THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
APR 03 2019
SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2018-001262
Case No. 2016-CP-18-0838

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. Ziegler; David Messinger; and South Carolina Public Interest Foundation, ... Appellants,

v.

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 Farnsworth, 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; Dorchester County Career and Technology Center; and Dorchester County Career and Technology Center Board of Trustees, ... Respondents.

FINAL BRIEF OF RESPONDENTS TOWN OF SUMMERVILLE, SUMMERVILLE TOWN COUNCIL, AND WILLIAM E. MCINTOSH, III

Robert L. Widener
Erik P. Doerring
BURR & FORMAN, LLP
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

William H. Davidson, II
Kenneth P. Woodington
DAVIDSON, WREN & PLYLER, P.A.
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

ATTORNEYS FOR RESPONDENTS
Town of Summerville, Summerville Town Council, and William E. McIntosh, III

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUES 1

INTRODUCTION & SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. This Court should affirm the circuit court's dismissal of the Plaintiffs' first and second causes of action 5

A. Standard of Review 5

B. The circuit court properly dismissed the first cause of action for lack of subject matter jurisdiction 5

C. The circuit court properly dismissed the second cause of action for lack of subject matter jurisdiction 7

1. It is the law of this case that the second cause of action is based on a violation of Act 388 and, therefore, the claim made in the second cause of action is within the exclusive jurisdiction of the ALC 7

2. The second cause of action is based on an alleged violation of Act 388 and is therefore within the exclusive jurisdiction of the ALC 7

3. Assuming the second cause of action is not based on alleged violations of Act 388, it manifestly is a "double taxation" claim and, as such, is within the exclusive subject matter jurisdiction of the ALC 9

D. The Plaintiffs' attempt to avoid the exclusive jurisdiction of the ALC by casting their first and second causes of action as "spending" claims fails as a matter of fact and law 9

1. The factual allegations in the second amended complaint demonstrate that the first and second causes of action are based on illegal tax collection 11

2. Absent the claim of illegal tax collection, the Plaintiffs cannot and do not state a cause of action under axiomatic principles of law 13

3. The Plaintiffs have not satisfied their appellate burden of demonstrating reversible error by the circuit 14

E. Summary and Conclusion 15

II. This Court should affirm the circuit court's dismissal of Messinger's fourth and fifth causes of action 15

A. Standard of Review 15

B. Background Facts & Summary of Argument 16

C. This Court should affirm the circuit court's dismissal of the fourth cause of action as to all defendants 17

1. The circuit court correctly ruled that § 1983 does not apply to state law claims, and this ruling is the law of this case 17

2. The circuit court correctly ruled that all defendants were immune from Messinger's state law claims under legislative immunity, and this ruling is the law of this case 19

D. The circuit court correctly dismissed the fourth cause of action against defendant McIntosh based on the immunity provided by the South Carolina Tort Claims Act, and Messinger's appellate argument is not preserved for appeal 19

E. This Court should affirm the circuit court's dismissal of the fifth cause of action as to all defendants 21

F. This Court should affirm the circuit court's dismissal of the fifth cause of action against Town of Summerville 21

G. This Court should affirm the circuit court's dismissal of the fifth cause of action against McIntosh 22

CONCLUSION 26

CERTIFICATE OF COUNSEL 27

TABLE OF AUTHORITIES

Cases

Board of Cty. Comm'rs of Bryan Cty., Okl. v. Brown,
520 U.S. 397 (1997) 22

Bond v. Floyd,
385 U.S. 116 (1964) 23

Buckner v. Preferred Mut. Ins. Co.,
177 S.E.2d 544 (S.C. 1970) 7, 18, 19

Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc.,
599 S.E.2d 362 (S.C. App. 2001) 15

Citizens United v. Federal Election Commission,
558 U.S. 310 (2010) 23

Crusader Serv. Corp. v. County of Laurens,
674 S.E.2d 495 (S.C. App. 2009) 5

Floyd v. Floyd,
615 S.E.2d 465 (S.C. App. 2005) 20

Gantt v. Selph,
814 S.E.2d 523 (S.C. App. 2018) 5

Greystone Catering Co. v. South Carolina Dep't of Rev. and Taxation,
486 S.E.2d 7 (S.C. App. 1997) 2

Hotel & Motel Holdings, LLC v. BJC Enters., LLC,
780 S.E.2d 263 (S.C. App. 2015) 18

International Ass'n of Machinists & Aero. Workers v. Haley,
832 F. Supp. 2d 612 (D.S.C. 2011),
aff'd by unpublished opinion (4th Cir. 2012) 24

Keller v. State Bar of California,
496 U.S. 1 (1990) 24

King v. AnMed Health,
659 S.E.2d 131 (S.C. 2008) 5

Long v. Cty. of Los Angeles,
442 F.3d 1178 (9th Cir. 2006) 18

McCall v. IKON,
670 S.E.2d 695 (S.C. App. 2008) 14

Monell v. Dep't of Soc. Servs. of City of New York,
436 U.S. 658 (1978)..22

Pleasant Grove City, Utah v. Summum,
555 U.S. 460 (2009)..25

Republican Party of Minn. v. White,
536 U.S. 765 (2002)..23

South Carolina Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC,
667 S.E.2d 7 (S.C. App. 2008) 20

Sykes v. James,
13 F.3d 515 (2nd Cir. 1993)..17

Todd v. Smith,
407 S.E.2d 644 (S.C. 1991) 22

USAA Prop. & Cas. Ins. Co. v. Clegg,
661 S.E.2d 791 (S.C. 2008) 20

West v. Atkins,
487 U.S. 42 (1988)..18, 25

Wood v. Georgia,
370 U.S. 375 (1962)..24

Wyatt v. Cole,
504 U.S. 158 (1992)..17

Constitution, Statutes, Court Rules & Miscellaneous

S.C. Const. art. V, § 1 3

S.C. Const. art. V, § 11 3

S.C. Const. art. XVII, § 2..3

S.C. Const. art. X, § 10 3

Act 388 [S.C. Code Ann. § 12-37-220(B)(47)(a) (Rev. 2014)] .... 5-15, *passim*

S.C. Code Ann. § 15-78-20(b) (Rev. 2015) 20

S.C. Code Ann. § 15-78-70(b) (Rev. 2015) 20

S.C. Code Ann. § 12-37-220(B)(47)(a) (Rev. 2014) .... 5-15, *passim*

S.C. Code Ann. §§ 12-60-10 to -3390 (Rev. 2014 & Supp. 2018) 2

S.C. Code Ann. § 12-60-80(A) (Rev. 2014) 2

S.C. Code Ann. § 12-60-80(B) (Rev. 2014) 5

S.C. Code Ann. § 12-60-3380 (Rev. 2014) 2

S.C. Code Ann. § 12-60-3390 (Rev. 2014) 3

42 U.S.C. § 1983 .... 16-22, *passim*

Rule 12(b)(6), SCRCP 15

STATEMENT OF ISSUES

1. The circuit court properly dismissed the first and second cause of action in the second amended complaint, because those claims rest upon claims of illegal tax collection that reside in the exclusive jurisdiction of the Administrative Law Court.

2. It is the law of this case that the second cause of action is based on a violation of Act 388, *i.e.*, upon a claim of illegal tax collection.

3. The plaintiffs' attempt to avoid the exclusive jurisdiction of the Administrative Law Court by "casting" the first and second causes of action as "spending" claims fails as a matter of fact and law, because the complaint alleges illegal tax collection and, absent that allegation, the complaint would not and could not state any claim.

4. The circuit court correctly ruled that § 1983 does not apply to the state law claims made in the fourth cause of action, and this ruling is the law of this case.

5. The circuit court correctly ruled that all defendants were immune from Messinger's state law claims under legislative immunity, and the dismissal of the fourth cause of action on this ground is the law of this case.

6. The circuit court correctly dismissed the fourth cause of action against defendant McIntosh based on the immunity provided by the South Carolina Tort Claims Act, and Messinger's appellate argument is not preserved for appeal.

7. The circuit court correctly ruled that the fifth cause of action cannot seek relief for false and defamatory statements, and this ruling is the law of this case.

8. This court should affirm the dismissal of the fifth cause of action against the Town of Summerville because: (a) there are no allegations of wrongdoing against the Town; (b) there are no allegations that McIntosh's actions were at the direction of or for the benefit of the Town or Town Council; (c) there are no allegations that would make the Town vicariously liable for the actions of McIntosh; (d) as a matter of law, there is no respondeat superior liability under § 1983; and (e) there is no allegation that Town had or followed any "custom" or "policy" that violated Messinger's federal constitutional rights.

9. This court should affirm the dismissal of the fifth cause of action against McIntosh, because there is no allegation that any actions by McIntosh actually interfered with Messinger's employment.

10. This court should affirm the dismissal of the fifth cause of action against McIntosh because: (a) his actions and statements are protected speech; (b) if McIntosh's actions and speech of the Town or Council, it was speech of the government itself; and (c) if McIntosh's actions and speech were his alone, then it was not done under "color of state law" as required for any § 1983 action.

INTRODUCTION & SUMMARY OF ARGUMENT[1]

There was 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. Some plaintiffs advocated the use of private security guards, but it was decided to use police officers. Appellants (Plaintiffs) now attack the funding of these SROs in this lawsuit.

Act 388 prohibits school purpose property taxes against owner-occupied homes.[2] The South Carolina Constitution prohibits double taxation.[3] The Plaintiffs' cornerstone allegation is that the tax money used to pay the SRO expenses was collected in violation of Act 388, and/or in violation of the constitutional prohibition against double taxation.

The South Carolina Revenue Procedures Act (RPA) provides the only remedy "in *any* case *involving* the illegal or wrongful collection of taxes."[4] The RPA remedy is an administrative process that ultimately ends with a hearing in the Administrative Law Court (ALC). Any relief from the judgment of the ALC is by appeal to this Court.[5] If an action covered by the RPA is brought in circuit court, "the circuit court shall dismiss the case

---

[1] Respondents join the "Statement of the Case" set forth in the Initial Brief of Appellants.
[2] As used herein, Act 388 is a reference to S.C. Code Ann. § 12-37-220(B)(47)(a) and its prohibition against "school purpose" taxes. Section 12-37-220(B)(47)(a) provides in full (emphasis added): "Effective for property tax years beginning after 2006 and to the extent not already exempt pursuant to Section 12-37-250, one hundred percent of the fair market value of owner-occupied residential property eligible for and receiving the special assessment ratio allowed *owner-occupied residential property* pursuant to Section 12-43-220(c) *is exempt from all property taxes imposed for school operating purposes* but not including millage imposed for the repayment of general obligation debt."
[3] *Greystone Catering Co. v. South Carolina Dep't of Rev. and Taxation*, 486 S.E.2d 7 (S.C. App. 1997).
[4] S.C. Code Ann. § 12-60-80(A) (Rev. 2014) (emphasis added). Section 12-60-80(A) provides in full: "Except as provided in subsection (B), *there is no remedy other than those provided in this chapter in any case involving the illegal or wrongful collection of taxes*, or attempt to collect taxes." (Emphasis added). The South Carolina Revenue Procedures Act (RPA) is codified at S.C. Code Ann. §§ 12-60-10 to -3390 (Rev. 2014 & Supp. 2018).
[5] S.C. Code Ann. § 12-60-3380 (Rev. 2014).

without prejudice."[6] Thus, as Plaintiffs concede on appeal, if the first and second causes of action involve the illegal collection of taxes, the ALC has exclusive jurisdiction. (Init. App. Br. 8-9).[7] To avoid this, Plaintiffs argue that their claims are based on the illegal spending of taxes, not the illegal collection of taxes.

Plaintiffs argue that paying for the SROs was illegal, but the only basis for this illegality is that the taxes used to pay them were collected illegally. Plaintiffs do not argue that they would have an illegal spending claim absent the illegal collection of taxes used to make those payments. (Init. App. Br., *passim*). Nor can they – there is no independent legal duty to not spend tax money on SROs. Thus, Plaintiffs' first and second causes of action "involv[e] the illegal or wrongful collection of taxes" and actually hinge upon claims of specified illegal tax collection. As Plaintiffs concede on appeal, such claims reside in the ALC's exclusive jurisdiction. (Init. App. Br. 8-9). Therefore, the circuit court correctly dismissed the first and second cause of action.

In the fourth and fifth causes of action, one plaintiff (Messinger) sued some Respondents for violating his state and federal constitutional rights during the public and legislative debate on whether to use police officers or private security guards as SROs. The circuit court dismissed on multiple grounds. Messinger fails to appeal or challenge all of these grounds and, therefore, the circuit court's unchallenged rulings are the law of this case and require affirmance. To the extent that Messinger challenges the circuit court's rulings, his arguments are not preserved for appellate review and have no merit.

---

[6] S.C. Code Ann. § 12-60-3390 (Rev. 2014).

[7] The South Carolina Constitution grants the General Assembly the power to create this exclusive jurisdiction. The circuit court has general original jurisdiction, but the General Assembly has the power to grant "exclusive jurisdiction" to an "inferior court" by statute. See S.C. Const. art. V, §§ 1, 11. The General Assembly also has the power to determine "in what manner claims against the State may be established and adjusted." *Id.* at art. XVII, § 2; see also *id.* at art. X, § 10. The General Assembly exercised these constitutional powers with respect to tax matters by enacting the RPA.

ARGUMENT

The Plaintiffs sued the Respondents under four causes of action. The Respondents are three groups of defendants: Town Defendants, County Defendants, and District Four Defendants. A fourth group of defendants are not respondents, because they did not make any dispositive motions and the appealed orders do not dismiss any claims against these defendants. (See R. 6, n.1; see generally appealed orders at R. 3-23, *passim*)

The Town Defendants are respondents Town of Summerville, Summerville Town Council, and William E. McIntosh, III. This brief is submitted by the Town Defendants. The Town Defendants join the briefs of the County and District Four Defendants.

The County Defendants are respondents Dorchester County, Dorchester County Sheriff, Dorchester County Council, and Council members. The claims against the County Defendants and Town Defendants were dismissed in an order entitled: "Order Granting Defendants' Motions to Dismiss Plaintiffs' Second Amended Complaint" appearing at R. 12-23. This order dismissed the first, second, fourth, and fifth causes of actions against the Town Defendants and County Defendants – the third cause of action did not make any claims against these defendants.[8]

The District Four Defendants are respondents Dorchester School District Four and Dorchester School District Four Board of Trustees. The circuit court granted their motion to dismiss in a separate order entitled "Order on Motion to Dismiss Filed by [District Four Defendants]" appearing at R. 3-11.

---

[8] The third cause of action is against the District Two defendants only, *i.e.*, Dorchester School District Two, the District's Board of Trustees, and the individual Board members. (R. 11, ¶¶ 24-25; R. 137, ¶¶ 105-107). These defendants are not respondents in this appeal, because the appealed orders did not rule on any issue related to this cause of action, and it remains pending against the District Two defendants.

I. This Court should affirm the circuit court's dismissal of the Plaintiffs' first and second causes of action.

A. Standard of Review

The circuit court dismissed the first and second causes of action for lack of subject matter jurisdiction, because the ALC has exclusive jurisdiction under the exclusive remedy provision of the RPA. (R. 17-18, 22).[9] Subject matter jurisdiction is a question of law for the court and subject to *de novo* review on appeal. *Gantt v. Selph*, 814 S.E.2d 523, 526 (S.C. App. 2018). Here, the answer to this jurisdictional question involves the meaning of Act 388 and its application to undisputed facts, which are also questions of law for the court and subject to *de novo* review on appeal. *King v. AnMed Health*, 659 S.E.2d 131, 134 (S.C. 2008) (meaning of statute); *Crusader Serv. Corp. v. County of Laurens*, 674 S.E.2d 495, 497 (S.C. App. 2009) (application of statute to undisputed facts). There are no "factual" issues in this case. The circuit court did not resolve any factual issues – its rulings are based on questions of law presented by the alleged facts.

B. The circuit court properly dismissed the first cause of action for lack of subject matter jurisdiction.

The first cause of action hinges on allegations that the Defendants violated Act 388. The Plaintiffs specifically allege a breach of Act 388 and incorporate an Attorney General Opinion finding that the conduct alleged by Plaintiffs violates Act 388.

Paragraph 100 alleges that the "expenditure of public funds for [SROs] . . . violate Act 388 by expending funds obtained by taxing owner-occupied residences for the purpose of a school operating expense, *as described by the South Carolina Attorney General* in

[9] The RPA includes an exception to the ALC's exclusive jurisdiction. Declaratory judgment actions with the "the sole issue [being] whether a statute is constitutional may be brought in circuit court." S.C. Code Ann. § 12-60-80(B) (Rev. 2014). It is undisputed that this exception does not apply here.

2015 S.C. AG LEXIS 105, attached as Exhibit 1." (R. 136, ¶ 100) (all emphasis added). The first cause of action seeks relief for damages caused by the "Defendants' violations of Act 388." *Id.* at ¶ 101.

The incorporated AG Opinion concluded that the conduct like that alleged in the complaint would violate Act 388 under the following analysis:

(1) the question presented was the "*legality* of certain property taxes that have been imposed and/or that will be imposed by Dorchester County Council ("Council") and by each of three school districts' in Dorchester County to finance School Resource Officers ("SRO" or "SROs") for the purpose of providing police protection at schools in those districts [and] . . . [i]n particular . . . *whether those taxes violate*." Act 388;

(2) the AG concluded that SRO expenses are a "school operating purpose" as envisioned by Act 388; and

(3) the AG concluded that "we believe a court would determine *taxation* by a county for a School Resource Officer is *unlawful* because it *evades the prohibition against taxation* of primary residences for school operating purposes [in Act 388]."

R. 288, 290-291 (emphasis added). In short, the first cause of action hinges upon allegations that the Town Defendants violated Act 388.[10]

By definition, the only way to violate a tax exemption statute like Act 388 is to assess and collect the prohibited tax against the exempted property. Therefore, any violation of Act 388 "involv[es] the illegal or wrongful collection of taxes." Pursuant to the RPA, claims "involving" the wrongful or illegal collection of taxes reside in the exclusive jurisdiction of the ALC. Accordingly, the circuit court properly dismissed the first cause of action for lack of jurisdiction.

[10] The issue of whether SRO expenses are "school operating purposes" under Act 388 is not an issue here. It was not decided by the circuit court, and it is not an issue on appeal. For purposes of this appeal only, it is uncontested that SRO expenses come within Act 388.

C. The circuit court properly dismissed the second cause of action for lack of subject matter jurisdiction.

The second cause of action is cast as "illegal double spending" that "violat[es] the South Carolina Constitution." (R. 137, ¶ 103). The second cause of action does not identify any specific provision of the Constitution, nor does it otherwise specify the legal duty breached by the Defendants in the alleged "illegal double spending." As shown below, the second cause of action resides in the exclusive jurisdiction of the ALC, because it rests upon a claimed violation of Act 388 and/or a claimed violation of a constitutional prohibition against "double taxation."

1. <u>It is the law of this case that the second cause of action is based on a violation of Act 388 and, therefore, the claim made in the second cause of action is within the exclusive jurisdiction of the ALC</u>.

The circuit court found that the second cause of action, like the first cause of action, was based on the alleged violations of Act 388. (R. 18). On appeal, the Plaintiffs do not dispute or challenge this ruling. (Init. App. Br., *passim*). Therefore, it is the law of this case that the second cause of action is based on alleged violations of Act 388. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970). As demonstrated in Argument I(B), *supra*, any violation of Act 388 is within the exclusive jurisdiction of the ALC and, therefore, the circuit court properly dismissed the second cause of action.

2. <u>The second cause of action is based on an alleged violation of Act 388 and is therefore within the exclusive jurisdiction of the ALC</u>.

Assuming the Plaintiffs have challenged the circuit court's ruling that the second cause of action is based on an alleged violation of Act 388, the circuit court's ruling was correct. In paragraph 103 of the second amended complaint, the Plaintiffs make the following claim:

> The expenditures and reimbursements of public funds for the expenses of the same SROs at the same schools at the same time made by both the County and a School District, and by the both the Town and a School District . . . constitute *illegal double spending* in violation of the South Carolina Constitution, *as described by the South Carolina Attorney General in 2015 S.C. AG LEXIS 105*, attached as Exhibit # 1.

(R. 137, ¶ 103) (all emphasis added). The referenced Attorney General Opinion is the same AG Opinion cited in the first cause of action and discussed earlier. (See Arg. I(B), *supra*).

The AG Opinion answered the following question: "Whether *double taxation* by both Dorchester County and a school district <u>for SROs</u> or for any other identical purpose is *unlawful because it is double taxation* and why?" (R. 288, 292) (all emphasis added). The AG described the question as "whether charging for the same School Resource Officers by both the school district and the county would constitute double taxation." (R. 292.). After concluding that the described taxation was a violation of Act 388, the Attorney General concluded that unlawful double taxation was a possibility:

> [W]e are of the opinion that *taxing* for the same School Resource Officers approaches *double taxation* such that a court could make that determination. We recognize that generally two different entities can tax for the same thing without constituting double taxation. However, the simple principle is this: where two entities <u>collect</u> the full amount to cover the cost of School Resource Officers, the taxpayers would be paying twice for the same thing. That is the very principle *double taxation* violates. The same principle would apply to any amount both entities are <u>collecting duplicate taxes</u> for.

(R. 294) (all emphasis added). In short, the AG concluded that the conduct alleged in the second amended complaint was taxation in violation of Act 388 and, it was improper double taxation for two entities to collect the same tax against the same property for the same thing.

The Plaintiffs' second cause of action is based upon claims that the defendants violated Act 388 by their separate acts of imposing and collecting the same prohibited tax

against the same exempt property. Alleging that different defendants committed the same wrong does not change the fact that the second cause of action is based upon alleged (albeit multiple) violations of Act 388. As shown earlier, any violation of Act 388 is within the exclusive jurisdiction of the ALC and, therefore, the circuit court properly dismissed the second cause of action.

3. Assuming the second cause of action is not based on alleged violations of Act 388, it manifestly is a "double taxation" claim and, as such, is within the exclusive subject matter jurisdiction of the ALC.

Even if the Plaintiffs' second cause of action does not turn on alleged violations of Act 388, it nevertheless remains a "double taxation" claim residing in the exclusive jurisdiction of the ALC. The second cause of action alleges a violation of the South Carolina Constitution as described in the incorporated AG Opinion. The only constitutional problem identified by the AG was the prohibition against double taxation. Thus, by its own terms, the second cause of action is based upon an allegation of "double taxation," which is a "case *involving* the illegal or wrongful collection of taxes." Therefore, any double taxation claim resides in the exclusive jurisdiction of the ALC, and the circuit court properly dismissed the second cause of action.

D. The Plaintiffs' attempt to avoid the exclusive jurisdiction of the ALC by casting their first and second causes of action as "spending" claims fails as a matter of fact and law.

The Plaintiffs concede that if the first and second causes of action "challeng[e] the wrongful assessment or collection of taxes," then the ALC has exclusive jurisdiction. (Init. App. Br. 8-9). To avoid this, the Plaintiffs' second amended complaint casts the first and second causes of action as illegal spending claims. This "casting" is the result of a tortured

procedural history in which the Plaintiffs claimed wrongful taxation and collection but later recast those claims as "illegal spending" to avoid the exclusive jurisdiction of the ALC.

On May 2, 2016, the Plaintiffs filed their original complaint, which sought a declaratory judgment that "taxes have been imposed and/or will be imposed illegally . . . to finance [SROs]" and an injunction requiring a "refund to taxpayers [of] taxes illegally collected." (R. 248-249, ¶ 2). In the first cause of action, the Plaintiffs alleged that "the methods of financing SROs violate Act 388" and damaged them by requiring them to pay "unlawful taxes." (R. 279-280, ¶¶ 96-97). Similarly, in the second cause of action, the Plaintiffs alleged that "the methods of financing SROs . . . constitute illegal double taxation" and damaged them by requiring them to pay "unlawful taxes." (R. 280, ¶¶ 99-100). The Plaintiffs sought a declaration that the defendants had violated Act 388 and the prohibition against double taxation, as well as an injunction and mandamus requiring a return of the illegally collected taxes. (R. 284-286). **Notably:** The original complaint did not cast the first and second cause of action as "illegal spending" claims.

On May 6, 2016, the Plaintiffs filed and served their Amended Complaint before serving their original complaint. (R. 145-244). The only significant difference between the original and amended complaints is that the Plaintiffs dropped their claim for a refund of illegally collected taxes. (See, *e.g.*, R. 182-184). The first and second causes of action remained the same. The first cause of action continued to rest upon the alleged violation of Act 388; the second cause of action continued to rest upon the allegation of double taxation; and both causes of action continued to allege the damage of having to pay "unlawful taxes." (R. 178-179, ¶¶ 97-102; *compare with* Orig. Cmplnt. at R. 279-280, ¶¶

95-100). **Notably:** As with the original complaint, the amended complaint did not cast the first and second cause of action as "illegal spending" claims.

The Town and County Defendants moved to dismiss the first and second cause of action, because those claims reside in the exclusive jurisdiction of the ALC pursuant to the exclusive remedy provision in the RPA. (See R. 595-599; and R. 571, 575-578). The parties resolved the motions with the following consent order: (a) Plaintiffs withdrew their amended complaint; (b) the Plaintiffs agreed to not assert "any claim or cause of action based on the refund, assessment and/or collection of South Carolina taxes" in their to-be-filed second amended complaint; and (c) the Town and County Defendants withdrew their motions to dismiss with unfettered leave to refile later. (R. 28, ¶¶ 1, 3-4).

In December 2016, the Plaintiffs filed and served their second amended complaint, recasting their first and second causes of action as "illegal spending" claims rather than "illegal taxation/collection" claims. This "recast" is an attempt to comply with the consent order and avoid the exclusive jurisdiction of the ALC. As demonstrated throughout this Argument I, *supra* and *infra*, the first and second causes of action in the second amended complaint present a "case *involving* the illegal or wrongful *collection* of taxes" and therefore reside in the exclusive jurisdiction of the ALC.

1. <u>The factual allegations in the second amended complaint demonstrate that the first and second causes of action are based on illegal tax collection</u>.

The Plaintiffs couch the first cause of action in terms of "expending funds" and the "expenditure of public funds." (R. 136, ¶ 100). In like manner, they couch the second cause of action in terms of "illegal double expenditures" and "illegal double spending." (R. 137, ¶ 103). They emphatically proclaim that "[t]his action is not brought to challenge the collection of or to request a refund of any tax." (R. 104, ¶ 2). The Plaintiffs' factual

allegations, however, demonstrate the fallacy of the Plaintiffs' attempted distinction between "illegal spending" and "illegal collection" in this case.

Part III(A) of the second amended complaint is entitled "SRO Funding – Act 388 and Double Taxation Violations." (R. 113). Part IV of the second amended complaint is entitled "Factual Allegations," and the key subparts are entitled "Violations of Act 388" and "Double Taxation by [defendants]." (R. 117; 130). Within these parts of the complaint, the Plaintiffs often use terms like spending and expenditures, but they ultimately cannot avoid the fact that their illegal spending claims are based solely on the taxes having been collected illegally.

In paragraph 50 of Part III(A), the Plaintiffs allege that the defendants cannot "spend funds *obtained by taxing* owner-occupied homes to fund SROs, because doing so *would violate [Act 388]*. (R. 114) (emphasis added). In paragraph 76 of Part IV(A), the Plaintiffs allege that "[a]t <u>all times</u> pertinent <u>all monies</u> paid and obligated to be paid . . . for SROs have been paid or will be paid *with property taxes raised . . . in violation of Act 388*." (R. 128) (all emphasis added) (See also R. 123 ¶ 63 and R. 129 at ¶ 80). In paragraph 89 of Part IV(B), the Plaintiffs explain their "double spending" claim:

> This financing scheme of having [County] and [Town] spend its tax revenues to fund the exenses (sic) of SROs and in turn to be reimbursed by a School District that spends its tax revenues to fund the same expenses for the same SROs in the same schools is unnecessary, <u>illegal double taxation</u> in *violation of the South Carolina Constitution* and in *violation of Act 388*.

(R. 132) (all emphasis added). In short, the only thing that makes the spending illegal is the alleged illegal collection of those taxes in violation of Act 388 and/or the constitutional prohibition against double taxation. In other words, the Plaintiffs claim that the taxes were spent illegally because, *but only because*, they were collected illegally.

The linchpin allegation in the first and second causes of action is that the taxes were collected illegally. Absent this illegal collection, the Plaintiffs cannot and do not state any claim, because there is no independent legal duty to not spend tax money or public funds on SROs. Therefore, as a matter of law, the first and second causes of action allege a "case involving the illegal or wrongful collection of taxes." Accordingly, the circuit properly dismissed these claims as residing in the exclusive jurisdiction of the ALC.

2. Absent the claim of illegal tax collection, the Plaintiffs cannot and do not state a cause of action under axiomatic principles of law.

The axiomatic requirement for any valid cause of action is the paradigm of an existing duty, a breach of that duty, and damages caused by that breach of that duty. The Plaintiffs overlook this fundamental principle of law in their rush to avoid the exclusive jurisdiction of the ALC.

The only legal duties allegedly breached by the Town Defendants are the tax collection prohibitions imposed by Act 388 and the constitutional prohibition against double taxation. Absent the illegal tax collection, there is no allegation in the second amended complaint that the "spending" would nevertheless be illegal based on some other, independent legal duty. Thus, absent the alleged illegal tax collection, the first and second causes of action would fail to state a claim, because there would not be any allegation of a legal duty breached by the Town Defendants. The Plaintiffs' claims, therefore, necessarily present a case "*involving* the illegal or wrongful *collection* of taxes." As a matter of law, such claims reside in the exclusive jurisdiction of the ALC.

3. <u>The Plaintiffs have not satisfied their appellate burden of demonstrating reversible error by the circuit.</u>

The Plaintiffs bear the burden of demonstrating reversible error by the circuit court. *McCall v. IKON*, 670 S.E.2d 695, 700-701 (S.C. App. 2008). They have failed to do so.

The Plaintiffs open their appellate argument with the generally correct observation that circuit courts have general, original jurisdiction over claims of "illegal expenditures" by governmental entities, unless the General Assembly grants exclusive jurisdiction to "inferior courts" by statute. (Init. App. Br. at 8). The Plaintiffs next correctly describe the circuit court's ruling that the first and second causes of action "involve[ed] the illegal or wrongful collection of taxes" and therefore came within the exclusive jurisdiction of the ALC under the exclusive remedy provisions of the RPA. (Id. at 8-9). The Plaintiffs concede that if their case is about the "wrongful assessment or collection of taxes," the circuit court's jurisdiction ruling is correct. (Id.). For the remainder of their appellate argument, the Plaintiffs summarily (albeit repeatedly) argue that their claims are based on the Defendants illegally spending tax dollars, not illegally collecting them. (Init. App. Br. 10-12, *passim*). The Plaintiffs, however, do not allege in their complaint and do not explain on appeal how the spending was "illegal," except that the taxes were collected in violation of Act 388 and/or the constitutional prohibition against "double taxation." The Plaintiffs' "spending" claims therefore "involv[e] the illegal or wrongful collection of taxes" and reside in the exclusive jurisdiction of the ALC.[11]

---

[11] Nothing in Act 388 purports to control or limit the expenditure or spending of tax dollars. This is not surprising, because the General Assembly's plainly stated intent and purpose in Act 388 is to prohibit and prevent the collection of those tax dollars – one cannot spend dollars that one does not have and cannot collect. In any event, and assuming Act 388 somehow includes a limitation on spending taxes assessed and collected in violation of Act 388, that "spending" claim *a priori* "involv[es] the illegal or wrongful collection of taxes" and, therefore, any such "spending" claims are within the exclusive jurisdiction of the ALC.

E. Summary and Conclusion

"[*A*]*ny* case *involving* the illegal or wrongful *collection* of taxes" is within the exclusive jurisdiction of ALC. The claims alleged in the first and second cause of action manifestly and necessarily "involve" the illegal or wrongful collection of taxes and therefore trigger the exclusive jurisdiction of the ALC. The Plaintiffs cannot avoid this with so-called "spending claims" that do not and cannot exist absent the underlying claim of illegal or wrongful tax collection. For this reason, and for all of the reasons set forth in this Argument I, it is respectfully submitted that this Court should affirm the circuit court's dismissal of the first and second causes of action.[12]

II. This Court should affirm the circuit court's dismissal of Messinger's fourth and fifth causes of action.

A. Standard of Review

The Appellants correctly summarize much of the law on reviewing orders that grant a motion to dismiss for failure to state a cause of action under Rule 12(b)(6), SCRCP. It is important to add, however, that legal conclusions are not accepted as true. *Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc.*, 599 S.E.2d 362, 364-365 (S.C. App. 2001). Questions of law are always for the court under a *de novo* standard of review. Moreover, there are no "factual" questions at issue here. The circuit court did not resolve any factual issues – the court accepted the alleged facts as true but dismissed the claims based on questions of law.

---

[12] The Plaintiffs fear that the circuit court will be deprived of jurisdiction over all cases challenging governmental action, "if that challenge involves the expenditure of public funds." (Init. App. Br. 7). This is a false fear. The ALC has jurisdiction in this case, because the alleged illegal collection of taxes is the only legal basis for the claims made in the first and second cause of action. This does not affect the circuit court's jurisdiction over cases that involve illegal spending claims, provided there is an independent legal duty and breach of duty beyond any alleged illegal or wrongful collection of taxes. Here, however, the Plaintiffs have not and cannot allege an "illegal spending" claim based on anything other than illegal tax collection. They have tried but failed to do so in a total of three complaints, including the second amended complaint at issue on appeal. Their claims therefore reside in the exclusive jurisdiction of the ALC.

B. Background Facts & Summary of Argument

David Messinger is the only plaintiff for the fourth and fifth causes of action, and he asserts these claims against respondents McIntosh, Chinnis, Phinney, Dorchester County, Town of Summerville, and Dorchester County Sheriff. (R. 138-140, ¶¶ 108-113). The circuit court dismissed the fourth and fifth causes of action on multiple grounds. (R. 19-22).

The fourth cause of action is based solely on alleged violations of Messinger's rights under the state constitution. It does not allege any violation of any federal right. (R. 138-139, ¶¶ 108-110). Because the fourth cause of action is state law only, the circuit court dismissed it upon the following separate and independent grounds:

1. The fourth cause of action does not and cannot state a claim under 42 U.S.C. § 1983, because it seeks monetary damages for alleged violations of Messinger's rights under the state constitution, and such claims cannot be made under 42 U.S.C. § 1983.

2. As to all defendants, Messinger's claims are barred by legislative immunity as retained in the South Carolina Tort Claims Act.

3. As to defendants Chinnis and McIntosh, they are members of County and Town Council, respectively, and they are immune from liability for Messinger's claims under the South Carolina Tort Claims Act.

(R. 20-21).

The fifth cause of action is based solely on alleged violations of Messinger's rights under the federal constitution and 42 U.S.C. § 1983. (R. 139-140, ¶¶ 111-113). The circuit court dismissed it as to all defendants, because it "claimed injuries to reputation arising out of allegedly 'false and defamatory statements,' which is not cognizable in an action under 42 U.S.C. § 1983."

On appeal, Messinger ignores the fourth cause of action and focuses on the fifth cause of action, *i.e.*, his "1983" claims for alleged violations of his federal constitutional rights, claims made only in the fifth cause of action. (Init. App. Br. at 13-29). As shown below, the circuit court's dismissal of the fourth and fifth cause of action is the law of this case and requires affirmance, because Messinger has failed to challenge the circuit court's rulings. Moreover, assuming Messinger has challenged the circuit court's rulings, his appellate arguments are not preserved for appeal. And in any event, the circuit court correctly dismissed the fourth and fifth cause of action.

C. This Court should affirm the circuit court's dismissal of the fourth cause of action as to all defendants.

The circuit court correctly ruled that Messinger's fourth cause of action asserted state law claims only, and pure state law claims are not cognizable under § 1983. The circuit court also correctly ruled that all defendants were immune from liability based on legislative immunity granted by state law. These rulings are the unchallenged law of this case and therefore require affirmance.

1. The circuit court correctly ruled that § 1983 does not apply to state law claims, and this ruling is the law of this case.

The circuit court ruled that the fourth cause of action stated only a state law claim, and state law claims are not cognizable under § 1983. (R. 20). This ruling was correct. "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their *federally guaranteed rights* and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (emphasis added). Section 1983 "creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere." *Sykes v. James*, 13 F.3d 515, 519 (2d Cir.

1993). To state a claim under § 1983, a plaintiff must allege two elements: (1) a right secured by the Constitution or laws of the United States was violated, and (2) the alleged violation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). Here, the fourth cause of action does not allege any violation of any federal right and, therefore, it does not and cannot state a claim enforceable under § 1983.[13]

Messinger argues that the circuit court erred in finding that he "did not state a cause of action for a § 1983 cause of action for violation of his rights . . . in violation of the First and Fourteenth Amendments of the United States Constitution" and "his rights under the due process clause of the Fourteenth Amendment[] of the United States Constitution." (Init. App. Br. at 17, 22; see also id. at 17-22 and 22-24). The circuit court never made these rulings – the circuit court ruled only that the state law claims made in the fourth cause of action could not be a § 1983 action. Messinger never challenges this ruling and, therefore, it is the law of this case. *Buckner*, 177 S.E.2d at 544.[14]

---

[13] 42 U.S.C. § 1983 provides in full: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

[14] In the last sentence of his arguments on stating a cause of action under § 1983, Messinger argues that the facts alleged in his complaint show "violations of the First and Fourteenth Amendments of the United States Constitution, as well as of Article I, Section 2 *of the South Carolina Constitution.*" (Init. App. Br. 24) (emphasis added). This is the only reference to any state law claim being made under § 1983, and it fails to support reversal of the circuit court for three reasons. First, it is a conclusory statement asserted in part of a sentence without discussion, argument, or supporting citations and, therefore, it is an abandonment of the issue on appeal. *Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 780 S.E.2d 263, 275 (S.C. App. 2015) (one-sentence argument is an abandonment of the issue on appeal). Second, it does not discuss or challenge the circuit court's actual ruling. Third, as shown earlier, the circuit court was correct – a § 1983 action does not lie for a pure state law claim like the fourth cause of action. See Arg. I(B), *supra*.

2. <u>The circuit court correctly ruled that all defendants were immune from Messinger's state law claims under legislative immunity, and this ruling is the law of this case.</u>

The circuit court dismissed the fourth cause of action against all defendants on the ground that legislative immunity under state law protected all defendants from any state law claim. (R. 21). On appeal, Messinger argues that legislative immunity does not protect the defendants from a § 1983 action for violation his federal constitutional rights. (Init. App. Br. 26-29). Again, the circuit court never made this ruling – the court ruled only that legislative immunity under state law protected the defendants from state law claims, which are the only claims made in the fourth cause of action. Messinger never challenges the circuit court's actual ruling and, therefore, "right or wrong, [it] is the law of this case and requires affirmance." *Buckner*, 177 S.E.2d at 544.

D. The circuit court correctly dismissed the fourth cause of action against defendant McIntosh based on the immunity provided by the South Carolina Tort Claims Act, and Messinger's appellate argument is not preserved for appeal.

This question is moot if this Court affirms the dismissal of the fourth cause of action as to all defendants upon the grounds set forth in Argument II(C), *supra*. *Buckner*, 177 S.E.2d at 544 (when the trial court rules upon more than one independent ground, the appellate court must affirm the appealed order if any of the separate independent grounds are affirmed – any presumed error in any other ground becomes moot).

As an independent and alternative ground, the circuit court dismissed the fourth cause of action against defendants Chinnis and McIntosh, because they are members of County and Town Council and therefore immune from liability for Messinger's claims under the South Carolina Tort Claims Act. (R. 20). On appeal, Messinger argues there is a question of fact on whether the defendants lost any immunity by acting outside the scope

of their official duties or acted with actual malice and with intent to harm. (Init. App. Br. 29)-30).[15]

Messinger's appellate argument is not preserved for appeal. He made this "outside scope" argument in opposition to the motion to dismiss. (R. 465). The circuit court, however, did not mention or rule upon his argument in dismissing the fourth cause of action. (R. 20). It was therefore incumbent upon Messinger to seek an explicit ruling with a 59(e) motion. A general ruling against a party is not sufficient to preserve that party's specific objection, and a 59(e) motion must seek an explicit ruling on the specific objection. *USAA Prop. & Cas. Ins. Co. v. Clegg*, 661 S.E.2d 791, 795 (S.C. 2008), *citing Floyd v. Floyd*, 615 S.E.2d 465, 474 (S.C. App. 2005). Messinger made a 59(e) motion, but he did not raise his "outside scope" argument. (R. 429-430). He argued only that the Tort Claims Act did not apply, because he was not suing in tort, and he was seeking only declaratory and injunctive relief, which is not barred by the Tort Claims Act. (Id.). Messinger does not pursue this argument on appeal, thereby abandoning it. *South Carolina Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 667 S.E.2d 7, 15 (S.C. App. 2008) (arguments made to trial court but not on appeal are abandoned).

---

[15] Section 15-78-20(b) provides in full: "The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved. The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in Section 15-78-70(b)."

Section 15-78-70(b) provides in full: "Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude."

E. **This Court should affirm the circuit court's dismissal of the fifth cause of action as to all defendants.**

The circuit court dismissed the fifth cause of action as to all defendants, because it "claimed injuries to reputation arising out of allegedly 'false and defamatory statements,' which is not cognizable in an action under 42 U.S.C. § 1983." (R. 21). Messinger does not challenge this ruling on its merits. (Init. App. Br., *passim*). Therefore, it is the law of this case that no defendant can be held liable for false or defamatory statements.

F. **This Court should affirm the circuit court's dismissal of the fifth cause of action against Town of Summerville.**

The fifth cause of action is a "1983 action" for alleged violations of Messinger's federal constitutional rights. The dismissal of this claim against Town should be affirmed for numerous reasons.

First, there is no factual allegation that Town did anything that deprived Messinger of any federal right. (R. 102-144, *passim*). Thus, the fifth cause of action manifestly fails to state any claim against Town. Accordingly, this Court should affirm the dismissal of the fifth cause of action against Town on this additional sustaining ground.

Second, while there are factual allegations against McIntosh, there are no factual allegations that McInstosh's alleged actions were undertaken at the direction of or for the benefit of Town or Town Council. (R. 102-144, *passim*). Therefore, the fifth cause of action manifestly fails to state any claim against Town. Thus, this Court should affirm the dismissal of the fifth cause of action against Town on this additional sustaining ground.

Third, there are no factual allegations that would make Town vicariously liable for the actions of McInstosh. (R. 102-144, *passim*). For example, there are no allegations that McIntosh had any authority to act on behalf of Town in undertaking the actions alleged by

Messinger. (*Id.*) Moreover, as a matter of law, there is no respondeat superior liability under § 1983 for municipalities. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978); *accord, e.g., Todd v. Smith,* 407 S.E.2d 644, 646 (S.C. 1991). Thus, the fifth cause of action manifestly fails to state any claim against Town. Accordingly, this Court should affirm the dismissal of the fifth cause of action against Town on this additional sustaining ground.

Fourth, it is axiomatic that municipal liability exists only if there is a municipal "policy" or "custom" that caused the plaintiff's injury. *E.g., Board of Cty. Comm'rs of Bryan Cty., Okl. v. Brown,* 520 U.S. 397, 403 (1997). Here, there is no allegation of any Town "policy" or any Town "custom" that deprived Messinger of any federal right, nor is there any allegation of any action by Town that did so. (R. 102-144, *passim*). Thus, the fifth cause of action manifestly fails to state any claim against Town. Accordingly, this Court should affirm the dismissal of the fifth cause of action against Town on this additional sustaining ground.

G. This Court should affirm the circuit court's dismissal of the fifth cause of action against McIntosh.

Messinger makes two factual allegations against McIntosh. First, he alleges that McIntosh made "false and defamatory statements and accusations" about Messinger on Facebook. (R. 119-120, ¶ 59). Second, he alleges that McIntosh "on multiple occasions . . . gratuitously questioned [him] about whether [his] current boss . . . would disapprove of [his] statements" on the SRO debate. (R. 121, ¶ 61). Messinger perceived this gratuitous questioning as a threat to interfere with his employment by contacting his boss. (R. 120-121, ¶ 60). There is no factual allegation, however, that McIntosh ever contacted Messinger's boss, nor is there any factual allegation that Messinger's boss was ever aware

of McIntosh's comments. (R. 102-144, *passim*). Moreover, there is no factual allegation that McIntosh's actions interfered with or affected Messinger's employment in any manner. (Id.).

Based on the two factual allegations against McIntosh, Messinger alleges that "[a]ctions" by McIntosh and Town deprived Messinger of his federal constitutional rights. (R. 139-140, ¶ 112). As noted earlier, Messinger never alleges any "actions" by Town, and his allegations of "actions" by McIntosh are limited to "gratuitously" questioning Messinger and posting "defamatory" comments on Facebook. Messinger alleges that McIntosh harmed him by threatening his employment through this "gratuitous" questioning and by making "false defamatory statements" about him on Facebook. (R. 139-140, ¶ 112(B) and ¶ 112(C)). In short, Messinger alleges that McIntosh's "actions" interfered with Messinger's participation in the public and legislative debate on SROs. Messinger's "actions," however, were protected speech in the same debate on SROs.

McIntosh's "actions" were an exercise of his own right as a public official and private citizen to personal expression on public issues.[16] Our political system is based on this type of government speech.[17] Indeed, the speech and opinions of public officials are the vehicle through which constituents and recipients of government services come to know their public officials and the opinions of those officials.

Free political speech, in other words, is not off-limits to someone simply because he or she is a public official. In *Citizens United v. Federal Election Commission*, 558 U.S.

---

[16] *See, e.g., Bond v. Floyd*, 385 U.S. 116, 136-37 (1964)(rejecting the idea that the First Amendment only applies to the "citizen-critics" of government and concluding that "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy").

[17] *See, e.g., Republican Party of Minn. v. White*, 536 U.S. 765, 781-82 (2002)("The role that elected officials play in our society makes it all the more imperative that they be allowed to freely express themselves on matters of current public importance.")(*quoting Wood v. Georgia*, 370 U.S. 375, 395 (1962)).

310, 340-41 (2010), the Supreme Court described the vital importance of political speech as "an essential mechanism of democracy," further noting that "political speech must prevail against laws that would suppress it, whether by design or inadvertence." Consistent with this, "[t]he First Amendment protects speech *and speaker*, and the ideas that flow from each." *Id.* at 341 (emphasis added). To the same effect is *Keller v. State Bar of California*, 496 U.S. 1 (1990):

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

496 U.S. at 12–13.

Messinger's claims for money damages, and any incidental requests for declaratory and injunctive relief, are based on statements by a public official expressing his views on the use of SROs. Therefore, Messinger's attempts to base legal and/or equitable claims on McIntosh's statements must fail as a matter of law, because he is effectively seeking to control the expression of public officials concerning SROs.[18] McIntosh's statements were protected by the First Amendment right that he holds in both his official and personal capacities.[19] To conclude otherwise would impermissibly diminish the value of free speech

[18] *See, e.g., International Ass'n of Machinists & Aero. Workers v. Haley*, 832 F. Supp. 2d 612, 629 (D.S.C. 2011), *aff'd by unpublished opinion* (4th Cir. 2012)(noting that politicians, elected officials and their appointees "can be expected to take sides on virtually any issue that captures the public's attention," adding that if courts were to entertain pronouncements concerning public matters as First Amendment challenges, then virtually every interchange would be subject to a lawsuit).

[19] *See, e.g., Wood v. Georgia*, 370 U.S. 375, 394-95 (1962)(addressing a sheriff's right, both as a candidate for public office and as a private citizen, to free expression on matters of current public importance).

and deter public officials from stating their opinions to their constituents and/or colleagues, which is the type the unrestricted "government speech" described in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009):

> A government entity has the right to "speak for itself." "[I]t is entitled to say what it wishes," and to select the views that it wants to express. Indeed, it is not easy to imagine how government could function if it lacked this freedom. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." (citations omitted).

In addition, "[t]he Free Speech Clause ... does not regulate government speech." *Pleasant Grove,* 555 U.S. at 467. This principle applies to individual governmental officials as well.[20] Accordingly, if McIntosh's speech is regarded as the speech of the Town of Summerville or its Town Council, it is outside the scope of the First Amendment, because it was speech by the government itself. Conversely, if McIntosh's speech is viewed as his alone, it could not have occurred "under color of state law," and therefore cannot be the subject of a Section 1983 claim.[21] Consequently, Messinger's fifth cause of action against McIntosh was properly dismissed for the reasons set forth in the appealed order and for the reasons set forth above.

---

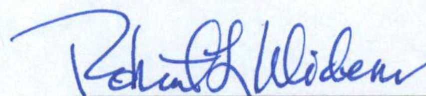
[20] *See, e.g., Pleasant Grove City, supra* (citizens cannot "insist that no one paid by public funds express a view with which [they] disagree[]").

[21] *West v. Atkins*, 487 U.S. 42, 48 (1988) (essential element of any § 1983 claim is that the defendant as acting under color of state law).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the appealed order.

Respectfully Submitted,



Robert L. Widener
Erik P. Doerring
BURR & FORMAN, LLP
Post Office Box 11390
Columbia, South Carolina 29201
(803) 799-9800

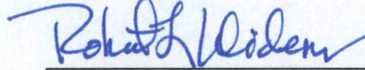
William H. Davidson, II
Kenneth P. Woodington
DAVIDSON, WREN & PLYLER, P.A.
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

ATTORNEYS FOR RESPONDENTS
Town of Summerville,
Summerville Town Council,
and William E. McIntosh, III

March 29, 2019
Columbia, SC

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



Robert L. Widener
Burr & Forman, LLP
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

1946235v1

RECEIVED
APR 03 2019
SC Court of Appeals