THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

---

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS



R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

---

APPELLATE CASE NO.: 2019-001648

---

DAVID T. STOKES,

Appellant,

v.

OCONEE COUNTY, WAYNE MCCALL, AND EDDA CAMMICK,

Respondents.

---

# APPELLANT'S INITIAL BRIEF

---

William E. Hopkins, Jr. (SC Bar No. 66474)
bill@hopkinsfirm.com
J. Clay Hopkins (SC Bar No. 102053)
clay@hopkinsfirm.com
HOPKINS LAW FIRM, L.L.C.
Post Office Box 1885
Pawleys Island, South Carolina 29585
(843) 314-4202 – Telephone
(843) 314-9365 – Facsimile

*Attorneys for Appellant*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**

**Statutes:**



**Rules:**

**Other Materials:**

## STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' MOTION TO QUASH?

II. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO AMEND?

III. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS WAYNE MCCALL AND EDDA CAMMICK?

## STATEMENT OF THE CASE

This action arises from Appellant David Stokes' termination from his position as Oconee County's Community Development Director (also known as the County's "Building Official"), effective on or about May 18, 2017. (Sept. 19, 2019 Order at 1). The Complaint asserts two causes of action (slander *per se* and wrongful termination in violation of public policy) and was filed on May 31, 2017. (*See* Compl.). Stokes sued Respondent Oconee County, as well as Respondents, Edda Cammick and Wayne McCall, who were at all times pertinent to the complaint Oconee County Council members, in their official capacities only. (*Id.*). Respondents filed Answers denying the allegations of the Complaint and Respondents McCall and Cammick filed counterclaims asserting abuse of process by Stokes.

Stokes alleges Respondents defamed him first at a Budget, Finance, and Administration Council Committee meeting. (*Id.*). At this meeting, it is undisputed that neither the Building Department nor Stokes were on the meeting's scheduled minutes and there was no discussion scheduled for the Building Department's budget or financial condition. (*See* Mem. Opp. S.J. at 5). Stokes also alleges Respondents communicated further defamatory statements to the Oconee County newspaper, The Journal. (*See* Compl.). Stokes contends, *inter alia*, that Respondents stated he was:

i. Making life miserable for the citizens of Oconee County;

ii. Lying about building codes and regulations, or making them up on his own;

iii. Funneling Oconee County citizens to certain contractors in exchange for kickbacks; and

iv. Illegally charged Respondent Cammick for a building permit which she did not need or defrauded her, as well as other citizens of Oconee County.

(*See id.*).

The 30(b)(6) deposition testimony of Respondent Oconee County was given by County Administrator Scott Moulder on March 7, 2018. On June 1, 2018, Stokes served a subpoena *duces tecum* on Scott Moulder seeking to depose him for his testimony as a fact witness in the case. On June 5, 2018, Respondents filed a motion to quash the subpoena, arguing that Mr. Moulder had previously testified to facts in this case in the 30(b)(6) deposition for the County. (*See* Resp. Mot. Quash). The motion was heard by the Honorable R. Lawton McIntosh on May 28, 2019 and in an Order dated September 19, 2019, the trial court granted Respondents' motion without explanation. (Sept. 19, 2019 Order).

On December 4, 2018, Respondents Oconee County and Edda Cammick filed a motion for summary judgment, arguing, among other things, that Respondents McCall and Cammick could not be sued in their official capacities, they were immune from suit for defamation, and that Stokes could not establish the elements of his claim for defamation. (*See* Dec. 4, 2018 Mot. S.J.).[1] On February 28, 2019, Respondent McCall

[1] Respondent Oconee County also sought summary judgment on Appellant's claim for wrongful termination in violation of public policy, which was denied and is not the subject of this appeal.

filed his motion for summary judgment, setting forth essentially the same arguments as Respondents Oconee County and Cammick. *(See* Feb. 28, 2019 Mot. S.J.). Although each Respondent had previously moved for summary judgment, on March 26, 2019, Respondents McCall and Cammick filed another motion for summary judgment on Stokes' defamation claim, as well as their abuse of process counterclaim. (*See* Mar. 26, 2019 Mot. S.J.).

On June 4, 2019, before the trial court issued its ruling on Respondents' separate motions for summary judgment (which will be discussed below), Stokes filed a motion to amend his complaint to assert causes of action against Respondents McCall and Cammick in their individual capacities. That hearing was held on August 8, 2019.

On September 19, 2019, the court granted Respondents' motions for summary judgment as to Stokes' defamation claim, finding that: "[Respondents] Cammick and McCall were not, and [could] not be sued in their individual capacities[.]"[2]

On September 24, 2019, the trial court denied Stokes' motion to amend finding any amendment would be futile. (Sept. 24, 2019 Order). The court's decision was based on two (2) points: first, that Stokes could not show Respondents McCall and/or Cammick acted outside the scope of their official capacities as members of the Oconee County Council; and, second, that Respondents McCall and Cammick were entitled to legislative immunity for any defamatory statements made about Stokes. (*See id.*).

---

[2] Stokes acknowledges he was a public official, and that he must show actual malice to prevail on his defamation claim, and therefore concedes he cannot maintain a claim against Respondent Oconee County for defamation pursuant to the South Carolina Tort Claims Act (the "TCA"), S.C. Code Ann. §15-78-60(17), which provides that "[t]he governmental entity is not liable for a loss resulting from ... employee conduct .... Which constitutes ... actual malice[.]"

Stokes timely served his Notice of Appeal on September 26, 2019.

## STANDARD OF REVIEW

South Carolina state courts have generally followed the federal courts. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999). A federal court of appeals reviews the district court's ruling on a party's motion to quash "only for an abuse of discretion." *In re Hubbard*, 803 F.3d 1298, 1307 (11th Cir. 2015) (citing *Ariel v. Jones*, 693 F.2d 1058, 1060 (11th Cir. 1982)). A district court's ruling on a motion to quash shall be "undisturbed" unless the district court as "made a clear error of judgment, or has applied the wrong legal standard." *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1330 (11th Cir. 2005); *see also SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996) (noting that an abuse of discretion occurs when the district court makes "a clear error of judgment" or applies "an incorrect legal standard" (internal quotation marks omitted)).

The standard of review of a trial court's ruling on a motion to amend pleadings is also abuse of discretion or manifest injustice. "[T]he decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal. The trial [court's] finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997).

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP; *White v. J.M. Brown Amusement Co., Inc.*, 360 S.C. 366, 601 S.E.2d 342 (2004); *Redwend Ltd. Partnership v. Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App .2003), *cert.*

*denied* (March 18, 2004) (citation omitted). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *White*, at 370, 601 S.E.2d at 344; *Redwend*, at 467, 581 S.E.2d at 501.

Summary judgment is only appropriate where 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. *Redwend*, at 467-68, 581 S.E.2d at 501. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). "Once the moving party carries its initial burden, the opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing there is a genuine issue for trial." *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001) (internal quotation marks omitted).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Vermeer*, at 59, 518 S.E.2d at 305. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Hall v. Fedor*, 349 S.C. 169, 173-174, 561 S.E.2d 654, 656 (Ct. App. 2002). "Moreover, summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Redwend*, at 469, 581 S.E.2d at 501 (citations omitted). "However, when plain, palpable, and indisputable facts exist on

which reasonable minds cannot differ, summary judgment should be granted." *Hedgepath*, at 355, 559 S.E.2d at 336.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO QUASH THE SUBPOENA OF SCOTT MOULDER.

On March 7, 2018, Stokes took the 30(b)(6) deposition of Respondent Oconee County. The County designated County Administrator Scott Moulder as its corporate designee witness. Moulder testified he was instructed by County Council to terminate Stokes' employment even though he had never received any complaint about him and was unaware of any performance issues. Moulder testified it was made clear to him it was either Stokes or him. On May 1, 2018, Moulder resigned his employment with Oconee County. On June 1, 2018, Stokes served a subpoena *duces tecum* on Moulder seeking to take his deposition as a fact witness in the case. The County objected, arguing Stokes was getting "two bites at the apple", and filed a motion to quash the subpoena. The trial court, without explanation, granted Respondents' Motion to Quash the subpoena *duces tecum* served upon Moulder for his deposition testimony as a fact witness. This was error.[3] While there is no South Carolina appellate court decision directly on point, the overwhelming consensus in other jurisdictions is that "[t]he same person may be deposed as a fact witness and a corporate representative in separate depositions." *Miller v. Waseca Med. Ctr.*, 205 F.R.D. 537, 540 (D. Minn. 2002); *see also Sabre v. First Dominion*

[3] Although a discovery order is ordinarily not immediately appealable, the issue has "a sufficient nexus or companionship to justify this Court's exercise of immediate appellate review." *Brown v. Cnty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) (recognizing courts may accept appeals of interlocutory orders not ordinarily immediately appealable when appealed with a companion issue proper for review, but declining to so where the issues appealed lack a sufficient nexus).

*Capital*, No. 01CIV2145BSJHBP, 2001 WL 1590544, *1 (S.D.N.Y. 2001).

"A Rule 30(b)(6) designee speaks as the corporation and testifies regarding the knowledge, perceptions, and opinions of the corporation. However, when the same deponent testifies in his individual capacity, he provides only his personal knowledge, perceptions, and opinions." *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996); *see, also, In re Motor Fuel Temperature Sales Practices Litig.*, 2009 WL 5064441, at *2 (D. Kan. Dec. 16, 2009) ("[C]ourts have consistently held that the fact that a company's employee was deposed under Rule 30(b)[] does not insulate the company from producing the same—or another—individual as a corporate representative to give a Rule 30(b)(6) deposition."); *LendingTree, Inc. v. LowerMyBills, Inc.*, No. 3:05CV153-C, 2006 WL 2443685, at *2 (W.D.N.C. Aug.22, 2006) (Prior deposition testimony by a witness in his or her individual capacity does not preclude an Rule 30(b)(6) deposition of the same witness); *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 210 F.3d 1, 17 (1st Cir. 2000). "In some circumstances, [a Rule] 30(b)(6) designee may also be deposed in his or her individual capacity. Because 'methods of discovery may be used in any sequence, [Fed. R. Civ. P. 26(d), a witness may be deposed either prior to or following his or her testimony as [a Rule] 30(b)(6) designee." *AG-Innovations, Inc. v. United States*, 82 Fed. Cl. 69, 81 (Fed. Cl. 2008).

The sole basis for Respondents' motion was that "Stokes was given the opportunity in compliance with his notice to address any factual matters that they wanted to address along with the 30(b)(6) notice." (August 6, 2019 Tr. 41).[4] As can be seen from

[4] Counsel for Respondents also raised issues of privilege protections based upon his prior employment with the County at the time of his 30(b)(6) deposition, which was encompassed by a belief that attorney-client privilege attached to Mr. Moulder. As the

the Rule 30(b)(6) Notice of Deposition of Oconee County, the facts to be testified to were ***only*** those facts as to Respondent Oconee County. For that reason, and for the overwhelming agreement on this issue by other jurisdictions, the trial court's decision to quash the subpoena *duces tecum* of Scott Moulder was legally and factually incorrect. The trial court's ruling was driven by a clear error of law and therefore constituted both an abuse of discretion as well as manifest injustice. Stokes submits the case should be remanded with the opportunity to depose Moulder, individually, before trial.

## II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND THE COMPLAINT TO ASSERT IDENTICAL CLAIMS AGAINST RESPONDENTS MCCALL AND CAMMICK IN THEIR INDIVIDUAL CAPACITIES.

The original complaint only asserted claims against McCall and Cammick in their official capacities. Stokes sought to amend the complaint to assert claims against them in their individual capacities as well, understanding a jury could easily find that although they were acting while serving as Council members when their misconduct occurred, such conduct was outside the scope of their official duties and would therefore create liability individually but not in their official capacities.

Rule 15(a), SCRCP, provides "[a] party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served[.]" Rule 15(a), SCRCP. "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." *Id.* "Courts have wide latitude in amending pleadings." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App.

---

trial court stated in open court, however, the clear language of Rule 4.2 RPC dispells this notion.

1997).

There was no evidence whatsoever presented of prejudice to any party not did the Court so find. Rather, the sole basis for the trial court's denial of Stokes' motion to amend was that such amendment would be "futile." (Sept. 24, 2019 Order at 2). This determination rested on two (2) legal theories. First, the trial court stated that amending the complaint to bring claims against Respondents McCall and Cammick in their individual capacities was futile because there was no scintilla of evidence that they made statements about Stokes outside of their official capacities as members of Oconee County Council. (*Id.*). Second, the trial court determined that "it would also be futile to add [Respondents] Cammick and/or McCall as individual defendants because they have an absolute privilege as to statements made by them in the course of their functions as members of the County Council." (*Id.*).

A court's decision to deny a motion to amend should not be based on the court's perception of the merits of an amended complaint. *Patton v. Miller*, 420 S.C. 471, 490-91, 804 S.E.2d 252, 262 (2017) (citing *Tanner v. Florence Cty. Treasurer*, 336 S.C. 552, 558-60, 521 S.E.2d 153, 156-57 (1999)). In rare cases, however, a trial court may deny a motion to amend if the amendment would be clearly futile. *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' ... it may be denied where the proposed amendment would be futile."), *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012) ; 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1487 (3d ed. 2010) ("If a proposed amendment is not clearly futile, then denial of leave to amend is improper.").

Determining whether an amendment to Appellant's complaint would be futile requires the Court to consider Respondents' assertions. *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 826 S.E.2d 585 (2019). The South Carolina Supreme Court's recent ruling in *Skydive* is controlling here.

In *Skydive*, the plaintiff argued the defendants conspired to remove plaintiff from the airport and engaged in conduct "designed to ruin or damage" the plaintiff's business. 426 S.C. 185. In furtherance of the conspiracy, the plaintiff contended the defendants refused to answer the plaintiff's correspondence, refused to refuel the plaintiff's aircraft, concealed the plaintiff's packages and mail, entered into the plaintiff's place of business without authorization, and interfered with the plaintiff's day-to-day operations. *Id.*

The South Carolina Supreme Court determined that to prove civil conspiracy, a plaintiff must prove the defendant acted "for the purpose of injuring the plaintiff." *Id.* (citing *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 546, 677 S.E.2d 574, 579 (2009)). The Court determined that the plaintiff's allegations appeared to satisfy the "intent to harm" exception under South Carolina's Tort Claims Act (the "TCA"), S.C. Code Ann. §15-78-70(b). *Id.*

Furthermore, the plaintiff claimed that certain governmental employees defamed it by communicating to other tenant businesses "false statements that were intended to impeach the honesty, integrity, virtue, or reputation" of the plaintiff. 426 S.C. 185-86. This governmental employee allegedly "published these statements with actual or implied malice" in an attempt "to injure [the plaintiff] in its office, business, or occupation," thereby exposing the plaintiff "to public hatred, contempt, [and] ridicule." *Id.* at 186. The plaintiff further claimed that other governmental employees fraudulently misrepresented the

county approval process for the plaintiff to obtain a long-term lease, which "caused ... injury to [the plaintiff's] business interests ... [and] its ability to lawfully operate." *Id.* The Court determined these allegations appeared to satisfy the "actual fraud" or "actual malice" exceptions under the TCA. *Id.*

The Court found the record on appeal also included claims that the defendants acted outside the scope of their employment at times. *Id.* Specifically, the plaintiff alleged that certain governmental employees,

> [I]n their individual capacities and ... acting outside the course and scope of their employment created a plan to deprive [the plaintiff] of its existing long-term lease by refusing to provide a copy of the fully-executed lease to [the plaintiff], issuing an adhesion temporary permit under threat of eviction, and accusing [the plaintiff] of unpublished and non-existent rule, regulation, and ordinance violations amounting to a plan to illegally shut down and permanently remove [the plaintiff] from [the airport].

*Id.* The Court also stated that the plaintiff further alleged the governmental employees,

> [I]n their individual capacities and all acting outside the course and scope of their employment continued a plan to deprive [the plaintiff] of its business lease by drafting, presenting and having Illegal Regulations enacted by the County Council, reporting violations of the Illegal Regulations to FAA as grounds for federal violations, harassing [the plaintiff's] customers, and interfering with its customers.

*Id.* In other instances, the Court found, plaintiff claimed the defendants acted in the scope of employment but outside the scope of their official duties. *Id.* For example, the plaintiff claimed the defendants acted "under cloak of state authority" to carry out "malicious actions." *Id.* The Court determined that the defendants' "duties" certainly did not include acting with malice toward the lessees of the Department. *Id.* Further, the Court said, by alleging the defendants conspired to remove the plaintiff's business from the airport, defamed the plaintiff's business, and fraudulently misrepresented the county lease approval process, the plaintiff suggested the defendants were acting against the interests

of their employers, which certainly would be outside of their official duties. *Id.* at 186-87.

As the Court held, governmental employees are not afforded immunity under the TCA for conduct outside the scope of his/her official duties, or for conduct that amounts to actual fraud, actual malice, or an intent to harm. *Id.* at 187 (citing S.C. Code Ann. §15-78-70(b)). Therefore, although the plaintiff alleged in its complaint that the defendants were acting as agents of the governmental entities, the Court determined that the facts and claims recited in the plaintiff's complaint set forth several plausible grounds upon which the plaintiff could successfully allege the defendants were not entitled to immunity. *Id.* It is not the "court's role to determine whether the allegations Skydive might make in an amended pleading will state a valid claim." *Id.*

As the Supreme Court held in *Skydive*, and based upon the record before the Court here, it is clear that allowing Stokes to amend his complaint would not be "clearly futile." *Id.* First, should Stokes allege that Respondents McCall and Cammick defamed him, his truthfulness, and fitness in his profession, Stokes would suggest Respondents were acting against the interests of their employer, which certainly would be outside of their official duties. *Id.* at 186-87. Stokes additionally seeks to claim Respondents acted in the scope of employment but outside the scope of their official duties. *Id.* at 186. For example, should Stokes claim Respondents acted "under cloak of state authority" to carry out "malicious actions," the Supreme Court states this is sufficient to bring a claim against Respondents. *Id.* Finally, the jury or this Court may determine that none of Respondents' "duties" include acting with malice toward the employees of the County. *Id.*

As to the trial court's second determination here, "[i]ndividual members of a local county council are not entitled to absolute immunity." *Brown v. County of Berkeley*, 622

S.E.2d 533, 366 S.C. 354 (2005) (citing *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) (noting that privilege depends not on rigid requirements but is determined by consideration of public policy)". Furthermore, the trial court's denial of the individual council members' motion to dismiss does not preclude the individual council members from raising the issues presented in their motion at a later point in the case. *Id.* (citing *Frazier v. Badger*, 361 S.C. 94, 101, 603 S.E.2d 587, 590 (2004) (stating that immunity under the Tort Claims Act is an affirmative defense that must be proved at trial)); *Sanders v. Prince*, 304 S.C. 236, 240, 403 S.E.2d 640, 643 (1991) (stating that when a government employee's conduct constitutes actual malice, he is not entitled to immunity from suit).

In *Brown*, the defendant county council enacted a written request for the plaintiff – an employee of the county clerk's office – to produce financial documentation for the past two years regarding ten (10) county bank and credit card accounts. *Id.* at 536. In reply to the county council's request, the plaintiff asserted that the county council violated the Freedom of Information Act (FOIA) by authorizing the request to produce in a closed executive session. *Id.* The plaintiff additionally claimed that the chairman of the county council improperly accused him of misusing the county credit card. *Id.* Following the council council's enactment of a resolution approving an "expanded audit" of the clerk's office. *Id.* The plaintiff filed suit seeking, among other forms of relief, a preliminary injunction prohibiting the audit of the clerk's office, and damages against the the county, the county council, and the individual council members for defamation, defamation *per se*, and intentional infliction of emotional distress. *Id.*

The trial court declined to dismiss the individual council members "at this early

stage." *Id.* The individual council members had moved for dismissal from the lawsuit citing the terms of the TCA and absolute legislative immunity. *Id.*

The *Brown* Court went on to state that the TCA provides "[n]othing in this chapter may be construed to give an employee of a governmental entity immunity from suit ... if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." *Id.* at 538 (citing S.C. Code Ann. § 15-78-70(b) (2005)). Were this Court "to recognize that the individual members of the county council enjoyed absolute immunity from suit, the above statute would be meaningless." *Id.* Additionally, as the *Brown* Court determined, "the individual council members will be free to raise such issues as qualified immunity, qualified privilege, and the provisions of the [TCA], at later stages of this case." *Id.*

Finally, as the *Richardson* court held, the 'absolute privilege is recognized as to defamatory statements made by legislators in the course of their functions, if such statements are connected with, or relevant or material to, the matter under inquiry." *Richardson*, 273 S.C. 142, 255 S.E.2d 341 (citing 50 Am.Jur.2d, Libel and Slander, Section 223; Annotations: 40 A.L.R.2d 941, 26 A.L.R.3d 492, 497; Prosser, Law of Torts, 4th ed. p. 781.) Here, as Stokes has argued vigorously at each stage of these proceedings, the meeting in question was a Budget Meeting and Appellant was not on the meeting minutes. In essence, Respondents maliciously brought Stokes name up in furtherance of Respondent Cammick's determination to get rid of him for his requiring her to comply with the County's building code – something that would be completely out of the legislative immunity purview.

Here, *Skydive* and *Brown* are controlling. Stokes should have been granted leave to amend his complaint to bring defamation claims against Respondents McCall and Cammick in their individual capacities. Because the trial court's determination that these amendments would be futile was legally and factually deficient, the ruling constituted a clear error of law and was therefore an abuse of discretion and a manifest injustice. Stokes submits the Court should reverse the trial court's order and upon remand grant Stokes leave to amend his complaint.

## III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS MCCALL AND CAMMICK IN THEIR OFFICIAL CAPACITIES.

For the same reasons *Skydive* supports Stokes' argument in support of his amendment, it should also lead this Court to the conclusion that Respondents McCall and Cammick can be sued in their official capacities. In some instances, like the *Skydive* plaintiff, Stokes claimed Respondents acted in the scope of employment but outside the scope of their official duties. (*See* Compl.). For example, in *Skydive*, the plaintiff claimed the defendants acted "under cloak of state authority" to carry out "malicious actions." 426 S.C. 186. The *Skydive* Court determined that the defendant's "duties" certainly did not include acting with malice toward the lessees of the Department. Further, by alleging Respondents conspired to remove Skydive's business from the airport, defamed Skydive's business, and fraudulently misrepresented the county lease approval process, *Skydive* suggests Respondents were acting against the interests of their employers, which certainly would be outside of their official duties. 426 S.C. 186-87.

A governmental employee is not afforded immunity under the TCA for conduct outside the scope of his official duties, or for conduct that amounts to actual fraud, actual

malice, or an intent to harm. S.C. Code Ann. §15-78-70(b). Therefore, like the *Skydive* plaintiff, although Stokes alleged in his complaint that Respondents were acting as agents of the governmental entities, the facts and claims recited in the complaint, and would be set forth in his amended complaint, set forth several plausible grounds upon which he could successfully allege Respondents are not entitled to immunity. 426 S.C. 187. It is not the Court's "role" to determine whether the allegations Appellant might make in an amended pleading will state a valid claim. *Id.* The Court "cannot definitively say it is impossible for Stokes to plead a valid claim against Respondents." *Id.*

"[I]it is entirely appropriate for Stokes to allege that some of an individual's actions were within the scope of their official duties, and some were not, or even to plead alternative theories of liability depending on whether an individual's actions were within the scope of their duties." *Id.* (citing Rule 8(a), SCRCP ("Relief in the alternative or of several different types may be demanded.")). Pleading alternative theories of recovery based on the uncertainty of whether an employee acted within the scope of his employment or his official duties is common. *Id.* at 187-88. (citing *Dickert v. Metro. Life Ins. Co.*, 311 S.C. 218, 220, 428 S.E.2d 700, 701 (1993), *as modified on reh'g* (Apr. 7, 1993) (reversing the circuit court for not permitting simultaneous causes of action against co-worker and employer based on the same conduct, stating, "Co-Employee may ... be held individually liable for an intentional tort he may have committed while acting within the scope of employment").

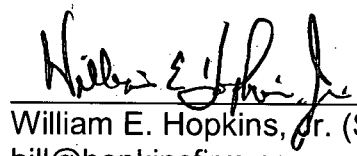
Other courts have addressed similar alternative theories of recovery. In *United Technologies Corp. v. Mazer*, 556 F.3d 1260 (11th Cir. 2009), for example, the district court granted a motion to dismiss for failure to state a claim. 556 F.3d at 1266. "The district

court was ... disturbed by [the plaintiff's] allegation that Mazer acted both personally and on behalf of [his employer]5 West–Hem, which the court found to be irreconcilably inconsistent." 556 F.3d at 1273. The Eleventh Circuit dismissed the district court's concern, [W]e are not troubled by what the district court saw as inconsistent allegations. Rule 8(d) of the Federal Rules of Civil Procedure expressly permits the pleading of both alternative and inconsistent claims. Thus, [the] complaint is not subject to dismissal simply because it alleges that both Mazer, individually, and West–Hem committed the tortious conduct, even if it would be impossible for both to be simultaneously liable (which question of impossibility we need not, and do not, resolve). 556 F.3d at 1273-74. *See also Johnson v. State Dep't of Health & Rehab. Servs.*, 695 So.2d 927, 930 (Fla. Dist. Ct. App. 1997) (in a tort claims case under a similar immunity provision, stating, "Johnson can therefore make claims against [the governmental entities] for acts of [their employees] committed within the scope of their employment and, in the alternative, pursue personal liability of these defendants"). For these reasons, Respondents were not entitled to summary judgment in their official capacities.

## CONCLUSION

Based upon the foregoing, Appellant David Stokes respectfully requests the trial court's Orders granting Respondents' Motion to Quash, Denying Stokes' Motion to Amend, and Granting Respondents' separate Motions for Summary Judgment as to his defamation claims be reversed. Additionally, Appellant would ask that the judgment be reversed for any other reason appearing in the record of the case.

**HOPKINS LAW FIRM, L.L.C.**



William E. Hopkins, Jr. (SC Bar No. 66474)
bill@hopkinsfirm.com
J. Clay Hopkins (SC Bar No. 102053)
clay@hopkinsfirm.com
Post Office Box 1885
Pawleys Island, South Carolina 29585
(843) 314-4202 – Telephone
(843) 314-9365 - Facsimile

ATTORNEYS FOR APPELLANT

Pawleys Island, South Carolina

November 27, 2019

Other Counsel of Record:

James W. Logan, Jr., Esquire
Stacy Todd Coffee, Esquire
LOGAN & JOLLY, LLP
1805 North Boulevard
Post Office Box 259
Anderson, South Carolina 29622

Attorneys for Defendants Oconee County
and Edda Cammick

Stephanie H. Burton, Esquire
GIBBES BURTON, LLC
308 East Saint John Street
Spartanburg, South Carolina 29302

Attorney for Wayne McCall

Roberta Barton, Esquire
Roberta Barton Law, Ltd. Co.
107 N. Fairplay Street
Seneca, South Carolina 29678

Attorney for Defendants Wayne McCall
and Edda Cammick

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge



---

Appellate Case No.: 2019-001648

---

David Stokes .....Appellant

vs.

Oconee County, Wayne McCall and Edda Cammick .....Respondents

---

CERTIFICATE OF SERVICE

---

I certify that I have served Appellant's Initial Brief, Designation of Matters to be included in the Record on Appeal, and the Certificate of Service on Respondents' attorneys by electronic mail and via Federal Express, on November 27, 2019, to Respondents' attorneys' offices located at the following address:

James W. Logan, Jr., Esquire
Stacy Todd Coffee, Esquire
LOGAN & JOLLY, LLP
1805 North Boulevard
Anderson, South Carolina 29622

Stephanie H. Burton, Esquire
GIBBES BURTON, LLC
308 East Saint John Street
Spartanburg, South Carolina 29302

Roberta Barton, Esquire
Roberta Barton Law, Ltd. Co.
107 N. Fairplay Street
Seneca, South Carolina 29678

William E. Hopkins, Jr.

Pawleys Island, South Carolina

# HOPKINS LAW FIRM, LLC

12019 OCEAN HIGHWAY
POST OFFICE BOX 1885
PAWLEYS ISLAND, SOUTH CAROLINA 29585
TELEPHONE: 843-314-4202
FACSIMILE: 843-314-9365
WWW.HOPKINSFIRM.COM

WILLIAM E. HOPKINS JR. •†
J. CLAY HOPKINS
IAN TAYLOR

•ALSO ADMITTED IN DISTRICT OF COLUMBIA
†SOUTH CAROLINA CERTIFIED MEDIATOR


November 27, 2019

**VIA HAND-DELIVERY**



The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: David Stokes v. Oconee County, Wayne McCall and Edda Cammick
Appellate Case No.: 2019-001648

Dear Ms. Kitchings:

Please find enclosed the original Appellant's Initial Brief, Designation of Matter to be Included in Record on Appeal, and Certificate of Service in the above referenced appeal.

Thank you for your assistance.

Sincerely,

HOPKINS LAW FIRM, LLC

William E. Hopkins, Jr.

WEHjr/kyr
Enclosures

cc: James W. Logan, Jr., Esquire (via E-mail and Federal Express)
Stacy Todd Coffee, Esquire (via E-mail and Federal Express)
Stephanie H. Burton, Esquire (via E-mail and Federal Express)
Roberta Barton, Esquire (via E-mail and Federal Express)