## STATEMENT OF ISSUES

I. **Did the circuit court err in in granting summary judgment to the Respondent where the court concluded that Appellant's claims are barred for failure to exhaust internal/administrative remedies?**

II. **Did the circuit court err in in granting summary judgment to the Respondent where the court concluded that Appellant's claims are barred by absolute legislative immunity?**

III. **Did the circuit court err in in granting summary judgment to the Respondent where the court found there were no genuine issues of material fact?**

## STATEMENT OF THE CASE

In this case Appellant, Sylvia Lockaby (hereinafter "Lockaby"), sued Respondents, The City of Simpsonville (hereinafter "Simpsonville"), Janice Curtis (hereinafter "Curtis"), and Adam Randolph (hereinafter "Randolph"), and Simpsonville Police Department[1] ("Simpsonville Police") seeking compensatory, actual, and punitive damages, including an award of reasonable attorney's fees and costs, for violation of her First and Fourth Amendment rights to the United States Constitution, under 42 U.S.C. § 1983, and for the torts of false imprisonment/seizure and gross negligence, resulting from Lockaby's arrest during the February 9, 2016 meeting of the City Council of Simpsonville, South Carolina. (R. pp. ___; complaint.) Lockaby was a member of the city council at the time and present at the aforementioned meeting. (R. pp. ___; complaint.) During her questioning of the city administrator, David Dyrhaug, about curb replacement in a part of Simpsonville, Lockaby was interrupted by Curtis. (R. pp. ___; exhibit to complaint.) Curtis then ejected Lockaby from the meeting and she was escorted out of council chambers (and the building) by Randolph, a police officer with the Simpsonville Police Department. (R. pp. ___; exhibit to complaint.)

Respondents, as well as then Defendant Simpsonville Police, then moved to dismiss this action, pursuant to Rule 12, SCRCP. Respondents and Defendant Simpsonville Police asserted two arguments: (1) that all Defendants actions in the controversy were subject to absolute immunity and did not give rise to liability under either 42 U.S.C. § 1983 or the South Carolina Tort Act and (2) that because Lockaby

[1] Simpsonville Police was later removed from this action upon the filing and service of the Amended Complaint in May 2018 and is not a party to this appeal.

also bought claims governed by the South Tort Claims Act, it was improper for Lockaby to name individual employee defendants for claims arising against their associated public bodies. (R. pp. ___; motion to dismiss.) While Respondents motion was pending, Lockaby amended and served her complaint that removed Defendant Simpsonville Police. (R. pp. ___; amended summons and complaint.) Lockaby then filed and served a return and memorandum in opposition to Respondents motion to dismiss. (R. pp. ___; return and memorandum in opposition to Defendants' motion to dismiss.) Respondents then filed and served a memorandum in support of its motion to dismiss. (R. pp. ___; memorandum in support of Defendants' motion to dismiss.) After a hearing before the Honorable Edward W. Miller on May 31, 2018, the court denied Respondent's Motion to Dismiss. (R. pp. ___; order denying Defendants' motion to dismiss.)

Respondents then answered the amended complaint. (R. pp. ___; answer.) Respondents admitted "so much of [allegations concerning the exchange that lead to Lockaby's seizure] as is reflected in the minutes of that meeting," denied the City of Simpsonville Council chambers was a traditional public forum, and admitted the topic being discussed by Lockaby and Dyrhaug was a matter of public concern. (R. pp. ___; answer.) Respondents also asserted various defenses, among them that Lockaby failed to exhaust her remedies and that Defendants' alleged actions were subject to absolute legislative immunity. (R. pp. ___; answer.)

On February 18, 2019, Respondents filed and served their motion for summary judgment. (R. pp. ___; motion for summary judgment.) Their grounds for their motion were as follows:

> 1. City Council meetings are subject to the Code of Ordinances for the City of Simpsonville ("Code"). The Code provides in § 2-63 that City Council meetings are governed by "Robert's Rules of Order, Newly Revised" ("Robert's Rules"). Under § 24 of Robert's Rules, any ruling by the chair may be appealed. Under that same rule, "[m]embers have no right to criticize a ruling of the chair unless they appeal from his decision." Lockaby did not appeal the ruling at issue in this case, and therefore her claims are barred.
>
> 2. The actions in question here are limited to one City Council meeting, and specifically, one ruling by the Mayor as presiding officer and the actions of Adam Randolph who was serving as sergeant-at-arms acting at the instruction of the presiding officer. As such, the actions at issue are subject to absolute legislative immunity and do not give rise to liability under 42 U.S.C. § 1983 or the South Carolina Tort Claims Act.

(R. pp. ___; motion for summary judgment.)

Respondents supplemented their motion to summary judgment by filing and serving an affidavit of Adam Randolph. (R. pp. ___; affidavit of Randolph.) Randolph admits he was serving the Simpsonville City Council on the night of February 6, 2016 as its sergeant-at-arms and that he reviewed the minutes from the meeting in question and they were "consistent" with his memory. (R. pp. ___; affidavit of Randolph.) He also says that when the recording stopped – thus, where the transcript stopped in the minutes – "I believe I was in the front of the Council Chamber near the Councilmembers. As I recall, Councilmember Lockaby said something to the effect of 'That's fine. I was leaving anyway.'" (R. pp. ___; affidavit of Randolph.) "Councilmember Lockaby then gathered her things, got up, and left voluntarily accompanied by her husband." (R. pp. ___; affidavit of Randolph.) Respondents also filed and served a memorandum in support of their motion for summary judgment. (R. pp. ___; memorandum in support of Defendants motion for summary judgment.)

Lockaby filed and served on April 23, 2019, the transcript of the deposition of Phyllis Long, who served as the city clerk to the Simpsonville city council and mayor during the controversy at issue. (R. pp. ___; Phyllis Long transcript of deposition testimony.) Among other things, Ms. Long discussed the drafting and approval of the minutes for the February 9, 2016 meeting, including the inclusion of the transcript of dialogue requested by Lockaby. (R. pp. ___; Phyllis Long deposition transcript.)

Lockaby also filed and served on that same day the transcript of the deposition of herself. (R. pp. ___; Sylvia Lockaby deposition transcript.) As to her interactions with Randolph after Curtis ejected her, Lockaby answers the question, "How were you arrested?", by replying "I think you've already asked me, and I've answered this. He escorted me out of the building. I'm sure if I had not gone willingly, then I would have been physically escorted out." (R. pp. ___; Sylvia Lockaby deposition transcript p. 30, ln. 17-21.)

On April 24, 2019, Lockaby filed and served a motion for continuance of the summary judgment hearing scheduled the next day. (R. pp. ___; Sylvia Lockaby motion for continuance.) Specifically, Lockaby informed the court that she had not yet had opportunity to receive full responses to discovery requests from Respondents and needed an opportunity to depose Respondents to properly prepare for the motion for summary judgment. (R. pp. ___; Sylvia Lockaby motion for continuance.) On that same day, Lockaby filed a memorandum in opposition to Defendants motion for summary judgment. (R. pp. ___; memorandum in opposition to Defendants motion for summary judgment.)

Respondents motion for summary judgment that is the subject of this appeal was heard before the Honorable Robin B. Stillwell on April 25, 2019. The court first heard Lockaby's motion for a continuance and decided to move forward with argument on Respondents' motion for summary, but indicated he would reserve ruling on the motion until after Lockaby had an opportunity to conduct the additional requested discovery and supplement the record, as long as that was done within 15 days of the hearing. (R. pp. ___; summary judgment hearing transcript pg. 3, ln. 5-16.)

On May 7, 2019, Lockaby deposed Curtis and on May 10, 2019, Lockaby filed her supplemental response to Defendants' motion for summary judgment and attached the deposition transcript of Curtis, as well as the approved minutes from February 9, 2016. (R. pp. ___; supplemental response to Defendants' motion for summary judgment; Curtis deposition transcript; minutes of February 9, 2016.)

On July 1, 2019, the court filed an order granting Defendants/Respondents' motion for summary judgment as to all of Lockaby's claims. (R. pp. ___; order on summary judgment.)

Lockaby moved to reconsider on July 11, 2019. (R. pp. ___; motion to reconsider.) On August 9, 2019, the court filed an order denying Lockaby's motion to reconsider. (R. pp. ___; order denying to motion to reconsider.)

This appeal followed.

## STATEMENT OF FACTS

On the evening of February 9, 2016, the Appellant, Ms. Lockaby, and the Respondents, Curtis and Randolph, were present at the city council chambers of the Simpsonville City Council at 118 N.E. Main Street in Simpsonville, South Carolina.

(R. pp. ___; amended complaint.) At that day and time, Curtis and Appellant served as elected officials on the Simpsonville City Council. Mayor Curtis served as the Respondent City of Simpsonville's mayor and Defendant Randolph served as a police officer for Respondent Simpsonville. (R. pp. ___; amended complaint.) At the meeting, Simpsonville City councilmembers, including Appellant and Curtis, had discussion of a motion by councilmember Matthew Gooch (seconded by councilmember Ken Cummings) to give permission for Simpsonville City Administrator David Dyrhaug to complete an application with the Greenville Legislative Delegation Transportation Committee (GLDTC) for curb replacement at Aster Drive in Simpsonville. (R. pp. ___; amended complaint.)

> On written request from Councilmember Lockaby:
>
> Councilmember Lockaby was recognized by Mayor Curtis and had the floor.
>
> Councilmember Lockaby: Are we opening a can of worms? Cause if we fix this...
>
> Mayor Curtis: Who are you talking to?
>
> Councilmember Lockaby: I'm looking at Mr. Dryhaug.
>
> Mayor Curtis: Well you didn't identify anyone.. .excuse me.
>
> Councilmember Lockaby: Mr. Dryhaug, I'm looking straight at you. Are we opening a can of worms when we do this? I'm just asking the question.
>
> Mr. Dyrhaug: I don't have an answer for that, but I...
>
> Councilmember Lockaby: Well.
>
> Mr. Dyrhaug: The issue is that so when this road was resurfaced that the reveal on the curb was diminished and that's caused an issue of storm water coming from the road onto private properties.
>
> Councilmember Lockaby: And we have storm water issues all over the city.
>
> Mayor Curtis: [Not intelligible]
>
> Councilmember Lockaby: I'm still speaking, please.

Mayor Curtis: Yes, but you're arguing the point and this isn't a time for argument. You can ask questions, but this isn't argument.

Councilmember Lockaby: I'm not arguing. I'm, I'm stating a fact that we have storm water issues all over the city. Is this opening a can of worms?

Mayor Curtis: Well, ask our attorney.

Councilmember Lockaby: I was asking Mr. Dryhaug, I haven't even gotten to the attorney yet.

Mayor Curtis: Well, okay, that's fine. Mr. Holmes, could you...

Councilmember Lockaby: I'm not finished.

Mayor Curtis: You are now. [Gavels] Thank you. Mr. Holmes...

Councilmember Lockaby: I am not.

Mayor Curtis: Yes, you are. Mr. Holmes, could you...

Councilmember Lockaby: [talks over, not intelligible] ...we had to do...

Mayor Curtis: [Gavels 3 times] Order. Order. Order.

Councilmember Lockaby: You going to throw me out?

Mayor Curtis: [Gavels] Order.

Councilmember Lockaby You going to threaten to throw me out?

Mayor Curtis: Keep it up and you'll find out.

Councilmember Lockaby: I guess I will.

Mayor Curtis: Okay.

Councilmember Lockaby: I'm keeping it up.

Mayor Curtis: [Gavels] Mr. Holmes will you please answer her question? Thank you.

Councilmember Lockaby: I know if you want to answer her question, I haven't asked one.

Mayor Curtis: Can I get the police officer from the back to enter the front, please?

Officer: Need her out?

Mayor Curtis: I need her out.

> Officer: Councilmember Lockaby, will you come with me, please?
>
> Mayor Curtis: We'll take a five minute recess. [Gavels.]
>
> Councilmember Lockaby leaves the council chamber at 7:30pm.
>
> Brief recess until 7:33pm when meeting resumed.

(R. pp. ___; amended complaint exhibit, minutes of February 9, 2016.)

Ms. Lockaby understood that she was being detained for disrupting the proceeding and that she was not free to remain in her councilmember seat. (R. pp. ___; amended complaint.) Ms. Lockaby obeyed Randolph's commands and made no attempt to flee the scene or in any fashion physically confront him. (R. pp. ___; amended complaint.) Immediately thereafter, Ms. Lockaby was seized and escorted away from the council chambers in the custody of Respondents Randolph and Simpsonville. (R. pp. ___; amended complaint.)

Appellant filed this action on February 9, 2018. (R. pp. ___; complaint.)

## STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that "summary judgment may be rendered only when 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 judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

"An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011).

## ARGUMENT

### I. It was improper for the trial court to conclude that Appellant's claims should be barred for failure to exhaust internal/administrative remedies

In granting summary judgment for Respondents, the order provides that Appellant "did not appeal the ruling[2] at issue in this case, and therefore her claims are barred for failure to exhaust internal remedies." (R. pp. ___; order on summary judgment 7.) The trial court concluded that at some point in the colloquy (on pages 7-9 above) between Appellant, Curtis and David Dyrhaug, Appellant should have ascertained a ruling from Curtis, who was mayor and presiding officer at the time. In effect, the "ruling" inferred by the trial court was something akin to "she is ejected", "you are removed" or "officer, please remove this person." Instead, apparently Appellant needed to understand either "Can I get the police from the back to enter the front, please?" or "I need her out" as a ruling from the presiding officer that needed to be appealed, pursuant to the procured outlined in § 24 of Robert's Rules, before Randolph, the sergeant-at-arms, says to Appellant "Councilmember Lockaby, will you come with me please?" Because at the point where Respondent Randolph has very nicely asked Appellant to come with him, two things have happened: 1) Appellant could no longer lawfully have a reasonable expectation to do anything other than obey

[2] Robert's Rules of Order (Newly Revised – Eleventh Edition) do not define "ruling."

the armed police officer[3] and (2) "other business has intervened" so it "is too late to appeal" for purposes of Robert's Rules § 24. *Robert's Rules of Order, Newly Revised* at 257 (11th Ed.). Consequently, even assuming Appellant had time to ascertain and "appeal" the ruling,[4] the application of this procedure from Robert's Rules to the facts of this case is precisely why they cannot be extended to excuse the freedom of expression of Ms. Lockaby or if they can be extended, why in this case, her failure to appeal should be excused.

The Robert's Rules of Order cannot create an administrative remedy as a matter of law. "The doctrine of exhaustion of administrative remedies only comes into play when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." Thomas Sand Co. v. Colonial Pipeline Co., 563 S.E.2d 109, 349 S.C. 402 (S.C. App. 2002)(quoting Med. Mut. Liab. Ins. Soc. of Md. v. B. Dixon Evander & Assocs., 92 Md.App. 551, 609 A.2d 353 (1992)). A litigant need not exhaust administrative remedies where "there are no administrative remedies for the wrongs it assertedly suffered." Id. Although the initial interruption by Curtis on page 2 of the approved Minutes can be tacked as the beginning of the censorship in this matter, it is the seizure on page 3 of the approved Minutes that provided Appellant with standing to bring this action for violations of her civil rights. See R. pp. ___; amended complaint exhibit, minutes of February 9, 2016.

[3] Particularly when considering Appellant was being seized by the sergeant-at-arms to the council body she was elected, in a room where her constituents were present.

[4] Preserved for review in the court's order before this body is Appellant's vigorous contention that she did not have time to appeal the ruling, assuming she had properly ascertained what it was, and should have been afforded such a reasonable inference as the nonmoving party when reviewing the colloquy.

In Thomas Sand, this Court was asked to consider whether Thomas Sand's failure to submit a revised application with the South Carolina Department of Health and Environmental Control (hereinafter "DHEC") precluded the company from suing a pipeline company for damages resulting from an oil spill on its property. This Court said "[i]f this were an appeal from the denial of the permit through the administrative process in which DHEC was the appropriate fact finder, Thomas Sand would clearly be required to exhaust its administrative remedies prior to bringing suit." Thomas Sand, 349 S.C. at 413.

> However, in a tort action against a third party, no such exhaustion requirement exists. The question is not whether the permit would have been granted but whether Thomas Sand was damaged, either by added delay or expense in the permit process or by the eventual denial of the permit, based on Colonial's negligence. DHEC is not the appropriate fact finder to answer this question. The jury is.

Id.

Similarly, The Maryland Court of Special Appeals in Med Mutual, cited by this Court above, said that for the appellant to successfully challenge respondent's standing to bring that case on the theory of failure to exhaust administrative remedies, appellant would have to show "the present case is, at its core, a claim of statutory violation." Medical Mut. Liability Ins. Soc. of Maryland v. B. Dixon Evander & Associates, Inc., 609 A.2d 353, 359, 92 Md.App. 551, 564 (Md. App., 1991).

In this action, Appellant is seeking compensatory and punitive damages against Respondents for the violation of her constitutional rights and for the negligence of improperly training and supervising Randolph. Mayor Curtis is not the appropriate factfinder for Ms. Lockaby's alleged violations and although the latest edition of the

Robert's Rules were adopted by ordinance, as the Order provides, neither those Rules nor the ordinances of Respondent Simpsonville, contain any procedure for appeal of the violation of rights guaranteed by the United States and South Carolina Constitutions.

Finally, where facts of a controversy have fallen squarely outside the traditional policy goals of traditional, administrative rulemaking and its adjudication process, South Carolina courts have recognized that the failure to exhaust purported administrative remedies may be forgiven, and cases may proceed. In 1966, the South Carolina Supreme Court considered a matter where Allstate Insurance Company and State Farm Mutual Automobile Insurance Company challenged the Insurance Commissioner of South Carolina's investigations into the companies as a violation of their rights of freedom of petition and speech as guaranteed by the First Amendment to the United States Constitution. Ex parte Allstate Ins. Co., 248 S.C. 550 (1966). The Richland County trial judge sustained the court's jurisdiction to hear the matter, disagreed with the Insurance Commissioner's position that the Insurance companies failed to exhaust their administrative remedies when they failed to appeal an adverse ruling by the Commissioner in its (administrative) proceeding, and enjoined the Commissioner from further investigation of the companies. Allstate Ins., 248 S.C. at 558. The Commissioner said that, specifically, by submitting to its investigation and challenging its authority, the companies would then need to subject the insurance companies witnesses sought by the Commissioner to contempt order for refusing to testify or they could await "the order or decision of the Commissioner after the investigation was completed." Id. at 566.

> The companies were doing business in this State. Subpoenas were issued to their agents to appear to testify at a hearing on March 21, 1966. One of the admitted purposes of the hearing or investigation was to determine whether the questioned activities of the companies would prohibit them from being issued a certificate of authority to do business *567 in this State for the year beginning April 1, 1966. In other words, the hearing or investigation was to be held on March 21, 1966 to determine whether the companies would be permitted to continue to do business in this State for the following year which began ten (10) days later, on April 1, 1966.

Id. at 566.

The Supreme Court of South Carolina excused the insurance companies failure to exhaust their administrative remedies in this case. "While we have, where the question was involved, rather consistently applied the doctrine of exhaustion of administrative remedies to avoid interference with the orderly performance of administrative functions, we have recognized that it is not an invariable rule." Id. at 567. The Court noted that in addition to the short period of time to exhaust its administrative remedy before losing ability to operate in the state on an annual basis and because the Commissioner would had to determine the validity of the companies actions in petitioning and speaking about matters of public concern before the legislature, "[t]hese circumstances afforded a sound basis for the action of the lower court in excusing the failure of the companies to first seek relief in the administrative proceedings and in granting injunctive relief." Id. 567-8.

In this appeal, in a light viewed most favorably to Appellant, if the Court decides that Ms. Lockaby was required to exercise an appeal of Curtis's ejection ruling, the Court should excuse her failure to do so. First, the appeal of Curtis ruling was not physically possible as Randolph was already asked to either approach or remove

Appellant. Second, the appeal was not permitted by the Robert's Rules, after Curtis asked Randolph to approach ("new business"). See Robert's Rules of Order, Newly Revised 257 (11th Ed.). Third, assuming an appeal was lodged by Appellant, it would have required other council members to understand issues of censorship, prior restraint and constitutional governance, not the Robert's Rules of Order or the ordinances of the Simpsonville, that related to Curtis interruption and ejection of Appellant. And fourth, assuming an appeal was lodged by Appellant, the other board members would have to be made aware of why Curtis chose to consistently interrupt Appellant while she had the floor and was going to eject her, and to this day: that has still not been explained by Respondents.

The court erred in granting summary judgment.

## II. It was improper for the trial court to conclude that Appellants claims are barred by absolute legislative immunity

The order provides "the action in question was legislative in nature" such that Respondents were entitled to absolute legislative immunity and therefore could not have liability under 42 U.S.C. § 1983 or the South Carolina Tort Claims Act. (R. pp. ___; order on summary judgment 9.) A brief review of the jurisprudence on absolute legislative immunity reveals the action taken by Respondent Curtis to seize Appellant and remove her from the meeting in question, could not be legislative in nature, as a matter of law.

In United States v. Gravel, the United States Supreme Court considered whether an aide to then U.S. Senator Mike Gravel would be protected from liability for the

disclosure and publishing of classified material. Gravel, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). If the Court determined his private publication of the classified material, in aide of Senator Gravel's wishes, was legislative in nature, the aide would face no liability. Id. "Legislative acts are not all-encompassing … they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel 408 U.S. at 625. The Supreme Court noted that the courts have extended legislative acts "to matters beyond pure speech or debate in either House, but 'only when necessary to prevent indirect impairment of such deliberations.'" Id. (citing United States v. Doe, 455 F.2d 753 (CA1 1972)).

The United States Fourth Circuit Court of Appeals agrees that "not all actions undertaken by local governmental bodies that have legislative responsibilities are necessarily 'legislative.'" Roberson v. Mullins, 29 F.3d 132 (4th Cir., 1994)(citing Scott v. Greenville County, 716 F.2d 1409, 1423 (holding that county council's action in delaying consideration of zoning permit was not legislative); Trevino v. Gates, 17 F.3d 1189, 1191 (9th Cir.1994) ("[N]ot all governmental acts by ... a local legislature ... are necessarily legislative in nature.") (quotation omitted); Brown v. Griesenauer, 970 F.2d 431, 437 (8th Cir.1992) (using same quotation); see also Forrester v. White, 484 U.S. 219, 224, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988) (stating that the characterization of an action undertaken by an official or a governmental body is not determined by the title of the official or body); Harlow v. Fitzgerald, 457 U.S. 800,

810-11, 102 S.Ct. 2727, 2734-35, 73 L.Ed.2d 396 (1982) (same); Butz v. Economou, 438 U.S. 478, 511, 98 S.Ct. 2894 2913, 57 L.Ed.2d 895 (1978) (same). Rather, a local governmental body only acts in a legislative capacity when it engages in the process of 'adopt[ing] prospective, legislative-type rules.'" Roberson at 135 (citing Front Royal, 865 F.2d at 79 (quotation omitted); Scott, 716 F.2d at 1423.) The Fourth Circuit held in that case that the county board's termination of Roberson, a county employee, was "plainly unrelated to 'adopt[ing] prospective, legislative-type'" and thus was not a legislative action such that the board members could not act in their legislative capacity when they participated in it. Id. (citing Front Royal, 865 F.2d at 79 (quotation omitted)). In this case, it is undisputed that councilmembers were discussing a matter of public concern (storm water drainage and curb replacement) in the physical area where the Simpsonville City Council had legislative responsibilities (the city limits of Simpsonville). See (R. pp. ___; amended complaint exhibit, minutes of February 9, 2016). It is also undisputed that it was during this discussion (where the minutes reflect Appellant was given the floor by Curtis) between Appellant and the city administrator, that Curtis interrupted and ordered Appellant's seizure and removal from the meeting. See Id. It is the interruption and seizure order by Curtis, not any action taken by the legislative body (like what occurred in virtually all of the cited legislative immunity authority above) that is complained of and must considered a legislative act in this matter to provide Respondents immunity. Based upon the foregoing authority, the actions by Respondents cannot be considered legislative acts entitling them to absolute legislative immunity in this matter.

The Order provides "[q]uite simply, 'legislatures may discipline members for speech with the corollary immunity from executive or judicial reprisal for doing so. Id. Under this authority, the Court grants summary judgment as to Lockaby's claim under 42 U.S.C. §1983." (R. pp. ___; order on summary judgment 10.) Respectfully, the court's reliance on Whitener v. McWatters, 112 F.3d 740 (4th Cir. 1997), is misplaced. "This case concerns the vote of the Board of Supervisors in policing its own ethics violations, obviously a core legislative activity." Whitener at 741. It is true that Whitener was disappointed with the outcome of straw vote. Id. "While he was arguably disciplined for speech, it was legislative speech, which is protected from executive or, in the United States, judicial interference, but not from the legislative body's judgment." Id. at 744. In this case, it is undisputed that that it is the actions of individual Respondents Curtis and Randolph that give rise to liability for all Respondents, not the actions of the city council. There was no vote – action by the legislative body – in this case.

The Whitener Court acknowledges the narrow scope of its holding: "[e]ven if, at some level, there is a judicially enforceable First Amendment constraint on a legislature's power to discipline one of its members, we certainly do not approach it in this case." Id. at 745. Arguably this case could fall within that First Amendment constraint; however, this case does not concern a use of the legislature's power, but instead a mayor's. Furthermore, the Fourth Circuit Court of Appeals finds Whitener was disciplined for his lack of decorum, "not for expressing his view on policy." Id. "We cannot conclude that the Loudoun County Board of Supervisors was without power to regulate uncivil behavior, even though it did not occur during an official

meeting. Such abusiveness, even when it occurs 'behind the scenes,' can threaten the deliberative process." Id. The Respondents' have maintained the position first stated in their answer to the amended complaint, wherein they deny Appellant's allegation that she was not disorderly during the meeting in question. See (R. pp. ___; answer 2.) Consequently, there is a material fact in issue to determine whether Whitener's application to this case is appropriate assuming the Court believes the lack of legislative action in this case is not distinguishable. Regardless, the Court can distinguish Whitener from this matter such that summary judgment relevant to any claim in this matter is not appropriate.

The court erred in granting summary judgment.

## III. It was improper for the trial court to find there were no genuine issues of material fact

In conclusion, the order provides it's only language regarding whether material facts were unresolved in this matter: "For these reasons, the Court finds there is no genuine issue as to any material fact and that judgment is appropriate as a matter of law with respect to all remaining claims. Accordingly, the Court grants Defendants' Motion for Summary Judgment." (R. pp. ___; order on summary judgment 12.)

The Respondents are not entitled to the summary judgment ruling they received in this case. "[S]ummary judgment may be rendered only when 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 judgment as a matter of law. Additionally, it must be

shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986). "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004).

In addition to clashes of material fact addressed in the first two issues, there is simply disagreement between the parties as to material matters of fact regarding this inquiry, among them 1) the words spoken by Appellant after Respondent Curtis ordered her removal and 2) the voluntariness of Appellant's actions during and immediately after the ruling from the presiding officer.

In Respondents' memorandum in support of summary judgment, excerpts from the deposition of Phyllis Long and the affidavit of Adam Randolph are included for the proposition that Appellant said "I'm leaving anyway" after the ruling from Curtis. (R. pp. ___; Respondents' memorandum of law in support of summary judgment 5-6.) Nowhere in Appellant's deposition does she testify to having said those words. Furthermore, the approved minutes of the February 9, 2016, business meeting in question do not state that Appellant said those words. (R. pp. ___; Exhibit 1 to Respondents' memorandum of law in support of summary judgment 4.) The relevant exchange occurs at the end of excerpted portion in the minutes:

> **Mayor Curtis:** I need her out.
>
> **Officer:** Councilmember Lockaby, will you come with me, please?

> **Mayor Curtis:** We'll take a five minute recess.
> [Gavels.]

(Id.)

Had Appellant actually said "I'm leaving anyway," that would have been included in the approved minutes. Respondents cite on page 8 of their memorandum to Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992) for the statement of law that

> [a] town council has the express duty to keep minutes of its proceedings which shall be a public record. S.C. Code Ann. § 5–7–250(b) (1976). Municipal records properly authenticated or verified are the only competent evidence of the proceedings of the transactions of the governing body. 5 E. McQuillan, The Law of Municipal Corporations § 14.05 (3d ed. 1989). Parol evidence cannot be admitted to explain, enlarge, or contradict minutes of the proceeding of a town council unless the minutes are incomplete or ambiguous. Id. § 14.07. Otherwise, parol evidence could render official minutes uncertain and unreliable so that the minutes would fail to afford dependable evidence of the proceedings of the municipal body.

Id.

The deliberative legislative process of approving minutes provides for the discussion and potential inclusion of facts which do not appear in the notes or audio recording of the meeting in question. If a member of the legislative body had an objection to the proposed minutes at the next meeting, that person would presumably ask for inclusion of certain omitted facts or, if those facts remained omitted from the proposed minutes, he or she would vote against the minutes adoption. Respondents are not be permitted in this action to "explain, enlarge, or contradict" the approved minutes of the February 9, 2016 business meeting of the Simpsonville City Council. Berkeley

at 208. Here, "further inquiry into the facts" is required; accordingly, summary judgment is not appropriate. Folkens at 196.

There also exists issues of material fact regarding whether Respondents had probable cause to seize Appellant. Please note that the record of this matter is devoid of any rationale from Respondents as to why the seizure was appropriate in this case. Respondents have vociferously contested that they are immune from liability but they did not defend this matter on the basis that probable cause existed for the seizure of Appellant as a result of her talking about a matter of public concern during a town council meeting while Respondent Curtis had provided Plaintiff with the authority to speak.

The court erred in granting summary judgment.

## CONCLUSION

This court should reverse the circuit court and remand Ms. Lockaby's claims for trial.

Respectfully submitted,

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May 21, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Judge



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Appellate Case No. 2019-001449

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Sylvia Lockaby,...……..……..……...Appellant,

v.

City of Simpsonville, Janice Curtis, and Adam Randolph,.....Respondents.

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PROOF OF SERVICE

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I certify that I served the Appellant's initial brief and designation of matter to be included in the record on appeal by attaching both to email correspondence and sending that email correspondence on May 21, 2020, addressed as follows:

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Respectfully submitted,

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May 21, 2020