THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

Joseph W. Owens, APPELLANT,

v.

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 RESPONDENTS.

REPLY BRIEF OF APPELLANT

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I. COUNCIL RESPONDENTS ARE NOT IMMUNE FROM LIABILITY FOR APPELLANT'S DEFAMATION CLAIMS UNDER THE DOCTRINE OF ABSOLUTE LEGISLATIVE IMMUNITY WHERE THE ALLEGED ACTS OF KNOWINGLY CONTRIBUTING TO, PUBLISHING AND REPUBLISHING THE DEFAMATORY STATEMENTS ALLEGED IN THE COMPLAINT WENT WELL BEYOND MERELY VOTING TO RELEASE THE BOLCHOZ REPORT TO THE PUBLIC.

In its Order Granting Defendants' Motion for Summary Judgment, the Trial Court ruled that Council Respondents were immune from suit for the allegations of defamation in Appellant's Amended Complaint under the doctrine of absolute legislative immunity. The Court ruled that "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 Granting Defendants' Motion for Summary Judgment, p. 6) In their Initial Brief – as they have throughout discussion of this issue – Respondents defend this ruling and this oversimplified and inaccurate rendition of the alleged conduct of the Respondents by citing, primarily, Richardson v. McGill, 273 S.C. 142, 255 S.E.2d 341 (1979).

In the Richardson case the Court cites, the alleged defamatory statements were published only at a joint meeting attended by the Williamsburg County Legislative Delegation and the Williamsburg County Recreation Commission, and concerned the performance of the Director of the Recreation Commission. The Richardson Court notes that "the meeting was attended only by the members of the Delegation, the Commission and appellant," Id. at 144. Importantly, the Richardson Court points out that:

> At the time the alleged statements were made in 1975 by respondent, Williamsburg County was operating under the Commission form of government and the legislative delegation was responsible for the appropriation of County funds. The members of the Recreation Commission were appointed upon

recommendation of the legislators; and were required, under Act 191 (1971), Section 7, to file a report of its operations with the legislative delegation. The statute provides:

> The Commission shall conduct its affairs on the fiscal year basis used by Williamsburg County. As shortly after the close of its operating year as may be practicable, the Commission shall compile a report of its operations, expenditures and activities and shall file such report with the clerk of court and the county legislative delegation.

Id. at 147.

On this basis, the Richardson Court determined that:

> [t]he duty to appropriate funds for the operation of the county government and the requirement that the Recreation Commission file a report with the legislative delegation *imposed some general duty upon respondent, as a legislator*, to review the performance of the Commission and its empoyees. 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.*

Id.

In reaching its final holding, the Court pointed out the following relevant observations: that "the alleged defamatory statements were uttered (1) at a meeting attended only by the legislative delegations and members of the Recreation Commission, and appellant; (2) by respondent, a member of the legislative delegation; and (3) concerning a matter related to legislative duties and, in which, all present had an official interest." Id. at 147. The Court affirmed summary judgment only "on the ground that the alleged defamatory statements were made on an absolutely privileged occasion," Id. at 148, as delineated above. The legislative power of appropriation of funds has, of course, been long recognized, and the requirement that members of the Recreation Commission report on its operations to the legislative delegation was set by statute, thus establishing the legislative duty.

No such duty is established here – these facts stand in stark contrast with the circumstances of this case, where the Council member Respondents took it upon themselves (notably, without expressly stating the purpose publicly) to "investigate" (a traditionally administrative function) then-Mayor Owens, while also taking extra-legislative steps, delineated in the Initial Brief of Appellant, to direct that investigation and ensure that particular defamatory information should be produced. After having thus authorized and manufactured the report, the Council member Respondents knowingly and recklessly published those false defamatory statements to the public to damage Joseph Owens politically and personally. The Council Defendants therefore acted well outside of the scope of their official duties as legislators, and this conduct, as mentioned, is more fully developed in the Initial Brief of Appellant.

In their brief, the Respondents contend that Plaintiff has asserted that a subsequent case, Brown v. County of Berkeley, 366 S.C. 354, 622 S.E.2d 533 (2005), has effectively overturned the Richardson case for the principle that members of the legislature do not, in fact, enjoy absolute immunity. This is not, however, accurate; Plaintiff points out that the Brown Court, in fact, *applies* the ruling in Richardson to support the principle that "[i]ndividual members of a local county council are not entitled to absolute immunity." Id. at 537. The Richardson Court states that the limits of this immunity "are fixed...by considerations of public policy. A sound public policy has long recognized an absolute immunity of members of legislative bodies *for acts in the performance of their duties*." Id. (emphasis added) The individual council members in Brown, as here, argued for dismissal "pursuant to the principle of absolute immunity and the terms of the South Carolina Tort Claims Act." Brown at 537. The Brown Court applied this principle to facts very similar to those in this case and determined that affirmative defense issues such as "qualified immunity, qualified privilege, and the provisions of the Tort Claims Act" were

not even available for summary disposition. Brown at 538. These facts regarding these defenses would instead have to be developed through the litigation process.

There is no public policy, whether one applies Richardson v. McGill, supra, or Brown v. County of Berkeley, supra, which would serve to expand legislative immunity to the activities described in Appellant's initial brief. Even if the act of voting to initiate this investigation, to continue the audit process and to initially publish the findings of that investigation were protected by absolute legislative immunity, indulging in these additional activities would render these Council Defendants liable. Appellant continues to maintain, however, that even the acts of voting on these issues do not fall within the scope of the legislative duties of the Council member Respondents. Respondents point to an exchange between the Court and Appellant's counsel to imply that it was "acknowledged that Council Respondents' act of commissioning and publishing the Bolchoz Report was within the scope of their legislative duties." Initial Brief of Respondents, pp. 22 – 23. There was initial confusion regarding the nature of Court's questioning regarding council's "legislative function or activities," and the Court certainly made no rulings based on this exchange. In any event, this brief exchange was never intended to abandon or stipulate to anything on this issue, and Appellant's position regarding the issue of legislative scope has been made abundantly clear in subsequent exchanges and court memoranda, including Appellant's initial brief. Even if this were to be deemed a stipulation on the part of Appellant, this Court has stated that "[s]tipulations will not be construed as to give the effect of an admission...obviously intended to be controverted or the waiver of a right not plainly intended to be relinquished." Suddeth v. Knight, 280 S.C. 540, 544, 314 S.E.2d 11, 14 (Ct. App. 1984) Furthermore, such "[a] stipulation will not be enforced if it is contradictory and confusing and stands in the way of a true determination of the parties rights or where it is subject

to different constructions and there is a disagreement as to what was intended to be included therein." Id. (citing 83 C.J.S. Stipulations Section 31 (1953)) Moreover, because this issue concerns a question of law, such a stipulation would not be binding on the court in any event. See McDuffie v. McDuffie, 308 S.C. 401, 418 S.E.2d 331 (Ct. App. 1992), opinion after grant of review, 313 S.C. 397, 438 S.E.2d 239 (1993).

Respondents have also insisted throughout this litigation that the Council member Respondents were authorized by S.C. Code Ann. § 5-7-100 to investigate Mayor Owens' office. They quote the portion of that statute which states "The governing body of the municipalities or its agents may investigate any department of the municipal government and any office thereof...." S.C. Code Ann. § 5-7-100. They have chosen, however, to omit the remaining language of this statute, which goes on to explain "...such governing body *shall* have the same power which a magistrate has to compel the attendance of witnesses and to require them to give evidence under oath in the same manner as is customary in the courts of this State..." Id. (emphasis added), and goes on to delineate the processes that are available to such a governing body, including the compulsion of evidence and testimony through the issuance of subpoenas and application to the courts for orders to enforce these powers. The language of this statute does not allow for "such governing body" to employ alternative methods to investigate municipal departments. The canon of statutory construction which applies here states "*inclusio unius est exclusio alterius*," and stands for the principle that "to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary, Pocket Edition (1996). Here, the legislature has made clear the powers and processes available to municipal governing bodies in conducting investigations. Any more expansive reading of this statute inevitably invites abuses by municipal officials. See United States v. Fuller, 162 F.3d 256

(C.A.4 (S.C.), 1998) (finding that Fuller's invocation of § 5-7-100 in asserting that he was conducting a mayoral investigation was a mistake of law). The initiation and conduct of the investigation in this case by Council member Respondents was therefore not only outside of the scope of their legislative duties, they were unlawful. Respondents contend that the audit was never legally challenged in this litigation, but Appellant has consistently challenged that the Council member respondents exceeded the scope of their legislative duties. In this context, Appellant has merely cited to S.C. Code Ann. § 5-7-100 as additional persuasive authority in support of his position on this issue. It should also be pointed out that the South Carolina Supreme Court has ruled that the courts of this state will not allow litigants to prevail on an issue of error preservation if such would result in a violation of the law. See Ward v. W. Oil Co., 387 S.C. 268, 692 S.E.2d 516 (2010).

II. APPELLANT PROPERLY PRESERVED THE ARGUMENT THAT COUNCIL RESPONDENTS ACTED OUTSIDE OF THE SCOPE OF THEIR OFFICIAL DUTIES AS LOCAL LEGISLATORS.

In their initial brief, Respondents assert that "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." Initial Brief of Respondents, p. 28. The issue of legislative scope was argued extensively by both Plaintiff and Respondents in their respective memoranda, and the Trial Court, in fact, ruled on this issue in Paragraph 2 of the Order under "Conclusions of Law." Finding the Council Defendants immune from suit, the Court stated that " [i]n South Carolina, absolute immunity 'does not depend on the rigid requirement of a strictly legislative or judicial proceeding; its limits are fixed rather by consideration of public policy.'" R.p. _____; Order Granting Defendants' Motion for Summary Judgment p. 6 (citing Corbin v.

Washington Fire and Marine Ins. Co., 278 F.Supp.393, 396 (D.S.C.) aff'd, 398 F.2d 543 (4th Cir. 1968)). The Trial Court then went on to rule against Plaintiff on the issue of legislative scope by determining that the Council Defendants were being sued solely for having voted in favor of authorizing the Bolchoz Report being made public. R.p. _____; Order Granting Defendants' Motion for Summary Judgment p. 6. Having thus limited the scope of conduct applicable to this case, the Trial Court determined that the Council Defendants enjoyed absolute immunity. Id. This issue was therefore properly preserved for appeal.

III. APPELLANT DID NOT FAIL TO APPEAL THE TRIAL COURT'S FACTUAL FINDING THAT APPELLANT SHARED THE BOLCHOZ REPORT WITH UNPRIVILEGED THIRD PARTIES BECAUSE THIS WAS NOT AN INDEPENDENT BASIS FOR THE TRIAL COURT'S RULING

Respondents assert that the Trial Court "found in its order granting summary judgment that Owens 'had already waived [any privilege] when he shared the Report with third parties.'" Initial Brief of Respondents, p. 44 (citing Order Granting Defendants' Motion for Summary Judgment, pp.6-7). In addition to accusing Owens of emailing a copy of the Bolchoz Report to former Major Matt Edwards (the other subject defamed by the document), Respondents speculate that the comments by two citizens during a West Columbia City Council meeting lend support to this ruling by the Trial Court. They go on to point out that this court ruling was not challenged in this appeal and has therefore been abandoned. They then contend that this unappealed ruling establishes an independent ground for barring Appellant's defamation claim under the theory of "self-publication." Initial Brief of Respondents, p. 45.

As an initial matter, Appellant Owens did not challenge this factual finding because he has admitted to emailing the Bolchoz Report to Matt Edwards. In its Order, the Trial Court in fact stated that "[t]he audit was considered confidential because of an *attorney-client privilege* that the Plaintiff had already waived when he shared the Report with third parties." (R.p. _____;

Order Granting Defendants' Motion for Summary Judgment pp. 6-7. The Trial Court failed to note the importance of this (presumably involuntarily) waiver of attorney-client in this context (it is, in fact, of no relevance); in any event the Court certainly did not make any ruling regarding "self-publication," much less any such ruling establishing this issue as an independent basis for the Court's order granting summary judgment. Moreover, it should be noted that the issue of self-publication is not applicable in these circumstances; one need only look to the case cited by the Respondents, Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001). Respondents describe in a parenthetical the finding of the Murray Court (citing 50 Am.Jur.2d *Libel and Slander* § 241 (1995)), stating that "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." Initial Brief of Respondents, p. 45 (emphasis added). Obviously, the circumstances involved in this case do not involve communication of defamatory statements by the Respondents solely to the Appellant, but instead to thousands of citizens. This possible defense is obviously inapplicable in this case, explaining the Trial Court's failure to rule on this (non-)issue. Because the issue of "self-publication" was not a basis for the Trial Court's ruling, Appellant could not in turn fail to appeal this finding, nor is this issue before this Court for consideration.

CONCLUSION

For the reasons stated herein and in the Initial Brief of Appellant, and to avoid denial of Appellant Joseph Owens' right to trial of this very important matter, this Court should reverse the judgement of the circuit court granting Defendants' motion for summary judgment and remand this case for completion of the discovery process and further litigation.

Respectfully submitted,

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August 1, 2016.

STATE OF SOUTH CAROLINA

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Respondents.

IN THE COURT OF APPEALS

CASE NO. 2015CP320017

CERTIFICATE OF SERVICE

I, the undersigned employee of the Burn Law Firm, LLC do hereby certify that I have served the attached Reply Brief of Appellant on the other parties to this action on this 1st day of August 2016, by depositing copies of the same in the United States Mail in Lexington, South Carolina, with proper postage affixed thereto, and addressed as follows:

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