THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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S.C. SUPREME COURT

Case No. 2011-CP-42-2538
Appellate Case No. 2016-002125

Gary G. Harris, ... Appellant,

v.

Tietex International, Ltd., ... Respondent.

RESPONDENT TIETEX'S RETURN OPPOSING APPELLANT HARRIS'S PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY

Respondent Tietex International, Ltd. ("Tietex") submits its Return Opposing Appellant Gary G. Harris's ("Harris") Petition for Writ of Certiorari.

Tietex has been dealing with Harris's baseless claims for a decade. Three Judges (United States Magistrate Judge Kevin F. McDonald, United States District Judge J. Michelle Childs, and South Carolina Circuit Judge J. Derham Cole) have granted summary judgment on Harris's claims—decisions that two appellate Courts (the United States Court of Appeals for the Fourth Circuit and the South Carolina Court of Appeals) have affirmed. Yet Harris continues asserting the same unfounded arguments.

Nothing in Harris's Petition in any way demonstrates why the Supreme Court (or the parties) should spend valuable time and resources continuing to assess Harris's claims. There are no "special and important" reasons that would justify certiorari. The Court of Appeals' decision (1) involved no novel questions of law, (2) was unanimous, (3) was not in conflict with any prior decision of this Court, (4) involved no substantial constitutional issues, and (5) did not include a federal question the led to a conflict with a decision of the United States Supreme Court.

Harris's Petition presented two questions for review. Both are mere regurgitations of arguments that the Circuit Court and Court of Appeals properly rejected. Harris continues to rely exclusively on his own unsupported and conclusory deposition testimony as the only "evidence" to show actual malice in his vain attempt to overcome the qualified privilege that clearly applied to the allegedly defamatory statements—internal employer memoranda regarding an employee's work performance. This is far from sufficient to create an issue of triable fact, which is one reason the Circuit Court

granted and the Court of Appeals affirmed summary judgment for Tietex. Harris also fails to show how the Court of Appeals erred in applying the statute of limitations to preclude Harris's untimely claims. Finally, Harris's Petition ignores numerous other bases for summary judgment in the Circuit Court's decision, which further supports the denial of Harris's Petition.

Harris's Petition must be denied accordingly, hopefully providing finality to the baseless claims Harris has forced Tietex to defend for the past decade.

STATEMENT OF THE CASE

A. Harris Files Initial Lawsuit against Tietex in 2008.

Harris, a former employee of Tietex, originally filed a lawsuit against Tietex in the Spartanburg County Court of Common Pleas on August 15, 2008—C.A. No. 2008-CP-42-4316 ("First Action"). Harris's First Action included a claim under the federal Age Discrimination in Employment Act ("ADEA"), and various state law claims. All of Harris's claims in the First Action arose from his employment with Tietex and his separation therefrom.

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

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

C. Harris Files Present Action against Tietex in 2011.

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

On March 8, 2012, Harris's newly-employed counsel entered his appearance. On August 10, 2012, the Court granted Harris's motion to amend his Complaint. On September 5, 2012, Harris filed his Amended Complaint in the Second Action. As in the First Action, all of Harris's claims in the Second Action arose from his employment with Tietex and his separation therefrom.

On May 3, 2013, Tietex moved for summary judgment in the Second Action. Harris opposed Tietex's motion, arguing in his brief and during the hearing that summary judgment was premature based on his inability to fully conduct discovery at that time.

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

Notwithstanding Harris's reliance on his alleged need for additional discovery in arguing that summary judgment was premature, Harris failed to engage in any discovery after the September 2013 Order other than a site visit to Tietex's facility, which he was extremely dilatory in conducting. While Harris noticed the depositions of two Tietex

executives to take place on January 16-17, 2014, he suddenly cancelled those depositions on January 14, explaining only that he was "going in a different direction."

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

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

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

In its March 20 Order, the lower court declared that it was granting summary judgment based on all of the following: (1) the allegedly defamatory written statements on which Harris relied—the only statements he was able to identify with any degree of particularity—were substantially true based on Harris's admissions and the Federal Court's conclusive findings; (2) the allegedly defamatory written statements were all subject to a qualified privilege as a matter of law, and Harris failed to present any evidence that would permit a jury to conclude that Tietex had abused that privilege;

(3) the doctrine of collateral estoppel precluded Harris's claims in their entirety; and (4) the statute of limitations and the doctrine of *res judicata* precluded Harris's defamation claims that he first asserted in the Second Action.

E. The Court of Appeals Affirms Summary Judgment for Tietex and Denies Harris's Petition for Rehearing.

On April 15, 2014, Harris filed his Notice of Appeal. After a delayed briefing schedule stemming from Harris's failure to comply with applicable deadlines, the case was submitted to the Court of Appeals on May 2, 2016. The Court of Appeals issued its Decision affirming the Circuit Court's Order on June 29, 2016. Harris filed a Petition for Rehearing on July 29, 2016, which the Court of Appeals denied on September 23, 2016.

FACTS

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

The below statement of facts is essentially identical to (1) the Federal Court's findings of fact in the First Action, which the Federal Court based almost exclusively on Harris's own testimony and described in the manner most favorable to Harris given all evidence in the record; and (2) the lower court's findings of undisputed fact in the Second Action now on appeal, which, like the Federal Court's factual findings, relied almost exclusively on Harris's own testimony and were described in the manner most favorable to Harris given all evidence in the record.

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

Harris began working at Tietex on July 13, 1994, as a Senior Research Chemist. (R. pp. 162, 599-601, 676-78, 737, 746.[1]) Harris's normal working hours were 8:00 a.m. to 5:00 p.m., but he claims he was often at work by 6:00 or 6:30 a.m. and stayed later than 5:00 p.m. (R. pp. 163, 602-03.) On occasion, Harris stayed until 8:00, 9:00, or 10:00 at night. (R. pp. 163, 605.)

Harris admits his supervisor, Wade Wallace, told him not to work in the plant for safety reasons when it was not operating. (R. pp. 164-65, 187, 634.) Wallace told Harris he could work in the plant anytime the plant was operational, and he could enter the facility to do office work when the plant was down. (R. pp. 164, 633-34.) Wallace told Harris not to operate any lab equipment in a lab setting when the plant was down and no other employees were present. (R. pp. 164-65.) Wallace told Harris that if he had to do lab work after regular business hours he should do it on weekday evenings when the second shift was operating. (R. p. 165.) Harris admitted he ignored these directives because his own opinion was it was safe for him to work with chemicals when the plant was not operating. (R. pp. 187, 603-04, 634.) While Harris's erratic hours had been acceptable to his previous supervisor, they were not acceptable to Wallace. (R. pp. 187, 635.) Harris admits this was a new directive under Wallace's supervision. (*Id.*) Harris admits he was the only employee who did lab work after hours. (R. pp. 163, 636-37.)

[1] Tietex provides parallel cites throughout this statement of facts to the relevant pages of the Federal Court Orders to demonstrate that all of these facts were actually litigated and conclusively determined in the First Action. Under the doctrine of collateral estoppel, these facts are entitled to preclusive and binding effect. *See Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997).

There are four sections in the technical building at Tietex: an office area; wet lab; physical testing; and an extension of the wet lab for chemists' work, with a burn room. (R. p. 608.) Harris's former supervisor, Jake Butts, had difficulty keeping track of Harris due to Harris's erratic work hours, so Butts relocated his office from the plant to the office areas of the technical building (the lab—where Harris's office was situated) in order to more closely supervise Harris. (R. pp. 163, 607-08.)

C. Tietex Documented Harris's Work-Related Issues.

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

On February 7, 2007, Harris told Wallace he was overwhelmed by personal and emotional problems that had occurred in his personal life over the past year, and he was having difficulty functioning. (R. pp. 165, 680.) Harris admits (1) his wife was ill during this time period, (R. pp. 165, 619); (2) dealing with his wife's illness left him stressed with major sleep disturbances, (R. pp. 165, 619-21, 681, 692); and (3) he was a "wreck" because of his wife's illness (R. pp. 165, 620, 692). Wallace told Harris that Tietex "would support him if he felt he needed to utilize EAP," but Harris stated that was not necessary. (R. pp. 165, 621, 680.)

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

On February 22, 2007, Harris left voice mail messages for Wallace and Tietex's Owner, Martin Wildeman, at 3:00 a.m. complaining about his inability to sleep and about unspecified work-related issues. (R. pp. 165, 606, 681.) Harris expressed concern about being moved from the lab and that he was "still not set up to easily do his bench work." (R. pp. 165, 681.) Harris asked for a lab pad coater and a vented hood. (*Id.*) Wallace reiterated his commitment to obtaining the necessary equipment for Harris. (R. pp. 621-

23, 681.) Wallace stated it would take time to locate, acquire, and install the equipment; however, Harris could use the equipment in the beam/dye area, and/or coordinate to use Robert Culbreth—a chemical technician—to perform work for him in the lab in the meantime. (R. pp. 165, 621-23, 681.) Harris believes Tietex was motivated to keep him out of the laboratory to avoid liability for any health problems he might experience rather than out of a real concern for his health. (R. pp. 166, 633.) Harris never asserted Tietex was motivated to keep him out of the lab because of any unlawful reason. (*Id.*)

3. Harris Complained about His Environmental Reporting Duties.

Harris admits he (1) complained about being required to stay involved with environmental reporting, and (2) stated he was concerned about completing an environmental report that was due on March 1, given his other projects. (R. pp. 166, 623, 682.) Wallace saw no reason that Harris's projects should interfere with his ability to complete the environmental report on time and made this clear to Harris. (*Id.*) Harris admits it was reasonable for Wallace to expect him to complete the report on time. (*Id.*)

4. Harris Disregarded the Chain of Command.

Wallace also asked Harris to come to him directly with issues before going to Tietex's owner, Wildeman. (R. pp. 166, 681.) Harris admits that, at times, he went directly to Wildeman rather than using the chain of command. (R. p. 626.) Harris admits it was inappropriate for him to complain to Wildeman about having to do the environmental reporting. (R. p. 625.)

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

On March 5, 2007, Wallace discussed several issues with Harris regarding his performance and documented the discussion at Harris's request in a memorandum to

Human Resources Director David Wilson, with a copy to Vice President of Manufacturing Mark Isbell and Harris. (R. pp. 166, 627-28, 683.) Wallace noted that Harris made emotional and overly vocal accusations and statements without supporting research or data, was not honoring the chain of command, harbored grudges over past grievances toward management in general, and complained about ownership of environmental reporting duties. (*Id.*) The memorandum concluded with the statement, "As we discussed these issues are not sustainable and it is mandatory that Harris make significant progress towards resolving these issues within the next 30 days." (R. pp. 166, 630-31, 683.)

At the time, Harris did not protest any of the points in the March 5, 2007, memorandum or claim that Wallace's observations were not true. (R. p. 632.) Harris admits he was experiencing emotional stress (R. pp. 619-21, 681, 692), circumvented Wallace by going directly to Wildeman (R. p. 626), and complained about environmental reporting tasks (R. p. 623). Harris does not deny he harbored grudges, and admits he had unresolved issues that existed before he began reporting to Wallace and had discussed those issues with Wallace. (R. pp. 629-30.)

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

On June 18, 2007, Wallace had another discussion with Harris regarding his subpar performance. (R. p. 166.) Wallace documented the discussion in a memorandum to Harris, with a copy to Wilson and Isbell. (R. pp. 166-67, 638, 685-86.) The discussion focused on two projects for which Harris was responsible. (R. pp. 167, 640, 685-86.) The first was the development and qualification of a Tietex coating compound ("C237

Project"). (R. pp. 167, 639, 685-86.) The second was the development of a finish formula and process ("T602 Project"). (R. pp. 167, 639-40.)

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

Harris had been working on the C237 Project for about six months. (R. pp. 167, 186, 641-42, 685-86.) Harris had predicted the C237 Project would result in significant cost savings for Tietex. (*Id.*) Harris claimed he had a successful trial before he began reporting to Wallace. (*Id.*) Despite Harris's characterization of the compound he created as a success, it was unacceptable because it was much more complicated to produce commercially than Harris had initially promised. (R. pp. 167, 186, 683.) In February, Wallace began working separately on a parallel C237 Project because it appeared Harris would fail to achieve the cost savings he had predicted. (R. pp. 167, 643, 683, 685-86.)

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

Because of expense, Tietex performs a plant production trial for a product only if laboratory production is successful. (R. p. 167.) Harris told Wallace the lab samples for the T602 project were promising, and Harris recommended a production trial. (R. pp. 167, 644.) According to Harris, the first plant production trial showed mixed results with some samples that were "not good," but others that were "comparable," depending on the amount of finish. (R. pp. 167, 645.) However, Harris told Wallace that, based on the results, another plant production trial was warranted. (R. pp. 167, 646, 685-86.) On Harris's recommendation, a second plant production trial was performed, which was unsuccessful. (R. pp. 167, 646, 673, 685-86.) A third trial was similarly unsuccessful. (R. pp. 167, 646-47, 673, 685-86.) When the second and third trials failed, Wallace reviewed the results of the first trial. (R. pp. 167, 685-86.) Wallace saw "that the results

of the first trial had not been as [Harris] portrayed them, so the second and third trials were unwarranted based on the results of the first." (R. pp. 167-68, 685-86.)

Wallace's June 18, 2007 memorandum cited Harris for his poor analytical practices and instructed him to improve his performance within 30 days. (R. pp. 168, 649, 685-86.) Harris considered this his final written warning. (R. pp. 168, 648, 685-86.)

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

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

Despite being told and understanding that his job was in jeopardy if his performance failed to improve, Harris made insufficient effort to complete the C237 project. (R. pp. 168, 687-88.) Instead, Harris began taking multiple days of vacation immediately after being given the warning on June 18. (R. pp. 168, 651-54.) These vacation days were frequently taken on short notice. (R. pp. 168, 651-52, 689.) Sometimes, Harris waited until the day before to notify Wallace. (*Id.*) Other than the environmental reporting, Wallace did not see that Harris improved on any of the issues cited in the March 5, 2007 memorandum. (R. pp. 168, 687-88.) Gate records and management observation showed that Harris continued to ignore the directive not to work in the chemical lab areas at nights or on the weekends. (*Id.*) The same records showed inconsistent work hours and erratic patterns of entry and exit to and from the facility. (*Id.*) Harris's co-workers complained that he did not return calls or e-mails consistently, disrupting their work patterns. (*Id.*)

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

Harris was scheduled to fly to Indiana on June 14 to visit a customer and return on June 15. (R. pp. 168, 654-55, 687-88.) After flying the first leg of his trip, Harris turned

around and came home because he had a headache. (*Id.*) Harris never told Wallace he had not met with the customer in Indiana. (R. pp. 168, 687-88.)

c. Harris Lied about his Whereabouts.

On the evening of Monday, July 2, after work, Harris left a voicemail message for Wallace telling him he had an ant infestation at his house. (R. pp. 168, 656-57.) Harris said he would take care of the ants first thing the following morning and then go to Hexion, a chemical facility, to work on a project. (*Id.*) Since Harris left this message after work hours, Wallace did not hear the message until the morning of Tuesday, July 3, 2007. (R. pp. 168-69, 656-57, 687-88.)

Harris purchased pesticide chemicals at Lowe's on the morning of July 3, at approximately 7:30 a.m. (R. p. 672.) Harris left a voicemail message for Wallace around 9:00 a.m., saying he had resolved the ant problem and was going to work at Hexion. (R. p. 169.) Harris did not arrive at Hexion until 1:30 p.m. (R. pp. 169, 659, 690.) Harris could not enter Hexion because he could not contact anyone he knew there to gain entry. (R. pp. 169, 657-58, 660-61.) Harris left without performing any work. (R. pp. 660-61.) There are no witnesses to establish how long Harris was allegedly at Hexion. (R. p. 662.) Harris is vague about how long he was at Hexion trying to get in. Harris estimates he was there between thirty and ninety minutes.[2] (R. pp. 169, 662-63.)

Harris claims that after leaving Hexion, he drove around for 30 to 45 minutes looking for Chemurgy, another chemical facility. (R. pp. 169, 664-65.) When Harris located Chemurgy, no one was there, so he did not stay. (*Id.*)

[2] Harris previously testified to the South Carolina Employment Security Commission that he was at Hexion around thirty minutes. (R. pp. 717-18.)

Harris left a message for Hexion employee Pam Westmoreland, telling her that he could not get into the laboratory. (R. p. 169.) Harris stated in his message that he needed a small sample of sulfuric acid, and he would return and pick it up. (*Id.*) Hexion employee George Henderson told Westmoreland that he would take the sample to [Harris] at Tietex on his way home. (*Id.*) Harris contends he told a Hexion employee to get the acid together so Harris could pick it up "at the guard house or something." (R. p. 665.) Harris never accomplished this task. (*Id.*)

Harris did not call Wallace to tell him about being unable to get in at Hexion or about his intent to go to Chemurgy. (*Id.*) Harris admits it would have been reasonable for him to call Wallace to tell him his plans had changed. (R. pp. 169, 668.) Harris understood he needed to let Wallace know his whereabouts, to let him know when he was away from the plant, and to keep his cell phone on so he could be reached. (R. p. 627.) Harris acknowledges it was reasonable for his supervisor to expect to be informed of his whereabouts "at all times." (*Id.*)

During the afternoon of July 3, Henderson brought the sulfuric acid Harris requested to Tietex. (R. pp. 169, 665.) Wallace was confused, as Harris was supposed to be at Hexion. Wallace called Henderson and asked if he had seen Harris that day. (R. p. 169.) Henderson had not. (*Id.*) Henderson only had a voicemail from Harris saying he needed some sulfuric acid because he was going to work on July 4. (*Id.*) Wallace was troubled because Harris was not where he said he would be, and Harris apparently planned to work with chemicals in the lab when the plant would be closed. (*Id.*)

Harris admits Wallace had no idea what Harris was doing on July 3, or even if Harris was working. (R. pp. 667-68.) Harris claims Wallace called him on his cell phone

between 4:30 p.m. and 5:00 p.m. and asked where he had been. (R. pp. 170, 666.) Harris told Wallace he had been at Hexion. (*Id.*) Wallace told Harris that Henderson had been to Tietex and said that Harris had not been at Hexion that day. (R. p. 170.) Harris then admitted he had gone to Hexion, but had been unable to get in or find anyone, so he left. (*Id.*) Harris could not give Wallace an adequate explanation of his whereabouts for the day. (R. pp. 170, 663-64, 687-88.)

Wallace told Harris he was suspended until Wallace returned from vacation. (R. pp. 170, 668.) During the call, Harris and Wallace were disconnected. (R. pp. 170, 668-68.) Wallace could not reach Harris again by telephone. (*Id.*) Wallace talked to Wilson about what transpired and left a voicemail message for Harris reiterating that he was suspended with pay and should not return to work until contacted by Tietex. (R. p. 170.)

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

Wallace conducted an investigation of the events of July 3 when he returned from vacation. (*Id.*) Wallace could not verify Harris's whereabouts for most of the hours between 9:00 a.m. and 4:00 p.m. on July 3. (R. pp. 687-88.) Wallace recommended the termination of Harris's employment. (R. p. 170.) The decision to terminate Harris's employment was made by Wallace, Wilson, Wildeman, Isbell, and Reed Cunningham (Tietex's President). (*Id.*) Harris was told he was not being terminated for one specific deficiency, but for many shortcomings that "added up," including the issues Wallace had addressed with him in the March 5, 2007 memorandum. (R. pp. 170, 650, 683.) These issues were also documented in a memorandum dated July 18, 2007. (R. pp. 170, 687-88.) Harris's employment was terminated on July 19, 2007. (R. pp. 170, 670, 691.)

Harris admits his employment was terminated for unsatisfactory performance. (R. pp. 670, 691.)

ARGUMENTS IN RESPONSE TO QUESTIONS PRESENTED

I. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT BASED ON THE PRIVILEGED NATURE OF ALL ALLEGEDLY DEFAMATORY STATEMENTS AND THE ABSENCE OF ANY ACTUAL MALICE.

"One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012) (citing *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999)). "'The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.'" *Id.* (quoting *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 32, 315 (Ct. App. 1987)). "Whether an occasion gives rise to a qualified or conditional privilege is generally a question of law for the court." *Harris v. Tietex Int'l Ltd.*, 417 S.C. 533, 540, 790 S.E.2d 411, 416 (Ct. App. 2016) (hereinafter "*Harris Ct. App.*") (citing *Murray v. Holnam, Inc.*, 344 S.C. 129, 140, 542 S.E.2d 743, 749 (Ct. App. 2001)).

As the Court of Appeals recognized, "[T]he qualified privilege applies 'to situations in which an employee's job performance is properly evaluated.'" *Id.* at 540, 790 S.E.2d at 416 (quoting *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989))). Harris cannot dispute that the documents he cites as allegedly defamatory are all internal written communications about his job performance.

Therefore, the qualified privilege applies, and the Circuit Court and Court of Appeals properly shifted the burden to Harris "'to show actual malice or that the scope of the privilege has been exceeded.'" *Id.* at 541, 790 S.E.2d at 415-16 (quoting *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 134).

To prove actual malice, Harris was required to show that Tietex was motivated by ill will, intending to causelessly and wantonly injure Harris, or that the statements were published with such recklessness as to show a conscious disregard for Harris's rights. *Swinton Creek Nursery*, 334 S.C. at 485, 514 S.E.2d at 134. Harris failed to meet this burden at every stage of the litigation, as demonstrated by his Petition.

In his Petition—as he has throughout this case—Harris relies exclusively on his own unsupported and conclusory deposition testimony as somehow creating a triable issue of fact on whether there was actual malice to overcome the qualified privilege. In Harris's own words, the only "evidence" he claims shows actual malice is his own "testimony . . . that Wallace [Harris's supervisor] intentionally fabricated events and various emails and written communications so that Petitioner would be terminated." (Petition at 5.) Harris's personal and subjective disagreement with the veracity of the purportedly defamatory statements is far from sufficient. If this were not the case, there could never be summary judgment on this issue. As the Court of Appeals recognized, "if the plaintiff fails to present evidence of a genuine issue of fact as to actual malice and the qualified privilege is otherwise applicable, summary judgment may be granted." *Harris Ct. App.*, 417 S.C. at 541, 790 S.E.2d at 416; *see also id.* ("Although abuse of the conditional privilege is generally an issue for the jury to decide, in the absence of a

controversy as to the facts, it is for the court to determine." (citing *Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981))).

Harris did not point to anything beyond his own unsupported and conclusory statements that would even potentially show (1) that the allegedly defamatory statements were false, (2) that Wade Wallace—his supervisor who made the statements—had any reason to believe the statements were false, or (3) that Wallace had any motivation to make false statements about him. Since Harris did not identify any documents, witnesses, or other evidence to create a genuine issue of fact regarding actual malice, the Court of Appeals properly affirmed summary judgment on this issue. Thus, Harris's Petition should be denied.

A. Each of the Allegedly Defamatory Written Communications was Privileged, and Harris Presented No Credible Evidence to Overcome the Privilege.

1. February 9, 2007 E-Mail from Wallace to Wilson.[3]

Harris's first defamation claim was based on a February 9, 2007 e-mail that his supervisor, Wallace, sent to Tietex's Human Resources Director, Wilson, with a copy to Wallace's supervisor, Isbell. (R. pp. 693-94, 747.) In this internal e-mail between managerial employees at Tietex, Wallace summarized a discussion he had with Harris two days earlier regarding personal and emotional problems Harris was experiencing that were impacting his performance. (R. p. 747.) Harris claims this e-mail was defamatory because he alleges that it was false and that it "showed a definite disregard for [his] stability mentally and that kind of thing." (R. p. 693.)

[3] The Court of Appeals properly concluded that Harris abandoned his claim on this statement, as he did not in any way mention it in his Initial Brief to the Court of Appeals. *Harris Ct. App.*, 417 S.C. at 542 n.3, 790 S.E.2d at 416 n.3.

The Circuit Court properly found this defamation claim insufficient because the content of the February 9 e-mail was substantially true. (R. pp. 16-17.) Harris admitted as much on more than one occasion: during his unemployment hearing (R. p. 702), and during his deposition in the First Action (R. pp. 698-701). (*See also* Facts Section C.1. *supra* at p. 7.)

The Circuit Court and Court of Appeals were also correct in concluding that the February 9 e-mail gave rise to a qualified privilege and that Harris failed to present any evidence showing that Wallace acted with actual malice. (R. pp. 16-17.) In fact, Harris admitted he has no evidence of malice on Wallace's part, stating he did not think Wallace was trying to "get rid of him" and had no idea about Wallace's motivation. (R. pp. 671, 674-75.)

Harris's sole allegations of "malice" in the Amended Complaint surround a contention that Tietex engaged in a conspiratorial campaign to "put forward false and defamatory reasons for the termination of [Harris] to achieve ulterior objectives." (R. pp. 86-87 at ¶¶ 14-15, 23-25.) Namely, the alleged objective "to replace [Harris] with a much younger woman with whom Mr. Isbell [allegedly] had an ongoing personal relationship." (*Id.*) This is merely an attempt to re-litigate the issues underlying his age discrimination claim in the First Action. Among other findings in its Orders in the First Action, the Federal Court specifically concluded (1) Tietex did not discriminate against Harris based on his age (R. pp. 175-78, 185-88), (2) Harris was not meeting Tietex's legitimate expectations at the time of his termination (R. pp. 175, 185-87), and (3) Tietex did not replace Harris with a younger employee (R. pp. 175-76, 187-88). As such, all allegations in the Amended Complaint regarding purported malice have been

conclusively determined in Tietex's favor and are precluded under the doctrine of collateral estoppel.

The undisputed facts also demonstrate Wallace did not exceed the scope of the privilege. Wallace's e-mail recounted his conversation with Harris to Wallace's own supervisor and Tietex's Human Resources Manager, both of whom Harris admits "had legitimate business need to know about and discuss" the issues in the e-mail. (R. pp. 708-09.)

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

Harris's second defamation claim focuses on the March 5, 2007 memorandum Wallace sent to Wilson with copies to Isbell and Harris. (R. pp. 694, 748.) Like the February 9 e-mail, this memorandum simply documented a performance-related discussion Wallace had with Harris. (R. p. 748.) Harris admits that Wallace generated the March 5 memorandum only because Harris requested that he do so. (R. p. 710.)

The Circuit Court properly concluded that this memorandum is not actionable as defamation because Harris has admitted that each point Wallace made in the memorandum was substantially true. (R. pp. 17-18 (citing R. pp. 619-21, 623, 626, 629-30); *see also* Facts Sections C.1. – C.5. *supra.*) As with the February 9 e-mail, the Circuit Court and Court of Appeals ruled that this memorandum is entitled to a qualified privilege as a matter of law. Harris failed to overcome that privilege because he did not produce any evidence from which a jury could conclude that Wallace acted with actual malice in drafting the memorandum (particularly since Harris, himself, specifically requested that Wallace prepare it) or that Wallace exceeded the scope of the privilege.

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

Harris's third defamation claim related to the June 18, 2007 memorandum Wallace provided to Harris, with copies to Wilson and Isbell, which Harris has described as his "final written warning." (R. pp. 694, 749-50.) The June 18 memorandum focuses exclusively on Harris's poor performance on the C237 and T602 projects. (*Id.*)

Harris's own testimony precluded a finding that the June 18 memorandum was false and defamatory, as he admits the statements in the memorandum are substantially true.[4] Harris admitted he had been working on the C237 project for six month and projected significant savings for Tietex. (R. pp. 641-42, 685-86.) Although Harris claimed he had a successful trial before reporting to Wallace, he admitted the direction of the project shifted. (R. p. 642.) Tietex was convinced Harris's compound was too complicated to produce commercially and, therefore, unacceptable. (R. pp. 685-86.)

Harris admitted that Wallace began working separately on a parallel C237 project in February. (R. pp. 643, 685-86.) Harris admitted his compound was never used by Tietex. (R. p. 643.) Harris admitted the first trial of the T602 project was not completely successful, with only mixed results, but he recommended a production trial anyway. (R. pp. 644-46, 685-86.) Harris admitted the two subsequent trials, run on his recommendation, were unsuccessful. (R. pp. 646-47, 685-86.) The June 18 memorandum is thus substantially true, according to Harris's own testimony.

[4] In the First Action, the Federal Court concluded that Harris failed to meet Tietex's legitimate expectations on the C237 and T602 projects for the very reasons summarized in Wallace's June 18 memorandum. (R. pp. 166-68, 175, 185-87.) Thus, beyond the undisputed facts showing the substantial truth of the June 18 memorandum, the doctrine of collateral estoppel prevents Harris from asserting in this action that he performed up to Tietex's legitimate expectations on the C237 and T602 projects.

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

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

The final specific statement on which Harris relied in making his defamation claims is the July 18, 2007 memorandum from Wallace to Wilson (with a copy to Isbell) in which Wallace summarized Harris's performance issues and recommended the termination of Harris's employment. (R. pp. 694-95, 756-57.) The Circuit Court and Court of Appeals correctly found this claim deficient for reasons similar to Harris's first three defamation claims. (R. p. 19.)

The summary of Harris's performance deficiencies in the July 18 memorandum is substantially true based on Harris's own testimony. (R. pp. 619-21, 623, 626-27, 629-30, 641-47, 651-65, 668; *see also* Facts *supra.*) An internal memorandum from an employee's supervisor to Human Resources recommending the employee's termination based on poor performance and poor judgment is entitled to a qualified privilege. There is no evidence to support a finding that Wallace acted with actual malice in publishing this memorandum, as with the other internal, performance-related communications on which Harris relied. Harris acknowledged that Wallace did not exceed the scope of the privilege or act unreasonably in providing the memorandum to Wilson and Isbell, as he admits that both Wilson and Isbell "would have had a need to know" about the subject matter of the memorandum. (R. p. 719.)

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

A consideration of the implications of permitting Harris's defamation claims based on Tietex's internal, performance-related communications to survive summary judgment demonstrates that public policy mandated the Court of Appeals' affirmation of the Circuit Court's decision. Harris's defamation claims based on these performance-related communications can be summarized as follows:

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

To permit such an employee's defamation claims to survive summary judgment would open the floodgates to litigation by every employee who is displeased with his employer's confidential performance-related critiques. This is a prime example of precisely what the qualified privilege is intended to protect against.

Harris relies on nothing more than his own subjective assessment regarding the veracity of the performance-related memoranda. This is not evidence from which a jury could reasonably conclude that Tietex abused the qualified privilege that inherently

applies to these memoranda as a matter of law. Given Harris's failure to identify a legitimate question of fact, "'it is for the court to say . . . whether or not the privilege has been abused or exceeded.'" *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (quoting *Woodward*, 297 S.C. at 32-33, 292 S.E.2d at 601); *see also* Restatement (Second) of Torts § 619, cmt. b (noting that the court should decide if the privilege has been abused where only one conclusion can reasonably be drawn).

II. THE COURT OF APPEALS PROPERLY APPLIED THE STATUTE OF LIMITATIONS TO BAR HARRIS'S DEFAMATION CLAIMS.

Harris's argument in opposition to the statute of limitations is simple—he contends that any defamation claims he made against Tietex in his second action should not be barred by the statute of limitations because his filing of a different defamation claim in the first action should have tolled the limitations period.

The flaw in Harris's argument is similarly straightforward—he fails to recognize that claims based on different allegedly defamatory statements are different claims entirely. *See, e.g.*, *George v. Fabri*, 345 S.C. 440, 456-61, 548 S.E.2d 868, 876-79 (2001) (analyzing defamation allegations separately in affirming grant of summary judgment); *McBride v. School Dist. of Greenville County*, 389 S.C. 546, 559-63, 698 S.E.2d 845, 851-54 (Ct. App. 2010) (analyzing alleged defamatory statements individually). This is particularly clear in light of the statute of limitations for defamation claims, which is based on "when the alleged defamatory statement is made." *Harris Ct. App.*, 417 S.C. at 542, 790 S.E.2d at 416.

The Court of Appeals properly determined that Harris's defamation claims in the First Action were based on statements that were allegedly made "*since his termination.*" *Id.* at 543, 790 S.E.2d at 417 (emphasis in original). This clearly excluded Harris's

defamation claims in the Second Action, which all involve performance-related communications that occurred during his employment.

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

III. THE ADDITIONAL BASES FOR AFFIRMING THE LOWER COURT'S DECISION FURTHER SUPPORT THE DENIAL OF HARRIS'S PETITION.

The Court of Appeals did not reach a number of issues on which the lower court based its summary judgment decision—(1) the allegedly defamatory statements were substantially true (R. pp. 15-19); (2) Harris's claims were barred by the doctrine of collateral estoppel (R. pp. 21-23); or (3) Harris's claims were at least partially barred by the doctrine of *res judicata* (R. p. 25). Even if the Court did grant certiorari on this matter based on Harris's Petition—though it should not, for the reasons set forth above—these additional issues would further warrant the affirmation of the Circuit Court's decision. The granting of Harris's Petition is not supported by the notions of judicial economy, as the reconsideration of the existing decision would simply lead to the same result. Harris's Petition should be denied for this reason as well.

CONCLUSION

Like his claims in the Second Action and his arguments before the Court of Appeals, Harris's Petition is nothing more than an attempt to gain multiple bites at the same apple. Harris has not pointed to any evidence to even potentially overcome the Court of Appeals' proper holdings on the application of the qualified privilege, the absence of actual malice, and the application of the statute of limitations. Harris's Petition should be denied accordingly.

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December 28, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

RECEIVED

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S.C. SUPREME COURT

Case No. 2011-CP-42-2538
Appellate Case No. 2016-002125

Gary G. Harris, ... Appellant,

v.

Tietex International, Ltd., ... Respondent.

PROOF OF SERVICE

I certify that I have served Respondent Tietex's Return Opposing Appelant Harris's Petition for a Writ of Certiorari on Petitioner by sending to his attorney of record a copy of the same via first class mail, properly addressed, postage prepaid at the following address: D. Alan Lazenby, Lazenby Law Firm, Post Office Box 6099, Spartanburg, South Carolina 29304.

December 28, 2016

Lucas J. Asper

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