Dist. Judge Order at 8 (adopting and incorporating entire Magistrate Order).) It is those findings of fact on which Tietex relies, and those alone, all of which are entitled to preclusive and binding effect.

In light of the Federal Court's Orders, the lower court understandably concluded that it was "unable to imagine any set of credible facts Harris could present at trial that would support his claims without contradicting the findings and conclusions of the Federal Court. There is no evidence in the record that would accomplish this result, rendering summary judgment proper based on the doctrine of collateral estoppel." (March 20, 2014 Order at 23.) The trial court was wholly correct in this conclusion, and summary judgment should be affirmed for this reason also.

IV. SUMMARY JUDGMENT WAS PROPER UNDER THE DOCTRINE OF *RES JUDICATA* AND THE STATUTE OF LIMITATIONS WITH RESPECT TO THE DEFAMATION CLAIMS HARRIS COULD HAVE RAISED BUT DID NOT RAISE IN HIS PRIOR LAWSUIT AGAINST TIETEX.

Harris admits that his First Action did not allege the following defamation claims: (1) his claim based on the February 9, 2007 e-mail from Wallace to Wilson (Harris Dep. 2 at 33); (2) his claim based on Tietex suspending his employment in July 2007 (*id.* at 33-34); or (3) his claim based on Tietex "bann[ing] him from the laboratory" (*id* at 34). Rather, he first asserted the first two of these claims in his *pro se* Complaint in the Second Action, and he only identified his claim based on being banned from the lab in his deposition in the Second Action. Using the October 12, 2011, filing of his *pro se*

Complaint as the date on which Harris asserted these claims (assuming the third of these claims relates back to that date), they are barred by the statute of limitations. Due to Harris' failure to plead these claims in the First Action, they are also barred by the doctrine of *res judicata*.

The statute of limitations applicable to Harris' defamation claims is two years. S.C Code Ann. § 15-3-550. The two-year statute of limitations runs from the date on which the allegedly defamatory statement was published, not from the time the statement was allegedly discovered. *Jones v. City of Folly Beach*, 326 S.C. 360, 369, 483 S E 2d 770, 775 (Ct. App. 1997) ("[S]ummary judgment [should be granted] because South Carolina has not adopted the discovery rule in libel and slander cases."). Harris' defamation claims based on (1) the February 9, 2007 e-mail from Wallace, (2) Tietex suspending his employment in July 2007, and (3) Tietex banning him from the lab in February 2007, are all based on "statements" that Tietex allegedly made in February and July 2007. Harris first alleged these claims in the Second Action, which he did not file until October 12, 2011. (Harris Dep. 2 at 33-34.) Thus, the trial court properly concluded that the two-year statute of limitations barred these claims.

While Harris has asserted that the statute of limitations for these claims should have been tolled under 28 U.S.C. § 1367(d) while his First Action was pending, he misreads that statute Section 1367(d) is limited on its face to "any claim asserted under [a federal court's supplemental jurisdiction], and . . . any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under [a federal court's supplemental jurisdiction]." Harris did not plead these defamation

claims in the First Action, and they were not dismissed from the First Action. Thus, they are excluded from the tolling provision of section 1367(d).

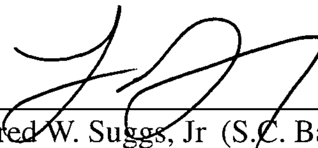
The complete absence of these three defamation claims in the First Action also implicates the doctrine of *res judicata.* "The doctrine of *res judicata* bars a litigant from raising any issues which were adjudicated in the former suit [between the parties] and any issues which might have been raised in the former suit." *Pye*, 325 S.C. at 432, 480 S.E.2d at 458 (citing *Hilton Head Ctr. v. Public Serv. Comm'n*, 294 S.C. 9, 362 S.E.2d 176 (1987)); *see also id.* ("'*Res judicata* also bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties'" (quoting *Riedman Corp. v. Greenville Steel Structures, Inc.* 308 S.C. 467, 469, 419 S E.2d 217, 218 (1992))).

These three defamation claims arose out of the same transaction or occurrence that was the subject of the First Action—his employment with Tietex and separation therefrom. Harris could have raised these claims in the First Action, but he chose not to do so. Based on Harris' failure to assert these claims in the First Action, the lower court properly ruled that the doctrine of *res judicata* precluded Harris from asserting the claims in the Second Action.

CONCLUSION

Harris' claims in this lawsuit were an impermissible attempt to gain a second bite at the apple in the same dispute in which he has been engaged with Tietex for seven years. Fortunately, the lower court recognized the insufficiency of Harris' claims on the eve of trial and granted Tietex summary judgment That decision should now be affirmed for each of the reasons set forth by the lower court: (1) Harris has failed to identify a

genuine dispute of material fact on any of his defamation claims, which primarily rely on internal, performance-related memoranda that are substantially true and subject to a qualified privilege that Harris cannot overcome; (2) the doctrine of collateral estoppel precludes Harris' defamation claims as a matter of law, as those claims rely on factual allegations that attempt to contract the Federal Court's binding and conclusive findings in the First Action; and (3) the statute of limitations and the doctrine of *res judicata* preclude Harris' three defamation claims that he could have raised but did not raise in the First Action. Accordingly, Tietex requests that the Court affirm the decision of the lower court



Fred W. Suggs, Jr (S.C. Bar No 5423)
Lucas J. Asper (S.C. Bar No. 77902)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P C
300 North Main Street, Suite 500
Greenville, South Carolina 29601
(864) 271-1300 (telephone)
(864) 235-8806 (facsimile)
fred suggs@ogletreedeakins.com
lucas.asper@ogletreedeakins.com

ATTORNEYS FOR RESPONDENT

October 6, 2014

RECEIVED
OCT 08 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

RECE...
OCT ...
SC Court of Appeals

J. Derham Cole, Jr, Circuit Court Judge

Case No. 2011-CP-42-2538
Appellate Case No. 2014-000902

Gary G. Harris, ... Appellant,

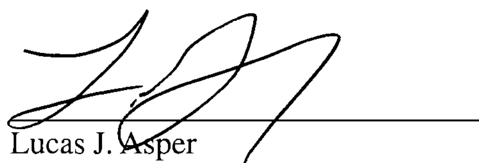
v

Tietex International, Ltd., ... Respondent.

PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief and Respondent's Designation of Matter to be Included in Record on Appeal on Appellant Gary G Harris by sending to his attorneys of record a copy of the same via first class mail, properly addressed, postage prepaid at the following addresses: D. Alan Lazenby, Ginger D Goforth, Lazenby Law Firm, Post Office Box 6099, Spartanburg, South Carolina 29304.

October 6, 2014



Lucas J. Asper

19108483 1

Ogletree Deakins

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Attorneys at Law
The Ogletree Building
300 North Main Street, Suite 500 (29601)
Post Office Box 2757
Greenville, SC 29602
Telephone 864 271 1300
Facsimile 864 235 4754
www ogletreedeakins com

October 6, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court Of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED
OCT 08 2014
SC Court of Appeals

Re: ***Gary G. Harris v. Tietex International, Ltd.***
Case No.: 2011-CP-42-4538
Appellate Case No.: 2014-000902

Dear Ms. Kitchings:

Enclosed for filing are the original and one (1) copies of the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal. As appears on the Proof of Service, opposing counsel have been duly served. Please return a stamped "*Filed*" copy to us in the enclosed prepaid envelope.

Please contact us with any questions or concerns.

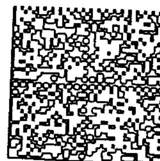
Sincerely,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

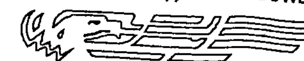
Lucas J. Asper

LJA/smc
Enclosures
cc: D. Alan Lazenby, Esq. w/ Enc. (*via* U.S. Mail)
Ginger D. Goforth, Esq. w/Enc. (*via* U.S. Mail)

Priority Mail
ComBasPrice



US POSTAGE PITNEY BOWES



ZIP 29601 $ 005.32⁰
02 1W
0001387336 OCT 06 2014

Ogletree Deakins

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

The Ogletree Building
300 North Main Street, Suite 500
Greenville, SC 29601

RECEIVED
OCT 08 2014
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court Of Appeals
1015 Sumter Street
Columbia, SC 29201

74