

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS
THE HONORABLE TANYA A. GEE
CIRCUIT COURT JUDGE

RECEIVED

JUL 25 2016

SC Court of Appeals

APPELLATE CASE NO. 2016-000068
CIVIL ACTION NO. 2015-CP-32-00170

Joseph W. Owens,

APPELLANT,

versus

Temus C. Miles, Jr., B.J. Unthank, L. Dale Harley,
Boyd J. Jones, Tommy G. Parler, Eric L. Fowler, Dennis
Tyndall, Ashley S. Hunter and McKay Public Affairs, LLC,

DEFENDANTS,

Of whom Temus C. Miles, Jr., B.J. Unthank, L. Dale Harley,
Boyd J. Jones, Tommy G. Parler, Eric L. Fowler, and
Dennis Tyndall are the

RESPONDENTS.

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COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Council Respondents are immune from liability for Appellant's defamation claims under the doctrine of absolute legislative immunity where the only act of publishing a defamatory statement alleged in the complaint was Council Respondents' vote to release the Bolchoz Report to the public.
- II. Appellant's argument that Council Respondents acted outside the scope of their official duties as local legislators is not preserved for appellate review where the Trial Court did not rule upon that issue; furthermore, the only act of Council Respondents relevant to the publication element of Appellant's defamation claims is their act of voting for the release of the Bolchoz Report to the public; in addition, any allegation that Council Respondents republished the Bolchoz Report is not actionable where Appellant did not allege with specificity in his complaint the manner in which the Report was republished and where this claim is based on the distribution of a document of public record.
- III. The Trial Court properly granted summary judgment to Chief Tyndall where Appellant failed to identify any defamatory statement published by Chief Tyndall.
- IV. The Trial Court properly granted summary judgment to Respondents where Appellant, a public figure, cannot establish that he can prove constitutional actual malice with clear and convincing evidence where there is no evidence that Respondents published any defamatory statement with knowledge of its falsity or with reckless disregard for its truth.
- V. Appellant failed to appeal the Trial Court's factual finding that Appellant shared the Bolchoz Report with unprivileged third parties prior to the Report's release to the public; therefore, the Trial Court's order granting summary judgment to Respondents can be affirmed on the separate and independent ground that Appellant's self-publication of the Bolchoz Report defeats his claims for defamation.
- VI. The Trial Court did not abuse its discretion in denying Appellant additional discovery prior to the Court's grant of summary judgment where additional discovery could not contribute to those claims that could be resolved as a matter of law on the basis of the allegations and the pleadings themselves (i.e, absolute legislative immunity and failure to identify any statement published by Chief Tyndall) and where it was only speculative as to whether Appellant would have discovered any evidence relating to constitutional actual malice.

COUNTERSTATEMENT OF THE CASE

This action arises out of defamation claims that Appellant Joseph W. Owens, who was mayor of the City of West Columbia, South Carolina at all times during this litigation until he lost his bid for reelection on November 3, 2015, filed against six City Council members who represent districts within the City of West Columbia (the “City”) and the Chief of Police for the City.

On January 15, 2015, Owens filed his Complaint¹ in the Court of Common Pleas for Lexington County against City Council members Temus C. Miles, Jr., B.J. Unthank, L. Dale Harley, Boyd J. Jones, Tommy G. Parler, and Eric L. Fowler (collectively, the “Council Respondents”), as well as Dennis Tyndall, Chief of Police for the City (“Chief Tyndall”). [R.pp. ___; Compl.]

Owens amended his Complaint on or about February 24, 2015 and asserted two causes of action against Council Respondents and Chief Tyndall: defamation *per se* and defamation. [R.pp. ___; Amended Compl.] The claims pertained to events occurring principally during 2014 and relating to the business of the City, the 2015 elections for mayor and city council positions, and the issuance of a report (the “Bolchoz Report”) produced by a consultant retained by City Council. The specific allegations of Owens against Council Respondents and Chief Tyndall include the following:

- That Council Respondents, with knowledge and support of Chief Tyndall, “caused [the Bolchoz Report] to be commissioned and released to the public at large that accused [Owens] of impropriety and unfitness in his office, [], criminal conduct” and/or “that tended to impeach the honesty, integrity, virtue and reputation of

¹ Owens’ Complaint was also filed against Ashley S. Hunter and McKay Public Affairs, LLC but these defendants, to the knowledge of Respondents, remain in the case and are not involved in this appeal.

[Owens thereby exposing] him to public hatred, contempt, ridicule, and obloquy”

- That such publication by Respondents “[was] false and [was] made with knowledge of their falsity and a reckless disregard for the truth.”

[R.pp. ___; Id. at ¶¶ 33 – 47.]

Council Respondents and Chief Tyndall answered the Amended Complaint on April 2, 2015, denying its materials allegations and asserting as affirmative defenses, among others, (1) absolute privilege from defamation which attaches to legislative proceedings; and (2) the failure of Owens to establish by clear and convincing evidence that Respondents acted with constitutional actual malice as required for public officials.

[R.pp. ___; Answer.]

On or about September 14, 2015, Council Respondents and Chief Tyndall filed a motion for summary judgment on Owens’ claims for defamation *per se* and defamation.

[R.pp. ___; Mtn.] Among the grounds asserted for summary judgment were (1) legislative immunity where the publication cited by Owens as grounds for his defamation claims was a report commissioned and released by an act of City Council, a legislative body, to address matters of relevance to city government; and (2) the failure of Owens to produce sufficient evidence to support a *prima facie* claim for defamation. [Id.] On September 29, 2015, Council Respondents and Chief Tyndall filed a memorandum of law with accompanying exhibits in support of their motion for summary judgment. [R.pp. ___; Memorandum with Exs.]

A hearing on Respondents’ motion for summary judgment was held on October 27, 2015 before the Honorable Tanya A. Gee. [R.pp. ___; Hearing Tr.] Following the hearing, Respondents submitted a supplemental memorandum in support of their motion

for summary judgment as well as additional exhibits. [R.pp. ___; Supplemental Memorandum.]

On December 7, 2015, the Trial Court issued its order granting summary judgment to Council Respondents and Chief Tyndall and dismissed in its entirety the lawsuit with prejudice against these Respondents. [R.pp. ___; Order.] The Trial Court ruled that summary judgment in favor of Respondents was appropriate for three separate, independent reasons:

1. As to all Respondents, Owens, a public figure, failed to demonstrate by clear and convincing evidence that the alleged defamatory statement (the Bolchoz Report) was published with knowledge of its falsity or with reckless disregard for its truth;
2. As to Council Respondents, such respondents are immune from Owens' defamation suit under absolute immunity where Council Respondents were "sued for voting 'yes' during a council meeting to allow an already authorized audit to be made public," which report Owens had already shared with third parties himself; and
3. As to Chief Tyndall, Owens failed to provide a scintilla of evidence that Chief Tyndall made or published a defamatory statement against Owens as Chief Tyndall took no part in publishing the Bolchoz Report.

[R.pp. ___; *Id.* at pp. 5-7.]

Owens filed and served his Notice of Appeal with this Court on or about January 6, 2016.

COUNTERSTATEMENT OF FACTS

Owens, at all times during this litigation until he lost his bid for reelection on November 3, 2015, was the Mayor of the City of West Columbia. [R.p. ____; Amended Compl., ¶ 1.] Council Respondents are each members of the City Council for the City, and Chief Tyndall is the Chief of the West Columbia Police Department. [R.p. ____; Id. at ¶ 2.]

The City of West Columbia operates as a council form of government pursuant to S.C. CODE ANN. §§ 5-11-10 to -40; see also WEST COLUMBIA, SC ORDINANCES § 1-1-1. Pursuant to Section 5-11-30, the City Council of West Columbia is a legislative body. See § 5-11-30 (“All legislative and administrative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council. Each member of council, including the mayor, shall have one vote.”). At all times relevant to the matters alleged by Owens, Council Respondents held the positions of City Councilmen.

In early 2014, tensions arose between Owens as Mayor, members of City Council, and Chief Tyndall regarding a number of administrative and personnel issues relating to the City. One of these issues, as Owens alleges in his Amended Complaint, stemmed from Chief Tyndall’s concern that “the Mayor and certain council members intended not to renew his contract as Chief of Police” and instead planned to replace Chief Tyndall by elevating Major Matt Edwards, who was currently acting as the Police Department’s second-in-command, to the position of police chief. [R.p. ____; Amended Compl. ¶ 6.]

While Chief Tyndall was certainly concerned about Edwards, his concern was not focused on his own employment, but rather on Edwards’ negative effect on the Police

Department as a whole. Chief Tyndall was aware that Edwards and Owens had a close relationship and that Edwards was considered “untouchable.” Owens had forced Chief Tyndall to promote Edwards to a position that Chief Tyndall had feared Edwards had neither the experience nor the temperament to handle. [R.pp. ___; March 16, 2014 e-mail re “Concerns of the Major Position” and related notes.]

Chief Tyndall’s fears were well-grounded. He became aware of Edwards’ practice of making gratuitous personnel reassignments, not based upon the training and expertise of such personnel but solely to show that Edwards was in a “position of power.” Edwards’ belittlement of officers and micromanagement of operations created a “hostile work environment.” Edwards took repeated actions to undercut Chief Tyndall’s authority, including, among other things, (1) removing persons Chief Tyndall had in place for the hiring and promotion boards and replacing such persons with Edwards’ close friends; (2) ordering applications for new hires be directed towards him instead of Chief Tyndall; (3) bypassing Chief Tyndall on the department budget and purchases; and (4) issuing raises totaling over \$20,000.00 which were signed off only by Owens and not Chief Tyndall or the City Administrator. [Id.] Chief Tyndall also became aware that Edwards might be “fixing” DUI tickets. [R.pp. ___; Transcribed Audio File of Mayor Owens’ “Ad Hoc Special Meeting,” pp. 10-11.]

Mindful of his overall responsibility for the operations of the Department, Chief Tyndall began further investigation of Edwards. Having learned of Chief Tyndall’s investigation of Edwards, Owens “convened an ad hoc meeting of city officials – himself, [Chief Tyndall], City Administrator Jennifer Cunningham, and Mayor Pro-Tem Casey Hallman – on March 10, 2014 in order to determine the nature of this investigation.”

[R.p. ____; Amended Compl. ¶ 10.] Unbeknownst to Owens, Chief Tyndall recorded this meeting with his cell phone.² [R.pp. ____; Transcribed Audio File of Mayor Owens’ “Ad Hoc Special Meeting.”] The meeting lasted several hours with Owens grilling Chief Tyndall about his attempts to “ruin” Edwards and disagreements between the two over who had the power to make personnel decisions within the Police Department. [Id.]

Councilman Miles learned of the March 10, 2014 ad hoc special meeting after it occurred, and at the March 17, 2014 City Council meeting, Miles expressed his concern and belief that a special committee meeting had been convened without the required notice required under South Carolina’s Freedom of Information Act (“FOIA”) and that City Council members should have been given notice of and an opportunity to have attended the meeting. [R.p. ____; March 17, 2014 Meeting Minutes, p. 5.]

This incident, along with other tensions between Owens and certain City Council members, formed part of the impetus for City Council to restructure the manner in which its meetings would be held. At the March 17, 2014 meeting, City Council members held an initial vote to remove Owens as the chair of council meetings. [R.pp. ____; March 17, 2014 Meeting Minutes.] Previous custom was that council meetings were chaired by the Mayor, and City Council was seeking to restructure the format to allow meetings to be chaired by any council member named by vote of the council. [R.p. ____; Id. at p. 1.] Council members Harley, Jones, Miles, Parker and Unthank voted in favor of the motion, and the motion passed five votes to four. [R.p. ____; Id. at p. 4.]

At the next council meeting held on April 1, 2014, a second vote regarding the chairing of council meetings was taken, with the motion again approved by council

² See S.C. CODE ANN. § 17-30-30 (permitting recording where the person recording is a party to the communication.)

members Harley, Jones, Miles, Parler and Unthank and passing with five votes to four. [R.p. ___; April 1, 2014 Meeting Minutes, p. 13.]

At the April 14, 2014 council meeting, City Council elected Councilman Unthank as chair for meetings. The Mayor would continue to have the same rights to attend meetings, speak his view, and vote at council meetings, but the remaining 2014 City Council meetings would be chaired by Unthank. [R.p. ___; April 14, 2014 Meeting Minutes, p. 1.] Owens strenuously objected to these developments and characterized City Council's actions as an "abuse of power" and vowed to "continue this fight in a court of law" to put an end to "this political power play." [Id.]

Also at issue during the April 14, 2014 council meeting was the termination of Major Matt Edwards' position with the Police Department. Edwards' position was eliminated on March 18, 2014 as part of a reorganization of the Department. [R.p. ___; March 18, 2014 Memorandum from Chief Tyndall.] At the April 14, 2014 meeting, City Council heard Edwards' grievance on the termination of his position pursuant to Chief Tyndall's reorganization of the Police Department. City Council upheld the termination of Edwards' employment. [R.p. ___; April 14, 2014 Meeting Minutes, p. 2.]

At the May 6, 2014 City Council Meeting, Councilman Miles noted that state law empowers city councils to investigate the operations of a city department. See S.C. CODE ANN. § 5-7-100 ("The governing body of the municipalities or its agents may investigate any department of the municipal government and any office thereof"); [R.p. ___; May 6, 2014 Meeting Minutes, p. 4.] Councilman Miles desired an accounting of the operations of the City's departments, and he suggested that City Council appoint an investigative agent to conduct an audit of the procedures and methods utilized by the City

to manage personnel, equipment, expenditures, and responses to citizen requests. Miles recommended attorney Robert Bolchoz as someone qualified to perform the audit. Over Owens' objections, the majority of the City Council voted to approach Bolchoz to discuss a contract for his services. [Id.]

At the May 13, 2014 City Council meeting, City Council voted to extend a contract to Bolchoz to perform a "procedural audit." [R.pp. ___; May 13, 2014 Meeting Minutes, pp. 2-3.] During executive session at the May 13, 2014 meeting, City Council discussed the reasons behind the decision to conduct the procedural audit. Councilman Miles noted one of his reasons for requesting the audit was with regards to the circumstances surrounding the termination of Matt Edwards as the Major of the Police Department. Miles informed the other City Council members that Chief Tyndall had provided him with an audio recording Chief Tyndall made of the March 10, 2014 meeting called by Owens after Owens learned of Chief Tyndall's decision to discuss with a SLED officer questions involving internal department operations. Miles felt that statements made by Owens on that tape called into question earlier statements made by Owens in an open letter addressed to the citizens of West Columbia which discussed Owens' thoughts on a number of personnel matters, his relations with other councilmembers, and other city businesses. [Id.]

On May 19, 2014, the City entered into a contract with Bolchoz to "conduct a review of various documents and facts relative to actions taken by city officials for the purpose of determining whether certain conduct is in keeping with the law." [R.pp. ___; Bolchoz engagement letter dated May 12, 2014 and signed by City's Deputy

Administrator on May 19, 2014.] The City Council's authorization of this audit was never legally challenged by Owens.

Over a period of several months, Bolchoz reviewed a large collection of materials, including audiotapes, videotapes, incident reports, purchase orders, reports, position descriptions, policies, memoranda, and various other documents. In addition, he interviewed more than thirty employees of the City. [R.pp. ___; Bolchoz Report, pp. 2-8.]

After completing his review, Bolchoz produced a written report of his findings on July 29, 2014 (the "Bolchoz Report"). The Bolchoz Report concluded that the City's administrative policies and procedures were consistent with general practice and appropriately defined for a municipality of West Columbia's size; however, the Report found that Owens, as Mayor, had systematically used his position to circumvent established procedures to "establish a system of patronage well beyond that which the average citizen, taxpayer, or voter would expect," and that his behavior had resulted in the creation of an "oppressive atmosphere of intimidation within City hall which . . . resulted in . . . employees circumventing established procedures and ignoring City ordinances at the Mayor's insistence." [R.p. ___; Bolchoz Report, p. 3.] The Report noted further instances where it appeared that Owens had compelled city staff to provide services on non-city properties, usurped authority of other city officials with regards to personnel decisions and the procurement process, allowed access to secure areas of the public safety complex by unauthorized persons, and violated FOIA. [R.pp. ___; *Id.* at pp. 3-4.]

Upon completion, Bolchoz issued his Report to Owens and the members of City Council. Bolchoz marked the Report as confidential based on the attorney-client privilege. [R.p. ___; Bolchoz Report, p. 1.]

Approximately a week after the Report was issued to the Mayor and City Council members, at the regularly-scheduled City Council Meeting of August 5, 2014, a number of citizens attended who indicated a wish to speak. [R.pp. ___; August 5, 2014 Meeting Minutes, pp. 2-8.] Two gentlemen, David Rish and Jimmy Brooks, spoke at some length, indicating their support for Owens and taking issue with the decision to retain Bolchoz to perform a procedural audit. Indeed, although the Bolchoz Report had not yet been made public, the comments of these two gentlemen indicated considerable familiarity with the Bolchoz Report. [R.pp. ___; Id. at pp. 2-8.]

Rish questioned why “thousands of dollars” were spent “to discredit Joe Owens,” and Rish spoke against charges that Owens violated FOIA by the calling of a special meeting and accusations that Owens used vulgar language during meetings, both items which were addressed in the Bolchoz Report. [R.pp. ___; ___; Id. at p. 3; Bolchoz Report, p. 7.] Rish also discussed charges against Matt Edwards. [R.p. ___; August 5, 2014 Meeting Minutes, p. 3.] The Bolchoz Report had also described instances when Edwards had violated certain City policies. [R.pp. ___; Bolchoz Report, pp. 5-6.]

Brooks, while discussing the procedural audit, stated that he thought the Bolchoz Report had “been shared with some people that are probably outside of you nine or ten or whatever it should be.” [R.p. ___; August 5, 2014 Meeting Minutes, p. 6.]

During the remarks by Brooks, Owens interjected himself into the discussion and began discussing the contents of the Bolchoz Report in open session: “It’s all me and

Matt Edwards. Nobody else.” [R.p. ____; Id. at p. 7 (discussing the report).] After Owens mentioned the Bolchoz Report, City Council members expressed concern that Owens’ actions had constituted divulging the contents of a classified report. [R.p. ____; Id. at p. 8.] City Council then took a vote to determine whether the Bolchoz Report should be made a public document. The motion passed with each of the six Council Respondents voting in favor of the motion, and Mayor Pro-Tem Hallman and Council Member Wingard voting in opposition. Owens stated he abstained from voting as he was named in the Report. [R.p. ____; Id. at p. 10.]

Discovery in the lawsuit subsequently revealed that Owens had already published the Bolchoz Report by sending the entire Report to unprivileged third parties, including Matt Edwards who was no longer employed with the City, prior to the August 5, 2014 City Council vote to release the Report to the public. [R.pp. ____; Hearing Tr., pp. 30, ll. 1-3; 34, ll. 5-8; 60, ll. 14-17.]

Owens’ lawsuit against Council Respondents and Chief Tyndall followed the release of the Bolchoz Report.

ARGUMENT

I. Council Respondents are immune from liability for Appellant's defamation claims under the doctrine of absolute legislative immunity where the only act of publishing a defamatory statement alleged in the complaint was Council Respondents' vote to release the Bolchoz Report to the public.

The Trial Court ruled that Council Respondents were immune from suit for the allegations and claims of defamation in Owens' Amended Complaint under the doctrine of absolute legislative immunity: "Although members of a city council may not enjoy absolute immunity in every respect, under the circumstances of this lawsuit, absolute immunity applies because council members are being sued for voting 'yes' during a council meeting to allow an already authorized audit to be made public." [R.p. ___; Order, p. 6.]

This State's Supreme Court recognized absolute immunity of members of legislative bodies for acts in the performance of their duties in Richardson v. McGill, 273 S.C. 142, 255 S.E.2d 341 (1979). In Richardson, the respondent was a member of the Williamsburg County Legislative Delegation. A joint meeting of the Legislative Delegation and the Williamsburg County Recreation Commission was called for the purpose of discussing the appellant's performance as the Director of the Recreation Commission. During the meeting, the respondent made defamatory statements regarding the appellant, including that he was "incompetent" and "going with the women in the Department and no woman would be hired unless [appellant] could go to bed with them and as a result he would hire no married women." Id. at 144, 255 S.E.2d at 342.

The appellant brought an action to recover damages for the slanderous statements, and the respondent defended that the statements were made on a privileged occasion concerning matters within his official duties as a legislator. Id. at 144-145, 255 S.E.2d

at 342. The lower court agreed with the respondent and ruled “that the statements were made in the course of his official duties and were absolutely privileged.” Id. at 145, 255 S.E.2d at 342.

The Supreme Court affirmed the decision of the lower court, first recognizing that when a communication is absolutely privileged, “no action will lie for its publication, no matter what the circumstances under which it is published.” Id. (internal citations omitted); Hainer v. Am. Med. Int’l, Inc., 328 S.C. 128, 135, 492 S.E.2d 103, 106 (1997) (“When a communication is absolutely privileged, no action lies for its publication, no matter what the circumstances under which it is published, i.e., an action will not lie even if the report is made with malice.”).

The Supreme Court next examined categories of communications which are absolutely privileged and observed that under South Carolina court decisions, the class of absolutely privileged communications has not been narrowly restricted to legislative and judicial proceedings but rather has been based on considerations of public policy:

While there has been some tendency in the decisions to narrow the absolute privilege, restricting it generally “to legislative and judicial proceedings and acts of State,” the courts of South Carolina have recognized “occasions other than those comprising strictly legislative or judicial proceedings,” where, under the considerations of public policy, absolute privilege has been upheld.

It is thus clear that unqualified privilege does not depend on the rigid requirement of a strictly legislative or judicial proceeding; its limits are fixed rather by considerations of public policy.

Id. at 145-46, 255 S.E.2d at 342-43 (quoting Corbin v. Washington Fire & Marine Ins. Co., 278 F. Supp. 393, 395-96 (D.S.C. 1968)).

Based upon the consideration of public policy, the Supreme Court held that members of legislative bodies are absolutely immune from suit for acts conducted while performing their duties:

A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties. Accordingly, an absolute privilege is recognized as to defamatory statements made by legislators in the course of their functions, if such statements are connected with, or relevant or material to, the matter under inquiry.

Richardson, 273 S.C. at 146, 255 S.E.2d at 343.

The appellant in Richardson contested whether the respondent's statements were made while the respondent was engaged in a legislative duty or process at the time the statements were made. The Supreme Court found that as a member of the legislative delegation from Williamsburg County, the respondent "had an official interest in the proper operation of the county government and its agencies, including that of the Williamsburg County Recreation Commission." Id. The Court further held that the respondent's statements were made with respect to matters of public concern, warranting absolute immunity for the respondent's conduct:

The matters under inquiry at the meeting in question were of public concern and, in view of the then relationship between the legislative delegation and the county government, related to the discharge of the responsibilities of the legislative delegation. Under the present facts, public policy mandated that legislators be permitted to pursue reports of incompetent or illegal behavior involving appointed county personnel without the necessity of having to justify their actions in a suit for defamation.

Id. at 147, 255 S.E.2d at 343.

South Carolina's grant of absolute immunity to members of legislative bodies for acts in the performance of their duties finds support by the United States Supreme Court.

In Bogan v. Scott-Harris, 523 U.S. 44 (1998), the United States Supreme Court explained the reasoning behind absolute immunity for local legislators:

The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. See Spallone v. United States, 493 U.S. 265, 279 (1990) (noting, in the context of addressing local legislative action, that “restriction on a legislator’s freedom undermines the ‘public good’ by interfering with the rights of the people to representation in the democratic process”).

...

Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. . . . And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability.

Id. at 52.

Other state jurisdictions have also recognized the paramount necessity for an absolute legislative privilege afforded to city council members acting in their legislative functions:

Such lesser legislative entities make important social and economic decisions that many times affect our lives to a greater degree than do decisions made by our state legislators and congressmen. If the utterances of members of the legislative bodies such as city councils are not cloaked with an absolute privilege, an unwarranted consideration – personal monetary liability – will be interjected into a councilman’s decision making process. This, we feel, would have the unavoidable effect of inhibiting the independent and forceful debate out of which decisions which best serve the interests of the populace are borne.

Cornett v. Fetzer, 604 S.W.2d 62, 63 (Tenn. Ct. App. 1980); see also Issa v. Benson, 420 S.W.3d 23, 27 (Tenn. Ct. App. 2013) (citing Cornett) (“We are persuaded that an absolute legislative privilege applies to city council members . . . acting in their legislative functions.”).

The absolute privilege that attaches to an elected office therefore allows an official to exercise his or her duties without fear of civil liability. Adoption of anything less than absolute immunity would discourage “qualified and otherwise willing individuals from seeking city or town council membership.” Sanchez v. Coxon, 854 P.2d 126, 130 (Ariz. 1993). Additionally, the adoption of a qualified, rather than an absolute, immunity for members of legislative bodies “would compel judicial inquiry into the motives for statements made by council members during often heated debates. Such an intrusive and probing inquiry would come at too high a cost in light of its chilling effect.” Id. at 129-30.

This State’s Supreme Court’s holding in Richardson, that absolute immunity attaches to members of legislative bodies for acts in the performance of their duties, is thus well-supported by public policy. Applying the holding of Richardson to the circumstances of this case, it is uncontestable that Council Respondents are entitled to absolute immunity for the allegations contained in Owens’ Amended Complaint.

The defamation claims asserted by Owens allege that Council Respondents “caused a report to be commissioned and released to the public at large” [R.pp. ___; Amended Compl., ¶¶ 34, 42.] A plaintiff is 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). Publication is an essential element of a

defamation claim. Burris v. Electro Motive Mfg. Co., 247 S.C. 579, 582, 148 S.E.2d 687, 688 (1966).

In Owens' Amended Complaint, the only allegation he has made with respect to how Council Respondents published the Bolchoz Report was Council Respondents' authorization of the release of the Report by vote at the August 5, 2014 council meeting. [R.p. ___; Amended Compl. ¶ 28.] Owens' claims for defamation against Council Respondents are therefore based only on the affirmative vote for release of the Bolchoz Report by each Council Respondent. There is no other basis for the publication element of the defamation claims set forth in Owens' Amended Complaint. As admitted by Owens, "[h]ad that Bolchoz report never been done, never been printed, never been released, we wouldn't be here today." [R.p. ___; ___; Owens Dep., p. 171, ll. 18-20; see also pp. 183, l. 24 – 184, l. 1 ("Q: What is the defamatory statement you're basing your suit upon? A: The report itself.").]

It is clear that the decision by Council Respondents to release the Bolchoz Report was made while they were carrying out their legislative duties by casting their votes on an issue of public concern, i.e., the policies and procedures of the City of West Columbia and the performance and competency of its mayor - during a council meeting. See Richardson, 273 S.C. at 147, 255 S.E.2d at 343 (noting public policy mandates that legislators be permitted to pursue reports of incompetent or illegal behavior involving appointed county personnel without the necessity of having to justify their actions in a suit for defamation). Such act of voting by Council Respondents to release the Bolchoz Report in the course of their duties is absolutely privileged under Richardson and the public policy of this State. Council Respondents are immune from the allegations in

Owens' lawsuit, and the Trial Court correctly granted summary judgment to Council Respondents.

In his brief, Owens raises several arguments contending that the Trial Court erred by finding that Council Respondents were entitled to absolute legislative immunity. Owens challenges whether the absolute immunity provided to members of legislative bodies under Richardson remains applicable law, citing the Supreme Court's case of Brown v. Cnty. of Berkeley, 366 S.C. 354, 622 S.E.2d 533 (2005) and a statement in that decision that "[i]ndividual members of a local county council are not entitled to absolute immunity." Analysis of the Brown decision shows that it did not overturn the holding in Richardson.

Brown involved a dispute between the Berkeley County Clerk of Court and the Berkeley County Council. Through an outside audit, the County Council became aware of financial discrepancies within the Clerk's office, including the Clerk's use of a county credit card. The County Council requested the Clerk to produce certain financial documentation, but the Clerk disputed the request and asserted the County Council violated FOIA by authorizing the request to produce in a closed executive session. The Clerk also claimed the Chairman of the County Council improperly accused her of misusing the county credit card. The decision does not identify under what circumstances this alleged defamatory statement was made, i.e., whether it was made during a council meeting or otherwise made during the performance of the councilman's duties or if it was made under circumstances outside of his duties as councilman. The County Council ultimately enacted a resolution approving an expanded audit of the Clerk's office. Id. at 357-58, 622 S.E.2d at 535-36.

The Clerk filed a suit seeking a preliminary injunction prohibiting the audit of the Clerk's office and damages against the individual council members for defamation, defamation *per se*, and intentional infliction of emotional distress. Id. at 358, 622 S.E.2d at 536. The lower court denied the Clerk's motion for a preliminary injunction and also denied a motion to dismiss filed by the individual council members on the basis of the terms of the South Carolina Tort Claims Act and absolute legislative immunity. Id. at 359, 622 S.E.2d at 536.

The Supreme Court affirmed the lower court's rulings in their entirety. With respect to the council members' appeal of the denial of the motion to dismiss, the Supreme Court found the denial was not immediately appealable and therefore not reviewable. Id. at 361-62, 622 S.E.2d at 537-38.

In dicta, the Supreme Court made the comment that "[i]ndividual members of a local county council are not entitled to absolute immunity." Id. at 361, 622 S.E.2d at 537. This statement by the Supreme Court is correct and does not contradict or abrogate the holding in Richardson which provided for absolute immunity of members of legislative bodies for acts in the performance of their duties. An individual member of a county council or other legislative body is not absolutely immune from all liability, from any source, merely by virtue of their status as a member of county council.³ Rather, the absolute privilege set forth in Richardson bestows, by way of public policy, absolute immunity to those members of legislative bodies "for acts in the performance of their

³ For example, a council member's defamatory comments about the ability and integrity of the government body's staff and personnel made at a private dinner unconnected to the member's public duties would likely not qualify for the absolute privilege even though the same comments made in another context, such as a part of an internal investigation, would qualify for absolute immunity. See Clark v. McGee, 49 N.Y.2d 613, 619-20 (Ct. App. 1980).

duties.” Richardson, 273 S.C. at 146, 255 S.E.2d at 343; see also Issa, 420 S.W.3d at 29 (“Communicating while being a legislator does not by itself shield one from defamation claims. However, certain communications made within legislative functions are accorded absolute privilege. . . . [This] privilege[] exist[s] on the basis of strong public policy reasons.”).

Because the Supreme Court in Brown found the denial of the motion to dismiss was not reviewable, the court did not address or discuss the context in which the alleged defamatory statements were made by the council member or whether such statements were entitled to any privilege. Brown does not overrule or limit the Richardson decision and leaves undisturbed the Richardson holding that, so long as the allegedly defamatory statements were undertaken in the performance of duty, the absolute privilege applies as a matter of public policy.⁴

Indeed, the Supreme Court, since its Brown decision, has reaffirmed the holding of Richardson. In 2013, the Court issued its opinion in Health Promotions Specialists, LLC v. South Carolina Bd. of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013) where it recognized that the Board of Dentistry was immune to a civil suit relating to the Board’s regulation imposing restrictions on hygienists’ work in schools by the “common law that interprets and applies principles of legislative immunity, a doctrine that *has not* been

⁴ The absolute legislative immunity provided for in Richardson does not render the language of the South Carolina Tort Claims Act meaningless. See S.C. CODE ANN. § 15-78-70(b) (“Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee’s conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.”). The Tort Claims Act governs all sorts of employee functions, while the Richardson opinion only addresses a special, particular type of immunity – that of legislative duties. If a certain official or employee is not acting within the scope of a legislative function, then the Tort Claims Act may apply to determine that person’s liability. In accord, the Tort Claims Act provides that “[t]he governmental entity is not liable for loss resulting from (1) legislative . . . action or inaction.” S.C. CODE ANN. § 15-78-60(1).

supplanted by the [Tort Claims Act.]” Id. at 637, 743 S.E.2d at 815 (emphasis added). The Court cited the Richardson opinion in support of this holding. Id. This Court should reject the argument by Owens that the holding in the Richardson opinion has been overturned.

Owens also contests the application of absolute immunity to the actions of Council Respondents, arguing that the actions taken by Council Respondents do not qualify as legislative acts or functions. As a part of this argument, Owens attempts to challenge the authority for City Council’s authorization of the audit conducted by Bolchoz. This audit has never been legally challenged, however, and Owens does not challenge it in his Amended Complaint against Respondents. In addition, S.C. CODE ANN. § 5-7-100 specifically authorizes such an investigation by City Council: “The governing body of the municipalities or its agents may investigate any department of the municipal government and any office thereof” While this statute provides for methods of issuing subpoenas and compelling the attendance of witnesses, it does not limit the manner in which a governing body may conduct an investigation. The investigation undertaken by Bolchoz was properly authorized by City Council.

Owens attempts to argue that the actions of Council Respondents did not constitute legislative acts and were rather only administrative actions which do not enjoy absolute immunity. At a previous hearing held in the case, Owens’ counsel, however, acknowledged that Council Respondents’ act of commissioning and publishing the Bolchoz Report was within the scope of their legislative duties:

Q: [W]ould you agree or disagree that this report that’s dated July 29, 2014, was created by council as part of their legislative function or activities?

A: Your Honor, it was a legislative result, yes. . . .

Q: But as part of your legislative function, as a legislator?

A: Yes, Your Honor.

...

As far as it actually commissioning Mr. Bolchoz's and then publishing, then, yes I would say it's within the scope, that portion of it.

[R.pp. ___; March 18, 2015 Hearing Tr., pp. 25, l. 15 – 26, l. 3.]

The action taken by Council Respondents in voting to approve Bolchoz to conduct an investigation or audit and in voting to release the Bolchoz Report to the public are undeniably legislative acts which qualify for absolute legislative immunity.

In Bogan, the United States Supreme Court held that acts of local legislators in “introducing, voting for, and signing an ordinance eliminating the government office held by respondent constituted legislative activities” and as such, the local legislators were entitled to absolute immunity from civil liability for their legislative actions. 523 U.S. at 46. “Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity.” Id. at 54 (internal citation omitted).

Voting is “quintessentially legislative.” Id. at 55. In Doe v. McMillan, 412 U.S. 306 (1973), the United States Supreme Court held that members of Congress could not be held liable for voting to publish a report. There, the House of Representatives authorized the Committee on the District of Columbia to conduct an investigation and study of the management and operation of any department or agency within the District of Columbia. A special subcommittee investigated the public school system for the District of

Columbia and submitted a report to the Speaker of the House. The report was ordered published by the members of the House Committee. Id. at 307-08.

The report included information about certain specifically named students, including absence sheets, copies of test papers, and documents related to disciplinary problems. Id. at 308-09. The parents of the students sued multiple defendants, including the chairman and members of the House Committee, and sought damages for the disparagement to the children's reputations. Id. at 309.

The United States Supreme Court held it was plain the members of Congress were absolutely immune from liability for "introducing material at Committee hearings that identified particular individuals, for referring the Report that included the material to the Speaker of the House, and for voting for publication of the report." "[T]he actions upon which petitioners sought to predicate liability were legislative acts . . . and, as such, were immune from suit." Id. at 312 (internal citation omitted).

Here, the action taken by Council Respondents which is central to Owens' defamations claims is their vote to release the Bolchoz Report to the public. This is a legislative act, and Owens' attempts to characterize this action as administrative fails.

Owens cites Alexander v. Holden, 66 F.3d 62 (4th Cir. 1995) in arguing that acts which single out specific individuals are administrative acts and not legislative acts entitled to absolute immunity. First, at issue in Alexander was the county commissioners' refusal to reappoint or hire a former county employee through consolidation of that position with another and refusal to hire or reappoint the employee to the newly created position thus effecting her termination. Id. at 63-65. In holding that the neither the commissioners nor county were entitled to legislative immunity after

the former county employee brought a discrimination suit, the Fourth Circuit found the defendants' action was an administrative personnel decision resulting in the termination of a specific employee. Id. at 67.

The Fourth Circuit observed that acts involving the state of affairs of a governmental body are legislative. Id. at 66. Here, the act of Council Respondents in authorizing an investigation into the management and operation of the City by city officials and authorizing the release of the report of the investigation to the public is an act involving the state of affairs of the City and thus is a legislative act under the principles set forth in Alexander.

Furthermore, Owens' contention that the actions of Council Respondents singled out a specific individual – himself – and thus were administrative actions under Alexander is wrong factually and legally. The investigation authorized by City Council was not designed to target the mayor as testified by Bolchoz:

Q: Did you go in with an understanding that you're to direct your focus to any one individual or any one department or any one area?

A: No, sir.

[R.p. ___; Bolchoz Dep., p. 18, ll. 8-12.]

In addition, after the Fourth Circuit's 1995 Alexander opinion, the United States Supreme Court issued its 1998 opinion in Bogan where the Court rejected the argument that because a particular individual was targeted, the local legislators' actions in voting to eliminate a government office was not legislative:

The [lower court] held that petitioners' [the local legislators] conduct in this case was not legislative because their actions were specifically targeted at respondent. Relying on the jury's finding that respondent's constitutionally protected speech was a substantial or motivating factor behind petitioners' conduct, the [lower] court concluded that petitioners

necessarily relied on facts relating to a particular individual and devised an ordinance that targeted [respondent] and treated her differently from other managers employed by the City. [internal citation omitted]. [T]he [lower] court *erroneously relied on petitioners' subjective intent in resolving the logically prior question of whether their acts were legislative.*

Id. at 54 (emphasis added).

The Court further admonished that the subjective motives or intent of local legislators should not be considered in determining whether an act that is the basis of a civil lawsuit is legislative and entitled to immunity – the very thing that Owens urges this Court to do throughout his appellant's brief:

Whether an act is legislative turns on the nature of the act, *rather than on the motive or intent of the official performing it.* The privilege of absolute immunity would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. [internal citation omitted]. Furthermore, it simply is not consonant with our scheme of government for a court to inquire into the motives of legislators. . . . We therefore [have] held the defendant . . . had acted in a legislative capacity even though he allegedly singled out the plaintiff for investigation in order to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights. [internal citation omitted.]

Id. at 54-55 (emphasis added).

Finally, Owens argues that the absolute immunity provided in Richardson was only granted because the defamatory statement was uttered at a meeting where solely legislative members and members of a recreation commission were present and that in this case, the vote to release the Bolchoz Report to the public therefore goes beyond the privilege set forth in Richardson.

The Richardson opinion takes no account of the size of the intended audience for the alleged defamatory statements. Indeed, the majority of council meetings are open to the public, so any utterance or publishing of words by a council member during the

course of his or her legislative duties could be heard by a member of the public in attendance at the meeting. See S.C. CODE ANN. § 30-4-60 (“Every meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter.”). The Richardson court only referenced the type of meeting in which the defamatory statements were made and the attendees of the meeting in making the determination of whether the statements were made during the course of the legislator’s duties. Richardson, 273 S.C. at 146-48, 255 S.E.2d at 343-44. Nowhere in the opinion did the court hold that attendance by a member of the public would destroy the absolute immunity granted to members of legislative bodies for acts in the performance of their duties. Indeed, as the United States Supreme Court held in McMillan, a legislator’s vote to publish a report cannot subject that legislator to liability. 412 U.S. at 312.

Council Respondents have been sued by Owens for authorizing a legitimate investigation into the affairs of the City and its officials and for voting to release the report of that investigation to the public. These are precisely the sort of acts that are protected from suit by the doctrine of absolute legislative immunity which itself is based upon the strong public policy of encouraging service by qualified members of the community and encouraging debate and actions which serve the interests of the public without fear of the imposition of personal monetary liability upon those who agree to serve as members of legislative bodies. For these reasons, the Trial Court’s grant of summary judgment to Council Respondents on the basis of absolute legislative immunity should be affirmed.

II. Appellant's argument that Council Respondents acted outside the scope of their official duties as local legislators is not preserved for appellate review where the Trial Court did not rule upon that issue; furthermore, the only act of Council Respondents relevant to the publication element of Appellant's defamation claims is their act of voting for the release of the Bolchoz Report to the public; in addition, any allegation that Council Respondents republished the Bolchoz Report is not actionable where Appellant did not allege with specificity in his complaint the manner in which the Report was republished and where this claim is based on the distribution of a document of public record.

In Part IV of his appellant's brief, Owens argues that even if Council Respondents' acts of voting to initiate an investigation and voting to publish the findings of that investigation are acts protected by absolute legislative immunity, Council Respondents engaged in additional activities rendering Council Respondents liable for the claims alleged in Owens' Amended Complaint. Owens lists various activities such as alleged meetings Council Respondents had regarding the investigation into the City's affairs. Owens also alleges that certain Council Respondents are liable for republishing the Bolchoz Report outside of their legislative functions.

First, in its order granting summary judgment to Council Respondents, the Trial Court did not rule upon whether any other alleged activities of Council Respondents or whether any alleged republishing of the Bolchoz Report by any of Council Respondents outside of their vote to release the Report to the public fell beyond the legislative privilege. Owens did not request the Trial Court to reconsider its order as to these issues by way of a Rule 59(e), SCRCP motion. Where a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved for appellate review. Summersell v. South Carolina Dep't of Pub. Safety, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999); see also Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding the Court of Appeals improperly

addressed an issue that the “circuit court did not explicitly rule on” when the appellant did not raise the issue in a Rule 59(e) motion to alter or amend).

Second, Owens’ argument misapprehends the nature of his defamation claims, in which the making of a false statement and publication of that statement to unprivileged third parties are the key elements. Burris v. Electro Motive Mfg. Co., 247 S.C. 579, 582, 148 S.E.2d 687, 688 (1966). Therefore, whatever other events Owens alleges may have occurred prior to City Council’s vote authorizing release of the Bolchoz Report to the public do not bear upon his defamation claims. Without Council Respondents’ vote to publish the Bolchoz Report, Owens could not state any claim for defamation. Owens’ defamation claims depend upon the vote to publish the Report, and as voting in this circumstance is unquestionably a legislative act entitled to absolute immunity, his claims against Council Respondents must fail.

The only other acts of Council Respondents which Owens references in his appellant’s brief are allegations that Council Respondents republished the Bolchoz Report after City Council voted to release the Report to the public. As an initial matter, Owens’ Amended Complaint only makes general references to the alleged republishing of the Bolchoz Report by Council Respondents and provides no details regarding the republishing of the Report. [R.pp. ___; Amended Compl., ¶¶ 29, 35, 43.] A “complaint must show in a definite and positive manner that the defamatory matter therein set out was communicated in one way or another to some third person or persons.” Burris, 247 at 582, 148 S.E.2d at 688. Therefore, Owens’ Amended Complaint does not sufficiently set forth a claim against Council Respondents for any publishing or republishing of the

Bolchoz Report other than their affirmative vote during a city council meeting to release the Report to the public.

Finally, even if the issue of republishing is preserved for appellate review, Owens only references in his appellant's brief Councilman Unthank's distribution of the Bolchoz Report after it had been authorized for release by City Council. Councilman Unthank cannot be liable for defamation under these circumstances for distributing an already public document properly authorized for release by City Council. See Wilson v. Preston, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008) (observing that county council was authorized to release to the public attorney-client privileged documents).

Councilman Unthank's act of sharing a public document would not be unlike the media's sharing of the Bolchoz Report which would be protected by the "fair report" privilege recognized in South Carolina which "protects fair and accurate reports of 'judicial records and proceedings and other official acts, reports, and records.'" White v. Wilkerson, 328 S.C. 179, 186, 493 S.E.2d 345, 348 (1997) (quoting S.C. JUR. *Libel and Slander* § 61 (1993)). This privilege extends to individuals as well as to news media. See Oliveros v. Henderson, 116 S.C. 77, 106 S.E. 855, 859-60 (1921).

Councilman Unthank's distribution of the by-now public Bolchoz Report cannot rise to the level of defamation where he is only alleged to have circulated a report of public record. The privilege extends to a report of the contents of the public record, and only any matter added to the report by the publisher, which is defamatory of the person named in the public records, is not privileged. Jones v. Garner, 250 S.C. 479, 487, 158 S.E.2d 909, 913 (1968). Owens has made no allegations in either his Amended Complaint or appellant's brief that Councilman Unthank added to the Bolchoz Report or

did anything more than distribute the Bolchoz Report which was available as a matter of public record and protected by the absolute legislative privilege.⁵ See Norman v. Borison, 17 A.3d 697, 717 (Md. Ct. App. 2011) (holding absolute judicial privilege applied to attorneys' republication of filed complaint on internet website).

Accordingly, where the issue that Council Respondents allegedly acted outside the scope of their official duties prior to and after the vote authorizing release of the Bolchoz Report to the public is either (1) not preserved for this Court's review; (2) not relevant to the publication element of Owens' defamation claims; or (3) not actionable where the Amended Complaint did not set forth with specificity the manner in which the Report was republished and Councilman Unthank merely distributed a document of public record, this Court should reject this attempt by Owens to circumvent the absolute privilege afforded by legislative immunity.

III. The Trial Court properly granted summary judgment to Chief Tyndall where Appellant failed to identify any defamatory statement published by Chief Tyndall.

The Trial Court separately granted summary judgment to Chief Tyndall on Owens' claims for defamation, ruling Owens "failed to provide a scintilla of evidence that [Chief Tyndall] made or published a defamatory statement against [Owens] as he took no part in publishing the Bolchoz Report." [R.p. ___; Order, p. 7.] As previously noted herein, the unprivileged publication of a statement to a third party is an essential

⁵ Council Respondents recognize that the United States Supreme Court's Doe v. McMillan opinion, which holds that legislators are immune from liability for voting to publish a report, suggests that republication of a public report may be actionable. 412 U.S. at 313-14. However, the Court was only analyzing liability for republication under the Speech or Debate Clause and did not consider any state or other public policy privileges protecting from liability a person's distribution of a document of public record.

element of a defamation claim which without, such claim will fail. Burris v. Electro Motive Mfg. Co., 247 S.C. 579, 582, 148 S.E.2d 687, 688 (1966).

Owens has never at any point in this litigation referenced or produced any evidence showing that Chief Tyndall published the Bolchoz Report or made any other defamatory statement. His Amended Complaint includes no factual allegations detailing how Chief Tyndall published or republished the Bolchoz Report, other than a vague allegation that Council Respondents released the Report with the support of Chief Tyndall. [See R.pp. ___; Amended Compl. ¶¶ 34, 42.] Such indefinite allegations are not sufficient to support a claim for defamation. See McNeil v. South Carolina Dep't of Corrs., 404 S.C. 186, 195, 743 S.E.2d 843, 848 (Ct. App. 2013) (holding the trial court did not err in dismissing the plaintiff's defamation action where she did not set forth with any specificity what the alleged false statements were and did not allege that the defendant published any statement to a third party or even made the alleged statements).

Owens' arguments to the Trial Court and this Court comprise of only allegations that Chief Tyndall was involved in the investigation leading to the preparation of the Bolchoz Report, but such allegations are not evidence of an unprivileged publication of the Report or any other defamatory statement to a third party by Chief Tyndall.

During his deposition, Owens conceded he could not point to any defamatory statement by Chief Tyndall:

Q: [W]hat defamatory statement did Chief Tyndall make against you?

A: What defamatory statement?

Q: Yes, sir.

A: ...

I can't tell you exactly what he did say, but I know he did tell us – another police officer - - that he had gotten - - he beat me down. He had gotten enough votes to get a three-year contract for \$300,000, and, I guess we taught Joe a lesson.

...

He was also up there one night laughing to some other people - - and he knows who they were - - about he had been given a three-year contract and nothing in there says he had to work so . . .

[R.pp. ___; Owens Dep., pp. 199, l. 25 – 200, l. 19.]

When further pressed as to whether there any further complaints as to Chief Tyndall, Owens alluded to some notes that he may have, but he did not have them with him and said he would have to track them down. [R.pp. ___; *Id.* at pp. 200, l. 20 – 201, l. 4.] When asked if there were any other issues he could recall with Chief Tyndall relevant to his defamation claims, Owens responded, “Not right now.” [R.p. ___; *Id.* at p. 202, ll. 5-6.]

In his deposition, Owens could not specify or recall any defamatory statement made by Chief Tyndall about Owens. The only evidence in the record is that Council Respondents spontaneously voted to release the Bolchoz Report at a regularly scheduled City Council meeting after Owens himself began discussing the contents of the Report during the meeting. [R.pp. ___; August 5, 2014 Meeting Minutes, pp. 7-8, 10.] There is no evidence, much less the substantial evidence Owens claims exists, pointing to any publication of the Bolchoz Report or any other defamatory statement by Chief Tyndall. See Williams v. Lancaster Cnty. Sch. Dist., 369 S.C. 293, 304-05, 631 S.E.2d 286, 292-93 (Ct. App. 2006) (affirming trial court’s grant of summary judgment to defendant on plaintiffs’ claim for slander where plaintiffs failed to come forward with any evidence showing that defendant was responsible for the publication of a defamatory statement);

see also Moody v. McLellan, 295 S.C. 157, 163-64, 367 S.E.2d 449, 453 (Ct. App. 1988) (affirming the trial court's grant of summary judgment on defamation claim due to appellant's failure to come forward with evidence respondent actually made the alleged statements).

Chief Tyndall discharged his burden of demonstrating the absence of a genuine issue of material fact as to whether he published any defamatory statement by pointing out to the Trial Court the absence of evidence to support any allegation by Owens that he made a defamatory statement. Once the moving party carries its initial burden, the “opposing party must, under Rule 56(e), ‘do more than simply show that there is some metaphysical doubt as to the material facts’ but ‘must come forward with specific facts showing that there is a *genuine issue for trial*.’” Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (emphasis in original)). Owens has failed to do so with respect to his defamation claims against Chief Tyndall. Therefore, the Trial Court properly granted summary judgment to Chief Tyndall on Owens’ causes of action for defamation.

IV. The Trial Court properly granted summary judgment to Respondents where Appellant, a public figure, cannot establish that he can prove constitutional actual malice with clear and convincing evidence where there is no evidence that Respondents published any defamatory statement with knowledge of its falsity or with reckless disregard for its truth.

As a separate and independent ground for its order granting summary judgment to both Council Respondents and Chief Tyndall, the Trial Court found that summary judgment was appropriate where Owens, a public figure,⁶ failed to submit “clear and

⁶ Owens has not challenged the finding that he is a public figure.

convincing evidence that the alleged defamatory statement (the Bolchoz Report) was published with knowledge of its falsity or with reckless disregard for its truth.” [R.pp. ____; Order, pp. 5-6.]

“The constitutional guarantee of free speech requires that a public official or public figure must prove a defamatory statement was made ‘with ‘actual malice’-that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” George v. Fabri, 345 S.C. 440, 451, 548 S.E.2d 868, 874 (2001) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)); see also Curtis Publ’g Co. v. Butts, 388 U.S. 130 (1967) (extending New York Times standard of actual malice to public figures). “Whether the evidence is sufficient to support a finding of actual malice is a question of law.” Elder v. Gaffney Ledger, 341 S.C. 108, 113, 533 S.E.2d 899, 901-02 (2000).

In McClain v. Arnold, 275 S.C. 282, 270 S.E.2d 124 (1980), a defamation case, the Supreme Court affirmed summary judgment finding no evidence of actual malice.

The Court stated in McClain:

The presence or absence of actual malice is a constitutional issue and “where a publication is protected by the New York Times immunity rule, summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection in the proper case.” . . . Unless the trial court finds, based on pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice, it should grant summary judgment for the defendant.

Id. at 284, 270 S.E.2d at 125 (internal citations omitted.)

The Supreme Court’s opinion in McClain, however, did not expressly state the standard by which actual malice should be assessed on summary judgment. The Court clarified this standard in George v. Fabri, holding “the appropriate standard at the

summary judgment phase on the issue of constitutional actual malice is the clear and convincing standard.” George, 345 S.C. at 454, 548 S.E.2d at 875. Thus, to survive a motion for summary judgment, a public figure must establish that it can prove, by clear and convincing evidence, that the defamatory statements were made with knowledge that they were false or with reckless disregard of whether they were false or not. Id. at 456-57, 548 S.E.2d at 876-77.

The United States Supreme Court has explained that the New York Times rule “protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant.” George, 345 S.C. at 454, 548 S.E.2d at 875 (quoting Garrison v. Louisiana, 379 U.S. 64, 77 (1964)).

With this principle in mind, “the actual malice standard is not satisfied merely through a showing of ill will or ‘malice’ in the ordinary sense of the term. Moreover, the reckless conduct contemplated by the New York Times standard is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. Instead, actual malice is governed by a *subjective* standard which tests the defendant's good faith belief in the truth of her statements. There must be sufficient evidence to conclude either that the defendant made the statements with a high degree of awareness of . . . probable falsity or that the defendant in fact entertained serious doubts as to the truth of his publication.” George, 345 S.C. at 456, 548 S.E.2d at 876 (internal citations omitted) (emphasis in original).

“The actual malice standard is premised on our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,

and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” Id. at 456-57, 548 S.E.2d at 876 (internal citations omitted).

Mere negligence in making a statement is insufficient as a matter of law to prove actual malice. Id. at 458, 548 S.E.2d at 877; see also Elder, 341 S.C. at 114, 533 S.E.2d at 902 (reckless disregard for the truth requires more than a departure from reasonably prudent conduct).

Owens contends the Trial Court erred in finding that he would not be able to prove by clear and convincing evidence that Respondents acted with constitutional actual malice. While he expends a good portion of his appellant’s brief attempting to refute the allegations of the Bolchoz Report and makes unsubstantiated and speculative accusations that Respondents knew the Report was false, what Owens did not do before the Trial Court and has still not done in this appeal is show actual evidence that Respondents published the Bolchoz Report with knowledge that it was false or with reckless disregard of whether it was false or not.

In fact, Robert Bolchoz, the attorney retained by the City to conduct the procedural audit and who authored the Bolchoz Report, stands by the accuracy and truthfulness of his report. [R.p. ___; Bolchoz Dep., p. 273, ll. 13-16 (“Q: And the report itself, you stand by the veracity of the memorandum that you prepared? A: Yes.”)]. Bolchoz, who prepared the report after interviewing dozens of witnesses and reviewing a large collection of material, testified that the memorandum he prepared accurately reflected the information he gathered. [R.p. ___; Id. at p. 68, ll. 15-17.]

In his deposition testimony, Bolchoz also strenuously refuted Owens' allegations that Bolchoz and Respondents collaborated in any way to produce a false report regarding Owens' conduct. Bolchoz testified that he did not go into the assignment to conduct the procedural audit for the City with any understanding that he was to direct his focus to any one individual or department. [R.p. ___; Id. at p. 18, ll. 8-12.] He received no specific instructions from Councilman Miles or any other council member on how to conduct or perform his work. His goal was to produce a document that reported his findings, whether "good or bad." [R.p. ___; Id. at p. 23, ll. 7-14.]

Bolchoz was specifically questioned whether the council members asked him to include particular areas in his report, and he again stated that they did not; however, he did state that specific areas were raised as items to investigate but no one told him what should be included in the report. [R.pp. ___; Id. at pp. 43, l. 15 – 44, l.7.]

Bolchoz was also asked to address the allegation in the Amended Complaint that his hiring was spearheaded by Respondents Unthank and Miles. He emphatically denied such accusations, stating "it is outrageously inaccurate and disingenuous as - - far as I go. I had no conversations with anybody about, hey, you've got to stick it to the mayor or, hey, you better make sure this report says X or Y or, hey, we got to get this thing done so that we can put the screws to this guy. And I'm just not- - that's absolutely a fabrication as regard to me. I don't know what they talked about amongst themselves, you know, and I don't particularly care; but, you know, just - - that that's. . ." [R.p. ___; Id. at p. 68, ll. 1-11.] Based on Bolchoz's deposition testimony, it is clear that any contention by Owens that the Bolchoz Report was a preconceived and coordinated plan is untrue and unsupported by the evidence.

Furthermore, with respect to each conclusion in the Bolchoz Report which Owens contends is false, Bolchoz defends the truthfulness of his Report. The evidence Bolchoz compiled to produce and support his Report negates any allegation by Owens that Respondents published the Report with knowledge that it was false or with reckless disregard of whether it was false or not:

- Bolchoz reported that Owens “procured services such as fence construction . . . without following the standard and established procurement procedures [and] signed check requests and directed payment of invoices, often in circumstances which called for the City Administrator’s approval.” [R.p. ___; Bolchoz Report, p. 4.] Bolchoz testified in his deposition that this conclusion was supported by his interview with the city treasurer who informed him that often individuals “would show up with a – with a receipt for work done that was signed by the mayor to claim their check from the treasurer’s office.” [R.p. ___; Bolchoz Dep., p. 155, ll. 4-18.] City employees advised Bolchoz that Owens authorized the fence construction without following proper procedures. [R.pp. ___; *Id.* at pp. 156, l. 14 – 157, l. 5.] The City Administrator further advised Bolchoz that she did not authorize the fence construction. [R.p. ___; *Id.* at p. 157, ll. 6-23.]
- Similarly, with respect to the purchase of an excavator by the City for \$68,546.00, Bolchoz reported that Owens did not adhere to proper procedures for its procurement. [R.p. ___; Bolchoz Report, p. 5.] Bolchoz was again advised by City employees, including Justin Black and the City Administrator, that Owens did not follow the procurement procedures and that the excavator

was delivered and received and paperwork for it completed prior to City Council's vote to approve its procurement. [R.pp. ___; ___; Bolchoz Dep., pp. 166, l. 11 – 170, l. 15; see also June 12, 2014 e-mail exchange between Bolchoz and Justin Black, purchase order and accompanying documentation.] Bolchoz was informed by City employees that “the standard procedure for buying a piece of equipment that large was not followed and then the equipment showed up and the mayor told her [the City Administrator] we are keeping it.” Bolchoz’s testimony indicates that employees informed him while the documentation might have labeled the equipment purchase as an emergency, employees did not consider it as such. [R.pp. ___; Bolchoz Dep., pp. 170, l. 24 – 172, l. 6.]

- With respect to his conclusion that Owens violated policy and procedure with respect to payroll or personnel status changes, Bolchoz’s findings were supported by Chief Tyndall’s documentation that Owens approved at least six raises for Matt Edwards in fourteen months without the approval of Chief Tyndall or the City Administrator. [R.pp. ___; See Chief Tyndall’s e-mail of March 16, 2014.] Bolchoz had also received information from the City Administrator regarding the hiring of a prior convicted felon without authorization. [R.pp. ___; Bolchoz Dep, pp. 176, l. 17 – 177, l. 5.]
- Bolchoz’s conclusion that Owens attempted to interfere with the grievance hearing regarding the termination of a police officer was supported by information provided by Deputy Department Head Jamie Hook who advised Bolchoz that Owens had contacted “him to make sure that he told his

employee to vote a certain way on this grievance.” [R.p. ___; Id. at p. 178, ll. 1 – 23.]

- Bolchoz’s conclusion in his Report that a police caption was ordered by Matt Edwards to sign off on a fraudulent time sheet for a subordinate was supported by evidence that time sheets for the employee indicated he was being paid for working on the job when he was actually receiving paid leave to attend 300 hours of class time – two months’ worth of tax dollars. [R.pp. ___; Id. at pp. 198, l. 24 – 201, l. 20.]
- Bolchoz’s conclusion in his Report that Matt Edwards had three dogs unnecessarily shot was supported by the statement of an officer on the scene that he did not perceive the dogs as being a threat or dangerous and that it was not necessary to kill them. [R.pp. ___; ___; Scott M. Morrison Note; Bolchoz Dep., pp. 202, l. 6 – 203, l. 18.] Even though an incident report may have documented the incident differently, that does not invalidate the officer’s opinion that the act of shooting the dogs was unnecessary.
- Bolchoz’s conclusion that Owens held a special committee meeting on March 10, 2014 which was not publicized in accordance with the requirements of FOIA is well documented, including by a transcription of the unpublicized meeting where Owens begins the meeting by announcing that “[s]pecial committees may be appointed by the mayor at any time to make investigations and . . . recommendations regarding any matter. So I appoint Casey [the current mayor pro tem].” [R.pp. ___; ___; Transcribed Audio File of Mayor Owens’ “Ad Hoc Special Meeting,” p. 8, ll. 10-14; Bolchoz Dep., pp. 233, l.

22 – 234, l. 20.] Owens admits he gave no notice of this meeting. [R.pp. ____; Owens Dep., pp. 115, ll. 20-22; 118, ll. 12-16; 303, ll. 15-10.] In support of his determination that Owens failed to comply with FOIA, Bolchoz testified: “You can’t have it both ways. You know, you can’t say I’m having a committee to grill the police chief and then, when you get called out for having a committee meeting without noticing the public, you claim it’s not a committee. It’s one or the other and I think it’s a committee.” [R.p. ____; Bolchoz Dep., p. 245, ll. 17 – 23.] It is, at the very least, debatable whether this special meeting called by Owens should have been publicized in compliance with FOIA. [R.p. ____; *Id.* at pp. 253, l. 7 - 254, l. 24.]

- Finally, Owens objects to the finding in the Bolchoz Report that a former senior police officer informed him that she had been told by a city council member that the member agreed to vote with Owens on a matter before City Council in exchange for Owens’ securing a promotion for a particular police officer related to the council member. [R.p. ____; Bolchoz Report, p. 7.] Bolchoz was provided this information by Jackie Brothers. Bolchoz spoke with her twice about her allegations and she was “very adamant” about it. [R.pp. ____; Bolchoz, pp. 222, l. 15 – 224, l. 10.] While Owens and the council member accused may deny Brothers’ allegations, their denial does not negate the support Bolchoz had for including Brothers’ allegation in his Report.

In summary, Bolchoz was provided information and documentation which substantiated the findings and conclusions drawn in the Bolchoz Report. He provided the

City a three-ring binder containing the material he had gathered supporting his Report. [R.p. ___; Bolchoz Dep., p. 21, ll. 5-12.] At most, Owens can only show that he disagrees with much of the Bolchoz Report and that he interprets the documentation underlying the Report's conclusions differently, but a disagreement does not establish that the Report was false or prepared with reckless disregard for the truth.

In addition, Owens cannot make the required leap to show that Respondents knew the Bolchoz Report was false or recklessly disregarded its truth when the Report was released to the public. In fact, when asked how Respondents should have known of the alleged falsity of the Report, Owens simply replied "Because they read it." [R.p. ___; Owens Dep., p. 81, ll. 6-8.] However, where Bolchoz has affirmed the Report's veracity and has testified as to the support for the Report's findings and conclusions, Owens cannot, as a matter of law, meet the constitutional actual malice standard with clear and convincing evidence.

When opposing a summary judgment motion, the 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*." Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (internal citation omitted) (emphasis in original). Where a verdict is not "reasonably possible under the facts presented, summary judgment is proper." Bloom v. Ravoira, 339 S.C. 417, 425, 529 S.E.2d 710, 714 (2000) (emphasis added).

In this case, the Trial Court properly granted summary judgment to Respondents on Owens' defamation claims. A judgment for Owens was not reasonably possible under the facts presented when measured against the standard of clear and convincing evidence.

For this separate and independent basis, the Trial Court's grant of summary judgment to Respondents on Owens' defamation claims should be affirmed.

V. Appellant failed to appeal the Trial Court's factual finding that Appellant shared the Bolchoz Report with unprivileged third parties prior to the Report's release to the public; therefore, the Trial Court's order granting summary judgment to Respondents can be affirmed on the separate and independent ground that Appellant's self-publication of the Bolchoz Report defeats his claims for defamation.

The Trial Court further found in its order granting summary judgment that Owens "had already waived [any privilege] when he shared the Report with third parties." [R.pp. ____; Order, pp. 6-7.] This factual finding by the Trial Court was supported by the minutes of the August 5, 2014 City Council meeting which recorded the remarks of citizens Rish and Brooks. The comments of these two gentlemen indicated familiarity with the conclusions of the Bolchoz Report even though the Report had not yet been made public. [R.pp. ____; ____; Order, p. 4; August 5, 2014 Meeting Minutes, pp. 2-8.]

In addition, at the motion for summary judgment hearing, the Trial Court was informed that Owens had e-mailed the Bolchoz Report to Matt Edwards, the former Major of the Police Department who was no longer employed by the City. [R.pp. ____; Hearing Tr., pp. 30, ll. 1-3; 34, ll. 5-8; 60, ll. 14-17.] At the hearing, Owens' counsel did not deny that Owens had e-mailed the report to Edwards. [R.p. ____; *Id.* at p. 59, ll. 9-10.]

Owens has not challenged this factual ruling by the Trial Court in his appeal. "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997); *see also Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993). Failure to challenge the ruling "is an abandonment of the

issue and precludes consideration on appeal.” Biales, 315 S.C. at 168, 432 S.E.2d at 484. The unchallenged ruling, “right or wrong, is the law of [the] case and requires affirmance.” Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970).

The Trial Court’s unappealed ruling that Owens waived any privilege associated with the Bolchoz Report by sharing it with unprivileged third parties defeats Owens’ defamation claims against Respondents. “Self-publication of the allegedly defamatory statement may bar a plaintiff from recovery.” Murray v. Holnam, Inc., 344 S.C. 129, 144, 542 S.E.2d 743, 751 (Ct. App. 2001) (citing 50 AM.JUR.2d *Libel and Slander* § 241 (1995) (as a general rule, where a person communicates a defamatory statement only to person defamed and the defamed person then repeats statement to others, publication of statement by person defamed, or “self-publication,” will not support defamation action against originator of statements)).

Therefore, where the Trial Court found that Owens had already shared the Bolchoz Report with third parties, and Owens has not challenged that finding on appeal, Owens cannot maintain his claims of defamation against Respondents for publishing the Report after he had already done so himself. The Trial Court’s order granting summary judgment to Respondents and dismissing Owens’ amended complaint in its entirety as to Respondents can be affirmed on this unappealed basis alone. See Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (stating where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case).

VI. The Trial Court did not abuse its discretion in denying Appellant additional discovery prior to the Court's grant of summary judgment where additional discovery could not contribute to those claims that could be resolved as a matter of law on the basis of the allegations and the pleadings themselves (i.e., absolute legislative immunity and failure to identify any statement published by Chief Tyndall) and where it was only speculative as to whether Appellant would have discovered any evidence relating to constitutional actual malice.

The Trial Court also found that further discovery would be of no use except to unnecessarily delay the grant of summary judgment to Respondents on Owens' defamation claims. [R.p. ___; Order, p. 6.] Owens contends summary judgment was not appropriate where discovery had not been completed.

"The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion." Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001). A party claiming that it has not had sufficient time and opportunity to complete discovery prior to the grant of a Rule 56, SCRCP motion for summary judgment "must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition." Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 53-54, 677 S.E.2d 32, 35-36 (Ct. App. 2009) (internal citations omitted). "A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." Id. at 54-55, 677 S.E.2d at 36 (citing Dawkins v. Fields, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003)).

Here, additional discovery would not have advanced Owens' case against Respondents. Further discovery would not have contributed to the resolution of either the absolute immunity issues or Owens' failure to sufficiently allege in his Amended Complaint that Chief Tyndall published any defamatory statement. These are issues of law that can be resolved on the basis of the allegations and the pleadings themselves. Moreover, in his own deposition, Owens could not point to any defamatory statement made by Chief Tyndall.

With respect whether Owens could prove constitutional actual malice by clear and convincing evidence, Owens' claim that additional discovery is needed hinges upon speculative deposition evidence that might be obtained. However, Bolchoz, the author of the Report at issue, has already confirmed its accuracy and has testified that he was not part of any conspiracy or other coordinated efforts with Respondents to produce and publish the Report. It is highly unlikely that Owens would uncover any evidence to the contrary. The grant of additional discovery would have only delayed the inevitable dismissal of Owens' defamation claims against Respondents. The Trial Court did not err or abuse its discretion in granting summary judgment to Respondents prior to the completion of discovery.

CONCLUSION

For the reasons set forth herein, the Trial Court's order granting summary judgment to Respondents should be affirmed where (1) Council Respondents are entitled to absolute legislative immunity as a matter of law; (2) Owens failed to sufficiently allege or present any evidence that Chief Tyndall published a defamatory statement; (3) as an independent and separate ground for all Respondents, Owens cannot prove to a jury constitutional actual malice by clear and convincing evidence as required on his defamation claims where he is a public figure; (4) Owens failed to appeal the Trial Court's factual finding that Owens shared the Bolchoz Report with unprivileged third parties prior to it being released to the public; therefore, the Trial Court's order granting summary judgment can be affirmed as to all Respondents on the separate and independent ground that Owens' self-publication of the Bolchoz Report defeats his claims for defamation; and (5) the speculative, additional discovery Owens seeks would have only unnecessarily delayed the grant of summary judgment to Respondents.

Respectfully submitted,



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July 22, 2016.

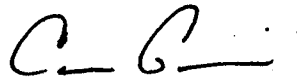
CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondents, Temus C. Miles, Jr., B.J. Unthank, L. Dale Harley, Boyd J. Jones, Tommy G. Parler, Eric L. Fowler, and Dennis Tyndall, do hereby certify that I have this date served the foregoing Initial Respondents' Brief, dated July 22, 2016, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

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July 22, 2016

RECEIVED

JUL 25 2016

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Joseph W. Owens v. Temus C. Miles, Jr., B.J. Unthank, L. Dale Harley, Boyd J. Jones, Tommy G. Parler, Eric L. Fowler, and Dennis Tyndall*
Appellate Case No. 2016-000068
Case No.: 2015-CP-32-00170
RPR File No.: 2047-332

Dear Ms. Kitchings:

Enclosed for filing are the original Initial Brief of Respondents and the Respondents' Designation of Matter to be Included in the Record on Appeal in the above referenced matter, along with our original Certificates of Service.

By copy of this letter, we are this day serving a copy of our Initial Brief and Designations on all counsel of record.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,



Carmen V. Ganjehsani

CVG

Enclosures

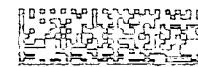
cc: Stephen "Chip" Burn, Esq. (w/enc.)
Andrew F. Lindemann, Esq. (w/enc.)
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