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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
# ARIZONA COURT OF APPEALS
## DIVISION ONE

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JEKAN THANGAVELAUTHAM, PHD, *Plaintiff/Appellant*,

*v.*

CRAIG HARDGROVE, *et al.*, *Defendants/Appellees*.

No. 1 CA-CV 17-0462
FILED 7-26-18

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Appeal from the Superior Court in Maricopa County
No. CV2016-055009
The Honorable Aimee L. Anderson, Judge *Retired*

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

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COUNSEL

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By Marshall A. Martin
*Counsel for Plaintiff/Appellant*

Arizona Attorney General's Office, Phoenix
By Ann R. Hobart
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**MEMORANDUM DECISION**

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Jon W. Thompson and Judge James P. Beene joined.

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**S W A N N**, Judge:

**¶1** Jekan Thangavelautham appeals the superior court's dismissal of his defamation complaint. Thangavelautham argues that the superior court erred by ruling that Craig Hardgrove's statements are protected by both conditional privilege under A.R.S. § 41-621(J) and common-law qualified privilege, and that the statements were not made with objective malice. Though we hold that the court correctly found that Hardgrove's statements are protected by both privileges, we also hold that the allegations of malice in the complaint were sufficient to withstand a motion to dismiss. For the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings.

**FACTS AND PROCEDURAL HISTORY**

**¶2** Thangavelautham was employed by the Arizona Board of Regents ("ABOR") at Arizona State University as the chief engineer on the LunaH-Map Project ("Project"). A Grant and Cooperative Agreement ("Agreement") with the National Aeronautics and Space Administration ("NASA") funded the Project. Hardgrove was employed by ABOR as the Project's principal investigator. The terms of the Agreement required that Hardgrove obtain approval from NASA before removing an employee from the Project. On December 15, 2015, Hardgrove provided Thangavelautham with a letter dismissing him from the Project. Hardgrove informed Thangavelautham that his dismissal letter had also been mailed to Janice Buckner, a NASA executive.

**¶3** In December 2016, Thangavelautham filed a complaint against Hardgrove and ABOR, alleging that Hardgrove had defamed him by making "untrue statements" and disseminating them to a third-party—Buckner. Hardgrove and ABOR filed a motion to dismiss for failure to state a claim under Ariz. R. Civ. P. ("Rule") 12(b)(6), arguing that Hardgrove's statements to NASA were protected by both a conditional privilege under A.R.S. § 41-621(J) and common-law qualified privilege. Thangavelautham filed an amended complaint and a response to the motion to dismiss. Hardgrove and ABOR then moved to dismiss the amended complaint. The

court dismissed the amended complaint with prejudice. Thangavelautham appeals.

## DISCUSSION

**¶4** We review the dismissal of a complaint for the failure to state a claim under Rule 12(b)(6) de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). Dismissal for failure to state a claim is warranted "only if 'as a matter of law [ ] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible to proof.'" *Id.* at 356, ¶ 8.

**¶5** Arizona follows a notice pleading standard. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 6 (2008). In determining whether a complaint states a claim upon which relief can be granted, we look only to the pleading itself and treat well-pled allegations as true. *Id*. at ¶ 7.

**¶6** The parties agree that Hardgrove is a state employee. At issue is whether Hardgrove's statements in the letter to NASA are protected by conditional or qualified privilege, and whether Hardgrove made the statements with the objective malice that would defeat those privileges. We address these issues in turn.

### I. HARDGROVE'S STATEMENTS ARE PROTECTED BY QUALIFIED AND CONDITIONAL PRIVILEGE.

**¶7** The court correctly held that Hardgrove's statements are protected by qualified privilege and conditional privilege under § 41-621(J).[1] Under § 41-621(J), "[a] state officer . . . is not personally liable for any injury or damage resulting from his act or omission in a public official capacity where the act or omission was the result of the exercise of the discretion vested in him if the exercise of the discretion was done in good faith without wanton disregard of his statutory duties." The term "privilege" is often used to describe protection from liability. *Carroll v. Robinson*, 178 Ariz. 453, 457 (App. 1994). Accordingly, "qualified immunity is parallel to conditional privilege particularly regarding defamatory communications." *Id.*

**¶8** "One's reputation is a significant, intensely personal possession that the law strives to protect" through the common law of

[1] ABOR is a state agency. *City of Tempe v. Ariz. Bd. of Regents*, 11 Ariz. App. 24, 25 (1969). The state is immune to the same extent as Hardgrove because his defense is not a personal one, but, rather, relates to his role as an agent of the state. *Carroll v. Robinson*, 178 Ariz. 453, 457 (App. 1994).

defamation. *Chamberlain v. Mathis*, 151 Ariz. 551, 555 (1986). But the law also grants government officials privilege for conduct within the scope of their employment. "[I]n a defamation case, qualified immunity will protect a public official if the facts establish that a reasonable person, with the information available to the official, 'could have formed a reasonable belief that the defamatory statement in question was true and that the publication was an appropriate means for serving the interests which justified the privilege.'" *Id.* at 559 (citation omitted). "Qualified immunity protects state officers and employees from liability for the good faith exercise of their discretionary authority." *Carroll*, 178 Ariz. at 456. "Because immunity protects official conduct, the allegation that [the defendant] was acting in his capacity as [a government official] is sufficient to support an immunity defense." *Chamberlain*, 151 Ariz. at 554; *see also Lewis v. Oliver*, 178 Ariz. 330, 337 (App. 1993) (holding that the defendant was a public official whose statements to his supervisor concerning transportation providers were protected by conditional privilege). Hardgrove's status as a government official who acted in that capacity was sufficient to support a defense under the common-law qualified privilege and the analogous conditional privilege under § 41-621(J).

## II. THE COMPLAINT'S ALLEGATIONS CONCERNING MALICE ARE SUFFICENT TO SURVIVE A MOTION TO DISMISS UNDER RULE 12(b)(6).

**¶9** At issue is whether Hardgrove abused his qualified or conditional privilege based on the allegations made in the complaint. The court's determination that a party's actions or statements are protected by a qualified privilege does not provide a defendant with a complete defense. A plaintiff may establish that the defendant is not entitled to the protection of the privilege by showing that the defendant "knew or should have known that he was acting in violation of established law or acted in reckless disregard of whether his activities would deprive another person of their rights." *Chamberlain*, 151 Ariz. at 558. "The plaintiff must establish proof of such malice by an objective standard." *Pinal Cty. v. Cooper*, 238 Ariz. 346, 350 (App. 2015). Malice is a question of fact for the jury to decide. *Miller v. Servicemaster By Rees*, 174 Ariz. 518, 520 (App. 1992).

**¶10** In notice pleading jurisdictions like Arizona, the requirements for a complaint are minimal—Rule 8(a)(2) requires only that the complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." Thangavelautham's amended complaint alleges that Hardgrove made multiple "untrue representations," several of which are as follows. First, Hardgrove falsely represented that

Thangavelautham "had communicated to the third party . . . the wrong delta-v numbers required to achieve lunar orbit," when "Defendant Hardgrove knew that Plaintiff was not responsible for these numbers, based on an email exchange earlier in 2015." Second, Hardgrove falsely claimed that Thangavelautham "insisted that 'key aspects' of the propulsion budget be carried out as 'risk reduction activity'" despite Thangavelautham specifically informing Hardgrove "in writing months earlier that the 'risk reduction activity' funds were required, not optional, which advice was immediately ignored by Defendant Hardgrove in his proposal to NASA." Third, Hardgrove falsely claimed that Thangavelautham lacked "proper accommodation and budget in the proposal for the [altitude] control system thrusters, when it was Defendant Hardgrove that prepared the budget."

**¶11** Assuming them to be true, as we must, these allegations are sufficient to survive a motion to dismiss under Rule 12(b)(6). Thangavelautham's defamation claim presents facts susceptible to proof that Hardgrove's statements to NASA were made with objective malice—i.e., knowledge of the statements' falsity or reckless disregard for their truth. If he presents evidence from which a reasonable jury could find that Hardgrove acted with objective malice, the privilege must yield. We express no opinion on the merits of these allegations, but *Cullen* requires that Thangavelautham receive the opportunity to have the question of privilege decided on the evidence rather than the pleadings.

## CONCLUSION

**¶12** We affirm the superior court's determination that a qualified privilege exists under statute and common law. We reverse the dismissal of Thangavelautham's defamation claim, and remand for further proceedings.

COURT OF APPEALS
STATE OF ARIZONA

AMY M. WOOD • Clerk of the Court
FILED: JT