

IN THE SUPREME COURT OF IOWA  
NO. 18-1170  
Grundy County No. CVCV059487

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SCOTT COOPER,

Plaintiff-Appellant,

vs.

CITY OF REINBECK,  
REINBECK TELECOMMUNICATIONS UTILITY AND  
TIM JOHNSON, MAYOR OF THE CITY OF REINBECK,

Defendants-Appellees.

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APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR GRUNDY COUNTY  
THE HONORABLE BRADLEY J. HARRIS, JUDGE

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**FINAL BRIEF OF DEFENDANTS-APPELLEES**

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## **CERTIFICATE OF FILING**

I, Dustin T. Zeschke, hereby certify that I have filed the attached Final Brief and Request for Oral Argument of Appellees by electronically filing a copy with the Electronic Document Management System on the 15th day of October, 2018.

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## **CERTIFICATE OF SERVICE**

I, Dustin T. Zeschke, certify that I served a copy of this Final Brief and Request for Oral Argument of Appellees on the 15th day of October, 2018, by electronically filing a copy with the Electronic Document Management System, which will send a notice of electronic filing to the following:

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. The District Court Did Not Err in Granting Summary Judgment on Plaintiff’s Defamation Claims on the Basis of Qualified Immunity and that Certain Statements were not Defamatory.

### Cases

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## **ROUTING STATEMENT**

Defendants-Appellees agree that this case should be retained by the Court of Appeals as the issues presented can be summarily disposed of by application of existing legal principles.

### **STATEMENT OF THE CASE**

#### **I. Nature of the Case.**

This case is before the Court on appeal following an Order in favor of Defendants on Plaintiff's claims of libel & slander per se and libel & slander per quod.

#### **II. Course of Proceedings and Disposition in the District Court.**

Plaintiff, Scott Cooper (hereinafter "Plaintiff"), commenced this action by filing his Petition at Law and Jury Demand in the Iowa District Court for Grundy County on March 30, 2017. (Petition, App. 4-16). Plaintiff's Petition is pled in two counts. Count I asserts a claim for libel & slander per se. Count II asserts a claim for libel & slander per quod. (Petition, App. 4-16).

Defendants-Appellees, City of Reinbeck, Reinbeck Telecommunications Utility (hereinafter "RTU") and Mayor Tim Johnson (hereinafter collectively referred to as "Defendants") filed their Answer on April 21, 2017. (Answer, App. 17-21). Defendants' Answer generally

denied the allegations of Plaintiff's Petition and raised affirmative defenses that (1) Plaintiff's Petition fails to state a claim upon which any relief can be granted; (2) Defendants at all times were acting in a good faith belief based upon reasonable grounds and the lawfulness of their actions under the circumstances; (3) the alleged defamatory statements made by Defendants were subject to the defenses of truth and opinion; and (4) the alleged defamatory statements were subject to absolute and qualified privilege. (Answer, App. 17-21).

On April 13, 2018, Defendants moved for summary judgment on the grounds that Plaintiff's defamation per se claims failed as a matter of law on the basis Defendants did not accuse Plaintiff of a crime; that Defendants were entitled to absolute privilege for statements made in the course of a judicial proceeding; that Defendants were entitled to qualified privilege; that the alleged defamatory statements were true and/or opinion; that Plaintiff cannot establish any damages; and that Defendant Mayor Tim Johnson was not involved in the motions, minutes, and publishing of the RTU Board and City Council minutes. (Motion, App. 22-24; Statement of Material Facts and Memorandum of Authorities, App. 25-42; Appendix, App. 43-65, 4-16, 97-98, 100, 106-117, 130-133). Plaintiff filed his Resistance on April 30, 2018, in which he contended that genuine issues of material fact exist that preclude

summary judgment in favor of Defendants. (Resistance, App. 66-68; Memorandum, App. 69-73). Defendants filed their Reply on May 4, 2018. (Reply, App. 74-79; Supplemental Appendix, App. 80-87, 100-105, 120-124, 126-129).

After conducting a hearing on May 21, 2018, the district court entered its Order on June 8, 2018, granting summary judgment in favor of Defendants. The district court found that Defendants were entitled to qualified privilege and there was no evidence in the record to establish the statements were made with malice. (Order p. 3, App. 90). The district court further found that the RTU Board and Reinbeck City Council minutes did not contain defamatory statements. (Order p. 4, App. 91).

Plaintiff filed his timely Notice of Appeal on July 6, 2018. (Notice, App. 93-95).

### **STATEMENT OF THE FACTS**

Defendant, City of Reinbeck, is a municipality located in Grundy County, Iowa. (Petition ¶2, App. 4). Defendant RTU is a utility board owned and operated by the City of Reinbeck and organized pursuant to Iowa Code chapter 388. (Petition ¶3, App. 4). At all material times, Defendant, Tim Johnson, was the Mayor of the City of Reinbeck. (Petition ¶4, App. 4). Plaintiff, Scott Cooper, was an employee of RTU from 2002 to May 18,

2015. (Petition ¶¶9, 14, App. 5). From May 12 through May 15, 2015, the City of Reinbeck had a catastrophic outage of their phone system. (Cooper Depo. pp. 74-76, App. 108-110). The outage affected the elderly, fire department and 911 emergency services. (Cooper Depo. pp. 68-69, App. 106-107).

On May 18, 2015, the RTU Board voted to terminate Plaintiff's employment. The minutes provide:

Scott Cooper did not show up at the meeting for his performance review. IAMU has reported that they will help with training and making sure all the contracts are up to date and make sure the system is running correctly. Based on the recent events of the telephone outage and other issues of Scott's past performance, Dan moved to terminate Scott Cooper effective immediately, seconded by Kristin. 4 ayes. Motion carried. No compensation was awarded but may be discussed at a later date.

(May 18, 2015 RTU Minutes, App. 97-98). On June 1, 2015, the RTU Board discussed compensation of Plaintiff. The minutes provide:

Scott Cooper's compensation was discussed. Smoldt, seconded by Suender, moved to pay Cooper 3 weeks' pay at \$23.20 per hour, as long as there is no unlawful activity found in the audit, pending City Council approval, 4 ayes. Motion carried.

(June 1, 2015 RTU Minutes, App. 57; Petition ¶16, App. 5-6). The minutes were published in the Reinbeck Courier on June 12, 2015. (Petition ¶15,

App. 5). On June 1, 2015, the City Council also held a meeting and discussed the proposal made by RTU regarding compensation of the Plaintiff. The City Council denied the proposal. The minutes provide:

Kristin Schiller from the RTU Board presented their recommendation for Cooper's compensation of 3 week's pay at \$23.20 per hour as long as there is no unlawful activity found in the audit. Harrison moved to deny Cooper any compensation, seconded by Eiffler. Roll call vote: Muller – aye, Eiffler – aye, Bunz – aye, Harrison – aye. Motion carried.

(June 1, 2015 City Council Minutes, App. 58-61; Petition ¶17, App. 6). The City Council minutes were also published in the Reinbeck Courier. (June 1, 2015 City Council Minutes, App. 61).

Plaintiff subsequently filed for unemployment benefits. (Petition ¶22, App. 6). At the hearing before Iowa Workforce Development, Mayor Tim Johnson and RTU Chair Dan Smoldt submitted an exhibit into evidence detailing their position regarding Plaintiff's termination. (Unemployment Exhibit, App. 62-63).

Plaintiff filed suit alleging that the statements made in the RTU and Reinbeck City Council minutes and in the unemployment exhibit were defamatory.

## ARGUMENT

### **I. The District Court Did Not Err in Granting Summary Judgment on Plaintiff's Defamation Claims on the Basis of Qualified Immunity and that Certain Statements were not Defamatory.**

#### **A. Error Preservation, Scope of Review, and Standard of Review.**

Defendants agree that Plaintiff has preserved error and that rulings on summary judgment motions are reviewed for correction of errors at law.

#### **B. Applicable Law.**

Defamation is the invasion of another's interest in reputation or good name. *Taggart v. Drake Univ.*, 549 N.W.2d 796, 802 (Iowa 1996). Defamation generally requires a plaintiff to establish 1) publication, 2) of a defamatory statement, 3) which was false and 4) malicious, 5) made of and concerning the plaintiff, 6) which caused injury. *Bierman v. Weier*, 826 N.W.2d 436, 443 (Iowa 2013). Defamation is comprised of the twin torts of libel (written) and slander (oral). *Id.* at 444. Courts recognize two types of defamation: per se and per quod. *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 46 (Iowa 2018).

##### **1. Defamation per se.**

Iowa law recognizes that certain statements are defamatory per se, meaning they are “actionable in and of themselves without proof of malice, falsity or damage.” *Bierman* at 444. (quoting *Vojak v. Jensen*, 161 N.W.2d

100, 104 (Iowa 1968). Defamation per se statements have a natural tendency to provoke the plaintiff to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social recourse. *Id.* Examples include published statements accusing a person of being a liar, a cheater, or a thief. *Id.* Defamation per se cases have been suggested to fall into four general categories: imputation of 1) certain indictable crimes, 2) loathsome disease, 3) incompetence in occupation, and 4) unchastity. *Barreca v. Nickolas*, 683 N.W.2d 111, 116 (Iowa 2004)(citing Patrick J. McNulty, *The Law of Defamation: A primer for the Iowa Practitioner*, 44 Drake L.Rev. 639, 650-52 (1996)). If a statement is clear and unambiguous, the issue of whether the statement is libelous per se is for the court. *Kiesau v. Bantz*, 686 N.W.2d 164, 175 (Iowa 2004) (overruled on other grounds by *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016)). If the court determines a statement is libelous per se as a matter of law, the burden then shifts to the defendant to prove the statement was used and understood in a different sense. *Id.* If a statement is susceptible to two reasonable meanings, it is not libelous per se if one of the meanings is not defamatory. *Id.* When the language can reasonably be construed as having two meanings, it is up to the jury to decide whether the statement is libelous per se. *Id.* When a court determines statements are not libelous per se, the

plaintiff is then required to establish all the elements of defamation, including proof of malice and damages. *Scott v. Gen. Cas. Ins. Co.*, 2003 WL 288959 (Iowa Ct. App. 2003).

## **2. Defamation per quod.**

In defamation per quod cases, a plaintiff must generally prove all six elements detailed above, including some sort of cognizable injury such as injury to reputation. *Bierman*, 826 N.W.2d at 444. Hurt feelings alone cannot serve as a basis of a defamation action. *Id.* A statement is generally considered defamatory per quod if it is necessary to refer to facts or circumstances beyond the words actually used to establish the defamation. *Id.* Accordingly, a statement is deemed defamatory per quod where the words themselves are not considered sufficiently harmful to the plaintiff without further context. *Id.*

## **3. Absolute privilege/immunity.**

The law recognizes that some communications are privileged. Privileged communications are divided into two main classes, those absolutely privileged and those qualifiedly privileged. *Barreca*, 683 N.W.2d at 117. (See also *Bandstra*, 913 N.W.2d at 47 “Otherwise actionable statements may be nevertheless rendered nonactionable when spoken or written pursuant to a qualified or absolute privilege.”). The law affords



defendants privileges because sometimes one is justified in communicating to others, without liability, defamatory information. *Id.* The law recognizes that in certain situations a person, in order to protect his own interest or interests of others, must make statements about another which may be libelous. *Id.* When that happens, the statement is privileged and no liability attaches to its publication. *Id.* When absolute privilege exists, it affords a complete defense. *Robinson v. Home Fire & Marine Ins. Co.*, 242 Iowa 1120, 1125, 49 N.W.2d 521, 524 (1951). Even the existence of express malice does not destroy an absolute privilege. *Id.*

a. Truth and opinion.

The truth of the statement is an absolute defense. *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 221 (Iowa 1996). Opinion is also absolutely protected under the First Amendment. *Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762, 769 (Iowa 2006). With regard to opinions, because the degree to which alleged defamatory statements have real factual content can vary greatly, the Iowa Supreme Court adopted a four-part test to lead to “a proper accommodation between the competing interests in free expression of opinion and in an individual’s reputation”:

1. Whether the alleged defamatory statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous.

2. The degree to which the alleged defamatory statements are objectively capable of proof or disproof.
3. The context in which the alleged defamatory statement occurs.
4. The broader social context into which the alleged defamatory statement fits.

*Yates*, 721 N.W.2d at 769-71. The analysis is whether the alleged defamatory statement can reasonably be interpreted as stating actual facts and whether those facts are capable of being proven true or false. *Id.* at 771. Under this analysis, statements of opinion can be actionable if they imply a provable false fact or rely upon facts that are probably false. *Id.*

b. Judicial proceeding.

Iowa recognizes an absolute privilege from liability for defamation which takes place in a judicial proceeding. *Spencer v. Spencer*, 479 N.W.2d 293, 295 (Iowa 1991). “An attorney or party is absolutely privileged to publish false and defamatory statements in judicial proceedings if (1) the statements are made preliminary to, or in the institution of, or during the course and as a part of a judicial proceeding, and (2) the content of the statement is reasonably pertinent or has some relation to the judicial proceeding.” *Id.* The purpose is to encourage the open resolution of disputes by removing the threat of subsequent civil suits arising from statements made in judicial proceedings. *Id.*

#### 4. Qualified privilege/immunity.

Qualified privilege is a defeasible immunity from liability, meaning the privilege may be defeated under certain circumstances. *Barreca*, 683 N.W.2d at 117. The privilege is lost when it is abused. *Id.* Abuse occurs when a defamatory statement is published with “actual malice.” *Id.* A qualified privilege exists when (1) the statement was made in good faith; (2) the defendant had an interest to uphold; (3) the scope of the statement was limited to the identified interest; and (4) the statement was published on a proper occasion, in a proper manner, and to proper parties only. *Id.* at 118. Generally, whether a statement is qualifiedly privileged is for the court, and whether the privilege was abused for the jury. *Id.*

It is well established that members of subordinate legislative bodies, including city councils, are entitled to qualified privilege. *Id.* The Iowa Supreme Court has held:

Surveying our precedents, we find that members of subordinate legislative bodies, including city councils, are entitled to a qualified privilege for statements made in the performance of their official duties “upon any subject matter pertinent and relevant” to the occasion. *See Cowman v. LaVine*, 234 N.W.2d 114, 124–25 (Iowa 1975) (city council member entitled to qualified privilege for statements made about police chief’s criminal history, during discussion at council meeting about the auxiliary police department; “qualified privilege is adequate to protect public officials

who in good faith make bona fide statements upon any subject matter pertinent and relevant to the question on the privileged occasion”); *Mills*, 245 Iowa at 593, 63 N.W.2d at 227 (for same reasons, qualified privilege available to the mayor of Des Moines, who allegedly slandered a lawyer during meeting of city council); *see also* McNulty, 44 Drake L.Rev. at 658 (local legislators entitled to a qualified privilege; privilege conditionally extends to “statements made in the performance of their official duties”). *But see* Restatement § 590 cmt. c (under the majority rule, members of local legislative bodies are afforded an absolute privilege). Responding to a complaint about alleged indecent and illegal conduct at a local business in his capacity as a local legislative official, Alderman Nickolas is entitled to a qualified privilege for his statements about The Factory at the Committee of the Whole meeting of the Davenport City Council.

*Id.* at 118-119. Whether the privilege was abused is then determined by proof of actual malice, meaning the statement was made with knowing or reckless disregard of the truth of the statement. *Id.* at 121. Whether qualified privilege was abused is generally for the jury, however, if there is no genuine issue of material fact, the court may determine as a matter of law. *Id.* at 123. In order to submit the issue to the jury, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *Id.* The actual malice standard requires a high degree of awareness of probable falsity. *Id.*

### C. Analysis.

Plaintiff is claiming the Defendants “printed in the paper unlawful activity to an audit.” (Cooper Depo. p. 110, App. 113). Specifically, Defendant RTU published the minutes of its June 1, 2015 meeting, which provided:

Scott Cooper’s compensation was discussed. Smoldt, seconded by Suender, moved to pay Cooper 3 weeks’ pay at \$23.20 per hour, as long as there is no unlawful activity found in the audit, pending City Council approval, 4 ayes. Motion carried.

(June 1, 2015 RTU Minutes, App. 57; Petition ¶16, App. 5-6). On June 1, 2015, the City Council took up the RTU’s proposal and denied the proposal. (June 1, 2015 City Council Minutes, App. 58-61; Petition ¶17, App. 6).

Plaintiff’s defamation claim on the basis of the published minutes should be dismissed as a matter of law for a number of reasons. First, Plaintiff cannot establish libel per se. As stated above, there are generally four categories of libel per se: imputation of 1) certain indictable crimes, 2) loathsome disease, 3) incompetence in occupation, and 4) unchastity. *Barreca*, 683 N.W.2d at 116 (citing Patrick J. McNulty, *The Law of Defamation: A primer for the Iowa Practitioner*, 44 Drake L.Rev. 639, 650-52 (1996)). The statement “as long as there is no unlawful activity found” does not accuse Plaintiff of a crime. As held by the district court, “the

statements contained a condition upon which the RTU board recommended compensation should be paid to the plaintiff. Neither published record of minutes accused plaintiff of illegal activity.” (Order p. 4, App. 91).

Second, the minutes are not defamatory as held by the district court. (Order p. 4, App. 91). To establish a claim for defamation, a plaintiff must prove the falsity of the challenged statements. *Bierman*, 826 N.W.2d at 447. Plaintiff cannot prove the statement “as long as there is no unlawful activity found” is false because there is no accusation. Third, Plaintiff cannot establish some sort of cognizable injury to reputation as required under Iowa law. *Bierman*, 826 N.W.2d at 444. Hurt feelings alone cannot serve as a basis of a defamation action. *Id.* Plaintiff testified that the minutes have not damaged his reputation because no one believes it:

Q. So it hasn't damaged your reputation, obviously, because they don't believe it.

A. Right. Those individuals have, I guess, faith or belief in me.

(Cooper Depo. p. 117, App. 116). Lastly, the RTU and City Council are entitled to qualified privilege. They are required to publish the minutes of their meetings. Meetings of governmental bodies shall be held in open session unless closed sessions are expressly permitted by law. Iowa Code §21.3. Each governmental body shall keep minutes of each action taken at

each meeting. *Id.* The vote of each member shall be made public at the open session. *Id.* The minutes shall be public records open to public inspection. *Id.* The law requires the city clerk to publish the minutes in a newspaper of general circulation in the city. Iowa Code §372.13. The RTU, as a utility board, is also required to publish a statement of their meetings. Iowa Code §388.4. There is no allegation that the minutes were published outside of these requirements. Thus, RTU and the City Council should be entitled to qualified immunity.

Additionally, Mayor Tim Johnson should be dismissed on the basis he had no involvement in the motions or the minutes. By Plaintiff's own testimony:

Q. Does the mayor of the city of Reinbeck make motions at council meetings?

A. No.

Q. Does the mayor of the city of Reinbeck vote on motions at council meetings?

A. No.

Q. Does the mayor of the city of Reinbeck make amendments to motions?

A. No.

Q. Does the mayor of the city of Reinbeck publish minute Meetings?

A. No.

Q. The minutes of the meetings?

A. No.

Q. Does the mayor of the city of Reinbeck control the content of the minutes?

A. No.

(Cooper Depo. pp. 108-109, App. 111-112).

Q. Now, Tim Johnson didn't have anything to do with the publication of the RTU minutes; correct?

A. Correct.

Q. And he didn't have anything to do with the motion of the RTU board, did he?

A. No.

Q. And he didn't have anything to do with the minutes of the RTU board - - I mean, excuse me, the minutes of the city council; correct?

A. Correct.

Q. He didn't have anything to do with that motion; correct?

A. Correct.

(Cooper Depo. p. 117-118, App. 116-117). Plaintiff's defamation claim on the basis of the RTU and City Council minutes fails as a matter of law against all Defendants.



Plaintiff's second claim of defamation is on the basis of an exhibit authored by Mayor Tim Johnson and RTU Board Chair Dan Smoldt to Iowa Workforce Development. (Cooper Depo. p. 111, App. 114). Specifically, Plaintiff takes issue with three general statements contained in the unemployment exhibit (1) the statement that Plaintiff locked out other employees from access to customer files and from accessing credit card payments, (2) the statement that Plaintiff placed the former RTU Board Chair Tom Bickett's signature on a bond, and (3) the statement that Plaintiff prolonged the phone outage. (Appellant's Proof Brief p. 12). The unemployment exhibit provides in relevant part:

During his time as temporary City Clerk, Scott locked out all other employees from access to customer files, locked out all employees from accessing credit card payments...

\* \* \*

In September 2013, a RTU Bond in the amount of \$155,000 was issued. The signature on the bond was that of RTU Board Chair, Tom Bickett. Tom has denied ever signing the bond and had stated that it was not his signature. This signature was done by Scott via either a stamp or cutting and pasting a signature from a previous document.

\* \* \*

On May 12, 2015 at around 2:40 a.m. all telephone service with RTU went down....Scott knew the outage could happen because RTU was operating on a debunk system for over a year and had no backup or emergency plan; Scott did not communicate with the city on updates or progress of the outage and showed poor customer service,

even laughing at the situation at a public meeting, showed no sense of urgency; negligently handled the system.

(Unemployment Exhibit, App. 62-63). Plaintiff further asserts these allegations were communicated to the RTU Board and City Council. (Appellant's Proof Brief p. 13).

Defendants are entitled to absolute privilege for the statements contained in the unemployment exhibit provided to Iowa Workforce Development as part of Plaintiff's unemployment hearing. The statements contained in the exhibit are absolutely protected on the basis it was made as part of a judicial proceeding. *Spencer*, 479 N.W.2d at 295.

The Defendants are also entitled to absolute privilege on the basis of truth and opinion. In regards to the locked files, Mayor Johnson testified the other employees did not have access to the files they needed, and Plaintiff was the only one with access. (Tim Johnson Depo. p. 24, App. 121 "Q. And so Scott must have locked them out then? A. He was the only one with access to those files.>"). The district court held the undisputed facts established that Defendant Johnson was fully aware of access available to customer files by employees, that the files were accessible by password security and that Plaintiff had access to the password code. (Order p. 3, App.

90). “No additional investigation was necessary regarding this statement.” (Order p. 3, App. 90).

In regards to the RTU Bond signature, Tom Bickett has testified he never signed the bond. (Bickett Depo. p. 56, App. 131). “[Y]ou can see pretty obviously that somebody overlaid a copy of my signature on this document.” (Bickett Depo. p. 56, App. 131; Bond, App. 44-56). Nor was the signature made with his permission. (Bickett Depo. p. 59, App. 132). Mr. Bickett also does not have an electronic signature. (Bickett Depo. p. 71, App. 133). The bank does not recall Tom Bickett signing the documents either, nor having Tom Bickett’s electronic signature. (Affidavit of Judi L. Peters ¶¶9-10, App. 65). It was Plaintiff’s responsibility to process the bond paperwork. (Tim Johnson Depo. p. 27, App. 123).

With respect to the statements regarding the outage, it is undisputed that the RTU systems did not have a backup, despite Plaintiff testifying it was “very” important to do so. (Cooper Depo. pp. 54-55, App. 101-102). RTU did have a written disaster plan, however, Plaintiff did not know where it was located at the time of the outage. (Cooper Depo. p. 56, App. 103). Plaintiff was the boss and ran the RTU, yet did not know where the plan was located. (Cooper Depo. pp. 56, 66, App. 103, 105). He testified that the backup plan was probably still in boxes from when he got evicted back in

January of 2014. (Cooper Depo. pp. 56-57, App. 102-104). For 18 months, Plaintiff thinks he had the disaster plan in one of five boxes, but he never took the time to locate it. (Cooper Depo. p. 57, App. 104). Thus, the statements contained in the exhibit to Iowa Workforce Development were factually true or the opinion of the Mayor and the RTU Board Chair about how Plaintiff handled the outage.<sup>1</sup>

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<sup>1</sup> The Administrative Law Judge in the unemployment hearing also held under her Findings of Fact:

[Plaintiff] acknowledged the system had faults and should have probably been updated as they were just hoping something like this would not happen. After the Board meeting, the Mayor contacted the Iowa Association of Municipal Utilities (IAMU) to see if they could offer assistance with the outage. The claimant had been given the number for the IAMU the previous day but did not contact it as he felt the issues were being resolved and he did not think this was a catastrophic situation which would require their involvement.

\* \* \*

Following the outage, the Board determined the claimant was not properly doing his job. The Board had learned there was no emergency plan in place in the event of an outage. It had also learned the employer was providing service on old equipment. The board also felt that the claimant's public response to the outage was not appropriate. As a result, the claimant was terminated on May 18, 2015.

(Administrative Law Judge Decision, App. 84).

Accordingly, all of the statements were true and/or opinion based upon the facts known and thus absolutely privileged.

The statements contained in the unemployment exhibit would also be entitled to qualified privilege on the basis that the Defendants had an interest to uphold, the statements were limited to that identified interest, and the statements were made in a proper manner and to proper parties. *Barreca*, 683 N.W.2d at 117. Plaintiff argues the statements contained in the letter were also communicated to the City Council and RTU Board, and thus do not fall under absolute privilege for judicial proceedings. (Appellant's Proof Brief p. 13). As an initial matter, Plaintiff's argument misstates the record. Plaintiff's cited evidentiary support provides that Mayor Johnson testified he believes he passed on only the allegation that Plaintiff stamped or cut and pasted Tom Bickett's signature on to the RTU Board. (Tim Johnson's Depo. pp. 30-32, App. 126-128). Mayor Johnson also reported this conduct to the City Council and the city attorney. (Tim Johnson Depo. pp. 31-33, App. 127-129). Communicating this kind of activity by an employee to the relevant boards and the city attorney is appropriate in carrying out his duty

as mayor and entitled to qualified privilege.<sup>2</sup> The Iowa Supreme Court has held:

...members of subordinate legislative bodies, including city councils, are entitled to a qualified privilege for statements made in the performance of their official duties “upon any subject matter pertinent and relevant” to the occasion.

*Barreca*, 683 N.W.2d at 118-19. Generally, whether a statement is qualifiedly privileged is for the court, and whether the privilege was abused for the jury. *Id.* at 118.

Plaintiff acknowledges that “[o]rdinarily, Tim Johnson would be entitled to qualified privilege as mayor of the City of Reinbeck for duties that are pertinent and relevant to his duties as mayor.” (Appellant’s Proof Brief p. 14). However, Plaintiff argues Defendants are not entitled to qualified privilege in this case because the statements were made with actual malice. To support the malice allegation, Plaintiff argues the Mayor did not make any investigation or make any inquiry into the allegations regarding Plaintiff stamping or cutting and pasting Tom Bickett’s signature. Plaintiff provides no evidentiary support for such statements, most likely because

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<sup>2</sup> Plaintiff has no evidence that the unemployment exhibit was published to any member of the public. (Cooper Depo. p. 114, App. 115). Accordingly, it was limited in scope to the relevant parties.

such a statement grossly misrepresents the testimony in this case. Mayor Johnson testified he did discuss the signature issue with Tom Bickett, who told him it was not his signature. (Tim Johnson Depo. p. 26, App. 122). Mayor Johnson also looked at the document and testified it appears to him that the signature was manufactured. (Tim Johnson Depo. pp. 26-27, App. 122-123). Mayor Johnson further believes that he talked to the bank about the signature issue. (Tim Johnson Depo. p. 28, App. 124). Accordingly, Plaintiff's only argument that Defendants are not entitled to qualified immunity on the basis of malice is without any factual support. In *Jones v. University of Iowa*, 836 N.W.2d 127 (Iowa 2013), the Iowa Supreme Court held that even if they were to assume for the sake of argument some of the alleged defamatory statements were false, Plaintiff failed to identify a single piece of record evidence suggesting that the Defendant acted with reckless disregard for the truth at any stage of the investigation or in the preparation of its report. *Jones v. University of Iowa*, 836 N.W.2d 127, 150 (Iowa 2013). To the contrary, the record in *Jones* demonstrated the Defendant's conclusions in his report were based on a thorough and deliberate investigation, and thus the record failed to show there is a genuine issue of fact on the question of actual malice. *Id.*

Similarly, the district court held “[n]o evidence exists from which the court could determine that defendant Johnson failed to investigate the truthfulness of those statements which plaintiff alleges are defamatory.” (Order p. 4, App. 91). The district court further held that there was no evidence that Defendant Johnson was acting outside the scope of his employment as Mayor regarding issues that affected the citizens of the City of Reinbeck. The statements were also limited to those individuals and entities which were necessary to protect the interest of the citizens of the City of Reinbeck. (Order p. 4, App. 91).

The statements contained in the unemployment exhibit are entitled to absolute privilege on the basis they were made in a judicial proceeding, are true and/or opinion. To the extent the statements were communicated to the City Council and RTU Board, such statements would be entitled to qualified immunity on the basis they were limited in scope and in the interest of the City discussing an issue with an employee.



## CONCLUSION

The district court did not err in granting summary judgment, and the district court's judgment in favor of Defendants should be affirmed.

Respectfully submitted,

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## REQUEST FOR ORAL ARGUMENT

Defendants-Appellees, City of Reinbeck, Reinbeck Telecommunications Utility, and Tim Johnson, Mayor of the City of Reinbeck request to be heard orally on the submission of this appeal.

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## **CERTIFICATE OF COST**

I, Dustin T. Zeschke, hereby certify that the actual cost of reproducing the necessary copies of the preceding Final Brief and Request for Oral Argument of Appellees, consisting of 35 pages was \$1.80.

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