THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell

Case No. 2018-CP-23-00731

Sylvia Lockaby ..... Appellant,

v.

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

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

1. In this action stemming from the conduct of the presiding officer and sergeant-at-arms during a city council meeting, did the trial court correctly grant summary judgment to the City of Simpsonville, Janice Curtis, and Adam Randolph on the following independent grounds: (1) Sylvia Lockaby, a sitting councilmember at the time, failed to avail herself of her administrative remedy during the meeting, (2) the doctrine of legislative immunity bars Lockaby's claims under 42 U.S.C. § 1983, and (3) Lockaby's claims under the South Carolina Tort Claims Act are barred by S.C. Code Ann. § 15-78-60 and common law legislative immunity?

STATEMENT OF THE CASE

This action and appeal stem from a meeting of the Simpsonville City Council ("City Council") on February 9, 2016. Sylvia Lockaby, a former member of City Council, filed a complaint on February 9, 2018 seeking recovery under 42 U.S.C. § 1983 and the South Carolina Tort Claims Act ("Tort Claims Act") against the City of Simpsonville, Janice Curtis (the "Mayor"), Simpsonville Police Department, and Adam Randolph (the "Sergeant-at-Arms").[1] (R. at 20-28). After the denial of a motion to dismiss, which clarified that there were no claims against the individual defendants under the Tort Claims Act (R. at 16-18), the remaining defendants (collectively, the "City") filed an answer to the amended complaint on June 26, 2018, asserting a general denial and additional defenses, including exhaustion of remedies and legislative immunity. (R. at 70-75).

After the parties submitted a status conference form choosing a trial date of June 17, 2019 (R. at 93-94), the City moved for summary judgment on February 18, 2019 raising the following grounds:

> 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.

[1] Lockaby filed an amended complaint to remove the Simpsonville Police Department as a separate defendant on May 24, 2018. The causes of action are the same. (R. at 58-70).

(R. at 76-77). The motion also attached an affidavit from the City Clerk authenticating and attaching portions of the Code and indicating the applicable edition of Robert's Rules. (R. at 78-79).

The motion was set for hearing on April 25, 2019. On the eve of the hearing, Lockaby filed a motion for a continuance seeking to conduct additional discovery. (R. at 272-73).

At the hearing on April 25, the trial court first heard the parties on the subject of the continuance request.[2] At that time, the City submitted the following chronology,

DATE	EVENT
2/9/18	Case filed.
6/20/18	Form 4 Order denying motion to dismiss.
6/26/18	Defendants serve discovery requests.
8/22/18	Defendants file motion to compel after no discovery responses received and only after sending a follow up letter and email seeking responses.
9/26/18	Plaintiff serves discovery responses in order to remove motion to compel hearing set for 10/2/18 from calendar
1/9/19	Mediation conducted.
2/7/19	Plaintiff's deposition.
2/11/19	Parties submit status conference form choosing 6/17/19 trial date.
2/15/19	Plaintiff serves discovery requests.[1] [Footnote: Plaintiff has not noticed any depositions in this matter, nor has she contacted the Defendants about scheduling depositions.]
2/18/19	Defendants move for summary judgment. Hearing originally set for 3/6/19, continued due to vacation of Defendants' counsel. Rescheduled for next term.
3/12/19	Defendants send notice of 4/25/19 hearing on motion for summary judgment, including information about the Court's memo requirements.
3/18/19	Defendants timely respond to Plaintiff's discovery requests.

[2] Per the Court Reporter, the first several minutes of the transcript are missing due to an equipment malfunction. (R. at 361:1-4).

4/18/19	Plaintiff sends letter demanding supplemental responses by 4/23/19 at noon.
4/23/19	• 11:47 Defendants send supplemental responses. • 1:41 Plaintiff sends follow up message and asks about continuance. • 1:47 Defendants agree they will consent if the hearing can be rescheduled before trial preparation would need to begin. • 3:08 Clerk indicates hearing would not be rescheduled until week of 6/17. • 3:20 Counsel for the parties have a phone call about any additional information sought. Counsel for Defendants is under the impression that the issue is resolved (or at least resolved enough to proceed with the hearing). • 4:24 Defendants file an additional affidavit in support of their motion pursuant to Rule 6, SCRCP.
4/24/19	• 8:57 Pursuant to the Court's policies, Defendants file a memorandum in support of their motion at least 24 hours before the hearing. • 12:16 Plaintiff files motion to compel and motion for continuance.
4/25/19	• 9:30 Hearing scheduled on motion for summary judgment.

(Chronology, R. at 386-87).

The trial court declined to grant the continuance but indicated it would hold the record open for fifteen days in the event any party wished to supplement the record. (R. at 384:2-8). Following the hearing, Lockaby deposed the Mayor and supplemented her response on May 10, 2019. (R. at 291-343).

The trial court entered an order granting summary judgment on July 1, 2019 on the grounds of exhaustion and legislative immunity with respect to both her state and federal claims. (R. at 1-

13). Lockaby moved to reconsider on July 11, 2019, and the trial court denied that motion by order dated August 9, 2019. (R. at 344-54, 14-15). This appeal followed.

FACTS

Lockaby's claims arise solely from the conduct of a single City Council meeting on February 9, 2016. (R. at 220-22).[3] City Council meetings are controlled by the Code and Robert's Rules. (R. at 84 (§ 2-63 ("[e]xcept as otherwise required by state law or ordinance, all proceedings of council shall be governed by the latest edition of 'Robert's Rules of Order, Newly Revised[.]'")), R. at 225:17-26:3). Lockaby has agreed that the November 24, 2015 revision of the Code is the version applicable to the February 9, 2016 City Council meeting. (R. at 224:5-13; *see also* R. at 78 (¶ 4)). As of February 9, 2016, the latest edition of "Robert's Rules of Order, Newly Revised" was the 11th edition. (R. at 78 (¶ 6)).

At the time of the meeting, Janice Curtis served as Mayor, and Lockaby was a member of City Council. (R. at 220). As Mayor, Curtis presided over City Council meetings. (R. at 226:9-11, 82-84 (§§ 2-34, -63)). Adam Randolph, an officer of the City's Police Department, was also present at the meeting and functioned as Sergeant-at-Arms. (R. at 235:13-17, 86 (§ 2-67(b)). As set forth in at § 2-67(b) of the Code,

> Any law enforcement officer who is serving as sergeant-at-arms of city council shall carry out all orders and instructions given by the presiding officer for the purpose of maintaining order and decorum at the city council meeting. Upon instruction of the presiding officer, it shall be the duty of such law enforcement officer to remove from the city council meeting any person who is disturbing the proceedings of the city council.

[3] The veracity of the minutes of that meeting are not in dispute and have been confirmed by Lockaby to the extent she was present. (R. at 229:25-30:13).

(R. at 86).

The conduct leading to Lockaby's claims was transcribed from an audio recording and is quoted in the minutes for the February 9, 2016 City Council meeting, which took place in the City Council Chambers in City Hall, as follows:

> **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.

(R. at 221-22).[4]

When the Mayor gaveled, the audio recording was paused for the duration of the recess. (R. at 266:25-67:2). The minutes would not have reflected anything that happened during a recess. (R. at 338:25-39:2). With respect to what happened between the transcript portion of the Minutes and when Lockaby left City Hall, the witnesses provided the following testimony:

1. **Phyllis Long, City Clerk**

Q. Did she say anything else to council?
A. No.

[4] Lockaby concedes that her claims are limited to this exchange. (R. at 234:12-16) ("And other than the portion of the minutes with that transcript in it, at this council meeting, do you contend anyone from the city has prevented you from speaking as you wished? A Other than this, no.")).

Q. Did anybody on council say anything to her?
A. No.
Q. Okay. Was -- to your recollection, was Council Member Lockaby arrested?
A. Oh, no, she was not.
Q. Did Adam Randolph or anyone else touch Council Member Lockaby?
A. No.
Q. Would you remember, if that had happened?
A. Yes, ma'am.

Q. And did you hear Council Member Lockaby say anything, as she was leaving the room that night?
A. She did say something. Best of my knowledge, it was something like, "I'm leaving anyway."
Q. Okay. And what was that in response to?
A. Because the mayor had asked the sergeant-of-arms to come forward to the front of the council chambers, and he was standing on the left-hand side of the chamber, and she was on the right, and --
Q. "She," Council Member Lockaby?
A. I'm sorry. Council Member Lockaby was on the right, coming down from the dais where her seat is. And she crossed in front of the dais toward the sergeant-of-arms and said, "I'm leaving anyway."
Q. Okay. And how did you observe council member Lockaby to leave the meeting?
A. How did I observe her? I'm not sure I understood.
Q. Sure. Did she -- was she rushing out of the room?
A. Oh, no, she gathered her things and walked out, took her husband with her.
Q. Okay. And would you characterize her actions, as she left, as voluntary or involuntary?
A. Voluntary.

(R. at 267:9-21, 268:20-69:22).

2. **Adam Randolph, Sergeant at Arms**

5. At the time the recording stopped, 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."

6. Councilmember Lockaby then gathered her things, got up, and left voluntarily accompanied by her husband.

7. I followed behind them as they left the Council Chambers and went down the stairs to the rear exit of City Hall. I then watched as the Lockabys exited the building.

8. At that time, I returned to my post in Council Chambers.

9. At no time during these events did I touch or arrest Councilmember Lockaby.

(R. at 270 (¶¶ 5-9)).

3. **Sylvia Lockaby**

A. I asked her if she was gonna throw me out like she just did Mr. Graham. She said if you keep on, I will; and I said, I'm keeping on, because I still had the floor, and about that time is when she called Mr. Randolph up.
Q Okay. What happened then?
A He said, do you need her out? She says, I need her out; so I gathered my stuff and I walked out.
Q Did you say anything else before you walked out?
A I don't believe I did.
Q Did you walk out by yourself?
A My husband was there with me.
[. . .]
Q Did you appeal the ruling from the mayor?
A No.
Q Did Officer Randolph, or anyone else, touch you?
A No, ma'am.
Q Were you, in any way, detained?
A I don't know what you mean by, detained. I was with an officer, for a few minutes there, while I was escorted out of the building.
Q Who was that?
A Officer Randolph.
Q Did he ever leave the council chambers?
A He walked out with me to make sure I got out of the building.
Q Are you sure about that?
A Yes.
Q Did he leave the building?
A He walked me outside of the door -- to the best of my knowledge, he walked me outside of the door, and then my husband and I went and got in the car.
Q Did anyone tell you what to do after you left the council chambers?
A No, they did not. There was nobody out there but me and my husband.
Q Did Officer Randolph say anything to you?
A I don't think he did.
Q Other than the language in the minutes, the transcript in the minutes, did anyone tell you that you needed to go anywhere specific, or needed to do anything specific?
A No.

Q Will you look for me at paragraph 25, on page four, and it says there that you were, "Seized and escorted away from the council chambers in the custody of

Defendants Randolph and Simpsonville." Can you tell me, based on your memory of that night, what that means?
A I was escorted out.
Q But you mentioned earlier that no one touched you.
A He did not touch me; he escorted me out.
Q Okay. Do you believe that Officer Randolph was doing anything other than acting as the sergeant-at-arms for the meeting, at the direction of the mayor?
A That's exactly what he was doing.
Q Do you believe Mayor Curtis was doing anything other than acting as the presiding officer of the meeting?
A Yes.
Q Okay. Tell me about that.
A I believe she was. I believe she was being vindictive.
Q Okay. But you do agree, she was the presiding officer of the meeting at the time?
A Yes.
Q And as the presiding officer, she would perform all those functions of the chair, from Robert's rules?
A Yes. Or the code of conduct, whatever it was.
Q Okay. How do you contend you were unlawfully detained?
A I was escorted out of the meeting; I was not allowed to stay in the meeting; I was not allowed to represent my ward or the rest of the city.
Q Because of the direction given by the presiding officer at the meeting?
A Yes.
Q How were you arrested?
A 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.
Q But that didn't happen?
A He did not touch me.

(R. at 231:22-33:23, 235:3-36:23).

Although she acknowledged that she knew a member of City Council could challenge or appeal a ruling from the presiding officer, Lockaby did not challenge any ruling from the Mayor as presiding officer. (R. at 220-22, 232:17-18, 228:8-15). In fact, earlier in the same meeting, Councilmember Graham as seconded by Lockaby appealed a ruling by the Mayor relating to "further comments on non-voting items." As testified by the Mayor,

Q. All right. Do you recall at any other point in that meeting where you indicated you may eject another member of council?
A. I do.

Q. And who were you referring to that -- that other person was?
A. Mr. Taylor Graham.
Q. Okay. And why did you indicate you were considering ejecting him?
A. I don't recall, but -- I don't recall what he had done.
Q. Okay. Do you recall, looking back now during your time as mayor on council, any other time besides the time you just mentioned and my client where you mentioned you may have a council member ejected?
A. No, sir. Because this was only my second meeting, second business meeting.
Q. Okay. And as a point of fact, did you at that meeting have that other individual ejected from the meeting?
A. No, sir.
Q. Okay.
A. He was called into order.
Q. Okay. How in your mind does being called into order effectively resolve your concerns about being ejected or not?
A. Well, I called him into order, and he appealed my decision. There was a vote taken because he wanted to appeal my decision, and his appeal failed; therefore, he was called into order.

(R. at 332:19-33:23). Graham's appeal failed by a vote of two to five, and the meeting proceeded from there. (R. at 220, 332:19-33:23).

STANDARD OF REVIEW

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Rule 56, SCRCP. "Summary judgment is appropriate in those cases in which plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984).

The Court must view the facts and inferences in the light most favorable to the nonmoving party. *See Thomas v. Waters*, 315 S.C. 524, 527, 445 S.E.2d 659, 661 (Ct. App. 1994). When the nonmoving party bears the burden of proof as to an issue, a party seeking summary judgment may meet this standard by pointing out to the trial court "that there is an absence of evidence to support the nonmoving party's case." *Richardson v. State-Record Co.*, 330 S.C. 562, 566, 499 S.E.2d 822,

825 (Ct. App. 1998). "[I]n 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." *Hancock v. Mid–South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). A scintilla of evidence is material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror. *Gibson v. Epting*, 426 S.C. 346, 353, 827 S.E.2d 178, 181 (Ct. App. 2019). "[A] scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows." *Id.* at 352, 827 S.E.2d at 181. A nonmoving party cannot evade summary judgment by creating and relying on "an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

If a motion has been properly made and supported in accordance with Rule 56, the non-moving party may not rest on its pleadings but must come forward with specific facts showing that there is a genuine issue for trial.[5] Rule 56(e), SCRCP; *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004). This showing must be based on evidence that would be admissible at trial. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002).

[5] Tellingly, Lockaby continues to rely on the allegations in her pleadings and the attachments to them in her appellant's brief. There are no other sources cited in her statement of facts.

ARGUMENTS

Lockaby concedes that there cannot be an effective City Council meeting without rules. (R. at 227:22-24). A City Council meeting must be allowed to proceed according to its rules and procedures without fear of later civil liability. With respect to Lockaby's claims, it does not matter whether the Mayor was correct in her rulings as presiding officer. The procedures in place and the doctrine of legislative immunity contemplate that no presiding officer is perfect. For all of the reasons set forth below, the trial court's grant of summary judgment should be affirmed.

With respect to the matters reflected in the minutes, the meeting minutes of a municipal body are the only admissible evidence.

> 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.*

Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992). As set forth above, there is no contention that the minutes are inaccurate as to what is reflected therein.

I. Lockaby failed to avail herself of the remedy provided in Robert's Rules in response to the Mayor's calls for order.

City Council meetings are subject to the Code, and the Code provides in § 2-63 that City Council meetings are governed by Robert's Rules. This is consistent with S.C. Code Ann. § 5-7-250(b) ("The council shall determine its own rules and order of business and shall provide for keeping minutes of its proceedings which shall be a public record."). This is further consistent with the South Carolina Freedom of Information Act, which requires that City Council follow its

published agenda with limited exceptions. S.C. Code Ann. § 5-7-250(c) ("Procedures for meetings of a municipal governing body shall not conflict with the provisions of the general laws of the state with regard to freedom of information."); S.C. Code Ann. § 30-4-80 (stating "[a]n agenda for regularly scheduled or special meetings must be posted on a bulletin board in a publicly accessible place at the office or meeting place of the public body and on a public website maintained by the body, if any, at least twenty-four hours prior to such meetings" and providing limited procedures for adding to a published agenda).

The presiding officer must have tools for ensuring that meetings proceed in accordance with the Code and state law. Included among those tools for the meeting in question was § 2-67(a) of the Code, which provided as follows:

> Any person who speaks at a city council meeting shall conduct himself or herself in a manner appropriate to the decorum of the meeting and shall not use any profane, abusive or obscene language nor any fighting works or otherwise engage in disorderly conduct. Any person who makes such remarks or otherwise engages in disorderly conduct which disrupts or otherwise impedes the orderly conduct of a city council meeting shall, at the discretion of the presiding officer, be barred from further audience before city council during that meeting and may be removed from the building.

(R. at 86). This provision is also consistent with state law. *See* S.C. Code Ann. § 30-4-70(d) (providing that the South Carolina Freedom of Information Act does not prohibit the removal of persons from meetings).

Under § 24 of Robert's Rules, in electing a presiding officer, the body "delegates to him the authority and duty to make necessary ruling on questions of parliamentary law." However, any ruling by the presiding officer 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."

The appeal provision is in place to give the City Council as a whole the opportunity to correct any ruling made by the presiding officer immediately after it is made. *See also* Robert's

Rules of Order, Newly Revised (11th ed.) at § 62 (addressing remedies for abuse of authority by the presiding officer). Thus, there was an administrative mechanism adopted by City Council to address Lockaby's concerns.[6] There is no mechanism that allows a member of Council to revisit actions in meetings after the fact.

Here, the rulings were the repeated calls for order followed by the direction that Lockaby should leave the meeting. As noted above, Lockaby was aware of the appeal procedure, and there had been an appeal from a call for order earlier in the same meeting. Had Lockaby appealed and received a second, City Council would have voted and the meeting would have proceeded in accordance with that vote. Lockaby did not appeal any of these rulings, and therefore her claims are barred for failure to exhaust internal remedies as found by the trial court in its discretion.

As set forth by the South Carolina Supreme Court,

> The general rule is that administrative remedies must be exhausted absent circumstances excusing application of the general rule. *Hyde v. S.C. Dep't of Mental Health,* 314 S.C. 207, 442 S.E.2d 582 (1994); *Andrews Bearing Corp. v. Brady,* 261 S.C. 533, 201 S.E.2d 241 (1973). "A general exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that a pursuit of them would be a vain or futile act." *Moore v. Sumter County Council,* 300 S.C. 270, 273–74, 387 S.E.2d 455, 458 (1990) (citing 82 Am.Jur.2d *Zoning and Planning* § 332 at 903 (1976)). Futility, however, must be demonstrated by a showing comparable to the administrative agency taking "a hard and fast position that makes an adverse ruling a certainty." *Thetford Properties IV Ltd. P'ship v. U.S. Dep't of Hous. and Urban Dev.,* 907 F.2d 445, 450 (4th Cir.1990).
>
> **The question of whether to require the plaintiff to exhaust administrative remedies is a matter within the sound discretion of the trial judge.** *Andrews Bearing Corp.,* 261 S.C. at 536, 201 S.E.2d at 243. A matter within the sound discretion of the trial judge will not be disturbed on appeal absent an abuse of

[6] Lockaby's argument that the Code and Robert's Rules do not create an administrative remedy was not raised until her Motion to Reconsider. As such, it is not properly preserved for review. *Hickman v. Hickman,* 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."). Moreover, the argument fails on the merits because City Council enacted the Code which incorporated Robert's Rules and its appeal remedy to address any errors that might be made by the presiding officer.

> discretion. *Tri–County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). "An abuse of discretion occurs where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Id.*

Law v. S.C. Dep't of Corrs., 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (emphasis added). Thus, this issue is one for the trial court, not for a jury.

Lockaby has neither produced evidence showing nor even alleged that any such appeal would have been futile. Nor has she shown that there was not an opportunity to appeal. To the contrary, the evidence shows the appeal procedure was applied earlier in the meeting to another call for order, and City Council proceeded in accordance with the vote. Similarly, Lockaby could have appealed any of the calls for order or the direction that she should leave the meeting. Therefore, there is no reason she should be excused from exhausting her administrative remedy.[7]

Here, this Court stands in a position to take a firm line that municipal bodies may make their own rules regarding meetings and all members must abide by any provisions of those rules relating to appeals of rulings by the chair. The place to resolve these disputes is in the City Council Chambers, not years later in a courtroom. These considerations are applicable regardless of whether the Mayor's ruling was correct. If Lockaby believed any ruling by the Mayor was in error, she was free to challenge it at the meeting.

This is similar to the rule that members of a legislative body that are unhappy with the decision of a governmental entity lack standing to seek recourse in the courts. *Newman v. Richland Cnty. Historic Pres. Comm'n*, 325 S.C. 79, 82-84, 480 S.E.2d 72, 74–75 (1997). As set forth there,

> The proper analogy is not to a corporation and its directors, but to a legislative body and its members. **We have been unable to find any case which permits a disappointed legislator to attack a decision of her own body, either through a declaratory judgment or through a direct "appeal" of the decision.**

[7] Lockaby's argument that she should be excused from the appeal requirement is new in her Appellant's brief and was neither raised to, nor ruled on by the trial court. As such, it is not preserved for review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733-34 (1998).

Id. (emphasis added). Lockaby did not appeal the ruling at issue here, and the trial court properly exercised its discretion in finding that the failure to exhaust her remedy in the meeting bars Lockaby's claims.

II. Lockaby's claims are barred by legislative immunity.

The actions in question here are limited to one City Council meeting, and specifically, a series of calls for order followed by a call for removal by the Mayor as presiding officer and the actions of Randolph who was serving as Sergeant-at-Arms at the instruction of the presiding officer. As such, the actions at issue are subject to legislative immunity and do not give rise to liability under 42 U.S.C. § 1983 or the Tort Claims Act.

A. The Fourth Circuit has found that disciplinary actions taken by a local legislative body against a member of that body are part of the legislative process and are subject to legislative immunity.

As found by the trial court, the action in question was legislative in nature. (R. at 9). Local legislative bodies are clothed with absolute immunity for their legislative actions. *Bruce v. Riddle,* 631 F.2d 272, 279 (4th Cir. 1980); *see also Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (upholding absolute immunity for local legislators under § 1983). "Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan*, 523 U.S. at 54 (internal quotation marks and citation omitted). In considering whether immunity applies, Courts do not consider motive or intent, but rather look solely to the "nature of the act." *Id.* Here, the only actions in question occurred in the actual conduct of a City Council meeting.

The Fourth Circuit has found this general rule applies to disciplinary action taken by a local legislative body against one of its members. *Whitener v. McWatters*, 112 F.3d 740, 741 (4th Cir. 1997). In that case, Whitener, a county supervisor, was disappointed with the outcome of a "straw vote" relating to committee assignments. *Id.* Following the vote, Whitener confronted several

other supervisors. *Id.* When those supervisors complained, the board voted to censure Whitener and to strip him of his committee assignments for a year. *Id.* Whitener brought action under 42 U.S.C. § 1983. *Id.* The Fourth Circuit affirmed the dismissal of Whitener's complaint as a matter of law because the board's actions "were protected by absolute legislative immunity." *Id.* at 745. As stated in the opening paragraph of *Whitener*, "[b]ecause we hold that a legislative body's discipline of one of its members is a core legislative act, we affirm." *Id.* at 741.

The facts of this case are not as extreme as those in *Whitener*. Lockaby was not stripped of any committee assignments, nor was there any other repercussion of the events at this meeting with respect to her service on City Council. The same rules, however, would still apply. It stands to reason that less egregious conduct would be subject to the same immunity applied in *Whitener*. It is absurd to suggest that there is no immunity because the alleged conduct in this case was not as severe.

In reaching this result, the *Whitener* court traced the idea of immunity from the common law forward to the ratification of the United States Constitution, and reasoned,

> Thus, Americans at the founding and after understood the power to punish members as a legislative power inherent even in "the humblest assembly of men." This power, rather than the power to exclude those elected, is the primary power by which legislative bodies preserve their "institutional integrity" without compromising the principle that citizens may choose their representatives. Further, because citizens may not sue legislators for their legislative acts, legislative bodies are left to police their own members. Absent truly exceptional circumstances, it would be strange to hold that such self-policing is itself actionable in a court.
>
> This history and long practice confirm that the disciplinary action taken by the [Defendant] against one of its members was legislative in nature. And [Plaintiff's] own contentions confirm that his conduct was legislative. He alleges that he harbored an unpopular voting position on the Board; that he expressed his position using abusive language; and that the Board disciplined him for it. 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. As legislative speech and voting is protected by absolute immunity, the exercise of self-disciplinary power is likewise protected.

Id. at 744 (internal citations omitted). Quite simply, "legislatures may discipline members for speech with the corollary immunity from executive or judicial reprisal for doing so." *Id.* Lockaby has correctly pointed out that legislative immunity does not extend to cover any possible speech by a legislator or legislative employee. *See Gravel v. United States*, 408 U.S. 606 (1972). However, those cases preserve immunity when they are part of a legislative body's meeting process. *See id.* at 625.

Lockaby's argument that there was not a vote by City Council as a whole on the ruling is unavailing as the Code, as passed by City Council, gave the Mayor powers as presiding officer, including the power under § 2-67 to remove "any person" impeding the conduct of a City Council meeting. Lockaby was free to appeal any of the Mayor's calls for order or the ultimate call for Lockaby's removal, which would have triggered a vote if seconded by another member of City Council.

Under this authority, Lockaby's claim under 42 U.S.C. § 1983 cannot stand. Again, legislative bodies must be free to conduct meetings according to their rules and procedures without fear of civil liability.

B. The actions in question are also subject to legislative immunity under the Tort Claims Act and the law of South Carolina.

As an initial matter, Lockaby has not appealed the trial court's rulings with respect to the Tort Claims Act and common law immunity found in section II(B) of the order. As such, they are the law of the case and must be affirmed on appeal. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (finding an unappealed ruling, right or wrong, is the law of the case and requires affirmance).

The Tort Claims Act "is the exclusive civil remedy available for any tort committed by a government entity, its employees, or its agents except as provided in § 15–78–70(b)." *Wells v.*

City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998); *see* S.C. Code Ann. § 15–78–200 ("Notwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act', is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty."). Thus, if there is immunity under the Tort Claims Act, Lockaby has not stated any tort claims against the City.

The Tort Claims Act extends immunity to "legislative, judicial, or quasi-judicial action or inaction." S.C. Code Ann. § 15-78-60(1). In addition, South Carolina courts recognize common law legislative immunity. *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 637, 743 S.E.2d 808, 815 (2013) ("[T]he Board's entitlement to immunity is supported by common law that interprets and applies principles of legislative immunity, a doctrine that has not been supplanted by the [Tort Claims Act]."); *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) ("A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties.").

Here, Lockaby's claims stem from the conduct of a City Council meeting at which Mayor Curtis was serving as presiding officer, Lockaby was present as member of City Council, and Randolph was serving as Sergeant-at-Arms. Following the ruling from the Mayor, Lockaby left the meeting. These facts reflect solely that the Mayor and Sergeant-at-Arms were acting in the performance of their duties under the Code. As stated by the South Carolina Attorney General's Office,

> [I]t appears the power of a legislative body to discipline one of its members would be considered an inherent "legislative power." And, as we have expressed in prior opinions of this Office, these legislative powers are applicable to local legislative bodies such as a municipal council. Accordingly, as a legislative body, we believe it is likely a court would find a municipal council has the authority to discipline one of its members as an inherent legislative power. It follows that this inherent authority could include removal of a member from a council meeting.

2016 WL 3355910, at *3 (S.C.A.G. May 31, 2016)(citing *Whitener*, 112 F.3d at 744); *see also* S.C. Code Ann. § 5-7-250(b) (providing city councils may set their own rules and order of business); S.C. Code Ann. § 30-4-70(d) (providing that the South Carolina Freedom of Information Act does not prohibit the removal of persons from meetings).

In light of *Whitener* and similar South Carolina authority, the City's actions relating to Lockaby at the February 9, 2016 City Council meeting arise from legislative action and are not actionable under the Tort Claims Act or by operation of common law legislative immunity. Therefore, the trial court correctly granted summary judgment as to all claims brought under the Tort Claims Act on this basis.

III. Lockaby failed to meet her burden in responding to the City's properly made and supported motion for summary judgment.

As discussed above, the trial court's rulings were within its discretion and were correct as a matter of law. Lockaby has not pointed to any question of fact that relates to the underlying grounds for the trial court's ruling: (1) did Lockaby appeal the Mayor's ruling, and (2) were the actions in question which occurred in the course of a City Council meeting entitled to legislative immunity?

For purposes of the motion for summary judgment, it is irrelevant what might have been said after the Mayor called for a recess and the City Clerk stopped the recording.[8] In addition, it is irrelevant to the trial court's order whether or not Lockaby left voluntarily, was seized, or whether there was probable cause for any seizure. Instead, the trial court ruled, as a matter of law, on the threshold questions of exhaustion and legislative immunity. Therefore, Lockaby did not meet her burden in responding to the City's properly made and supported motion for summary

[8] Again, the testimony is clear that the recording was stopped when the Mayor called a recess and that any matters occurring during the recess would not have been in the minutes.

judgment by presenting "specific facts showing that there is a genuine issue for trial." Rule 56(e), SCRCP.

CONCLUSION

Lockaby had a remedy to the extent she believed she was improperly asked to leave the February 8, 2016 meeting of City Council. She could have challenged the ruling at that time, and if a majority of City Council had agreed, she would have been permitted to stay at the meeting. The matter would have been resolved internally and in real time.

Instead, Lockaby waited years after the fact and filed a lawsuit. The trial court correctly granted summary judgment, finding that Lockaby should have appealed the ruling at the meeting and that the actions in question were subject to legislative immunity as a matter of state and federal law. For these reasons, this Court should affirm the trial court's order granting summary judgment to the City.

Respectfully submitted,

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October 5, 2020
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell

Case No. 2018-CP-23-00731

Sylvia Lockaby .....Appellant,

v.

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

CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Respondents City of Simpsonville, Janice Curtis, and Adam Randolph in this matter complies with Rule 211(b), SCACR.

Respectfully submitted,

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