IN THE SUPREME COURT
STATE OF ARIZONA

JAVAN "J.D." and HOLLY MESNARD, husband and wife, Petitioners, v. . HONORABLE THEODORE CAMPAGNOLO, Respondent, DONALD M. SHOOTER, Respondent-Real Party-In-Interest.	No. CV-20-0209-PR Court of Appeals (Div. One) No. 1 CA-SA-20-0125 Maricopa County Superior Court Case No. CV2019-050782

RESPONDENT-REAL PARTY-IN-INTEREST DONALD M. SHOOTER'S OPPOSITION TO PETITION FOR REVIEW OF DECLINED JURISDICTION OF SPECIAL ACTION

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INTRODUCTION

Respondent-Real Party-In-Interest Donald M. Shooter ("Shooter") submits this Opposition to Mesnard's Petition For Review of the July 13, 2020 Decision of the Court of Appeals declining jurisdiction of Mesnard's Petition for Special Action. Mesnard's Petition for Review to this Court should be denied. Questions of pure law regarding legislative immunity are not presented; there is no issue of statewide importance involved. The Court of Appeals correctly declined jurisdiction of Mesnard's Special Action, which had essentially sought an interlocutory appeal of the Defendant Superior Court's denial in part of the Mesnard Petitioners' motion to dismiss, and Mesnard's Special Action sought to pursue that interlocutory appeal (i) without compliance with Rule 3 of the Arizona Special Actions Rules of Procedures limiting the questions that may be presented in a special action (failure of duty, exceeded jurisdiction or arbitrary and capricious) and (ii) without compliance with the rule that on a motion to dismiss, the Court is to assume the truth of the well pleaded factual allegations of the Amended Complaint and the truth of the reasonable inferences from those allegations. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008).

What the Amended Complaint (APP.V2 021-135) shows is a much different set of facts than those asserted in the Petition for Special Action made to the Court of Appeals and in the Petition for Review made to this Court. The Amended

Complaint's pleaded facts prompted the Respondent Superior Court to deny application of the absolute legislative immunity to the defamation claim and the civil conspiracy and respondeat superior claim related to defamation. (APP. 021-036.)

It was not a proper request by the Mesnard Petitioners to urge the Court of Appeals to accept jurisdiction of a special action so that the Mesnard Petitioners could have the Court of Appeals address legal issues without compliance with Rule 3 of the Arizona Special Actions Rules of Procedures and without adhering to the basic legal standard governing motions to dismiss.

SPECIAL ACTION JURISDICTION

While the Arizona Revised Statutes at § 12-120.21(A)(4) provides that "[t]he court of appeals shall have: . . . Jurisdiction to hear and determine petitions for special actions brought pursuant to the rules of procedure for special actions," the Petition for Special Action here did not comply with Rule 3 of the Arizona Special Actions Rules of Procedures. Rule 3 provides:

> The only questions that may be raised in a special action are:
>
> **(a)** Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
>
> **(b)** Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
>
> **(c)** Whether a determination was arbitrary and capricious or an abuse of discretion.

The State Bar Committee Note to Rule 3 commented:

> The special action requests extraordinary relief, and acceptance of jurisdiction of a special action is highly discretionary with the court to which the application is made. A plaintiff, in addition to the showing required in all lawsuits that he has standing and that the matter is subject to judicial review, must always carry the burden of persuasion as to discretionary factors.

The Mesnard Petitioners' argument did not fit the limitations of Rule 3. What the Respondent Superior Court did was to consider carefully Mesnard's absolute legislative immunity argument and concluded that an absolute legislative immunity did not cover what the Amended Complaint pleaded concerning Mesnard's surreptitiously editing of the Sherman & Howard report to remove exculpatory information about Shooter and what the Amended Complaint pleaded concerning Mesnard's issuing of a knowingly false press release to attack a Shooter. (APP. 21-36.)

COUNTER-STATEMENT OF ISSUES

1. Whether the Petition for Special Action complied with Rule 3 of the Arizona Special Actions Rules of Procedures in disputing the Respondent Superior Court's decision that an absolute legislative immunity does not cover what the Amended Complaint pleaded concerning Mesnard's surreptitiously editing of a draft Sherman & Howard report by Mesnard to remove exculpatory information about

Shooter and concerning Mesnard's issuing of a knowingly false public press release to attack Shooter.

2. Whether the Petition for Special Action complied with Rule 3 of the Arizona Special Actions Rules of Procedures in disputing the Respondent Superior Court's decision that an absolute legislative immunity does not cover what the Amended Complaint pleaded concerning Mesnard's surreptitiously editing of a draft Sherman & Howard report by Mesnard to remove exculpatory information about Shooter.

3. Whether the Petition for Special Action complied with Rule 3 of the Arizona Special Actions Rules of Procedures in disputing the Respondent Superior Court's discretionary decision not to convert the Mesnard Petitioners' motion to dismiss into one for summary judgment and consider the Mesnard Petitioners' argument about the Notice of Claim.

THE PLEADED FACTS

The Statement of Facts in the Petition for Special Action and in the Petitioner for Review here is not what is pleaded in the Amended Complaint. As noted above in the Introduction, on a motion to dismiss, the Court is to assume the truth of the well pleaded factual allegations of the Amended Complaint and the truth of the reasonable inferences from those allegations. The facts that frame a Petition for Special Action and a Petition for Review must be what is pleaded in the Amended

Complaint and were presented before Defendant Superior Court in considering the motion to dismiss. The Amended Complaint's factual narrative of events included the following (APPV2-021-135):

(i) on November 2, 2017, the Governor's Chief of Staff Kirk Adams was informed by then Representative Shooter that he planned to use his subpoena power as Chair of the House Appropriations Committee to investigate irregular state procurement practices;

(ii) on November 7, 2017, Representative Ugenti-Rita, the girlfriend of the Governor's Deputy Chief of Staff Brian Townsend, accused Shooter of sexual harassment;

(iii) Mesnard, then Speaker of the House, pressured Shooter to resign, but Shooter asked for an investigation of Ugenti-Rita's allegations as well as the conduct of Ugenti-Rita and Representative Rebecca Rios;

(iv) in response, for the first time in the Arizona Legislature's and United States history and in contravention of parliamentary norms, rather than convene the Ethics or Special Committee to evaluate conduct complaints against Representatives Shooter, Ugenti-Rita and Rios, Mesnard and his staff hired, on November 15, 2018, the private firm Sherman & Howard to conduct an investigation into the allegations against Shooter, Ugenti-Rita and Rios -- Sherman & Howard has since refused to

disclose its retainer letter and Mesnard has approved the payment of Sherman & Howard of over $250,000 for the investigation;

(v) throughout the investigation, Mesnard suspended Shooter from his position as Chairman of the House Appropriations Committee and repeatedly asked Shooter to resign (the suspension eliminated Shooter's ability to issue subpoenas to investigate corruption);

(vi) In November 2017, Mesnard unilaterally created, without the required vote of members, a "zero-tolerance" policy related to sexual harassment that was applied only to Shooter retroactively and not to Ugenti-Rita or Rios;

(vii) the Sherman & Howard report would state "the investigation was conducted in light of the House's very expansive zero tolerance Policy, as opposed to whether someone might be able to state and prove a claim for workplace harassment, discrimination or hostile work environment in a court or administrative proceeding";

(viii) a copy of a draft investigation report was provided to Mesnard nine days before Mesnard released to the public what Mesnard deemed the final report and during those nine days, Mesnard changed the report to remove exculpatory information about Shooter -- hence, exculpatory information about Shooter made known to the Sherman & Howard investigation team was not reported and not released to the public;

(ix) Even Sherman & Howard's investigation report determined that a majority of the allegations against Shooter did not constitute sexual harassment even under Mesnard's specially created "zero-tolerance" policy;

(x) Sherman & Howard wrote in a conclusory manner that there was no credible evidence that Ugenti-Rita had violated the sexual misconduct policy, even though a known victim of Ugenti-Rita provided testimony, photographs and corroborating witnesses;

(xi) on February 1, 2018, Mesnard issued a press release attacking Shooter and had House members vote on expulsion just four days after the release of the Sherman & Howard report without providing the promised opportunity for Shooter to respond in writing to the report and without providing an opportunity to Shooter to defend himself in a hearing before his peers;

(xii) Kelly Townsend, the representative who advocated on the House floor to expel Shooter from the Arizona House, subsequently stated on the floor of the Arizona House that "in retrospect it was the wrong process to remove Shooter without an ethics hearing"; and

(xiii) the requirement of due process and the hearing process by an ethics committee of elected peers is supported by the National Council of State Legislatures.

SUMMARY OF PROCEDURAL HISTORY

Shooter brought suit in Superior Court, but the case was removed to federal district court, which in turn dismissed the federal 42 U.S.C. § 1983 due process claim and remanded the state law claims back to the Superior Court (APP. 119-133). While Shooter took an appeal of the dismissal of the 42 U.S.C. § 1983 claim to the U.S. Court of Appeals for the Ninth Circuit (*sub judice* after oral argument), Shooter has been litigating state law claims in the Superior Court.

In response to the state court Defendants' motion to dismiss Shooter's Amended Complaint, the Respondent Superior Court (i) granted the motion as to the claims for denial of state constitutional due process claim and the civil conspiracy and respondeat superior claim related to denial of state constitutional due process and (ii) denied the motion as to the defamation claim and the civil conspiracy and respondeat superior claim related to defamation. (APP. 021-036.) The Mesnard Petitioners then brought their Petition for Special Action, but the Court of Appeals declined jurisdiction.

ARGUMENT

The Mesnard Petitioners begin their Argument by asserting the breadth and importance of the Arizona legislative immunity, citing such cases as *Tenney v. Brandhove*, 341 U.S. 367 (1951), which involved a civil rights suit brought by Brandhove against members of the California Legislature and the U.S. Senate

Committee on Un-American Activities for calling Brandhove for testimony before them -- action which was ruled to be within the sphere of legitimate legislative activities. This case, however, is vastly different. The core defect to the Argument of the Petition for Special Action and now the Petition for Review is that it does not address the pleaded facts that led Respondent Superior Court not to apply legislative immunity to the well pled facts in the Amended Complaint: Mesnard's surreptitious editing of a draft Sherman & Howard report to remove exculpatory information about Shooter and Mesnard's issuing of a press release to attack and defame Shooter for knowingly sending a letter with false information, jeopardizing the anonymity of a victim of sexual harassment and engaging in a clear act of retaliation and intimidation.

I.

LEGISLATIVE IMMUNITY DOES NOT APPLY TO MESNARD'S EDITING OF THE SHERMAN & HOWARD REPORT

The Petition for Review argues that Mesnard has an absolute immunity for a privileged publication of the Sherman & Howard report. But the Petition does not address the critical point that Mesnard's surreptitious editing of the Sherman & Howard report to remove exculpatory information about Shooter was not within the "sphere of legislative activity" to which the immunity applies. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975).

Legislative privilege "stems from the doctrine of legislative immunity, which in turn springs from common law and is embodied in the Speech or Debate Clause of the United States Constitution and the principles underlying our government's separation of powers." *Arizona Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 136, 75 P.3d 1088, 1094 (Ct. App. 2003). Legislative privilege exists for state legislators acting in a legislative capacity in a similar way as the Speech or Debate Clause bars members of Congress acting in their "legitimate legislative sphere" from civil liability or criminal prosecution; in Arizona, this legislative immunity has been embodied in the State Constitution. 206 Ariz. at 136-137. *See* Arizona Legislative Manual, pp. 26-27 (2003) (listing activities that are legislative).

There are, however, recognized limits to legislative immunity or privilege:

> This legislative privilege does not extend to cloak all things in any way related to the legislative process. Rather, the privilege extends to matters beyond pure speech or debate in the legislature only when such matters are an integral part of the deliberative and communicative processes relating to proposed legislation or other matters placed within the jurisdiction of the legislature, when necessary to prevent indirect impairment of such deliberations. The privilege does not apply to "political" acts routinely engaged in by legislators, such as speech-making outside the legislative arena and performing errands for constituents. Similarly, the privilege does not apply to the performance of "administrative" tasks.

206 Ariz. At 137 (internal citations omitted).

Furthermore, Arizona courts do not favor immunity from common law liability. *Sanchez v. Coxon,* 175 Ariz. 93, 97, 854 P.2d 126, 130 (1993). As the

Supreme Court of Arizona has stated, "lack of responsibility can breed lack of care." 175 Ariz. at 97, 854 P.2d at130. This Court acknowledges that there are certain situations when unrestrained speech is necessary, legislative debate being one of them. 175 Ariz. at 97, 854 P.2d at 130. For this reason, the Court has held that a "legislator speaking to a legislative body during a formal legislative meeting" was privileged, regardless of the statements said at that meeting, because "it is the *occasion* of the speech, *not the content,* that provides the privilege." 175 Ariz. at 97, 854 P.2d at 130.

Given the recognized limitations on legislative immunity, Respondent Superior Court's decision not to apply legislative immunity to Mesnard's surreptitious editing of the Sherman & Howard report to remove exculpatory information about Shooter was solidly justified. Mesnard was not performing a legislative function but rather was engaged in an attack on Shooter. Further, it certainly cannot be said that Respondent Superior Court had a duty to apply legislative immunity to Mesnard's surreptitious editing of the Sherman & Howard report to remove exculpatory information about Shooter, which means that the Petition does not satisfy Rule 3 of the Rules of Procedure for Special Actions.

The Petition for Review attempts to escape this conclusion by casting the issue as one of Mesnard's release of the Sherman & Howard report. But that was not what caused the non-application of immunity.

II.

LEGISLATIVE IMMUNITY DOES NOT APPLY TO MESNARD'S PRESS RELEASE

The Petition argues that the Mesnard press release was protected by legislative immunity. Again, the Petition does not address the critical point that Mesnard's press release not about legislative activities, but rather to attack Shooter politically with false statements -- that Shooter knowingly sent a letter with false information, jeopardized the anonymity of a victim of sexual harassment and engaged in a clear act of retaliation and intimidation.

A. *Brewster*: Political Tasks Versus Legislative Tasks.

The U.S. Supreme Court has noted certain tasks that are political in nature and thus outside of the purely legislative tasks of legislators, including "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *United States v. Brewster*, 408 U.S. 501, 512 (1972). As the U.S. Supreme Court notes, these activities are "performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections." 408 U.S. at 512. While these are legitimate actions for a legislator to perform, the U.S. Supreme Court has held that they are not protected by the privilege. 408 U.S. at 512.

Given the recognized limitation on legislative immunity, Respondent Superior Court's decision not to apply legislative immunity to Mesnard's press release political attack on Shooter was amply justified. Mesnard was not performing a legislative function reporting on legislative developments, but rather was engaged in a political attack on Shooter. Respondent Superior Court did not have a duty to apply legislative immunity to Mesnard's political attack on Shooter in the press release, which means that the Petition does not satisfy Rule 3 of the Rules of Procedure for Special Actions.

B. Inapposite Cases Relied Upon In The Petition.

To avoid the conclusion that legislative immunity does not apply to the Mesnard press release politically attacking and defaming Shooter, the Petition cites three inapposite cases.

1. *Barr v. Mateo.*

Barr v. Mateo, 360 U.S. 564 (1959), was a 5-4 decision in which a press release issued by an agency Acting Director announcing the suspension of certain employees was treated by the (bare) U.S. Supreme Court majority as within the line of duty and thus immune from a defamation suit. The primary issue that split the Court, however, was whether the complained of press release was within the line of duty of the Acting Director -- the dissenters emphatically said the complained of press release was not within the line of duty of the Acting Director. *Barr v. Matteo*,

360 U.S. 564, 576 (1959) (Black, J., dissenting); *Barr v. Matteo*, 360 U.S. 564, 579 (1959) (Warren, J., dissenting*). Barr v. Matteo* is not applicable for three reasons.

First, the Petition cannot treat a press release by a Government Director or legislator as privileged as a matter of law. Mesnard's argument is based not upon the allegations of the Amended Complaint asserting how false and out of line was the press release (APP.V2 021-135: Am. Cmplt. ¶¶ 175-183), but upon Mesnard's own "spin" about the press release, which is not the stuff of a motion to dismiss addressed to the sufficiency of the pleading.

Second, *Barr v. Matteo* dealt with privilege for an executive officer, not a legislative officer. As the dissent of then Chief Justice Warren points out, executive immunity and legislative immunity are two different animals. 360 U.S. at 579-584 (Warren, J., dissenting*)*.

Third, Arizona state courts have expressly declined to follow *Barr v. Matteo*. In *Goddard v. Fields*, 214 Ariz. 175, 177, 150 P.3d 262, 264 (Ct. App. 2007), a case involving a defamatory press release, a general rule of qualified privilege for executive officials was adopted, "expressly reject[ing] the rationale supporting absolute immunity for executive officials articulated in *Barr v. Matteo*."

2. *Abercrombie v. McClung.*

Abercrombie v. McClung, 55 Haw. 593, 525 P.2d 594 (Haw. Sup. Ct. 1974), involved a legislator's elaboration of remarks made on the State Senate floor in

response to a press question about what was said on the State Senate floor. That case is clearly factually inapposite. A legislator's elaboration of remarks made on the State Senate floor concerns a legislator's actions as a legislator and was not a discretionary political attack.

3. *State ex rel. Oklahoma Bar Ass'n v. Nix*.

State ex rel. Oklahoma Bar Ass'n v. Nix, 1956 OK 95, 295 P.2d 286 (1956), was an inapposite disciplinary case in which it was determined that the appropriate professional disciplinary sanction was a reprimand, not a suspension, and that while the remarks of the respondent Nix made in a formal Senate meeting were ruled privileged, the televised remarks of the respondent Nix were ruled not privileged.

III.

THE NOTICE OF CLAIM ISSUE WAS NOT FOR A SPECIAL ACTION

The Mesnard Petitioner cites cases involving a Notice of Claim outside the context of a Petition for Special Action, which misses the point that the Notice of Claim issue was not for this special action.

The Respondent Superior Court had declined to accept Mesnard's request to consider the Notice of Claim in a Rule 12 motion or to treat the motion as one for partial summary judgment -- action that was within the discretion of the Respondent Superior Court and not a failure of duty or constituting arbitrary and capricious action within the meaning of Rule 3 of the Arizona Special Actions Rules of

Procedures. Indeed, Mesnard's request to the Respondent Superior Court that this part of his motion be summarily treated as one for partial summary judgment was out of line with Rule 12 of the Arizona Rules of Civil Procedure giving a party opposing a motion converted to one for summary judgment the opportunity to submit an evidentiary record in opposition.

Further, the Notice of Claim here (APP.V1 124-140) stated Mesnard "defamed" Shooter "in the media" and Defendants acted "in concert" engaging in "character assassination." A claimant is not required to provide an "exhaustive list of facts." *Backus v. Arizona*, 220 Ariz. 101, 107, 203 P.3d 499, 505 (2009).

CONCLUSION

For the reasons stated above, the Court should decline review of the Court of Appeals' declining jurisdiction of Mesnard Petitioners' Special Action and should order such other relief as deemed just and proper.

Dated: August 26, 2020

Respectfully submitted,
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