ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

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

David Michael Hollis, Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

Derwood L. Aydlette, III
Gignilliat, Savitz & Bettis, LLP
900 Elmwood Avenue, Suite 100
Columbia, South Carolina 29201
(803) 799-9311
Attorneys for Respondent

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STATEMENT OF THE CASE

Appellant David Michael Hollis asserts claims that Respondents Philip Hinely ("Hinely"), Davis Anderson ("Anderson"), and David Brown ("Brown"), in their individual capacities (collectively "the Individual Respondents"),

conspired to terminate Appellant's at-will employment, and that Respondent Fairfield County ("the County") defamed him at the time of that termination. As is relevant to this appeal, the procedural history of this case is as follows. Appellant filed this action in the Fairfield County Court of Common Pleas on March 1, 2012. On January 24, 2013, Respondents moved for a judgment on the pleadings under Rule 12(c), SCRCP. On or about March 7, 2013, the circuit court, Judge Brooks P. Goldsmith, heard oral argument on Respondents' motion for judgment on the pleadings. By written order, Judge Goldsmith granted Respondents' motion for judgment on the pleadings. (R. pp. 2-7).

On April 5, 2013, Appellant timely filed a motion to reconsider under Rule 59, SCRCP. In support of that motion, Appellant filed his own affidavit with the court asserting certain facts which were not otherwise part of the record, and which were intended to defeat Respondents' assertion that Appellant was a public official. Respondents filed a responsive memorandum with the court which included portions of Appellant's deposition transcript. Neither Appellant nor Respondent opposed the other's introduction of facts outside of the pleadings. Judge Goldsmith denied Appellant's motion to reconsider. (R. p. 1). This timely appeal followed.

STATEMENT OF FACTS

The facts relevant to Respondents' motion for judgment on the pleadings come largely from Appellant's complaint. Those facts are that Appellant is the former Animal Control Supervisor of the County. (R. p. 11, ¶ 1). In that capacity, as he correctly pleads, he was a "public official" of the County. (R. p. 13, ¶ 12). Hinely, Anderson, and Brown, were at all times relevant, the County Administrator, Deputy County Administrator and an animal control officer, respectively. (R. p. 12, ¶ 3). Appellant was terminated from his job by defendant Anderson over his handling of a case in which a citizen's dog "severely wounded" another dog owned by the same citizen. (R. p. 12. ¶¶ 4, 6). Appellant elected to allow the citizen to maintain custody of the offending animal as long as the owner agreed to securely confine the animal. (R. p. 12, ¶ 5). Following Appellant's termination, a County magistrate ruled that the offending animal should be taken from its owner and euthanized. (R. p. 13, ¶ 11). Appellant grieved his termination and the County's Grievance Committee ("the Committee") recommended that the termination be upheld. (R. p. 13, ¶ 9). By state law, the Committee's recommendation was referred to Hinely, who accepted that recommendation. (R. p. 13, ¶ 9) Judge Goldsmith also took judicial notice of the fact that Appellant had obtained, pursuant to his role as the County's Animal Control

Supervisor, a Limited Duty Law Enforcement certification from the South Carolina Law Enforcement Division. (R. p. 72)

Additional facts outside of the pleadings were introduced by Appellant in support of his motion to reconsider. First, Appellant filed an affidavit asserting his limited authority, and to which he refers in his initial brief. (R. pp. 118-120). In response to Appellant's motion to reconsider, and in light of the fact he had submitted an affidavit in support of that motion, Respondents then introduced Appellant's deposition testimony that he was the highest ranking enforcement official of the County's animal control ordinances (R. p. 142, ll. 7-11); that he had personally euthanized "probably 1,000 dogs" and that "[j]ust a few" of those were court-ordered (R. p. 143 l. 11 – p. 144, l. 11); that he held a Level II certification from the National Animal Control Association, which, according to Plaintiff, is "an organization that's nationally recognized, and it certifies you with laws and stuff with animal control" (R. p. 142 ll. 15-25; p. 152); that that training included "Animal Cruelty Investigations," "Blood Sports (Dog and Cock Fighting)," "Crime Scene Photography," "Officer Safety/Defensive Tactics (Classroom and Practical)" and "Search and Seizure" (Resp. to Mot. Reconsider Ex. A); and that according to that organization, "Deputy Sheriffs and Police Officers make numerous public contacts during their shifts, but Animal Control Officers

make four (4) times as many contacts during the same time period." (R. p. 140). Appellant did not object to the introduction of any of that evidence.

Appellant also did not oppose the introduction of his deposition testimony regarding his defamation claim, nor did he submit any additional evidence in support of that claim. As to Brown, Appellant testified that his defamation claim rested solely on Brown's statements that he "didn't have nothing to do with what happened to [Appellant], what you did was yourself, you shouldn't – it was your fault" and that if Appellant "took care of the dog situation" he would not have been fired. (R. p. 147, l. – p. 148, l. 25; S. R. p. 4, ll. 1-2). As to Anderson, Appellant testified that Anderson stated in Appellant's grievance hearing that he was terminated because "I wasn't doing my job." (App. Dep. pp. 102-103). As to Hinely, Appellant testified that he knew of no defamatory statements. (*Id.* p. 103).

STANDARD OF REVIEW

Respondent's motion for judgment on the pleadings was properly decided by Judge Goldsmith pursuant to the standards for Rule 12(c). However, once Appellant filed his motion for reconsideration supported by his own affidavit which constituted material outside of the pleadings, the motion was in essence converted to one for summary judgment. *See* Rule 12(b), SCRCP ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action,

matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."); *Charleston County Sch. Dist. v. Harrell*, 393 S.C. 552, 559 n. 4, 713 S.E.2d 604, 608 n. 4 (2011) (recognizing that a motion to dismiss may be converted into a motion for summary judgment when the court considers matters outside of the pleadings). The fact that the evidence outside of the pleadings was not submitted until Appellant's motion to reconsider does not change the analysis. *See Davis v. Progressive N. Ins. Co.*, 2012 OK CIV APP 98, 288 P.3d 270, 271 ("As there were matters outside the pleadings, affidavits and correspondence attached as exhibits to the motion to reconsider, this motion is converted into one for summary judgment and we will apply the summary judgment standard of review."); *Sprague v. Fitzpatrick*, 546 F.2d 560, 563 (3d Cir. 1976) (court's reliance on affidavits in *sua sponte* reconsideration of motion to dismiss "convert[ed] the dismissal into a grant of summary judgment pursuant to rule 12(b)(6)").

In *Cox Enterprises, Inc. v. Nix*, 273 Ga. 152, 153, 538 S.E.2d 449, 451 (2000), the defendant submitted evidence outside of the pleadings in support of a motion to dismiss. In response, the plaintiff "did not object to Defendants' reliance upon evidence, but instead submitted his own material and also

requested the trial court to consider the transcript of [a] TRO hearing." *Id.* "Thus, [plaintiff] acquiesced in Defendants' submission of evidence in support of their motion to dismiss and also, in effect, requested that the motion be converted into one for summary judgment." *Id.*

Here, the procedure is slightly different in that Respondents relied solely on the pleadings and evidence of which the court could take judicial notice in support of their motion for judgment on the pleadings. Subsequently, Appellant submitted evidence outside of the pleadings in support of his motion for reconsideration. Respondents then did likewise. At that point, the parties, "in effect, requested that the motion be converted into one for summary judgment." *Id.* Thus, the standards for review under Rule 56, SCRCP, should apply.

"Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). "In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary

judgment." *Id.*, 747 S.E.2d at 181-182, *citing Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Id.*, 747 S.E.2d at 182 (quoting *Brockbank*, at 379, 534 S.E.2d at 692.

ARGUMENT

1. The trial court correctly determined that Appellant's defamation claim against the County is barred by the Tort Claims Act because, at all times relevant, he was a public official.

To the extent Appellant argues that the lower court erred in holding that he was a public official, the lower court's ruling was correct and should be upheld. "Under the S[outh] C[arolina] T[ort] C[laims] A[ct], a governmental entity is not liable for a loss that results from 'employee conduct outside the scope of his official duties or which constitutes actual fraud, *actual malice*, intent to harm, or a crime involving moral turpitude." *Gause v. Doe*, 317 S.C. 39, 41, 451 S.E.2d 408, 409 (Ct. App. 1994) (emphasis in original) (quoting S.C. Code § 15-78-60(17) (Supp. 1993)). In *Gause,* this court determined that a law enforcement officer's defamation claim against his employer was barred because, as a public official, he had to prove actual malice as an element of his case under the defamation standards established

in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). *Id.*

Here, Appellant was a SLED-certified law enforcement official and, by his own admission, the highest ranking law enforcement official for the County's animal control ordinances. As a Class 3 Limited Duty Law Enforcement Official, he had "limited powers of arrest." S.C. Code of Regs. 38-007. Every South Carolina case that has examined the issue has held that law enforcement officers are public officials. *Miller v. City of West Columbia*, 322 S.C. 224, 471 S.E.2d 683 (1996) (applying Constitutional actual malice standard in case involving assistant police chief); *Beckham v. Sun News*, 289 S.C. 28, 344 S.E.2d 603, *cert. denied*, 479 U.S. 1007 (1986) (applying Constitutional actual malice standard in case involving former police officer); *McClain v. Arnold*, 275 S.C. 282, 270 S.E.2d 124 (1980) (holding police officer is a public official); *Gause, supra.* The fact that Appellant's law enforcement powers were "limited" means only that they were limited to the area of animal control. *See* 2012 Op. Att'y. Gen. dated Oct. 02, 2012, 2012 WL 4836949 ("Class 3 . . . officers MAY perform as . . . Animal Control" and "MAY NOT perform as County Code Enforcers (with the exception of . . . Animal Control Officers"). Plaintiff's law enforcement certification alone makes him a public official.

Further, in *Demby v. English*, 667 So. 2d 350, 354 (Fla. 1st DCA 1995), a county animal control director was deemed a public official because she was "the chief enforcement officer for a division of county government and [wa]s authorized to enforce county and state law, and pursuant to this authority she and the officers whom she directs are empowered to, among others, enter private property, impound people's pets, and issue citations carrying civil penalties." *Id.* Though the appellee there "[wa]s not an elected public official, she most certainly is a public officer wielding a portion of the sovereign power of this state, and the qualified privilege of every citizen to criticize such a public officer applies in this instance."

And courts applying North Carolina and Maryland's public official immunity laws have found animal control officers to be public officials. *Kitchin ex rel. Kitchin v. Halifax County*, 192 N.C. App. 559, 568, 665 S.E.2d 760, 766 (2008) ("Animal Control Lead Officer is a public officer" because his powers include "authority to . . . impound and euthanize dogs or cats . . . and destroy stray dogs or cats in quarantine districts" and thus "exercises a portion of sovereign power and exercises discretion"); *Walker v. Prince George's County, Maryland*, 2008 WL 7555247, *6 (D. Md. Mar. 31, 2008), *aff'd sub nom. Walker v. Prince George's County, MD*, 575 F.3d 426 (4th Cir. 2009) (Animal Control Officer entitled to public official immunity). That immunity only applies to public officials and not to mere public employees.

See Daniel v. City of Morganton, 125 N.C.App. 47, 55, 479 S.E.2d 263, 268 (1997) (public official immunity applies to employees whose duties "involve the exercise of the sovereign power" as opposed to "public employee[s' duties which] are historically characterized as 'ministerial.'"); *Baltimore Police Dep't v. Cherkes*, 140 Md.App. 282, 328, 780 A.2d 410, 437 (2001) ("the actor must be a public official, rather than a mere government employee or agent"). And in *Scepurek v. Municipality of Anchorage*, 1985 WL 1077799, *2 (Alaska Ct. App. Jan. 23, 1985), the court held that Animal Control Officers are "peace officers" and "public officers."

Further, "[a]nimal control is part of the state's police power." *Fabrikant v. French*, 691 F.3d 193, 208-09 (2d Cir. 2012) (quoting *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 701–02, 704 (1897); *accord, San Diego County Veterinary Med. Ass'n v. County of San Diego*, 116 Cal. App. 4th 1129, 1137, 10 Cal. Rptr. 3d 885, 891 (2004) ("[A]nimal regulation and control is within the County's legitimate police powers . . ."); *Muehlieb v. City of Philadelphia*, 133 Pa. Cmwlth. 133, 140, 574 A.2d 1208, 1211-12 (1990) ("As previously stated, enactment of the Animal Control Law was a proper exercise of the City's police power."); *Young v. Broward County*, 570 So. 2d 309 (Fla. Dist. Ct. App. 1990) ("In our judgment, the trial court correctly interpreted the [vicious dog] ordinance as providing for the protection of the public under the county's police powers."); *Vill. of Carpentersville v. Fiala*, 98

Ill. App. 3d 1005, 1008, 425 N.E.2d 33, 35 (1981) ("The limitation of dog ownership by reference to types of residences creates legislative classifications which must withstand equal protection scrutiny in order for the ordinance to be upheld as a valid exercise of the police power.").

Moreover, Appellant personally euthanized approximately 1,000 dogs, only a few of which were ordered by a court, meaning the remaining acts of euthanasia were carried out at Appellant's discretion. In fact, he pleads that he was the only County employee certified to administer the "restricted and deadly drugs" employed for euthanasia. (R. p. 13, ¶ 11) It is a government entity's police power which authorizes it to impound and destroy by euthanasia what is otherwise private property. *See, All States Humane Game Fowl Org., Inc. v. City of Jacksonville, Fla.*, 2008 WL 2949442, *13 (M.D. Fla. July 29, 2008) (enjoining the euthanasia of a rooster to allow the owners "notice and an opportunity to be heard before the destruction of their private property"); *County of Pasco v. Riehl*, 635 So. 2d 17, 18-19 (Fla. 1994) (finding due process violation because the plaintiff's dog which was their "private property was subject to, among other things, physical confinement, tattooing or electric implantation, and muzzling" which amounts to "a deprivation of property"); *Garcia v. Vill. of Tijeras*, 108 N.M. 116, 123, 767 P.2d 355, 362 (Ct. App. 1988) ("The ordinance [banning the ownership of pit bulls], being a proper exercise of the Village's police power, is not a deprivation of property

without due process even though it allows for the destruction of private property.").

The very issue that resulted in Appellant's termination from employment – his refusal to take custody of a dangerous animal – in and of itself involves his exercise of discretion not to enforce those police powers. S.C. Code § 47-3-750(A) ("If a law enforcement agent, animal control officer, or animal control officer under contract with a county or municipal government to provide animal control services has probable cause to believe that a dangerous animal is being harbored or cared for in violation of Section 47-3-720 or 47-3-740 or 47-3-760(E), the agent or officer may petition the court having jurisdiction to order the seizure and impoundment of the dangerous animal while the trial is pending.").

As the court stated in *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907), a public official is "[o]ne who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent." As "the chief animal control officer" for the County (R. p. 76), Appellant was the top law enforcement officer for animal control, supervising a team of other officers. The public was most certainly interested in Appellant's performance of his duties, as the

enforcement of laws regulating dangerous or abused animals is a matter of public interest. Thus, the lower court correctly held that Appellant was a public official, especially when viewed in light of his law enforcement certification. *See Rosenblatt v. Baer,* 383 U.S. 75, 86, 86 S. Ct. 669, 676, 15 L. Ed. 2d 597 (1966) ("Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply.").

2. The trial court correctly held that appellant's civil conspiracy claim failed because he was an at-will public official.

The lower court also correctly ruled that Appellant's civil conspiracy claim was barred by both *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004) ("*Angus I*") and *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261 (2006) ("*Angus II*"). As the lower court correctly held, *Angus I* stands for the proposition that an at-will employee cannot maintain an action for civil conspiracy against his employer or employees authorized to terminate his employment.

Appellant incorrectly states that *Angus I* does not bar claims against employees in their individual capacities for actions outside of the course and

scope of their duties. He relies on this court's opinion in *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010), in support of that proposition. *Pridgen* is inapposite to Appellant's case. First, *Pridgen* implicitly acknowledges the continuing viability of the holding of *Angus I* that individuals empowered to terminate the employment of an at-will employee cannot be sued individually, stating:

> This court also determined Angus' argument that she was suing them not as council members, but in their individual capacities, was unpersuasive. This court noted Angus' employment agreement specified that she served "at the will" of the Council. Therefore, because the council members acted within their authority when they fired Angus, they could not be sued for doing what they had the right to do.

Id. at 391 S.C. at 246, 705 S.E.2d at 63. However, *Angus I* was inapplicable in *Pridgen* because "Pridgen's claim was against the Appellants, *who did not have the power to terminate his employment.*" *Id.* (emphasis added). "Because Pridgen did not serve at the will of the [individual] Appellants, they were not immune from suit by Pridgen for civil conspiracy." *Id.* [1] Here, Appellant concedes that he was terminated by Anderson, and that Hinely finalized that termination when he accepted the recommendation of the Committee that Appellant's termination be upheld. [Complaint ¶¶ 4, 6, 9]

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[1] It is also notable that the lower court in *Pridgen* had ruled the plaintiff was not an at-will employee, rendering *Angus I* further irrelevant. *Id.* at n.1.

Recently in *Faile v. Lancaster County, S.C.*, 2013 WL 786447, at *4 (D.S.C. Mar. 1, 2013), the court rejected an argument similar to Appellant's. Granting a motion to dismiss, the court noted that "*Angus II* did not disturb *Angus I*'s holding that an at-will employee could not maintain an action against the employer, or those authorized to act on behalf of the employer, for civil conspiracy that resulted in the employee's termination." *Id.* at n.6; *accord*, *Reed v. Town of Williston,* 2009 WL 821013, at *3 (D.S.C. Mar. 27, 2009) ("[T]his case is governed by *Angus I* to the extent that the Court of Appeals held that public officials cannot be sued for civil conspiracy for terminating at-will employees when such actions are within the scope of a their official authority. . . . Thus, the public officials cannot be sued in their individual capacities for exercising this authority.").

Here, Appellant concedes he was an at-will employee. He also concedes he was fired by Anderson and Hinely. Thus, under *Angus I* he cannot sue Hinely or Anderson individually "for doing what they had a right to do." *Angus I,* 358 S.C. at 503, 596 S.E.2d at 70. And *Angus I* governs regardless of whether Appellant was a public official.

Appellant's civil conspiracy claim is also barred by *Angus II* because he was a public official, as well as an at-will employee. As set out above, Appellant was unquestionably a public official. Under *Angus II*, at-will public officials cannot sue anyone for civil conspiracy relating to the termination of

their employment. 368 S.C. at 170-171, 628 S.E.2d at 262 ("Because of Angus's status as a public official, we conclude her action for civil conspiracy cannot be maintained against any of these defendants."). Thus, Appellant's claim is barred against all of the Individual Respondents.

3. **As an additional sustaining ground, the statements upon which Appellant relies to support his defamation claim are not actionable.**

Rule 56, SCRCP, provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Rule 56 also allows for the filing of "[s]upporting and opposing affidavits," which affidavits may "be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." *Id.* Once Appellant elected to convert Respondents' motion for judgment on the pleadings into one for summary judgment by submitting his affidavit in support of his motion for reconsideration, Respondents submitted to the court Appellant's deposition testimony. Appellant did not object to that submission at the lower court and does not oppose it now.

While the lower court did not specifically reference any of this evidence in its order denying Appellant's motion to reconsider, "[u]nder the present

rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 419, 526 S.E.2d 716, 723 (Ct. App. 2000) (citing SCACR 208(b)(2) ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)."); SCACR 220(c) ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.")); *accord Alexander v. Houston,* 403 S.C. 615, 621, 744 S.E.2d 517, 521 (Ct. App. 2013) ("a respondent may raise on appeal any additional sustaining grounds appearing in the record, even where those reasons have not been ruled on by the lower court").

Appellant testified he knew of no defamatory statements uttered by Hinely. Thus, this court should affirm judgment in Hinely's favor.

Appellant testified that the only defamatory statement he claims Anderson expressed was that Appellant "wasn't doing [his] job." Anderson made that statement in Appellant's grievance hearing. This court held in *Crowell v. Herring*, 301 S.C. 424, 431-32, 392 S.E.2d 464, 467-68 (Ct. App. 1990), that statements made during an investigation *preceding* a VFW court martial, as well as those made at the hearing, were quasi-judicial in nature

and absolutely privileged. VFW organizations are non-profit and non-governmental. *See Sprangers v. Greatway Ins. Co.*, 182 Wis. 2d 521, 529, 514 N.W.2d 1, 3 (1994) ("The VFW is incorporated under sec. 188.11, Stats.1991-92. It is a non-profit entity under sec. 501(c)(19) of the Internal Revenue Code for federal tax purposes."). Certainly if statements made during a non-profit corporation's investigation and hearing are quasi-judicial in nature, statements made during a government entity's grievance process created pursuant to state law are as well. *See* S.C. Code §§ 8-17-130 (grievance process includes "the authority to call for files, records and papers pertinent to any investigation; to determine the order of the testimony and the appearance of witnesses; [and] to call additional witnesses . . ."); *see also Gallegos v. Escalon*, 993 S.W.2d 422, 426 (Tex. App. 1999) (grievance hearing "before the school board was quasi-judicial in nature and Gallegos is absolutely immune with respect to his answers to questions posed by the board members"); *Johnson v. Brown*, 193 Or.App. 375, 385, 91 P.3d 741, 747 (2004) (statements made to county investigators were absolutely privileged where the quasi-judicial action was a subsequent grievance hearing); *Hope v. National Alliance of Postal & Federal Employees*, 649 So.2d 897, 900 (Fla.App.1995) (holding statements made during course of grievance procedure absolutely privileged); *Surrency v. Harbison*, 489 So.2d 1097, 1104

(Ala.1986) (statement made in the course of a grievance hearing is absolutely privileged).

Even if Anderson's statements were not privileged, they constitute protected opinion. "[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S. Ct. 2695, 2706, 111 L. Ed. 2d 1 (1990); *accord Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 520, 506 S.E.2d 497, 507 (1998). The fact that a magistrate ruled that the dog in question was dangerous confirms Anderson's opinion. At the very least, it confirms that Anderson's opinion was reasonable and not provably false. *Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332, 1339 (E.D. Va. 1987), *citing, Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("Statements of opinion are absolutely protected under the first amendment."); *see De Leon v. St. Joseph Hospital, Inc.*, 871 Fed.2d 1229 (4th Cir. 1989) (finding that statements in a letter that a physician's qualifications were unsatisfactory and recommending that his application for hospital privileges be denied were opinion and therefore were not defamatory); *Gunter v. Vill. of Gilberts*, 1992 WL 168543, *5 (N.D. Ill. July 9, 1992) (statement that plaintiff "was fired because he was not doing his job . . . is probably not actionable" in liberty interest context of damage to reputation).

As to Brown, Appellant testified that his defamation claim rested on Brown's statements that he "didn't have nothing to do with what happened to [Appellant], what you did was yourself, you shouldn't – it was your fault" and that if Appellant "took care of the dog situation" he would not have been fired. (R. p. 147, ll. 6-13). As with Anderson, nothing that Brown said is "provably false." *Milkovich, supra.* Brown's opinion is that had Appellant handled the matter of the dangerous dog differently, he would not have lost his job. Brown's opinion is protected as a matter of law. *Id.*

Accordingly, as an additional sustaining ground, the judgment as to Appellant's defamation claim against the County should be affirmed because Appellant lacks any evidence to support his claim.

4. **As an additional sustaining ground, Appellant's civil conspiracy claim is barred because *Angus I* stands for the proposition that Hinely and Anderson are incapable of conspiring against Appellant, leaving Brown as the only conspirator.**

Appellant alleges that Hinely, Anderson, and Brown conspired to terminate his employment. (R. p. 14, ¶ 19) He concedes he was an at-will employee, and that Hinely and Anderson terminated him. *Angus I* bars his civil conspiracy claim against Hinely and Anderson because he cannot sue them for doing what they had a right to do. That leaves Brown as the only possible conspirator. A civil conspiracy requires, as its first element, "a combination of two or more persons." *Hackworth v. Greywood at Hammett,*

LLC, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). As Brown cannot constitute a conspiracy of one, Appellant's civil conspiracy claim fails as a matter of law and the lower court's order should be affirmed.

5. <u>As an additional sustaining ground, Appellant's civil conspiracy claim fails because he concedes that the primary purpose of the conspiracy was to allow Brown to take Appellant's job rather than to harm Appellant.</u>

Appellant alleges in his Statement of the Case that the purpose of the alleged conspiracy was "to get Appellant fired so that Respondent Brown could assume his job . . ." (Brief of Appellant, p. 5) He is bound by that assertion. Rule 208(b)(1)(C), SCACR ("Any matters stated or alleged in appellant's statement shall be binding on appellant.")

The second element of a claim for civil conspiracy is that the goal of the conspiracy must be "for the purpose of injuring the plaintiff." *Hackworth*, 385 S.C. at 115, 682 S.E.2d at 874. As this court stated in *Benedict College v. National Credit Systems, Inc.*, 400 S.C. 538, 545, 735 S.E.2d 518, 522 (Ct. App. 2012), "To be actionable, . . . a conspiracy's 'primary purpose or object' must be 'to injure the plaintiff.'"

A conspiracy allegedly aimed at promoting Brown is not a conspiracy for the "primary purpose" of injuring Appellant. Thus, the lower court's order should be affirmed on this additional sustaining ground. *Benedict, supra*; *accord, Ellis v. Davidson*, 358 S.C. 509, 527, 595 S.E.2d 817, 826 (Ct. App.

2004) (no conspiracy shown where plaintiff "proved only that [defendant] was involved with the Firm in the formation of Absolute, not that he undertook this enterprise for the purpose of injuring either Ellis or American"); *Bivens v. Watkins*, 313 S.C. 228, 235, 437 S.E.2d 132, 136 (Ct. App. 1993) (no conspiracy shown where there was a "complete lack of evidence to establish that the purpose of the business of the parties was anything other than profit motivated, and not meant to deprive [plaintiff] of her property"); *Reed v. Aiken County et al.*, 2010 WL 4238848, at *6 (D.S.C. Oct. 21, 2010) (no conspiracy where plaintiff could only show that the aim of the conspiracy was to protect the job of the council chairperson's friend, not harm the plaintiff).; *see also, Petra Int'l Banking Corp. v. First Am. Bank of Virginia*, 758 F. Supp. 1120, 1142 (E.D. Va. 1991), *aff'd sub nom., Petra Int'l Banking Corp. v. Dameron Int'l Inc.*, 953 F.2d 1383 (4th Cir. 1992) ("[a]ny injury to [Plaintiff] was a 'secondary' or 'consequential' result of the parties' attempt to protect themselves" and thus not actionable as a conspiracy); *Guar. Towers, LLC v. Cellco P'ship*, 2007 WL 2617651, *6 (M.D. Pa. Sept. 6, 2007) (no actionable conspiracy where claim was "that both defendants acted to obtain more revenue" rather than harm plaintiff); *Radue v. Dill*, 74 Wis.2d 239, 246, 246 N.W.2d 507, 511 (1976) (conspiracy to "protect [one's] own interests," rather than to injure another, not actionable).

6. **As an additional sustaining ground, Appellant's civil conspiracy claim fails because he failed to properly allege special damages.**

The third element of a claim for civil conspiracy is proof of special damages. *Hackworth, supra.* "General damages are inferred by the law itself, as they are the immediate, direct, and proximate result of the act complained of." *Benedict*, 400 S.C. at 548, 735 S.E.2d at 523 (quoting *Hackworth*, 385 S.C. at 116–17, 682 S.E.2d at 875). "In contrast, special damages are not implied by law because they 'are the natural, but not the necessary or usual, consequence of the defendant's conduct.'" *Id.* "Moreover, because the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." *Hackworth,* 385 S.C. at 115, 682 S.E.2d at 874. Thus, a plaintiff must plead damages that are different from those asserted in his other causes of action and that are unexpected or unique. Here, Appellant did neither.

Plaintiff alleges in his cause of action for defamation "[t]hat publication of such words and statements with a reckless disregard for the truth have not only caused the plaintiff to permanently lose his job but have *injured his reputation* and inflicted severe and continuing *humiliation, embarrassment, and mental anguish* which will continue into the future." (R. p. 14, ¶ 15 (emphasis added)) In his conspiracy cause of action, he alleges "[t]hat as a direct and proximate result of the defendants' civil conspiracy, the

plaintiff has sustained severe and continuing *emotional distress* and loss of *reputation*." (R. p. 15, ¶ 22) "Emotional distress . . . includes all highly unpleasant mental reactions, [including] humiliation [and] embarrassment . . ." *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 359, 650 S.E.2d 68, 72 (2007) (quoting Restatement (Second) of Torts § 46 cmt. j). Thus, the damages alleged by plaintiff as to his conspiracy claim – emotional distress and loss of reputation – are identical to the damages he asserts in his defamation claim.

Moreover, there is nothing unusual or unexpected about the damages he asserts as to his conspiracy claim. The damages alleged are "exactly those damages that one would expect to flow from the alleged conspiracy to terminate him." *James v. Pratt & Whitney*, 2005 WL 3440868, *3 (D.S.C. Dec. 14, 2005). There is nothing extraordinary or unusual about sustaining emotional distress and a loss of reputation from losing one's job. And this court has explicitly ruled that "emotional distress and humiliation [a]re not special damage[s]." *Wardlaw v. Peck*, 282 S.C. 199, 206, 318 S.E.2d 270, 275 (Ct. App. 1984). That leaves only Appellant's assertion of his loss of reputation, which is, by definition, asserted as part of his defamation claim. Accordingly, Plaintiff's conspiracy claim fails because he has not properly alleged special damages.

CONCLUSION

The lower court correctly held that Respondents' were entitled to judgment as a matter of law. Alternatively, Respondents are entitled to summary judgment. Accordingly, the judgment of the trial court should be affirmed.

Respectfully submitted,

Derwood L. Aydlette, III
Gignilliat, Savitz & Bettis, LLP
900 Elmwood Ave., Suite 100
Columbia, S.C. 29201
Tel.: (803) 799-9311

Columbia, South Carolina

January 30, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

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Appellate Case No. 2013-001257

David Michael Hollis, Appellant,

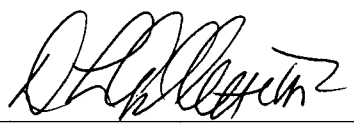
v.

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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.



Derwood L. Aydlette III
Gignilliat, Savitz & Bettis, LLP
900 Elmwood Ave., Suite 100
Columbia, S.C. 29201
(803) 799-9311
Attorneys for Respondents

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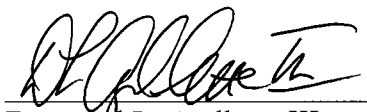
PROOF OF SERVICE

I hereby certify that I have this day caused to be served a copy of the Final Brief of Respondent on counsel of record by deposit in the United States mail, first-class postage prepaid, addressed to:

J. Lewis Cromer, Esq., Julius W. Babb, IV, Esq., J. Paul Porter, Esq.
J. Lewis Cromer & Associates, LLC
P.O. Box 11675
Columbia, SC 29211



Derwood L. Aydlette III
Gignilliat, Savitz & Bettis, LLP
900 Elmwood Ave., Suite 100
Columbia, S.C. 29201
(803) 799-9311

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