THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS
THE HONORABLE KRISTI LEA HARRINGTON
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2018-001262
CIVIL ACTION NO. 2016-CP-18-00838

Dorchester County Taxpayers Association, individually and on behalf of all others similarly situated; Weatherstone Property Owners Association, individually and on behalf of all others similarly situated; George Resnick; William A. Harbeson; James Stephen Greene, Jr.; Homer P. Gonzalez; Gerald E. Zieglar; David Messinger; and South Carolina Public Interest Foundation,

APPELLANTS,

versus

Dorchester County; Dorchester County Council; David Chinnis, George Bailey, Jay Byars, Willie Davis, Carroll S. Duncan, Larry Hargett, and William R. Hearn, Jr., in their official capacities as Members of Dorchester County Council; Town of Summerville; Summerville Town Council; William E. McIntosh, III, in his official capacity; Dorchester County Sheriff, Luther C. Knight, in his official capacity; Dorchester School District Two; Dorchester School District Two Board of Trustees; Joseph R. Pye, Justin Farnsworh, Gail Hughes, Brian Mitchum, Tanya Robinson, Sam Clark, Barbara Crosby, and Lisa Tupper, in their official capacities; Dorchester School District Four; Dorchester School District Four Board of Trustees; Dorchester County Career and Technology Center; and Dorchester County Career and Technology Center Board of Trustees,

RESPONDENTS.

FINAL RESPONDENTS' BRIEF OF DORCHESTER COUNTY; DORCHESTER COUNTY COUNCIL; DAVID CHINNIS, GEORGE BAILEY, JAY BYARS, WILLIE DAVIS, CARROLL S. DUNCAN, LARRY HARGETT, AND WILLIAM R. HEARN, JR., IN THEIR OFFFICAL CAPACITIES AS MEMBERS OF DORCHESTER COUNTY COUNCIL; DORCHESTER COUNTY SHERIFF LUTHER C. KNIGHT, IN HIS OFFICIAL CAPACITY; and CAPTAIN TONY PHINNEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE OF THE DORCHESTER COUNTY SHERIFF

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COUNTERSTATEMENT OF THE CASE

This action arises out of a public and legislative debate on whether to use police officers or private security guards as School Resource Officers (SROs) to protect the safety of public schools in Dorchester School Districts Two and Four. The Plaintiffs advocated the use of private security guards, but it was decided to use police officers. The Plaintiffs filed this suit attacking the funding of these SROs.

The Plaintiffs originally filed their Complaint in the Court of Common Pleas for Dorchester County on May 2, 2016, followed by an Amended Complaint on May 6, 2016. [R.pp. 245-337; 145-244; Compl.; Am. Compl.] On December 12, 2016, the Plaintiffs filed a Second Amended Complaint. [R.pp. 102-144; Second Am. Compl.]

The suit was brought against multiple defendants. Three groups of defendants are involved in this appeal: the Town Defendants, the County Defendants, and the District Four Defendants.

This Respondents' Brief is filed on behalf of the County Defendants, which include: Dorchester County (the "County"); Dorchester County Council ("County Council"); David Chinnis, George Bailey, Jay Byars, Willie Davis, Carroll S. Duncan, Larry Hargett, and William R. Hearn, Jr., in their official capacities as members of Dorchester County Council (collectively, "County Council"); Dorchester County Sheriff Luther C. Knight, in his official capacity ("County Sheriff"); and Captain Tony Phinney, individually and in his official capacity as an employee of the Dorchester County Sheriff ("Captain Phinney").

The Town Defendants include the Town of Summerville, the Summerville Town Council, and William E. McIntosh, III. The District Four Defendants include

Dorchester School District Four and Dorchester School District Four Board of Trustees. While this brief is filed only on behalf of the County Defendants, the County Defendants will note herein where they join in the arguments of the other respondents.

The Second Amended Complaint is premised on two core allegations by the nine Plaintiffs: (1) that the County's expenditures of tax revenues to fund the payments to deputy sheriffs serving as SROs were expenditures for "school operating purposes" which are exempt under S.C. CODE ANN. § 12-37-220(B)(47)(a) ("Act 388"); and (2) that the County Defendants instituted an alleged "financing scheme" that violated Act 388 and resulted in improper double taxation. [R.pp. 102-44; Id.] Based upon these allegations, the Plaintiffs asserted a First Cause of Action for Violation of Act 388 and a Second Cause of Action for illegal double expenditures. [R.pp. 136-137; Id. at ¶¶ 99-104.] Under each of these causes of action, the Plaintiffs sought declaratory relief and a permanent injunction.[1] [R.pp. 140-141; Id. at pp. 39-40.]

In the Second Amended Complaint, Plaintiff David Messinger ("Messinger") also asserted claims against the County, David Chinnis, in his official capacity as a member of County Council, the County Sheriff, and Captain Tony Phinney, individually and in his official capacity as an employee of the County,[2] for alleged violations of the South Carolina Constitution and United States Constitution during the public and legislative debate on whether to use police officers or private security guards as SROs. [R.pp. 138-140; Id. at ¶¶ 108-113.] Under the Fourth and Fifth Causes of Action pertaining to these

[1] The Plaintiffs also asserted a third cause of action arising out of Dorchester School District Two's alleged failure to comply with Act No. 98 of 2009. [R.pp. 137; Second Am. Compl., ¶¶ 105-107.] This cause of action is not directed toward the County Defendants.

[2] These claims were also brought against the Town and Defendant McIntosh.

alleged constitutional violations, Messinger asserted he was entitled to "nominal, actual, compensatory and punitive damages." [R.pp. 138-140; Id. at ¶¶ 110, 113.]

On January 23, 2017, in response to the Second Amended Complaint, all County Defendants except for Captain Phinney filed a Motion to Dismiss.[3] The County Defendants argued, in part, that the Plaintiffs' property-tax based claims should be dismissed for lack of subject matter jurisdiction because the South Carolina Revenue Procedures Act ("RPA") provided the exclusive remedy for those claims. The County Defendants also moved to dismiss Messinger's constitutional claims. [R.pp. 537-568; Mtn.] Captain Phinney subsequently filed his Motion to Dismiss on February 3, 2017, joining in the arguments above. [R.pp. 496-502; Mtn.]

A hearing was held on the Motion to Dismiss filed by the County Defendants as well as other defendants on December 12, 2017 before The Honorable Kristi Lea Harrington. [R.pp. 340-402; Hearing Tr.]

On March 15, 2018, the Circuit Court granted the County Defendants' Motion to Dismiss. [R.pp. 12-23; Order.] As to the property-tax based claims, the Circuit Court ruled that it lacked subject matter jurisdiction because the RPA provided the exclusive remedy. [R.pp. 17-19; Id. at pp. 4-6.]

As to Messinger's constitutional claims, the Circuit Court ruled:

(1) Messinger's claims for money damages based on violations of the South Carolina Constitution were not cognizable under the state constitution or 42 U.S.C. § 1983;

(2) Defendant Chinnis was immune from the state-based constitutional claims under the South Carolina Tort Claims Act;

[3] At the time the Motion to Dismiss was filed by the other County Defendants, Captain Phinney had not yet been served. [R.p. 557; Mtn., p. 20 n.8.]

(3) the doctrine of legislative immunity barred Messinger's state-based constitutional claims;

(4) Messinger's claims based on injuries to reputation were not cognizable under § 1983; and

(5) Eleventh Amendment immunity barred the § 1983 claims against the County Sheriff and Captain Phinney.

[R.pp. 19-22; Id. at pp. 6-9.]

The Plaintiffs filed a Motion to Reconsider the Order Granting the Motion to Dismiss on April 3, 2018. [R.pp. 422-436; Mtn.] The County Defendants responded to the Motion to Reconsider on April 16, 2018. [R.pp. 2nd Supp. R.p. 1-11; Res.] The Circuit Court denied the Motion to Reconsider on June 11, 2018. [R.p. 1-2; Form 4.]

The Plaintiffs filed and served their Notice of Appeal on or about July 3, 2018.

ARGUMENT

I. This Court should affirm the dismissal of the Plaintiffs' property-tax based claims for the lack of subject matter jurisdiction.

Pursuant to Rule 208(b)(6), SCACR, the County Defendants hereby join in the arguments asserted by the Town Defendants in Section I. of their Respondents' Brief and incorporate and adopt those arguments herein.

II. This Court should affirm the dismissal of Plaintiff Messinger's state and federal constitutional claims.

The County Defendants also hereby join in the arguments asserted by the Town Defendants in Section II. of their Respondents' Brief and incorporate and adopt those arguments herein. The County Defendants further show as follows:

A. Standard of Review.

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." Rydde v. Morris, 381 S.C.

643, 646, 675 S.E.2d 431, 433 (2009). The appellate court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and reasonably deducible inferences in the complaint would entitle the plaintiff to relief on any theory of the case. Id. The court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law. Flateau v. Harrelson, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

B. Statement of Facts as to Constitutional Claims.

In addition to the property-tax based claims, Messinger also alleged state and federal constitutional claims arising out of alleged violations of his rights of free association, to petition for redress of grievances and of speech and expression. [R.pp. 138-140; Second Am. Compl., ¶¶ 108-113.] These claims, asserted in the Fourth and Fifth Causes of Action of the Second Amended Complaint, were brought only against the County, Defendant Chinnis, the County Sheriff, Captain Phinney, the Town of Summerville, and William E. McIntosh III, a member of the Summerville Town Council.[4] [R.pp. 138-140; Id.]

Messinger's constitutional claims arise out of the public dispute over how security in schools should be funded. The crux of the Plaintiffs' lawsuit is that the County increased property taxes on local owner-occupied homes in the County to provide schools with additional funds necessary to pay for the cost of SROs provided by the County or Town in the schools. [R.pp. 128-132; Id. at ¶¶ 78, 85-89.] The Plaintiffs allege in the suit that Dorchester County School District Two commissioned an "independent review of the efficiency" of operating costs in the schools in the district. [R.pp. 117-118; Id. at ¶

[4] With respect to the constitutional claims, this brief is only filed on behalf of the County, Defendant Chinnis, the County Sheriff, and Captain Phinney.

55.] A report was prepared by the firm that performed this cost review, Tidwell & Associates (the "Tidwell Report"). [R.p. 118; Id. at ¶ 56.]

The Tidwell Report recommended that Dorchester County School District Two "take several actions to increase [the school district's] efficiency and save [the school district] money," which included "contracting with private security services for the School Resource Officer Program, or directly hire security officers." [R.p. 118; Id. at ¶¶ 56-57.] The Tidwell Report purportedly noted that contracting with a private security company or directly employing security guards to serve as School Resource Officers, as opposed to the present use of County Sheriffs and Town Police Officers, would save the school district money. [R.p. 118; Id. at ¶ 57.] The school districts declined to adopt the recommendations in the Tidwell Report to contract with private security guards or hire direct security guards in their schools. [R.pp. 102-144; Second Am. Compl.]

Messinger alleges in the Second Amended Complaint that "[p]ublic support for implementing the . . . cost-saving recommendations in the Tidwell Report . . . [was] squelched and impeded by intimidating and threatening actions and communications made by officials of Dorchester County Council, the Dorchester County Sheriff's Office and Summerville Town Council." [R.p. 119; Id. at ¶ 59.]

Messinger contends that in October 2015, Summerville Town Councilman McIntosh published on Facebook "false and defamatory statements and accusations" about Messinger and Michael Turner, "two proponents of the recommendations in the Tidwell Report and opponents to the Council's, the Town's and the School District's unlawful expenditures for SROs, for the purpose and with the effect of undermining their credibility and influence, deterring them from expressing their views and preventing them

from persuading government officials to comply with the Tidwell Report's recommendations regarding the funding of SROs." [R.pp. 119-120; Id. at ¶ 59.]

Specifically, Messinger alleges that McIntosh published the following statement on Facebook to Messinger about Messinger and Turner:

> Mr. Messinger is just sore that the county didn't go along with his and Mike Turner's hare-brained scheme to create a taxpayer-financed private security force for washed-out enforcement officers.
>
> The truth is you were part of a group of unemployed and barely employed law enforcement officers and former (and with good reason former) law enforcement officers who rallied behind Mike Turner to hoo-doo District 2 into supporting the creation of private security force in our schools. It was nothing more than a full employment scheme for washed-out cops. The county saw right through it, and now you're mad at the county council chairman. You are right – I do have a sense of humor. Hopefully, your chief in Mt. Pleasant has one too.
>
> [Messinger] spent countless hours emailing folks to support this hare-brained private security scheme for all our schools, and he is spitting nails at the county for quashing it.

[R.p. 120; Id.]

Messinger contends that after reading these statements by McIntosh on Facebook, Defendant Chinnis republished them by stating on Facebook "Nailed it Bill!" [R.p. 120; Id.]

Messinger alleges that McIntosh "repeatedly threatened to interfere with the employment of Messinger, by providing derogatory information about Messinger to Messinger's employer, for the purpose of and with the effect of making Messinger afraid to express his views regarding these SRO matters." [R.p. 120; Id. at ¶ 60.] He further alleges that "McIntosh's and Chinnis' threats and personal attacks on Plaintiff Messinger . . . are a part of a pattern, a conspiracy and a continuation of past efforts by Dorchester County, the Town, and the Dorchester County Sheriff to discredit, defame, intimidate and

interfere with the Constitutional rights and with the employment of Messinger and others who criticize or oppose their actions or policies." [R.p. 121; Id. at ¶ 61.]

Messinger also contends that Captain Phinney "repeatedly called the Chief ("Chief") of the Mt. Pleasant Police Department ("Department") during which conversations Phinney made statements to the Chief discrediting Messinger and trying to get the Mt. Pleasant Police Department to terminate the employment of Messinger." Captain Phinney purportedly "told the Chief of the Mt. Pleasant Police Department that Captain Phinney was calling [the] Chief at the request of Captain Phinney's supervisors at the Dorchester County Sheriff's office, to state that the Chief and the Department should terminate the employment of Messinger because Messinger was the Administrator of the Facebook page for Concerned Citizens of Dorchester County where Messinger was claimed to have made slanderous statements." Messinger alleges that he was "involuntarily counseled and warned by the Chief and the Internal Affairs Sergeant of the Mt. Pleasant Police Department [and that he] was required by [the] Chief to cease being the Administrator of the Concerned Citizens of Dorchester County Facebook page as a condition of his continued employment with the City of Mt. Pleasant." He further alleges he was "intimidated and deterred from exercising his Constitutional rights of expression and assembly and to petition his government for redress of grievances." [R.pp. 121-122; Id. at ¶ 61.]

Based upon these allegations, Messinger brought a Fourth Cause of Action in the Second Amended Complaint for violations of freedom of expression, association, and petition to redress grievances under Article I, Section 2 of the South Carolina Constitution and a Fifth Cause of Action for violations of the First and Fourteenth

Amendments under the United States Constitution and 42 U.S.C. § 1983 against the County, Defendant Chinnis, the County Sheriff, Captain Phinney, Defendant McIntosh, and the Town. [R.pp. 138-140; Id. at ¶¶ 108-113.]

Under each cause of action, Messinger claims that these defendants deprived Messinger of his state and federal constitutional rights by "doing, conspiring to engage and engaging in a pattern of doing, *inter* alia, the following actions, maliciously, wantonly, recklessly, willfully, in bad faith, for corrupt purposes and with the intent to harm Messinger and to interfere with his Constitutional rights . . .

> A. Contacting and trying to persuade Defendant Messinger's employers to terminate the employment of Messinger;
>
> B. Repeatedly suggesting, stating and threatening Messinger that Messinger's employer might be notified by said Defendants of Messinger's protected advocacy and actions and that Messinger might lose his employment or have his protected speech, advocacy and actions restricted as a condition of Messinger's employment, if Messinger did not cease his protected speech, advocacy and actions; and
>
> C. McIntosh, without justification, repeatedly making, and Chinnis republishing, on Facebook and elsewhere false and defamatory statements about the positions, views, character, motives and professional history, employment background and abilities of Messinger and another police officer with whom Messinger was exercising his rights of association and free speech and expression, and petitioning for redress of grievances.

[R.pp. 138-140; Id. at ¶¶ 109, 112.]

Under both the Fourth and Fifth Causes of Actions, Messinger alleges that as "a direct and proximate result of the above-named Defendants' violations described above, Messinger was forced to cease administering and to limit his communications on his public website, and to otherwise restrict his communication; has been deterred, and will continue to be deterred, from exercising his Constitutional rights by being deprived of

his rights of free association, to petition for redress of grievances, and to engage in free speech and expression protected by the South Carolina Constitution; has suffered fear of the loss of his job as a police officer, and has suffered emotional distress, humiliation, embarrassment, injury to his reputation, and other damages, for which he is entitled to nominal, actual, compensatory and punitive damages and reasonable attorney fees and costs." [R.pp. 138-140; Id. at ¶¶ 110, 113.]

The Circuit Court dismissed Messinger's Fourth Cause of Action for violations of the state constitution and his Fifth Cause of Action for violations of the federal constitution and § 1983 because:

(1) Messinger's claims for money damages based on violations of the South Carolina Constitution were not cognizable under the state constitution or 42 U.S.C. § 1983;

(2) Defendant Chinnis was immune from the state-based constitutional claims under the South Carolina Tort Claims Act;

(3) the doctrine of legislative immunity barred Messinger's state-based constitutional claims;

(4) Messinger's claims based on injuries to reputation were not cognizable under § 1983; and

(5) Eleventh Amendment immunity barred the § 1983 claims against the County Sheriff and Captain Phinney.

[R.pp. 19-22; Order, pp. 6-9.]

In his appeal, Messinger has only challenged the Circuit Court's dismissal of the § 1983 claims. As further shown below, the Circuit Court properly dismissed the § 1983 claims against the County, Defendant Chinnis, the County Sheriff, and Captain Phinney.

C. Plaintiff Messinger has not challenged the dismissal of the Fourth Cause of Action for violations of the South Carolina Constitution and the dismissal of these claims is now law of the case; furthermore, the South Carolina Constitution does not provide a private right of action for civil damages arising from state constitutional violations.

While Messinger makes a brief cursory statement in his Conclusion that he stated valid causes of action under the state constitution, the Statement of Issues on Appeal and the arguments in his brief only challenge the Circuit Court's dismissal of the Fifth Cause of Action for violations of the United States Constitution and 42 U.S.C. § 1983.

Under Rule 208(b)(1)(B), SCACR, "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Therefore, Messinger has waived and failed to preserve for appellate review the dismissal of the Fourth Cause of Action for violations of the state constitution by not including this issue in his Statement of Issues on Appeal. See Burris v. Propst Lumber & Logging, Inc. 396 S.C. 85, 94, 719 S.E.2d 695, 700 (Ct. App. 2011).

The Circuit Court also ruled that Messinger's state constitutional claims under the Fourth Cause of Action were required to be dismissed because money damages are not available for violations of rights under the South Carolina Constitution[5] and because state law claims are not cognizable under 42 U.S.C. § 1983, citing Quillan v. Evatt, 315 S.C.

[5] Messinger's Fourth Cause of Action only sought monetary damages as relief. [R.pp. 138-139; Second Am. Compl. ¶ 110.] While his prayer for relief purported to also seek injunctive relief for alleged violations of the state constitution, it is well-established that "relief to be granted depends not upon that asked for in the prayer but it must be such as is warranted by some allegation contained in the pleadings." Mortgage Loan Co. v. Townsend, 156 S.C. 203, 226, 152 S.E. 878, 886 (1930); see also Speizman v. Guill, 202 S.C. 498, 515, 25 S.E.2d 731, 739 (1943) ("The prayer is no part of the cause of action. It cannot add anything to or take anything away from the facts pleaded. The prayer is no part of the charging or pleading portion of the complaint, which is the controlling factor in determining what are the ultimate facts alleged."). In any event, Messinger has not argued on appeal that there was any error by the Circuit Court in dismissing the Fourth Cause of Action based upon the type of relief sought.

489, 491, 445 S.E.2d 639, 640 (Ct. App. 1994) (observing claims under 42 U.S.C. § 1983 "are not available for all alleged torts of state officials or injuries allegedly suffered at the hands of state officials;[r]ather, such claims are limited to violations of rights protected by the United States Constitution and federal law.").

There is no private right of action under Article I, § 2 of the South Carolina Constitution. There is no statutory scheme in South Carolina which enables a citizen to bring a private right of action for civil damages under the State Constitution. Because the State Constitution does not provide for a private cause of action for state constitutional violations and because the General Assembly has not enacted a statute enabling this type of action, any claim of Messinger seeking monetary damages for alleged violations of Article 1, § 2 of the South Carolina Constitution fails as a matter of law.

Messinger has not challenged this ruling on appeal. "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." Lindsay v. Lindsay, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997); see also Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993). Failure to challenge the ruling "is an abandonment of the issue and precludes consideration on appeal." Biales, 315 S.C. at 168, 432 S.E.2d at 484. The unchallenged ruling, "right or wrong, is the law of [the] case and requires affirmance." Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970).

Messinger has abandoned on appeal the dismissal of his Fourth Cause of Action for violations of the state constitution and has only requested this Court to review the dismissal of his § 1983 claims under the Fifth Cause of Action. Accordingly, the Circuit

Court's dismissal of Messinger's Fourth Cause of Action pertaining to alleged violations of the state constitution should be affirmed on appeal for the reasons above.

D. The Circuit Court properly dismissed Plaintiff Messinger's Fifth Cause of Action because claims of injury to reputation arising out of defamatory statements are not actionable under 42 U.S.C. § 1983.

The Circuit Court dismissed Messinger's Fifth Cause of Action brought pursuant to 42 U.S.C. § 1983 in its entirety against all named defendants because it was based on claimed injuries to reputation arising out of allegedly "false and defamatory" statements which is not cognizable in an action under Section 1983. In Paul v. Davis, 424 U.S. 693 (1976), the United States Supreme Court held that a liberty interest is not implicated when the only injury suffered as the result of government action is a stigma or damage to reputation:

> While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.

Id. at 701.

Messinger nevertheless claims that the allegations of his § 1983 claim are not for solely defamation, but for retaliation for exercising his First Amendment rights as well as a claim for violation of his due process rights for the alleged interference with his employment. The allegations of Messinger's § 1983 cause of action do not support either a retaliation claim or a due process violation and were properly dismissed by the Circuit Court.

To assert a § 1983 retaliation claim, a "plaintiff must demonstrate that the defendant's actions had some adverse impact on the exercise of the plaintiff's

constitutional rights." Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 685 (4th Cir. 2000). The plaintiff must establish three elements to prove a § 1983 retaliation claim: (1) that his or her speech was protected; (2) the defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech; and (3) a causal relationship existed between the speech and the defendant's retaliatory action. Id. at 686.

Furthermore, "where a public official's alleged retaliation is in the nature of speech, in the absence of a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow, such speech does not adversely affect a citizen's First Amendment rights, even if defamatory." Id. at 687; see also International Ass'n of Machinists and Aerospace Workers v. Haley, 832 F. Supp.2d 612, 627-28 (D.S.C. 2011) ("when the challenged government action is government speech, there is no retaliation liability—even if the plaintiff can demonstrate a substantial adverse impact—unless the government speech concerns 'private information about an individual' or unless it was 'threatening, coercive, or intimidating so as to intimate that punishment, sanction, or adverse regulatory action will imminently follow.'") (internal citation omitted).

Messinger does not adequately allege a § 1983 retaliation claim against the County, Defendant Chinnis, the Deputy Sheriff, or Captain Phinney. His claims against these defendants are based upon (1) Defendant Chinnis' republishing of a Facebook post written by McIntosh in which McIntosh alleges Messinger was part of a group supporting a tax-payer financed scheme for private security forces in school; and (2) Captain Phinney's alleged statements to the Chief of the Mt. Pleasant Police Department

purportedly discrediting Messinger in an alleged attempt to have the Department terminate the employment of Messinger. [R.pp. 119-122; Sd. Am. Compl., ¶¶ 59-61.]

At most, what Messinger alleges is that these defendants made false and defamatory statements about him to others. Other than the alleged statements made by these defendants to others, there was no retaliatory action taken against Messinger by these defendants. In fact, these defendants did not employ Messinger and could not take any immediate action against him. The alleged retaliatory action, in restricting his communications, was purportedly taken by Messinger's employer, the Mt. Pleasant Police Department. The United States Court of Appeals for the Third Circuit has noted that "it has never been established that a governmental official who does not himself retaliate but instead pressures another individual to retaliate . . . can be held personally liable." Zaloga v. Borough of Moosic, 841 F.3d 170, 177 (3d Cir. 2016).

Therefore, Messinger does not sufficiently allege that these defendants took retaliatory action against him. He simply accuses these defendants of making false and defamatory statements about him to others which may have affected his employability. These allegations do not rise to the level of a First Amendment retaliation claim or a violation of his due process rights by these defendants. Messinger's allegations under the Fifth Cause of Action amount to nothing more than a defamation claim which the United States Supreme Court has consistently reaffirmed is not a constitutional deprivation. See Siegert v. Gilley, 500 U.S. 226 (1991) (former government employee's allegations against former supervisor alleging that supervisor wrote a defamatory letter depriving him of a constitutionally protected liberty interest without due process did not make out violation of any clearly established constitutional right). The Supreme Court noted that

even an allegation about defamation resulting in loss of employment opportunities would not convert the plaintiff's claim into a constitutional claim, noting that "the plaintiff in Paul v. Davis similarly alleged serious impairment of his future employment opportunities as well as other harm." Id. at 234.

The damages claimed by Messinger in the Fifth Cause of Action flow from injury to his reputation which occurred as a result of allegedly false and defamatory statements by the defendants about his views on the use of privately-funded SROs. Under the case law cited above, these allegations are plainly insufficient to maintain a § 1983 claim for any constitutional deprivations. Therefore, the Circuit Court properly dismissed the Fifth Cause of Action in its entirety as to all defendants named thereunder.

E. The Circuit Court properly dismissed the constitutional claims against the County because Plaintiff Messinger did not make any factual allegations against the County and did not allege any governmental custom or policy that caused his constitutional rights to be violated.

As a separate and independent ground with respect to the County, the Circuit Court properly dismissed all constitutional and 42 U.S.C. § 1983 claims asserted by Messinger against the County because Messinger does not any factual allegations against the County under these claims. There is no factual allegation that the County did anything that deprived Messinger of any federal right. [R.pp. 102-144; Second Am. Compl., *passim*.] Thus, Messinger manifestly fails to state any claim against the County. Accordingly, this Court should affirm the County's dismissal on this additional sustaining ground.

Furthermore, a municipality or other local government entity may only be held liable under § 1983 "where the constitutionally offensive acts of [ ] employees are taken

in furtherance of some municipal 'policy or custom.'" See Milligan v. City of Newport News, 743 F.2d 227, 229 (4th Cir. 1984) (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978)); see also Wolf v. Fauquier Cty. Bd. of Supervisors, 555 F.3d 311, 321 (4th Cir. 2009) ("A county may be found liable under 42 U.S.C. § 1983 only 'when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.'") (citations omitted); Moore v. Florence Sch. Dist. No. 1, 314 S.C. 335, 338, 444 S.E.2d 498, 499-500 (1994) (same).

Additionally, the doctrine of respondeat superior is generally inapplicable to § 1983 suits, such that an employer or supervisor is not liable for the acts of employees, absent official policy or custom resulting in an illegal action. Monell, 436 U.S. at 694–95. Messinger fails to allege in the Second Amended Complaint any evidence of a governmental policy or custom of the County that caused his constitutional rights to be violated. Thus, the Circuit Court correctly dismissed all constitutional claims against the County in their entirety.[6]

F. The Circuit Court properly dismissed Plaintiff Messinger's Fifth Cause of Action pursuant to 42 U.S.C. § 1983 against the County and Defendant Chinnis because they are absolutely immune under the doctrine of legislative immunity.

Messinger's § 1983 claim against the County and Defendant Chinnis was also properly dismissed under the doctrine of legislative immunity. Federal, state, regional,

[6] While the Circuit Court did not rule upon this ground in granting the motion to dismiss as to the County, "[t]he appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 527 S.E.2d 716, 723 (2000) (holding "respondent. . . may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court").

and local legislators are entitled to absolute immunity for suits under § 1983 for acts performed in a legislative capacity. Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980); Bogan v. Scott Harris, 523 U.S. 44, 49 (1998) (holding local legislators are likewise absolutely immune from suit under § 1983 for their legislative activities). The legislative immunity applies not just to the individual members of a county council but to the County itself. See Hollyday v. Rainey, 964 F.2d 1441, 1443 (4th Cir. 1992) (finding that county was protected by absolute legislative immunity because the plaintiff's case or the defense "would perforce require testimony of the legislators involved regarding their motives").

In Bogan, the United States Supreme Court explained the reasoning behind absolute immunity for local legislators:

> The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. See Spallone v. United States, 493 U.S. 265, 279 (1990) (noting, in the context of addressing local legislative action, that "restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process").
>
> . . .
>
> Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. . . . And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability.

Id. at 52.

Absolute legislative immunity attaches to all actions taken "in the sphere of legitimate legislative activity." Id. at 54 (internal citation omitted). Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official

performing it. "The privilege of absolute immunity 'would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.'" Id. (quoting Tenney v. Brandhove, 341 U.S. 367, 377 (1951)). Furthermore, it simply is "not consonant with our scheme of government for a court to inquire into the motives of legislators." Id. The Court therefore held that the defendant in Tenney had acted in a legislative capacity even though he allegedly singled out the plaintiff for investigation in order "to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights." Id., at 371 (internal quotation marks omitted).

The only factual allegation against Chinnis, and therefore the County, is that he publicly made a comment on a matter of public concern for which he, as a local county councilman, would make policy decisions. [R.p. 120; Second Am. Compl., ¶ 59.] The South Carolina Supreme Court has recognized that statements about matters of public concern by local legislators are absolutely privileged even if defamatory.

In Richardson v. McGill, 273 S.C. 142, 255 S.E.2d 341 (1979), the respondent was a member of the Williamsburg County Legislative Delegation. A joint meeting of the Legislative Delegation and the Williamsburg County Recreation Commission was called for the purpose of discussing the appellant's performance as the Director of the Recreation Commission. During the meeting, the respondent made defamatory statements regarding the appellant, including that he was "incompetent" and "going with the women in the Department and no woman would be hired unless [appellant] could go

to bed with them and as a result he would hire no married women." Id. at 144, 255 S.E.2d at 342.

The appellant brought an action to recover damages for the slanderous statements, and the respondent defended that the statements were made on a privileged occasion concerning matters within his official duties as a legislator. Id. at 144-145, 255 S.E.2d at 342. The lower court agreed with the respondent and ruled "that the statements were made in the course of his official duties and were absolutely privileged." Id. at 145, 255 S.E.2d at 342.

The Supreme Court affirmed the decision of the lower court, examining categories of communications which are absolutely privileged and observed that the class of absolutely privileged communications has not been narrowly restricted to legislative and judicial proceedings but rather has been based on considerations of public policy:

> While there has been some tendency in the decisions to narrow the absolute privilege, restricting it generally "to legislative and judicial proceedings and acts of State," the courts of South Carolina have recognized "occasions other than those comprising strictly legislative or judicial proceedings," where, under the considerations of public policy, absolute privilege has been upheld.
>
> It is thus clear that unqualified privilege does not depend on the rigid requirement of a strictly legislative or judicial proceeding; its limits are fixed rather by considerations of public policy.

Id. at 145-46, 255 S.E.2d at 342-43 (quoting Corbin v. Washington Fire & Marine Ins. Co., 278 F. Supp. 393, 395-96 (D.S.C. 1968)).

Based upon the consideration of public policy, the Supreme Court held that members of legislative bodies are absolutely immune from suit for acts conducted while performing their duties:

> 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, 273 S.C. at 146, 255 S.E.2d at 343.

The appellant in Richardson contested whether the respondent's statements were made while the respondent was engaged in a legislative duty or process at the time the statements were made. The Supreme Court found that as a member of the legislative delegation from Williamsburg County, the respondent "had an official interest in the proper operation of the county government and its agencies, including that of the Williamsburg County Recreation Commission." Id. The Court further held that the respondent's statements were made with respect to matters of public concern, warranting absolute immunity for the respondent's conduct:

> The matters under inquiry at the meeting in question were of public concern and, in view of the then relationship between the legislative delegation and the county government, related to the discharge of the responsibilities of the legislative delegation. Under the present facts, 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.

Id. at 147, 255 S.E.2d at 343.

While the purported comment of Chinnis was made on a social media forum and not during a legislative meeting, the comment related to a matter of public concern of which Chinnis was entitled to express his views as a local legislator. Allowing a suit against Chinnis and the County under these circumstances would chill public debate by

legislators about matters of public policy. For this additional reason, the Circuit Court correctly dismissed the Fifth Cause of Action against the County and Defendant Chinnis.

G. The Circuit Court properly dismissed the Fifth Cause of Action pursuant to 42 U.S.C. § 1983 against the County Sheriff and Captain Phinney in their official capacities.

The Circuit Court further ruled that the County Sheriff and Captain Phinney, as deputy sheriff, are state officials not amenable to suit under 42 U.S.C. § 1983. The United States Supreme Court has held that neither the state, nor a state official acting in an official capacity, are "persons" within the meaning of § 1983 that can be sued for civil damages pursuant to § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989); In Cone v. Nettles, the South Carolina Supreme Court specifically held deputies and sheriffs are state officials and therefore not liable in their official capacity under § 1983. 308 S.C. 109, 111-12, 417 S.E.2d 523, 524-25 (1992); see also Wyatt v. Fowler, 326 S.C. 97, 101-02, 484 S.E.2d 590, 592-93 (1997). Therefore, Messinger cannot maintain the Fifth Cause of Action brought pursuant § 1983 against the County Sheriff or Captain Phinney in their official capacities.

Messinger argues that he nevertheless can maintain a § 1983 claim against the County Sheriff and Captain Phinney in their official capacities for declaratory and prospective injunctive relief. First, the Circuit Court found that Messinger only sought monetary relief in his Second Amended Complaint for any alleged constitutional violations. [R.p. 20; Order, p. 7.] Messinger has not specifically challenged that finding by the Circuit Court. Therefore, it is now law of the case that he only sought monetary damages under his § 1983 cause of action. See Lindsay v. Lindsay, 328 S.C. 329, 338,

491 S.E.2d 583, 588 (Ct. App. 1997); see also Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993).

Second, it is clear that Messinger's Fifth Cause of Action under § 1983 only sought relief in the form of monetary damages. [R.p. 140; Second Am. Compl. ¶ 113.] While his prayer for relief purported to also seek injunctive relief for alleged violations of the United States Constitution, it is well-established that "relief to be granted depends not upon that asked for in the prayer but it must be such as is warranted by some allegation contained in the pleadings." Mortgage Loan Co. v. Townsend, 156 S.C. 203, 226, 152 S.E. 878, 886 (1930); see also Speizman v. Guill, 202 S.C. 498, 515, 25 S.E.2d 731, 739 (1943) ("The prayer is no part of the cause of action. It cannot add anything to or take anything away from the facts pleaded. The prayer is no part of the charging or pleading portion of the complaint, which is the controlling factor in determining what are the ultimate facts alleged."). Because Messinger did not seek declaratory and injunctive relief under the Fifth Cause of Action pursuant to § 1983, his argument that he can maintain this cause of action against the County Sheriff and Captain Phinney[7] for declaratory and injunctive relief fails as a matter of law.

[7] Only Captain Phinney was sued in both his official and individual capacities. While Messinger argues he can maintain a claim against Phinney in his individual capacity, the argument under Section II. D. herein that a claim under 42 U.S.C. § 1983 cannot be based on defamatory statements and injury to reputation precludes the § 1983 claim in its entirety, including against Captain Phinney in his individual capacity.

CONCLUSION

For the reasons set forth herein and in the Respondents' Brief of the Town Defendants, the County Defendants respectfully request this Court to affirm the dismissal of the Second Amended Complaint.

Respectfully submitted,

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March 20, 2019.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondents complies with Rule 211(b), SCACR.

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March 20, 2019.

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondents named below, do hereby certify that I have this date served the foregoing Final Respondents' Brief, dated March 20, 2019, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

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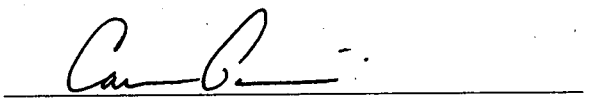

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Dated: March 20, 2019.