THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

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SC Court of Appeals

R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2019-001648

DAVID T. STOKES,

Appellant,

v.

OCONEE COUNTY, WAYNE MCCALL, AND EDDA CAMMICK,

Respondents.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. THERE IS NO AUTHORITY TO SUPPORT THE CIRCUIT COURT'S ORDER GRANTING RESPONDENT COUNTY'S MOTION TO QUASH THE SUBPOENA OF SCOTT MOULDER.

As Oconee County admits, Mr. Moulder can be deposed as both a 30(b)(6) witness and a fact witness. (Resp.'s Br., at 6). However, Oconee County and Edda Cammick argue that Stokes, "by asking questions about Mr. Moulder's personal knowledge of the facts and his personal opinion thereon," accomplished both in the same deposition and cannot depose him as a fact witness a second time." (*Id.*). This argument is inaccurate and misstates the record before the Court.

First, the 30(b)(6) notice, which was for Oconee County and *not* Mr. Moulder, directed the County to provide a witness who would testify to ***only*** those facts as to Oconee County. Respondents cannot point the Court to any statement or portion of the notice that indicates Stokes sought Mr. Moulder's testimony regarding any subject matter in dispute. In fact, it was the County's decision to produce Mr. Moulder as the 30(b)(6) witness. The County could have produced several individuals, but chose to produce Mr. Moulder – knowing that his testimony would be the County's testimony.

There is nothing inherently improper about the same person being deposed both as a Rule 30(b)(6) representative and in his/her individual capacity. At least one court has addressed the County's argument that Mr. Moulder's individual deposition will likely be duplicative. *See Tessera, Inc. v. Sony Corp.*, No. C11-04399 EJD (HRL) (N.D. Cal. July 9, 2012) (Order Denying Motion for Protective Order where a party sought individual testimony and the individual was designated as a 30(b)(6) witness).

In *Tessera*, the court stated that the "fact that the same person is designated to

testify as an individual and as an agent pursuant to Rule 30(b)(6) does not create a presumption that the testimonies will be coincident." *Id.* at *1 (citing *Mitchell Eng'g v. City & Cnty. of San Francisco*, 2010 U.S. Dist. LEXIS 20782, *3-4 (N.D. Cal. Feb. 2, 2010) ("Even if the general topics to be addressed at the 30(b)(6) deposition will overlap to some extent [with the individual deposition topics], the questions asked, and the answers given might not.")). As Stokes previously noted in his Initial Brief, courts have rejected arguments that such dual depositions are duplicative, mainly because the purposes of the Rule 30(b)(6) and individual depositions are different, and an individual deposition is not similarly binding on a corporate defendant as is a Rule 30(b)(6) deposition. *See, e.g., Smith v. General Mills, Inc.*, 2006 WL 7276959, at *5 (S.D. Ohio Apr. 13, 2006) ("Courts have soundly rejected GMO's argument that prior deposition testimony from individual fact witnesses relieves a corporation from designating a corporate spokesperson in response to a Rule 30(b)(6) notice of deposition."); *Commodity Futures Trading Com'n v. Midland Rare Coin Exchange, Inc.*, 1999 WL 35148749, at *3 (S.D. Fla. July 30, 1999) ("It is also clear that under both Local Rule 26.1.K, and Rule 30 of the Federal Rules of Civil Procedure, Plaintiff has the right to depose Modist for six hours in a deposition under 30(b)(6), and subsequently depose Modist under 30(b)(1) in his individual capacity for an additional six hours. As Plaintiff has noted, the depositions serve distinct purposes, impose different obligations on Defendant Global, and involve different ramifications.").

Thus, Stokes was entitled to seek both types of discovery – a 30(b)(6) deposition of Oconee County and the individual deposition of Scott Moulder – and these forms of discovery are not "duplicative" even if they address similar or overlapping subject matters.

Presumably understanding the fallacy in its position, the County then attempts to

argue that attorney-client privilege should shroud Mr. Moulder's testimony from any future discovery. (*Id.*). Although the Circuit Court's Order granting Respondent's Motion to Quash did not provide any factual or legal basis for its decision, this argument was quickly rejected by the Court when Appellant pointed the Court to Rule 4.2 of the South Carolina Rules of Professional Conduct.[1] (Tr. 49) (THE COURT: "It sounds to me 4.2 is unambiguous in this application, so I'll disagree with you on that one, Mr. Logan.").

However, the County completely misinterprets the principle of attorney-client privilege. It is well settled that attorney-client privilege "only protects disclosure of communications; ***it does not protect disclosure of the underlying facts by those who communicated with the attorney.***" *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The client . . . may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." (citation and quotation marks omitted)). For that reason, even if the County's argument had merit, which it does not, any claims of privilege would not extend to Mr. Moulder's understanding of the underlying facts of Stokes' claims or Respondents' defenses – whether those facts were disclosed to the County's attorneys or not.

Furthermore, to determine whether the attorney-client privilege would apply, the Court must first have a situation to which it can apply the law. *Muskrat v. United States*, 219 U.S. 346, 356 (1911) ("The province of the [] courts is to adjudicate actual disputes, not to issue advisory opinions."). Here, any ruling on the applicability of the attorney-client privilege would amount to little more than an advisory opinion, given that the exact nature

[1] "Consent of the organization's lawyer is not required for communication with a former constituent." Rule 4.2, n.7, RPC, Rule 407, SCACR.

of the questioning cannot be known. Until the 30(b)(6) deposition takes place, no ruling on the propriety of the assertion of attorney-client privilege is proper.

For that reason, and for the overwhelming jurisdictional agreement on this issue, 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. STOKES' AMENDMENT ASSERTING CLAIMS AGAINST RESPONDENTS MCCALL AND CAMMICK IN THEIR INDIVIDUAL CAPACITIES WOULD NOT BE FUTILE.

McCall and Cammick argue that the trial court did not err in denying Stokes' motion to amend for two (2) reasons: first, that the trial court properly found that "[Appellant] failed to present a scintilla of evidence that Cammick or McCall acted outside of their official capacities," and therefore could not be sued in their individual capacities under South Carolina's Tort Claims Act, S.C. Code Ann. §15-78-70; and, second, the trial court correctly determined that any amendment would be futile because Cammick and McCall enjoyed absolute legislative immunity for any defamatory statements made regarding Appellant. (Resps.' Br., 7-8).

McCall contends there is no evidence the defamatory statements made by him were about Stokes. (McCall Br., 7-8). This contention ignores overwhelming South Carolina case law supporting the conclusion that Stokes can clearly establish a *prima facie* case of defamation. Under South Carolina law, to prove defamation a plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged

communication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 710 S.E.2d 67, 74 (2011).

A statement is defamatory if it "tends to impeach the honesty, integrity, virtue, or reputation, or publish the natural and alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or obloquy, or to cause him to be shunned or avoided, or to injure him in his office, business, or occupation." *Smith v. Bradstreet*, 41 S.E. 763 (1902). A statement is *per se* actionable (i.e., general damages are presumed to exist) where it charges the plaintiff with "unfitness in one's business or profession." *Hotzchieter v. Thomson Newspapers, Inc.*, 506 S.E.2d 497, 506 (1988). If the statement is actionable *per se*, then the defendant "is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages." *Id.* If the statement is not actionable *per se*, then "the plaintiff must plead and prove both common law malice and special damages." *Id.* A statement that leads the public to believe Appellant did something illegal at work should meet both standards. *See Campbell v. Int'l Paper Co.*, C/A No. 3:12-cv-03042-JFA (D.S.C. May 3, 2013) (holding that a statement that the plaintiff committed a gross safety violation at work arguably meets both standards).

Words or conduct or the combination of words and conduct can communicate defamation. *Mains v. K Mart Corp.*, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988); *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 272 S.E.2d 633 (1980). Furthermore, it is possible for an act of termination to be actionable defamation under

South Carolina law. *See Johnson v. Dillard's, Inc.*, 2007 WL 2792232, at *18 (D.S.C. Sept. 24, 2007) (citing *Eubanks v. Smith*, 354 S.E.2d 898 (1987); *Tyler,* 275 S.C. at 456, 272 S.E.2d at 633).

As with many of Respondents' arguments, individually and collectively, McCall's argument asks the Court to ignore the facts of the case. "To prevail in a defamation action, the plaintiff must establish that the defendant's statement referred to some ascertainable person and that the plaintiff was the person to whom the statement referred." *Burns v. Gardner*, 328 S.C. 608, 615, 493 S.E.2d 356, 359 (Ct. App. 1997). "Where a publication affects a class of persons without any special personal application, no individual of that class can sustain an action for the publication." *Hospital Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 377, 9 S.E.2d 796, 800 (1940) (citation omitted). Thus, "where defamatory statements are made against an aggregate body of persons, an individual member not specially imputed or designated cannot maintain an action." *Id.* "Where defamatory words reflect upon a class of persons impartially, and there is nothing showing which one is meant, no action lies at the suit of a member of the class." *Id.* at 378, 9 S.E.2d at 800 (citation omitted); *see also* 50 Am. Jur. 2d. Libel and Slander § 225 (2017) ("Under the 'group libel doctrine,' a plaintiff has no cause of action for a defamatory statement directed to some of, but less than, the entire group when there is nothing to single out the plaintiff; consequently, the plaintiff has no cause where the statement does not identify to which members it refers.").

However, in *Holtzscheiter*, our Supreme Court held that "[w]hile the general rule is that defamation of a group does not allow an individual member of that group to maintain an action, this rule is not applicable to a small group." *Holtzscheiter*, 332 S.C. at 514, 506

S.E.2d at 504. The *Holtzscheiter* court held a newspaper liable for publishing a statement that a murder victim lacked "family" support. *Id.* The murder victim's mother sued for defamation alleging the statement defamed her. *Id.* at 508, 506 S.E.2d at 500. The *Holtzscheiter* court indicated there was evidence from which a jury could find the statement was "of and about" the victim's mother. *Id.* at 514, 506 S.E.2d at 504.

The primary cases relied upon by McCall are factually distinguishable from this action. *See Hospital Care Corp.*, 194 S.C. at 377-87, 9 S.E.2d at 800-04 (affirming the circuit court's order ruling that a small insurance company could not maintain a defamation action against defendants who published pamphlet stating that small insurance companies that had recently entered into the insurance business were inexperienced and financially unstable); *id.* (affirming the finding that the pamphlet was not actionable because the defamation, if any, was to a class and had no specific application to the plaintiff); *see also Burns*, 328 S.C. at 615-16, 493 S.E.2d at 360 (holding two blind citizens lacked standing to maintain defamation action on behalf of blind population in general).[2]

The only evidence in this record shows that McCall and Cammick were referring to Stokes – and not the County's Buildings Department as a whole – when the defamatory statements were made. McCall's defamatory statements regarding Cammick being forced to purchase a building permit for her carport was undoubtedly referring to Stokes. Stokes was also the "head" of the Department and Respondent County testified in its 30(b)(6) deposition that Stokes was the only Buildings Department employee considered

[2] McCall's remaining arguments are addressed in conjunction with County and Cammick's arguments.

for termination. Furthermore, Stokes was terminated on May 1, 2017, only six (6) days after the April 25, 2017 County Council meeting. For that reason, it is clear who McCall and Cammick were referring to when they made their defamatory statements, but, at the very least, there is a genuine issue of material fact regarding whether Stokes could establish that the statements were directed at him, and, thus, the question should be submitted to a jury.

As to Cammick and McCall's remaining arguments, there was sufficient evidence presented to the trial court showing they acted outside the scope of their official duties as members of Oconee County Council, and the issue should be decided by a jury.

The Tort Claims Act, S.C. Code Ann. §15-78-70, specifically provides that government employees may be liable in tort actions:

> (a) This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the *scope of his official duty* is not liable therefor except as expressly provided for in subsection (b).
>
> (b) Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the *scope of his official duties* or that it constituted *actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.*
>
> ...

(Emphasis added). Immunity under the statute is an affirmative defense that must be proved by the defendant at trial. *Tanner v. Florence City-County Bldg. Comm'n*, 333 S.C. 549, 552, 511 S.E.2d 369, 371 (Ct. App. 1999).

The Supreme Court has held the term "scope of employment" as used in an insurance policy is broader than the term "scope of official duties" as used in the Tort Claims Act. *South Carolina State Budget and Control Bd. v. Prince*, 304 S.C. 241, 245,

403 S.E.2d 643, 646 (1991). If "scope of employment" is a broader term than "scope of official duties" — the term used in the governmental immunity statute — it follows that acts not within the "scope of employment" are not within the "scope of official duties." *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587 (2004).

Whether an act is within the "scope of employment" may be determined by implication from the circumstances of a particular case. *Hamilton v. Miller*, 301 S.C. 45, 48, 389 S.E.2d 652, 653 (1990); *Wade v. Berkeley Cnty.*, 330 S.C. 311, 319, 498 S.E.2d 684, 688 (Ct. App. 1998). In *Prince*, the Supreme Court held that the course of someone's employment requires some "act in furtherance of the employer's business." 304 S.C. at 246, 403 S.E.2d at 647.

Three older South Carolina cases have applied these standards in the context of claims for defamation. Each of these cases found the alleged defamation fell outside the scope of employment because the statements at issue were not made with any purpose to serve the employer, even though some were made during the work day while the employee was otherwise performing work. *See Johnson v. Life Insurance Co. of Georgia*, 88 S.E.2d 260 (1955) (finding insurance agent who made comment to one insured about why another insured's claim was denied acted outside the scope of his employment because he was not the agent for the insured whose claim was denied and did not have authority to speak for the company with respect to the denied claim); *Bosdell v. Dixie Stores Co.*, 167 S.E.2d 834, 837 (1933) (finding employee was "not acting . . . within the scope of his authority" in making a defamatory statement where there was no evidence the employee "at the time was engaged in the performance of any duty committed by the company in connection with [the plaintiff's] employment or discharge, or that he had any

authority to make any statement with reference to the matter on behalf of the defendant"); *Courtney v. American Ry Express Co.*, 113 S.E. 332 , 335 (1922) (finding casual comment by one railroad employee to another about why an employee was let go fell outside the scope of employment because the employee was not "engaged in the discharge of any duty committed to him" by the employer when the allegedly defamatory comment was made).

Furthermore, the Supreme Court has determined that actions which constitute a retaliatory motive can present a question of fact concerning whether actions taken were outside the scope of one's official duties. *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587 (2004) (finding that an employee's retaliatory conduct was a continuation of his improper sexual advances toward the plaintiff and was a product of personal, not occupational, motives: "The principle of governmental immunity is not intended to protect a defendant who has used his authority for nothing more than to personally retaliate against an employee. In addition, section 15-78-70(b) denies governmental immunity for defendants whose actions involve actual malice and an intent to harm.").

Stokes has presented evidence that shortly after Cammick was initially told she needed a building permit to build a carport on her property, she and McCall engaged in a smear campaign against Stokes by making statements about him and his department that were false, and as discovery has shown, wholly unsupported by any evidence. In fact, each Respondent (including Respondent County through its 30(b)(6) witness) all confirmed there was no evidence to support any statements made by Cammick and McCall about Stokes. In their arguments to the circuit court, though, all of Cammick and McCall's defenses to their defamatory statements rest on a deceptive argument that there

were numerous complaints about Stokes' department.

The claim there were numerous complaints about Stokes' department is vehemently disputed. In his deposition, McCall specifically admitted under oath there was no evidence that Stokes:

1. Was harassing contractors in Oconee County (McCall Dep. p. 30, ¶¶ 21-24);
2. Had a "sweet deal" (*Id.*, p. 32, ¶¶ 6-8)

    Q. "All right. Did you provide any written evidence of a sweet deal going?"

    A. "No, no."

3. Was funneling citizens to a specific contractor, (*Id.*, p. 32, ¶¶ 17-20)

    Q. "Have you seen any evidence of a disproportionate amount of people getting funneled to Mr. Whitten?"

    A. "I don't know."

Cammick also openly admitted she had no evidence to support the statements made about Stokes. (Cammick Dep., p. 64, ¶¶ 15-16). When asked if she had evidence to support a claim Stokes had a sweetheart deal with a contractor, Cammick said, "No." (*Id.*, p. 65, ¶¶ 8-11).

Oconee County confirmed that each statement made by Cammick and McCall at this meeting was factually incorrect. Mr. Moulder testified that "[t]here was no evidence" to support the claims Cammick and McCall made:

> Q: Do you recall [Respondent] McCall saying "Well, they got a sweet deal going. They are recommending you got to go down to a certain other builder or seller of carports and sheds and he is the only person that could stamp the drawings?"
>
> A: I recall a statement to that effect.

Q: Okay. What evidence does [Respondent] County have to support that allegation?

A: I have seen no such evidence.

Q: He also said, "I'm looking through some papers right now, but building codes is funneling people down to his office." Do you recall him saying that?

A: I recall a statement to that effect.

Q: What evidence does Oconee County have that the building codes department was funneling people to some contractor's office?

A: I have seen no such evidence.

...

Q: Does the county have any evidence to support the claim the building codes making up rules?

A: I don't have any written evidence.

(Moulder Dep. p. 32, ¶¶ 21-24); (Moulder Dep. pp. 33-36).

In fact, Oconee County held a grievance hearing for Stokes, and that committee determined "[t]here are no written complaints filed against [Stokes] by any county residents, contractors or departmental staff members, nor are there any disciplinary actions or reprimands."[3] Likewise, McCall testified regarding the Grievance Committee's decision:

Q. Do you know whether Mr. Stokes had a grievance hearing over his termination?

A. No, sir, I do not.

Q. I am going to read to you from their findings. Okay? They stated "There was no verifiable evidence presented at the hearing to refute what is documented in his " -- that's Mr. Stokes --" personnel file. There are no written complaints filed against him by any county residents, contractors or departmental staff members, nor are there any disciplinary actions or

[3] No Respondent has ever disputed or appealed the findings of the Grievance Committee.

reprimands. It is the recommendation of this committee that tangible documentation or evidence be produced for review by the committee and Mr. Stokes or, in the alternative, for full reinstatement with back pay as requested in the original complaint." Do you have any reason to dispute what I just read?

A. I don't know anything about it.

Q. Okay. Did anyone ever ask you to submit documentation or the complaints you had heard from builders regarding Mr. Stokes' grievance hearing?

A. No, sir.

Q. Were you asked to testify at Mr. Stokes' grievance hearing?

A. No, sir.

(McCall Dep. p. 39, ¶15 - p. 40, ¶13). These facts alone – an official arm of Oconee County disputing its own assertions alleged in this action in addition to McCall disputing his own testimony regarding citizen complaints – creates a genuine issue of material fact concerning Cammick and McCall's respective positions they did not act outside the scope of their official duties, and the circuit court abused its discretion in denying Stokes' motion to amend the complaint to assert claims against McCall and Cammick in their individual capacities.[4]

Cammick and McCall appear to agree with Stokes that any legislative privilege in making statements is limited. (Resps.' Br. 9, n. 8) ("[C]ouncilpersons may nonetheless enjoy a limited privilege when they were 'engaged in a legislative duty or process at the time the defamatory statements were made,' which is precisely what the Circuit Court found.").

A defendant may assert a conditional or qualified privilege as an affirmative

[4] *See Weir v. Citicorp Nat'l Servs.*, 435 S.E.2d 864, 865 (1993) ("When the truth of the defamatory communication is in dispute, the issue is a jury question.")

defense in a defamation action when the defamation is made in good faith and with proper motives. *See Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) ("In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege."); *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986) ("Whe[n] the defamation is made in good faith and with proper motives, a defendant may claim a qualified or conditional privilege."). "Under this defense, 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." *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 134. However, the privilege does not protect against unnecessary defamation, and the person making the statement must be careful not to go beyond what his interests or duties require. *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001).

In *Bell v. Bank of Abbeville*, our Supreme Court held:

> In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.

208 S.C. 490, 493–94, 38 S.E.2d 641, 643 (1946). Generally, whether an occasion gives rise to a qualified privilege is a question of law for the court. *Castine v. Castine*, 403 S.C. 259, 267, 743 S.E.2d 93, 97 (Ct. App. 2013). "A qualified privilege may exist whe[n] the parties have a common business interest. However, the qualified privilege exists only

when the publication has occurred in a proper manner and to proper parties only." *Abofreka*, 288 S.C. at 125–26, 341 S.E.2d at 624–25 (citation omitted).

When the occasion gives rise to a qualified privilege, a prima facie presumption to rebut the inference of malice exists, and the plaintiff has the burden to show either actual malice or that the scope of the privilege has been exceeded. *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 134. The privilege is abused and lost, leaving the speaker unprotected, when either of following situations occur: "(1) a statement [is] made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement [is] made in reckless disregard of the victim's rights." *Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012). "[T]he fact that a duty, a common interest, or a confidential relation existed to a limited degree, is not a defense, even though the publisher acted in good faith." *Swinton Creek Nursery*, 334 S.C. at 485, 514 S.E.2d at 134 (quoting *Fulton v. Atl. Coast Line R. Co.*, 220 S.C. 287, 297, 67 S.E.2d 425, 429 (1951)).

Ordinarily, ***the jury*** determines if a qualified privilege has been abused or exceeded. *See id.* (emphasis added) ("Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused.").

As Stokes has previously noted, 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." *Brown v. Cnty. of Berkeley*, 366 S.C. 354, 622 S.E.2d 533, 538 (2005) (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.* Furthermore, 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 v. McGill*, 273 S.C. 142, 255 S.E.2d 341 (1979) (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, the meeting in question was a Budget Meeting and neither Stokes nor his department appeared on the meeting agenda. Viewing the facts in the light most favorable to Stokes, McCall and Cammick maliciously brought his name up in furtherance of 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. These statements were totally false – as confirmed by the County through its 30(b)(6) witness and its Grievance Committee. These facts create a genuine issue of material fact concerning whether McCall and Cammick's statements were made outside the scope of their official duties, which should be submitted to a jury. Finally, any claim of privilege must be submitted to a jury to determine whether any privilege was abused. Because there is sufficient evidence that any privilege was abused or exceeded, the

circuit court's determination that Stokes' amendment to bring claims against McCall and Cammick in their individual capacities 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 him leave to amend his complaint.

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

McCall and Cammick failed to address the Supreme Court's recent decision in *Skydive Myrtle Beach, Inc. v. Horry Cnty*, likely because the decision completely supports Stokes proceeding with claims against them in both their individual and official capacities. 426 S.C. 175, 826 S.E.2d 585 (2019).

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 McCall and Cammick 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 they are not entitled to immunity. 426 S.C. 187. As Stokes previously argued, 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.

Thus, "it is entirely appropriate for [Appellant] 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").

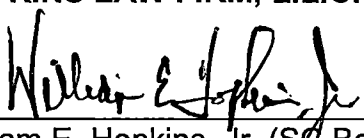
As the Supreme Court stated, it is not the Court's "role" to determine whether the allegations Stokes might make in an amended pleading will state a valid claim. *Id.* The Court "cannot definitively say it is impossible for Stokes to plead a valid claim against Respondents." *Id.* For these reasons, summary judgment was improper here because there genuine issues of material fact existed, and the trial court's decision should be reversed and remanded and Stokes should be permitted to proceed with claims against McCall and Cammick in their individual and 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.



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February 5, 2020

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

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SC Court of Appeals

Case No.: 2017-CP-37-00320

David T. Stokes, ...Appellant

vs.

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

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PROOF OF SERVICE

I, Kathy Roberts, an employee of Hopkins Law Firm, LLC, hereby certify that on February 5, 2020 I caused a true and correct copy of the **Reply Brief of Appellant** and **Appellant's Corrected Designation of Matter to be Included in Record on Appeal** in the above captioned action to be served on all counsel of record via electronic mail and U.S. Mail, postage prepaid, addressed as follows:

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February 5, 2020

VIA FEDERAL EXPRESS

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FEB 06 2020
SC Court of Appeals

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 and one copy of the Reply Brief of Appellant and Appellant's Corrected Designation of Matter to be Included in Record on Appeal in the above referenced appeal. Please file the original and return a file stamped copy to me in the enclosed self-addressed, stamped envelope.

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 US Mail)
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