IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
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.

FINAL BRIEF OF RESPONDENTS OCONEE COUNTY AND EDDA CAMMICK

James W. Logan, Jr., SC Bar No. 3385
logan@loganandjolly.com
Stacey Todd Coffee, SC Bar No. 6525
coffee@loganandjolly.com
LOGAN & JOLLY, LLP
Post Office Box 259
Anderson, SC 29622
(864)226-1910
(864)226-1931 (fax)
Attorneys for Respondents Oconee County
and Edda Cammick

Roberta Barton, SC Bar No. 81110
Roberta Barton Law, Ltd. Co.
107 N. Fairplay Street
Seneca, SC 29678
(864(882-5878
Attorney for Respondents Edda Cammick
and Wayne McCall

Date: May 7, 2020

Other Counsel of Record:

William E. Hopkins, Jr.
J. Clay Hopkins
Hopkins Law Firm, LLC
P.O. Box 1885
Pawleys Island, SC 29585
Attorneys for Appellant

Stephanie H. Burton
Gibbes Burton, LLC
308 East Saint John Street
Spartanburg, SC 29302
Attorney for Respondent Wayne McCall

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court abuse its discretion in granting the Respondents' Motion to Quash the Subpoena of Scott Moulder?

2. Did the trial court abuse its discretion in denying the Plaintiff/Appellant's Motion to Amend Complaint?

3. Did the trial court err in granting summary judgment to Respondent Edda Cammick in her official capacity?

STATEMENT OF THE CASE

This action arises from the Plaintiff/Appellant's termination from his position as Oconee County's Community Development Director, effective on or about May 18, 2017. The Complaint, alleging two causes of action (slander *per se* and wrongful termination in violation of public policy), was filed on or about May 31, 2017. (R. pp. 31-36.) The Plaintiff/Appellant sued Oconee County, as well as Councilmembers Edda Cammick and Wayne McCall, in their official capacities only. (Complaint, R. p. 34, ¶ 17.)[1] The Respondents filed timely Answers, denying many of the material allegations of the Complaint and pleading numerous affirmative defenses. (R. pp. 37-57.) The following Orders/Motions are at issue herein:

1. Order dated September 19, 2019 (R. pp. 16-25), granting the June 5, 2018 Motion to Quash the Subpoena *Duces Tecum* issued to Scott Moulder (R. pp. 76-82).
2. Order dated September 19, 2019 (R. pp. 16-25), granting summary judgment to the Respondents Oconee County and Edda Cammick as to Plaintiff/Appellant's defamation cause of action.
3. Order dated September 24, 2019 (R. pp. 26-29), denying the Plaintiff/Appellant's June 4, 2019 Motion to Amend Complaint (R. pp. 717-718).

[1] James W. Logan, Jr. and Stacey Todd Coffee represent Oconee County and Edda Cammick, in her official capacity as a member of the Oconee County Council. Roberta Barton represents Edda Cammick and Wayne McCall in their individual capacities. Stephanie Burton represents Wayne Cammick in his official capacity as an Oconee County Councilman and is filing a separate Brief.

STATEMENT OF THE FACTS

According to the Complaint, "Defendant Oconee County hired Plaintiff as the Building Official in December 2011." The Building Official "is the administrator for building and code compliance within Oconee County." (Complaint, R. p. 32, ¶ 7.) Plaintiff/Appellant was terminated by the County Administrator, Scott Moulder, effective May 18, 2017.[2] According to Moulder, the termination was based on "growing concerns with the complaints that we were receiving about the department" and Moulder's belief that "a change in the department needed to be made." (Depo. of Scott Moulder, p. 19, l. 16-25, R. pp. 148.) Moulder testified that there had been numerous complaints about the Building Code's department, including "inconsistency with application of the code, rudeness and the time frame it took to get permits, ... inability to get ahold of somebody when they called up there or get a call back, modifying in the field how we are going to enforce a code without notifying the contractors of that change, just to name a few." (Moulder Depo. p. 29, l. 1-15, R. pp. 149.) Mr. Moulder also testified that there "were discussions about Mr. Stokes and others over a three or four-month time period in the fall of 2016" and that neither Cammick nor McCall directly recommended that the Appellant be terminated. The ongoing discussions were about the Plaintiff/Appellant as well as four (4) other department heads and were "about complaints that they had about those particular offices and that they wanted the matters cured." (Moulder Depo. p. 31, l. 11 – p. 32, l. 9, R. pp. 150-151.)

The Plaintiff/Appellant acknowledged that Mr. Moulder "receive[d] complaints about the building codes department" which were relayed to the Plaintiff/Appellant and

[2] Oconee County Code of Ordinances §6-81 specifically provides that "[t]he codes department shall be headed by a building official who shall be appointed by and serve at the pleasure of the chief administrative officer."

that Moulder told him his termination was due to questions about his "incompetence and not knowing the codes and permitting issues and complaints from contractors." (Stokes Depo. p. 44, l. 22-25; p. 81, l. 17 – p. 82, l. 17, R. pp. 206 and 243-244.) Although the Plaintiff testified that he did not "precisely" know whether or not people complained about his department to Defendants McCall or Cammick or other members of the County Council, he admitted that he was aware of a meeting where multiple builders complained to Councilman Wayne McCall about his department and of a separate complaint made by a property owner (Joel Perkins). (Stokes Depo. p. 67, l. 11 – p. 70, l. 19; p. 76, l. 22 – p. 78, l. 11. R. pp. 229-232 and 238-240.)

The Plaintiff/Appellant alleged that, prior to his termination, he was defamed during a Budget, Finance, and Administration Council Committee meeting in April of 2017.[3] (Complaint, R. p. 33, ¶ 14-15.) Specifically, the Complaint alleged that "Defendants McCall and Cammick ... asserted they had received numerous citizen complaints regarding customer service and delays with Plaintiff's department, and that Plaintiff had 'blackballed' certain contractors and businesses within Oconee County." A certified transcript of the relevant portion of the meeting was filed with the Circuit Court and can be found in the Record on Appeal at R. pp. 135-146. A video recording is available at the Your Oconee channel on YouTube website, or found at: https://www.youtube.com/watch?v=ehWpf6AWqbM.[4] A review of the transcript/video shows that the Plaintiff's name was not mentioned during the meeting.[5]

[3] The Plaintiff also alleged wrongful termination in violation of public policy, which remains pending in the Circuit Court and is not at issue in this appeal.

[4] The relevant portion starts at 1:18:30 timestamp.

[5] In his Brief, Plaintiff/Appellant states that "Stokes also alleges Respondents communicated further defamatory statements to the Oconee County newspaper." However, as pointed out in the Respondent's Memorandum in Support of Motion for Summary Judgment (R. p. 97-98), the Plaintiff testified in his deposition that his claim is based entirely on statements made at the Council Committee meeting on April

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE RESPONDENTS' MOTION TO QUASH THE SUBPOENA OF SCOTT MOULDER.

On or about February 1, 2018, the Plaintiff/Appellant's attorney issued a "Notice of Taking Video Deposition of 30(b)(6) Representative of Defendant Oconee County." (R. pp. 83-89.) Exhibit A attached to that notice included a request to also examine the witness as a "fact" witness as evidenced by the first three (3) items listed therein:

1. The factual bases of all denials of Plaintiff's Complaint.
2. The factual bases of all affirmative defenses.
3. The factual bases of any response to any discovery request.

(R. p. 87-89.) In response to such Notice, the County's attorney produced the then Oconee County Administrator, Scott Moulder, to testify on behalf of the County. During Mr. Moulder's deposition, Plaintiff/Appellant's attorney asked numerous fact-based and personal opinion questions of Mr. Moulder, without objection by the defense attorneys.

Subsequent to the deposition, Mr. Moulder left his position with the County, and the Plaintiff/Appellant served a notice to depose him a second time, to which the County's attorney filed the Motion to Quash at issue herein. (Notice, R. pp. 79-82, Motion to Quash, R. pp. 76-89.) In the Motion, the County argued (1) that Mr. Moulder had previously been deposed as a fact witness during the 30(b)(6) deposition; and (2) Mr. Moulder's involvement in and knowledge of the case are protected by the attorney-client privilege,

---

25, 2017. Plaintiff also acknowledged that the newspaper article was based upon either the author being present at the Budget meeting or based upon video of the meeting and that he was not aware of any conversations or direct communications between Cammick or McCall and the author of the article. (Stokes Depo. p. 121, l. 3-11, R. p. 564.) At the August 6, 2019 hearing, Plaintiff's attorney also confirmed to the Court that Plaintiff's defamation claim was based entirely on the statements made at the Council Committee meeting. (8/6/19 Transcript, p. 3, l. 13-22, R. p. 793.) Based thereon, the April 25, 2017 Budget meeting is the only communication at issue in the Plaintiff's defamation claim.

as he represented the County and was intimately familiar with "matters contained in the litigation" prior to his departure from the County.

As to the first argument, the County does not dispute that Moulder could have been deposed as both a 30(b)(6) designee and a fact witness. Rather, as to this argument, it is the County's position that, by asking questions about Mr. Moulder's personal knowledge of the facts and his personal opinion thereon, the Plaintiff accomplished both in the same deposition and cannot depose him as a fact witness a second time. *See* S.C.R.C.P. 30(a)(2) ("The deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown.")[6]

As to the attorney-client privilege, the County argued at the hearing that the County's attorney had "extensive conversations and discussions [about the case] with all of the people in the county that may have some information regarding this case, including Mr. Moulder, under the protections of the attorney-client privilege." (5/28/19 Transcript, p. 40, l. 10-14, R. p. 761.) It was, and is, the County's position that the attorney-client privilege attached as soon as the County's attorney spoke with Mr. Moulder about the litigation in his capacity as a representative and employee of the County. "The attorney-client privilege protects against disclosure of confidential communications by a client to his attorney." *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 293, 692 S.E.2d 526, 529 (2010) (citing *State v. Owens,* 309 S.C. 402, 407, 424 S.E.2d 473, 476 (1992)).

Because the Plaintiff/Appellant has not shown that the Circuit Court abused its discretion in granting the Motion to Quash, the ruling should be affirmed. *See Dunn v.*

[6] Note that the Plaintiff/Appellant did not introduce Moulder's deposition transcript to the Circuit Court and that such is, therefore, not part of the record before this Court.

Dunn, 298 S.C. 499, 502, 381 S.E.2d 734 (1989); *Bayle v. S.C. Dep't of Transp.,* 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct.App.2001); *Karppi v. Greenville Terrazzo Co., Inc.,* 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct.App.1997) (burden is upon the party appealing the order to demonstrate the court abused its discretion).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PLAINTIFF/ APPELLANT'S MOTION TO AMEND COMPLAINT.

Following the hearing on the Defendants' Motions for Summary Judgment, the Plaintiff/Appellant filed a Motion to Amend his Complaint (R. pp. 717-718) to add claims against Cammick and McCall in their individual capacities. Following a hearing on August 6, 2019 (8/6/19 Hearing Transcript, R. pp. 791-802), the Court entered its Form 4 Order denying the Plaintiff's motion (R. pp. 13-15), and then entered a formal Order on September 24, 2019 (R. pp. 26-29). As indicated by the Circuit Court, a party may amend his pleading by leave of court, which "should generally" be "freely given." (9/24/19 Order, R. p. 27.) However, leave to amend "may be denied where the proposed amendment would be futile." *See Skydive Myrtle Beach v. Horry County*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019) (quoting *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct.App.2010)). "A circuit court's ruling on a Rule 15 motion to amend is within its discretion." *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017).

The Court denied the Motion to Amend, finding that the amendment to add Cammick (and McCall) as individual defendants would be futile because "Plaintiff failed to present a scintilla of evidence that Cammick or McCall acted outside of their official capacities as members of the Oconee County Council" and that, based thereon, they could not be sued in their individual capacities under §15-78-70 of the S.C. Tort Claims Act. The Court also found that the amendment would be futile because Cammick (and

McCall) have an absolute privilege as to statements made by them in the course of their functions as members of the County Council.[7]

Even if a councilperson could act outside of the scope of their position and lose their immunity and/or be subjected to individual liability, the facts of this case do not present that situation. The Circuit Court found that "[t]here is not a scintilla of evidence that either Cammick or McCall acted outside of their official capacity as members of Oconee County Council during that meeting," and the Plaintiff/Appellant has not and cannot point to any such evidence in the record. And, yet, the Plaintiff/Appellant's primary argument herein is that he should be allowed to add Cammick as an individual defendant because he theoretically could claim she acted outside of the scope of her position. It would be "futile" to allow Plaintiff to make such a claim when the Circuit Court has already ruled that Plaintiff presented no evidence to support such a claim (and Plaintiff has pointed to no such evidence in the Record that is before the Court).

Plaintiff argues that the case of *Skydive Myrtle Beach v. Horry County*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019) is controlling here and required the Circuit Court to grant his Motion to Amend. However, he greatly misinterprets the import of *Skydive*. In *Skydive*, the Court dealt with a Rule 12(b)(6) motion, as opposed to the Rule 56 summary judgment motion that was before the Circuit Court herein. The *Skydive* Court found that the Plaintiff *could have* alleged that the defendants acted outside the scope of their official capacities and should have, therefore, been given an opportunity to amend his Complaint. Here, however, the Circuit Court actually took into consideration whether there was any

[7] Additionally, the Circuit Court found that Plaintiff failed to produce sufficient evidence of malice, could not show that the alleged defamatory statements even referred to the Plaintiff, and could not show that any of the statements were "false," all of which are required to provide his defamation claim. Please note that Plaintiff/Appellant does not appeal these findings nor point this Court to any such evidence.

evidence that the Defendants acted outside of the scope of their positions and determined, in its discretion, that there was not and that the proposed amendment would clearly be futile.

In addition, the Circuit Court found that Cammick and McCall could not be sued for defamation, including slander *per se*, due to an absolute privilege afforded to "members of legislative bodies for acts in the performance of their duties" and "if such statements are connected with, or relevant or material to, the matter under inquiry." (Order, p. 5-6, R. p. 20-21) (citing *Richardson v. McGill*, 273 S.C. 142, 255 S.E.2d 341 (1979); Restatement (Second) of Torts §590 (1977) (a member of a local legislative body is "absolutely privileged to publish defamatory matter concerning another in the performance of his legislative functions")). "A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties. Accordingly, an 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*, *supra*, at 146.[8] As shown by the transcript and video of the meeting, the alleged statements were made at a County Council Committee meeting, dealt with a County office that the Council oversees and which is funded by taxpayer money, dealt with the undisputed fact that complaints had been made about that office, and did not even mention the Plaintiff's name.[9]

---

[8] Plaintiff/Appellant cites *Brown v. County of Berkeley*, 366 S.C. 354, 622 S.E.2d 533 (2005), for the proposition that the privilege enjoyed by councilpersons cannot be absolute, based on the wording of S.C.Code Ann. § 15–78–70(b). However, it is clear from *Brown*'s citation to *Richardson, supra*, that councilpersons 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.

[9] Under the similar facts presented in *Richardson*, "public policy mandated that legislators be permitted to pursue reports of incompetent or illegal behavior involving appointed county personnel without the necessity of having to justify their actions in a suit for defamation."

Because an amendment to add Cammick as a defendant in her individual capacity would be futile based on the facts and/or either an absolute or limited immunity, the Circuit Court's denial of the Plaintiff's Motion to Amend should be affirmed.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT EDDA CAMMICK IN HER OFFICIAL CAPACITY.

The Circuit Court's grant of summary judgment to Edda Cammick, in her official capacity, on the Plaintiff's cause of action for slander *per se* should be affirmed, as it is clearly not proper to sue Cammick in her official capacity as a councilmember. Instead, as required by §15-78-70 of the S.C. Tort Claims Act, the "only" properly named defendant would be the "agency or subdivision for which the employee was acting" and "the agency or political subdivision for which the employee was acting must be substituted as the party defendant."[10]

The Circuit Court found that Cammick and McCall were not properly named defendants based on §15-78-70 and because "[t]here is not a scintilla of evidence that either Cammick or McCall acted outside of their official capacity as members of Oconee County Council" during the Budget, Finance, and Administration Meeting. (9/19/19 Order, pp. 5-6, R. p. 20-21.) "When reviewing the grant of a summary judgment motion, [the Court of Appeals] applies the same standard of review as the trial court under Rule 56, SCRCP. Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all

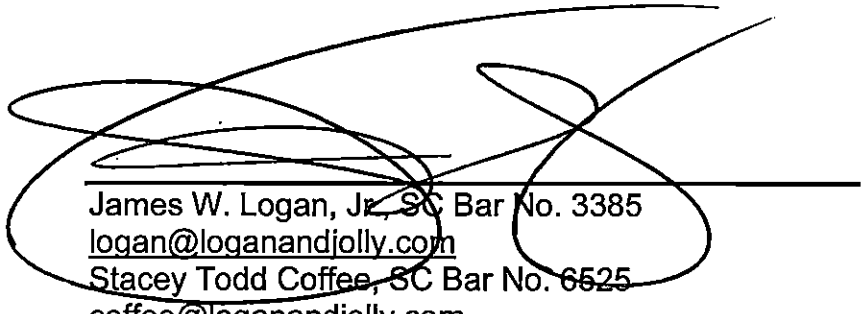
[10] Note that the Plaintiff/Appellant did not appeal the Circuit Court's grant of summary judgment to Oconee County, including the Court's findings that Plaintiff had failed to establish the required elements of a defamation or slander *per se* cause of action. (9/19/19 Order, p.p. 6-8, R. pp. 21-23.) Based thereon, suing Cammick in her official capacity, which is equivalent to suing Oconee County, would be repetitious and futile.

reasonable inferences in the light most favorable to the non-moving party." *Zurich Am. Ins. Co. v. Tolbert*, 378 S.C. 493, 496–97, 662 S.E.2d 606, 607–08 (Ct. App. 2008), aff'd, 387 S.C. 280, 692 S.E.2d 523 (2010). (Internal citations omitted.)

Essentially, Plaintiff/Appellant's argument is not that Cammick (and McCall) can be sued in their official capacities (which would be the equivalent of suing the County itself)[11] but that he should be allowed to amend his Complaint to sue them individually. However, as discussed above, the Circuit Court properly denied the Plaintiff's attempt to amend the Complaint to do so and was also correct in granting summary judgment to Cammick in her official capacity.

CONCLUSION

As argued herein and as supported by the Record on Appeal, the Circuit Court's rulings should be affirmed.



James W. Logan, Jr., SC Bar No. 3385
logan@loganandjolly.com
Stacey Todd Coffee, SC Bar No. 6525
coffee@loganandjolly.com
LOGAN & JOLLY, LLP
Post Office Box 259
Anderson, SC 29622
(864)226-1910
(864)226-1931 (fax)
Attorneys for Respondents Oconee County and Edda Cammick

Roberta Barton
Roberta Barton Law, Ltd, Co.
107 N. Fairplay Street
Seneca, SC 29678
Attorney for Respondents Wayne McCall and Edda Cammick

[11] See FN 10 hereinabove.

Date: May 7th, 2020

Other Counsel of Record:

William E. Hopkins, Jr.
J. Clay Hopkins
Hopkins Law Firm, LLC
P.O. Box 1885
Pawleys Island, SC 29585
Attorneys for Appellant

Stephanie H. Burton
Gibbes Burton, LLC
308 East Saint John Street
Spartanburg, SC 29302
Attorneys for Respondent Wayne McCall

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Common Pleas

R. Lawton McIntosh, Circuit Court Judge

RECEIVED
MAY 12 2020
SC Court of Appeals

Appellate Case No.: 2019-001648

DAVID T. STOKES .....Appellant,

v.

OCONEE COUNTY, WAYNE MCCALL and EDDA CAMMICK.....Respondents.

CERTIFICATE OF COUNSEL

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

James W. Logan, Jr., SC Bar No. 3385
logan@loganandjolly.com
Stacey Todd Coffee, SC Bar No. 6525
coffee@loganandjolly.com
LOGAN & JOLLY, LLP
Post Office Box 259
Anderson, SC 29622
(864)226-1910
(864)226-1931 (fax)
Attorneys for Respondents Oconee County
and Edda Cammick