PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2382

THOMAS M. CANNON; JESSE M. CONNER; DONALD M. KOONS; NICHOLAS M. TERRELL,

Plaintiffs – Appellees,

v.

CALVIN R. PECK, JR., in his individual capacity; CAROLINE MITCHELL, in her individual capacity,

Defendants – Appellants,

and

VILLAGE OF BALD HEAD ISLAND, NORTH CAROLINA,

Defendant.

No. 21-1061

THOMAS M. CANNON; JESSE M. CONNER; DONALD M. KOONS; NICHOLAS M. TERRELL,

Plaintiffs – Appellants,

v.

VILLAGE OF BALD HEAD ISLAND, NORTH CAROLINA; CALVIN R. PECK, JR., in his individual capacity; CAROLINE MITCHELL, in her individual capacity,

Defendants – Appellees.

Appeals from the United States District Court for the Eastern District of North Carolina, at Wilmington. Malcolm J. Howard, Senior District Judge. (7:15−cv−00187−H−KS)

Argued: January 25, 2022 Decided: June 8, 2022

Before MOTZ, AGEE, and WYNN, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge Wynn wrote the opinion, in which Judge Motz and Judge Agee joined.

ARGUED: Norwood Pitt Blanchard, III, CROSSLEY MCINTOSH COLLIER HANLEY & EDES PLLC, Wilmington, North Carolina, for Appellants/Cross-Appellees. Samuel B. Potter, HODGES, COXE & POTTER, LLP, Wilmington, North Carolina, for Appellees/Cross-Appellants. **ON BRIEF:** Bradley A. Coxe, HODGES, COXE & POTTER, LLP, Wilmington, North Carolina, for Appellees/Cross-Appellants.

WYNN, Circuit Judge:

In August 2014, Plaintiffs Thomas Cannon, Jesse Conner, Donald Koons, and Nicholas Terrell were fired from their Department of Public Safety positions with the Village of Bald Head Island ("the Village"), a municipality located in Brunswick County, North Carolina. Following their departures, Village employees published Plaintiffs' termination letters and department separation affidavits which accused Plaintiffs of violating certain employee policy provisions.

Plaintiffs filed suit alleging numerous claims. As relevant here, they brought defamation claims under North Carolina state law against the Village; Calvin Peck, Jr., the Village Town Manager; and Caroline Mitchell, the Village Director of Public Safety. The district court dismissed the defamation claims against the Village but found Peck and Mitchell liable for defamation for publishing the termination letters and separation affidavits, respectively. Defendants appealed and Plaintiffs cross-appealed as to the dismissal of the Village.

For the reasons discussed below, we affirm the district court's dismissal of all defamation claims against the Village and its judgment against Mitchell for defamation stemming from the publication of the separation affidavits. However, we reverse the district court's judgment against Peck for defamation arising from publication of the termination letters for lack of actual malice.

I.

A.

For several years Plaintiffs worked for the Village's Department of Public Safety.[1] *Cannon v. Vill. of Bald Head Island* (*Cannon IV*), No. 7:15-CV-187-H, 2020 WL 7041459, at *1 (E.D.N.C. Nov. 30, 2020). "The Department combines [the Village]'s firefighting, paramedic, and police departments in a single multi-disciplinary group of emergency personnel." *Cannon v. Vill. of Bald Head Island* (*Cannon II*), 891 F.3d 489, 494 (4th Cir. 2018). Conner and Koons worked as Public Safety Officers, while Cannon and Terrell were employed in leadership positions as Lieutenants of Public Safety.

On August 28, 2014, Conner, Koons, and Terrell were called to individual meetings with Peck and Mitchell, and informed that they were being fired, effective immediately. Conner, Koons, and Terrell were then made to turn in their badges and clean out their lockers before being escorted off the premises. Because he was out of town at the time, Cannon was informed of his immediate termination by way of a phone call from Mitchell on the same day.

During their individual meetings, Conner, Koons, and Terrell were each handed a letter, signed by Peck, stating that the "communications that [they] took part in during the period from July 25, 2014 to August 15, 2014" violated certain provisions of the Village

[1] The following facts are taken from a combination of the district court's factual findings and the record before this Court.

Personnel Policy (the "Policy"), subjecting Plaintiffs to immediate termination. J.A. 37–39].[2] Cannon later received a similar termination letter by certified mail.

The specific Policy provisions these "communications" violated varied with each termination letter and Plaintiff. Conner's letter stated that his "actions and comments" violated provisions of the Policy "related to discourteous treatment of other employees . . . and inappropriate electronic communications." J.A. 37. Cannon's letter included allegations of discourteous treatment and inappropriate communications as well as violations of Policy provisions pertaining to "harassment." J.A. 36. And Koons's and Terrell's letters included accusations of discourteous treatment, inappropriate electronic communications, harassment, *and* "sexual harassment." J.A. 38–39. Cannon's and Terrell's letters further stated that the Village had "no tolerance for harassment," especially by those in leadership positions who were "expected to not only abide by policy, but to assist in upholding" those policies. J.A. 36, 39. Each letter concluded that the "egregious nature of these communications and the flagrant violation of policy . . . constitute[d] detrimental personal conduct and is thereby grounds for immediate termination." J.A. 36–39. The letters offered no further information as to what specific behaviors or comments violated these provisions.

The communications referenced in the termination letters included two separate text-message chains in which Plaintiffs, and other Village Public Safety Officers,

[2] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

participated.[3] The text messages were sent during the officers' off-duty time and on their private phones. The content of the text messages runs the gamut, containing swear words, personalized memes, movie references, general commentary, and crude jokes.

For example, the first text-message chain, which includes all Plaintiffs, begins with a comment from Cannon stating, "[Officer Sam Proffit] getting his hands dirty . . . Of course there was a young female involved," followed by a picture of a man fixing a bicycle. J.A. 921. Conner reiterated the sentiment and Proffit retorted that "[Conner] only does it to show off for the same sex." J.A. 923.

In the second chain, Conner, Koons, Terrell, and several other officers exchanged memes and discussed frustrations with Village management. For instance, in one message, Terrell sent a picture of a man in a revealing bathing suit with the remark "New water rescue gear," which sparked a train of comments from Conner, Koons, Terrell, and other officers regarding male genitalia sizes. J.A. 929–930B. Another officer messaged that he "heard on [a social media app] the other day that [Officer] Matt [Cox] and [Terrell] were lovers," to which Terrell retorted that the other officers were "all just jealous because Matt is the best and coolest supervisor on [Bald Head Island] and he chose me to be his [best friend forever]." J.A. 930J, 930L.

Officer Jeff Sypole, who is not a party to this suit, sent several memes involving Conner. The first included Conner's picture captioned, "I am not saying I want to be a

[3] Cannon participated in only one of the two text-message chains. *Cannon IV*, 2020 WL 7041459, at *2 n.1. However, neither Peck nor Mitchell was aware of the limited nature of his involvement until much later. *Id.* at *8.

[Lieutenant] but if dicks had wings, my mouth would be an airport." J.A. 930E. Another was captioned, "I am no weather man, but the command staff can expect a few inches tonight." J.A. 930D. The last meme sent by Sypole depicted a man being hit in the face with hot dogs and stated that "Jeese's [sic] [Lieutenant] interview went well." J.A. 930F. Terrell, Koons, and Conner all responded to these memes. Terrell indicated laughter ("Haha") and commented that one of them was "The funniest shit [he had] ever seen." J.A. 930E–F. Koons remarked that he thought Conner got "upgraded to [Captain]" and that Conner had "been in the office all day taking a pounding." J.A. 930F. Conner simply stated that Sypole had spelled his first name incorrectly.

The texts also discussed issues with management and referenced Mitchell several times. Many of these messages related to a 2014 newspaper article which allegedly quoted Mitchell as claiming that "all but two of the full-time staff of 20 have their certifications in the four areas"—law enforcement, paramedic, firefighter, and water rescue. J.A. 21, 328–29; *see also* J.A. 925–29. Plaintiffs assert that there was technically no certification for water rescue. Accordingly, Conner, Terrell, and Koons all expressed concern about the article, as did other officers in the chat who indicated that this statement was categorically false. A few comments, largely made by officers other than Plaintiffs, observed that Mitchell was either being less than honest or simply could not count.

As part of this ongoing conversation, Sypole sent a meme of Mitchell captioned, "Only two of our staff are not certified in all areas. But that does not include me, a captain. A captain not fit for duty[,] and four other staff members[,] but that is off the record." J.A. 930I. None of the Plaintiffs responded. Sypole also sent a picture of Mitchell captioned,

"Who am I? I'm the dude, playing a dude, disguised as another dude," in reference to the film *Tropic Thunder*. J.A. 930N Once again, none of the Plaintiffs responded. Sypole also sent another *Tropic Thunder*–inspired meme regarding Mitchell seeking CPR training in Colorado, commenting, "You want us to think nothing of you going to Colorado for CPR training? You just went full retard." J.A. 924; *see also* J.A. 458. In response, Terrell wrote "Hahaha" and Koons commented, "Good one." J.A. 924.

B.

After Plaintiffs were terminated, Karen Williams, the Village's Director of Human Resources and Communications, sent an email on behalf of Peck to all Village employees regarding Plaintiffs' terminations ("August 28 email"). The email did not explicitly name Plaintiffs but stated that several "officers have been released from employment this morning based on violations of Village policies pertaining to harassment, sexual harassment, discourteous conduct[,] and inappropriate electronic communications." J.A. 1132. The email then quoted the section of the Policy defining "detrimental personal conduct" and warned employees that the Village had "zero tolerance" for conduct that violated these standards. J.A. 1132.

The next day, August 29, Williams sent copies of the Plaintiffs' termination letters to multiple news outlets in response to public-records requests. After turning over the letters, Williams told Peck that she thought she "need[ed] to do an investigation" on the terminations. J.A. 621. Peck responded that "that ship has sailed, it's time to stand down and move on. It is too late now." J.A. 621. With the termination letters in hand, various newspapers published articles regarding Plaintiffs' terminations and alleged misconduct.

On September 8, Mitchell filled out and signed Affidavits of Separation, known as F-5B forms ("separation affidavits"), for each Plaintiff. On the forms, Mitchell indicated that she was "aware of . . . investigation(s) in the last 18 months concerning potential criminal action or potential misconduct by this officer." J.A. 40, 42, 44, 46. Her description of the facts stated—incorrectly—that "[a] complaint was filed with this agency regarding this Officer and several others involving inappropriate electronic communications that created a hostile work environment in violation of Village Policy." J.A. 41, 43, 45, 47. As required by law, Mitchell then submitted the separation affidavits to the North Carolina Criminal Justice Education Training Standards Commission, where they are available to potential employers. These forms are often reviewed as part of a certified law-enforcement officer's background check when they seek new employment.

After their terminations, each Plaintiff sought alternative employment with varying degrees of difficulty. By the time of trial, Koons had secured other employment as a law-enforcement officer and Cannon received law enforcement retirement benefits and became a reserve officer, while Conner and Terrell accepted firefighter/paramedic positions. *Cannon IV*, 2020 WL 7041459, at *9–11.

C.

On August 26, 2015, Plaintiffs filed suit against the Village, Peck, and Mitchell for a variety of claims, including North Carolina state-law defamation claims.[4] The complaint

[4] This case has come before this Court before. In 2016, Defendants sought summary judgment on the grounds that qualified immunity barred Plaintiffs' First Amendment retaliation and Fourteenth Amendment due-process claims, as well as on all defamation

specified two allegedly libelous publications that "reflected unfavorably upon [Plaintiffs] in their profession and subjected them to ridicule, contempt[,] and disgrace": those of the termination letters (by Peck) and the separation affidavits (by Mitchell). J.A. 29–30. Plaintiffs claimed damages in the form of lost wages, lost earning capacity and opportunities, emotional distress, and loss of reputation.

At the bench trial, Mitchell explained that she became aware of the text messages during a meeting with Officer Nicholas Hiatt regarding an unrelated matter when, upset with something Mitchell said, Hiatt threw his phone on the table and said, "You want to see unprofessional, I'll show you unprofessional." J.A. 779. Mitchell scrolled through Hiatt's phone and found the two text message chains discussed above. Based on this interaction, she identified Hiatt as one of the "complainant[s]" referenced in the separation affidavits. *Cannon IV*, 2020 WL 7041459, at *4. Mitchell also identified Officer Matthew Cox as a complainant, stating that he knew about the text messages, having been informed of them by Hiatt. She testified that Cox had complained about the text messages and

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claims for lack of actual malice. *Cannon II*, 891 F.3d at 496–97. The district court granted summary judgment on Cannon's retaliation claim but found qualified immunity did not bar the other First and Fourteenth Amendment claims. *Id.* at 497; *Cannon v. Vill. of Bald Head Island* (*Cannon I*), No. 7:15-CV-187-H, 2017 WL 2712958, at *20 (E.D.N.C. June 22, 2017), *aff'd in part, rev'd in part, dismissed in part*, 891 F.3d 489. It declined to dismiss the defamation claims. *Cannon II*, 891 F.3d at 497; *Cannon I*, 2017 WL 2712958, at *20. The Defendants filed an interlocutory appeal. This Court affirmed the denial of qualified immunity on the due-process violations but held that Peck and Mitchell were entitled to qualified immunity on the retaliation claims. *Cannon II*, 891 F.3d at 500–01, 506. However, we declined to address the defamation claims, as they were not properly before us. We therefore remanded the case in accordance with our decision. *Id.* at 508.

Plaintiffs' unprofessional behavior and expressed that he felt that he was being "picked on" or "made fun of."[5] J.A. 782.

After securing a printed copy of the text chains, Mitchell met with three members of her Command Staff: Captains Christopher Shawn Freeman, Gilbert Scott Anderson, and Paul Swanson. At the meeting, they discussed the text chains and each Plaintiff's involvement therein. Mitchell felt that the text messages had "sexual connotations" and were "problematic," "inappropriate," "unprofessional," and "disrespectful." J.A. 790–91. Given the text messages' disrespectful nature and tendency to create an unsupportive team culture, Mitchell recommended termination. Anderson and Swanson supported the terminations. Freeman, however, testified that he was against Plaintiffs' terminations and did not believe they had violated any Village Policies, which he communicated to Mitchell prior to Plaintiffs' termination. There is no indication that Mitchell ever relayed Freeman's objections to Peck. Instead, Mitchell reported the "complaint" and the team's collective recommendation to terminate Plaintiffs to Peck.

Peck ultimately agreed with Mitchell's and the Command Staff's recommendation to fire Plaintiffs. He testified that he found the messages, "taken as a whole," "appalling." J.A. 594. He believed the texts were "offensive," "homophobic," "of a sexual nature," "constituted sexual harassment" and "harassment," and "affect[ed] the morale of the organization." J.A. 594–97, 622, 625–28. He also believed others, such as council members, were offended by the messages. Peck thought the "overall tone of the text

[5] Hiatt was a member of the cited text conversations. Cox was not.

message exchange displayed a clear tone of hostility and insubordination" toward Mitchell and the Command Staff, that Plaintiffs "had no respect for the superior officers in their chain of command," and that several comments were "directed at [Mitchell] because of her sexual orientation," which he found offensive. *Cannon IV*, 2020 WL 7041459, at *8. Peck further agreed that "taken in total," he fired Plaintiffs because they "were jerks and disrespectful to the chain of command." J.A. 599–600.

After deciding to terminate Plaintiffs due to the text messages, Peck "directed" Williams "to prepare termination letters for each of the Plaintiffs." *Cannon IV*, 2020 WL 7041459, at *9. As part of this process, Peck testified that he and Williams sat down and went through the Policy to determine which provisions "fit" Plaintiffs' conduct. J.A. 600. Peck explained that Williams, whom he described as someone who dealt with the Policy "nearly every day," J.A. 619, recommended to him which Policy violations she thought "fit" the behavior displayed in the messages, J.A. 603. Peck stated that the selection of which Policy provisions were violated was a "joint decision," J.A. 603, but that the ultimate decision was his responsibility. Williams, however, actually drafted the letters. She testified that Peck was "very familiar" with the Policy, that she only provided recommendations for relevant sections of the Policy, and that Peck made the final decision as to what provisions to include in the letter for each Plaintiff. J.A. 575.

When pressed at trial, Peck was unable to explain why Koons and Terrell were terminated for sexual harassment, but Conner and Cannon were not. And, although Peck held Cannon and Terrell responsible for all the messages due to their supervisory positions,

he was unaware that Cannon was only a participant in one chain of messages and not the other.

D.

The district court ultimately found Mitchell and Peck liable for defamation. However, it dismissed all libel claims against the Village, holding that Plaintiffs failed to offer any evidence showing waiver of sovereign immunity.[6]

The district court held Mitchell liable for libel per se against all Plaintiffs for the publication of the separation affidavits. *Cannon IV*, 2020 WL 7041459, at *14. For support, the district court relied on deposition and trial testimony. At trial, Hiatt and Cox testified that—contrary to Mitchell's assertions—they did *not* complain about Plaintiffs or the text threads. Hiatt explained that he had only revealed the messages to Mitchell to demonstrate that everyone had concerns regarding training and management structure. Hiatt also denied ever having told Cox about the messages.

Cox testified that he had "not seen the text chain" at issue but that he was shown a text message by Hiatt, the contents of which he did not remember, and that he told Hiatt to "recuse himself from that conversation." J.A. 537. Cox explained that he did not know whether that message was part of the chain that led to Plaintiffs' terminations. He also stated that he never spoke to Mitchell or Peck about any text messages, never complained

[6] The district court made further rulings on Plaintiffs' liberty-interest, due-process, and wrongful-discharge claims, but those claims are not the subject of this appeal. Instead, only the state-law claims, originally before the court on supplemental jurisdiction, are at issue here. *See* 28 U.S.C. § 1367.

that he felt picked on or harassed, and "did not feel like [he] was being picked on." J.A. 544.

Based on this record, the district court found that Mitchell's statement in the separation affidavits that a complaint had been filed was false, as neither Hiatt nor Cox were complainants. *Cannon IV*, 2020 WL 7041459, at *4, *14, *17. Indeed, the court found that there was no evidence that Hiatt, Cox, or any text participants were "offended, upset, or felt picked on, or harassed, sexually or otherwise" by the content of the messages. *Id.* at *5; *see id.* at *4, *14. And, as Mitchell "was the self-described person to whom the alleged complaint[s] [were] made" and also the author of the separation affidavits, the district court found that she knew of this falsity. *Id.* at *14.

The district court further held that Peck committed libel per se for the publication of Cannon's, Koons's, and Terrell's termination letters and libel per quod for the publication of Conner's termination letter. *Id.* at *14–15. The court found that the statements contained in the termination letters were false, and that Peck acted with actual malice in publishing the letters since the true reason he fired Plaintiffs was because he believed "they were jerks." *Id.* at *14.

Defendants timely appealed, challenging the district court's defamation rulings. Plaintiffs cross-appealed, challenging the district court's dismissal of their libel claims against the Village as well as the exclusion of certain evidence. We consider the parties' challenges in that order.

II.

At base, defamation is a state-law tort claim. *Wells v. Liddy*, 186 F.3d 505, 521 (4th Cir. 1999). In North Carolina, "to make out a *prima facie* case for defamation, [the] 'plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation.'" *Griffin v. Holden*, 636 S.E.2d 298, 302 (N.C. Ct. App. 2006) (quoting *Smith–Price v. Charter Behav. Health Sys.*, 595 S.E.2d 778, 783 (N.C. Ct. App. 2004)). Generally, a communication is deemed "defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977) (May 2022 Update); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993) (quoting Restatement (Second) of Torts § 559). And where the plaintiff is a public official, they must also prove that the defendant published the false statements with "actual malice." *Griffin*, 636 S.E.2d at 304.

In North Carolina, there are two distinct forms of defamation: libel and slander. "In general, libel is written while slander is oral." *Tallent v. Blake*, 291 S.E.2d 336, 338 (N.C. Ct. App. 1982). Plaintiffs only assert written libel claims. Libel, in turn, is divided into three separate classes: "(1) publications obviously defamatory which are called libel *per se*; (2) publications susceptible of two interpretations one of which is defamatory and the other not; and (3) publications not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances become libelous, which are termed libels *per quod*." *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405, 408 (N.C.

1984) (quoting *Arnold v. Sharpe*, 251 S.E.2d 452, 455 (N.C. 1979)). For libel per se claims, North Carolina law "presumes that general damages actually, proximately, and necessarily result"; thus, "'no proof is required' to support the precise amount of a damages award." *Eshelman v. Puma Biotechnology, Inc.*, 2 F.4th 276, 283 (4th Cir.) (quoting *Flake v. Greensboro News Co.*, 195 S.E. 55, 59 (N.C. 1938)), *cert. denied*, 142 S. Ct. 714 (2021).

The district court categorized all the separation affidavits and Cannon's, Koons's, and Terrell's termination letters as constituting libel per se. *See Cannon v. Vill. of Bald Head Island* (*Cannon III*), No. 7:15-CV-187-H-KS, 2019 WL 13115845, at *2 (E.D.N.C. Dec. 31, 2019); *Cannon IV*, 2020 WL 7041459, at *14. By contrast, it found Conner's termination letter to be libel per quod. *See Cannon III*, 2019 WL 13115845, at *2; *Cannon IV*, 2020 WL 7041459, at *15. Defendants argue that the court erred in (1) finding that the separation affidavits constituted libel per se and (2) finding that any of the termination letters constituted defamation *at all*.[7] [Opening Br. at 16–18.] We address each argument

[7] In their briefing before this Court on the instant appeal, neither Peck nor Mitchell asserts any privileges that may shield the publications from a defamation challenge. *Compare* Opening Br. at 16–18, *with Cannon II*, 891 F.3d at 503 (acknowledging that, pertaining to the due-process claims, Peck raised an argument that the publication of the termination letters to the press was not truly voluntary given the public-records requirements of N.C. Gen. Stat. § 160A-168(b)(11)), *and Cannon I*, 2017 WL 2712958, at *11 (rejecting claims of absolute privilege in the publication of the separation affidavits and noting that Plaintiffs had put forward sufficient evidence of actual malice on behalf of Mitchell to defeat summary judgment and rebut a qualified privilege, assuming it applied). Consequently, they have waived these defenses. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to '"develop [its] argument"—even if [its] brief takes a passing shot at the issue.'" (quoting *Brown v. Nucor Corp.*, 785 F.3d 895, 923 (4th Cir. 2015) (Agee, J., dissenting))).

in turn, reviewing the district court's findings of law de novo and findings of fact for clear error. *United States v. Landersman*, 886 F.3d 393, 406 (4th Cir. 2018).

A.

We turn first to Defendants' argument that the district court erred in holding that the separation affidavits—penned by Mitchell—were libelous per se when they stated that a complaint had been filed against each Plaintiff for having engaged in inappropriate electronic communications that created a hostile work environment. Defendants do not challenge the district court's findings on nearly all elements of defamation: that the statements within the separation affidavits were of or concerning Plaintiffs, published to a third person,[8] false, and made with actual malice. Instead, their argument boils down to one narrow dispute: whether the separation affidavits are libelous on their face such that damages may be presumed. We agree with the district court that they are.

[8] Before the district court, Defendants unsuccessfully advanced the argument that neither Conner's nor Terrell's separation affidavits were ever seen by any prospective employer nor any member of the general public prior to the filing of this lawsuit, and therefore never officially published for defamation purposes. J.A. 370–71. But in their Opening Brief before this Court, Defendants do not clearly assert that the district court erred in finding that Conner's and Terrell's separation affidavits were published to at least one other individual. Though Defendants refer to this issue in their Reply Brief to some degree, their failure to adequately raise it in their Opening Brief means they have waived this argument. *See Grayson O Co.*, 856 F.3d at 316 (an argument not raised in an appellant's opening brief is typically waived); *Metro. Reg'l Info. Sys. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 602 n.13 (4th Cir. 2013) (holding that an appellant "waived [an] argument by raising it for the first time in its reply brief").

1.

"In North Carolina, '[w]hether a publication is libelous *per se* is a question of law for the court." *Eshelman*, 2 F.4th at 281 (quoting *Boyce & Isley, PLLC v. Cooper* (*Boyce & Isley I*), 568 S.E.2d 893, 899 (N.C. Ct. App. 2002)). For a publication to be libelous per se, the defamatory words "must be susceptible of *but one meaning* and of such nature that *the court* can presume *as a matter of law* that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." *Renwick*, 312 S.E.2d at 409 (quoting *Flake*, 195 S.E. at 60). Thus, there are two steps a court must follow in making the initial determination of whether a statement is defamatory per se.[9]

First, the court must "determine whether the statements or publications are subject to a single interpretation." *Boyce & Isley, PLLC v. Cooper* (*Boyce & Isley II*), 710 S.E.2d 309, 316 (N.C. Ct. App. 2011). We consider the statement "stripped of all insinuations, innuendo, colloquium[,] and explanatory circumstances," *Renwick*, 312 S.E.2d at 409 (quoting *Flake*, 195 S.E. at 60), and focus on how an average reader would understand the publication, *Skinner v. Reynolds*, 764 S.E.2d 652, 655 (N.C. Ct. App. 2014). *See Eshelman*, 2 F.4th at 281 (focusing on how an "ordinary person" would understand the allegedly defamatory statement (citing *Flake*, 195 S.E. at 60)). As the Supreme Court of North Carolina has repeatedly explained, in making this determination, "[t]he general rule is that

[9] Throughout this opinion we use the terms "libelous per se" and "defamatory per se" interchangeably, though we recognize that libel is a subset of defamation.

publications are to be taken in the sense which is most obvious and natural and according to the ideas that they are calculated to convey to those who see them." *Flake*, 195 S.E. at 60. "The principle of common sense requires that courts shall understand [the alleged defamatory statements] as other people would." *Id.* Consequently, "[t]he question always is, How would ordinary men naturally understand the publication?" *Id.* That some "supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make them libelous." *Renwick*, 312 S.E.2d at 409 (quoting *Flake*, 195 S.E. at 60).

"Once a court has concluded that only one meaning can be derived from the publication, the court must determine whether [said interpretation is] defamatory." *Boyce & Isley II*, 710 S.E.2d at 316; *Eshelman*, 2 F.4th at 281(applying this two-step inquiry). This inquiry is constrained, as the alleged statement "must be defamatory *on its face* 'within the four corners'" of the publication. *Griffin*, 636 S.E.2d at 303 (emphasis added) (quoting *Renwick*, 312 S.E.2d at 409). In North Carolina, a publication is libelous per se "when considered alone without innuendo, colloquium or explanatory circumstances[, it]: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace." *Renwick*, 312 S.E.2d at 409.

2.

The allegedly defamatory statement in each of the separation affidavits states: "A complaint was filed with this agency regarding this Officer and several others involving

inappropriate electronic communications that created a hostile work environment in violation of Village policy." J.A. 41 (Terrell), 43 (Conner), 45 (Cannon), 47 (Koons). The magistrate judge held that this statement "r[o]se to the level of libel *per se* under North Carolina law in that such statements tend to impeach one's trade or profession or to otherwise subject one to ridicule, contempt, or disgrace." *Cannon III*, 2019 WL 13115845, at *2; *see also Cannon IV*, 2020 WL 7041459, at *14 (finding libel per se). For the reasons outlined below, we agree.

a.

We ask first whether the alleged defamatory statement is "subject to a single interpretation." *Boyce & Isley II*, 710 S.E.2d at 316. We hold that it is.

In determining the common understanding or average reader's interpretation of a term, courts frequently look to popular dictionary definitions. *See, e.g.*, *CACI Premier Tech. v. Rhodes*, 536 F.3d 280, 297 (4th Cir. 2008) (looking to common dictionaries to determine the meaning of "torture" and "torment"); *Badame v. Lampke*, 89 S.E.2d 466, 468 (N.C. 1955) (looking to Webster's dictionary to determine the common meaning of "shady" and "shady deals"); *Clark v. Brown*, 393 S.E.2d 134, 137 (N.C. Ct. App. 1990) (consulting the Oxford English Dictionary to determine the common understanding of the term "incompetent"). And, although constrained in our review to the four corners of the separation affidavits, we still "must view the words within their full context and interpret them 'as ordinary people would understand' them." *Boyce & Isley I*, 568 S.E.2d at 899 (quoting *Renwick*, 312 S.E.2d at 410).

The allegation under dispute states that "[a] complaint was filed . . . involving inappropriate electronic communications that created a hostile work environment." J.A. 41, 43, 45, 47. The common definition of "inappropriate" is something that is "unbecoming," "unsuitable," "unfitting," or "improper." *Inappropriate*, Merriam-Webster Unabridged, https://unabridged.merriam-webster.com/unabridged/inappropriate (last visited June 5, 2022) (saved as ECF opinion attachment); *Inappropriate*, Oxford English Dictionary, https://www.oed.com/view/Entry/93142 (last visited June 5, 2022) (saved as ECF opinion attachment); *Inappropriate*, Dictionary.com, https://www.dictionary.com/browse/inappropriate (last visited June 5, 2022) (saved as ECF opinion attachment). So, standing alone, it is somewhat vague.

But the full disputed phrase gives context to that term, as it requires the electronic communications to have risen to a level *sufficient to foster a complaint that Plaintiffs had created a hostile work environment*. A complaint is commonly defined as "the act or action of expressing protest, censure, or resentment: [the] expression of injustice." *Complaint*, Merriam-Webster Unabridged, https://unabridged.merriam-webster .com/unabridged/complaint (last visited June 5, 2022) (saved as ECF opinion attachment).

The phrase "hostile work environment" is defined by one online dictionary as "an uncomfortable work situation created by managers or coworkers harassing or intimidating an employee." *Hostile-Work-Environment*, YourDictionary, https://www.your dictionary.com/hostile-work-environment (last visited June 5, 2022) (saved as ECF opinion attachment) (listing as examples continuous sexually explicit jokes and retaliation by a manager in an effort to make an employee so uncomfortable they quit). And this phrase

is commonly understood to have a meaning in line with, or relating to, the legal definition. *Signs of a Hostile Work Environment (Plus Ways to Prevent One)*, Indeed, https://www.indeed.com/hire/c/info/hostile-work-environment (last visited June 5, 2022) (saved as ECF opinion attachment) (defining a hostile work environment as one "where the words and actions of a supervisor, manager, or coworker negatively or severely impacts another employee's ability to complete their work," noting that "an unlikable bad habit or one that repeatedly bothers another coworker isn't quite enough to create a hostile work environment," and citing the legal criteria for finding a hostile work environment). Under Title VII, for example, "[a] hostile environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (en banc) (internal quotation marks and alterations omitted).

Consequently, we hold the statement is subject to a single interpretation. An average reader would understand the separation affidavits to allege that the "electronic communications" sent by Plaintiffs were so inappropriate or improper that they created an environment that caused significant discomfort to others or negatively interfered with others' ability to perform their duties to the degree that they caused at least one person to file a complaint with the Village.

b.

Having determined that the disputed phrase is subject to only one meaning, we must now ask whether that meaning is defamatory. Because the phrase does not refer to an

"infamous crime" or "infectious disease," our focus is on whether the separation affidavits authored by Mitchell, without consideration of any outside explanation, "tend[] to impeach [Plaintiffs] in [their] trade or profession" or "otherwise tend[] to subject [them] to ridicule, contempt or disgrace." *Renwick*, 312 S.E.2d at 408–09. For the reasons explained below, we hold that they do under the first of these prongs, and therefore do not reach the second.

To disparage an individual in his trade or profession, a statement must "touch the plaintiff in his special trade or occupation, and . . . contain an imputation necessarily hurtful in its effect on his business." *Gibson v. Mut. Life Ins. Co. of N.Y.*, 465 S.E.2d 56, 60 (N.C. Ct. App. 1996) (quoting *Badame*, 89 S.E.2d at 468). In contrast, statements merely "calling [the] plaintiff 'dishonest' or charging that [the] plaintiff was untruthful and an unreliable employee, are not actionable *per se*." *Id.* (quoting *Stutts v. Duke Power Co.*, 266 S.E.2d 861, 865 (N.C. Ct. App. 1980)).

Defendants argue that the separation affidavits are not defamatory per se because they do not truly impeach Plaintiffs in their professions. Opening Br. at 34–35 (citing *Skinner*, 764 S.E.2d at 655). Under Defendants' theory, the accusation that Plaintiffs engaged in "inappropriate electronic communications that created a hostile work environment," leading to a complaint, conveys "at most" only an "imperfect sense or practice of moral virtue, duty or obligation." *Id.* at 36 (quoting *Williams v. Rutherford Freight Lines, Inc.*, 179 S.E.2d 319, 323 (N.C. Ct. App. 1971)).[10] We disagree.

[10] Although Defendants cite *Williams* for the proposition that words that "convey only the imputation of an imperfect sense, or practice of moral virtue, duty, or obligation, are not sufficient" to support a finding of libel per se, we note that *Williams* involved the

The disputed statement directly maligns Plaintiffs' professional capacities by stating that a complaint was filed charging them with creating a hostile work environment. This statement does not merely accuse Plaintiffs of being dishonest, unreliable employees, or of possessing generally flawed characters. *See Williams*, 179 S.E.2d at 323; *Richardson v. Mancil*, 706 S.E.2d 843, 2010 WL 5464905, at *5 (N.C. Ct. App. 2010) (unpublished table decision) (collecting examples of statements that failed to support libel per se actions). Instead, it alleges that Plaintiffs engaged in communications so unfitting to their station that they created a hostile atmosphere for their coworkers through either intimidation or harassment, which interfered with others' abilities to complete their work and led a coworker to file a complaint.[11] This degrades Plaintiffs in their positions as Public

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different context of determining when someone was charged with an infamous crime. *See Williams*, 179 S.E.2d at 323 (quoting *Ringgold v. Land*, 193 S.E. 267, 268 (N.C. 1937) (discussing when the accusation of a crime is sufficient to show slander per se)). In the context of determining whether the defendant had impeached the plaintiff's *trade or occupation*, the *Williams* court instead considered whether the statement was "made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiff's character or qualities, where such special significance is lacking." *Id.* (internal quotation marks omitted).

[11] This is not to say that any statement that an individual created or facilitated a hostile work environment, or filed a complaint to that effect, will always result in liability for defamation. Numerous other factors would need to be considered on a case-by-case basis, including veracity, fault, and the existence of any privileges. *See, e.g.*, *Taube v. Hooper*, 840 S.E.2d 313, 319 (N.C. Ct. App. 2020) ("Truth is an absolute defense to an allegation of defamation."); *Topping v. Meyers*, 842 S.E.2d 95, 101 (N.C. Ct. App. 2020) (discussing certain privileges under North Carolina law and noting that "complete immunity obtains only *where the public service or the due administration of justice requires it*, e.g., words used in debate in Congress and the State Legislatures, reports of military or other officers to their superiors in the line of their duty, everything said by a judge on the bench, by a witness in the box, and the like" (quoting *R.H. Bouligny, Inc. v. United Steelworkers of Am., AFL-CIO*, 154 S.E.2d 344, 354 (N.C. 1967))), *appeal*

Safety Officers, particularly since Public Safety Officers are supposed to serve and protect, not intimidate and harass. *Compare Clark* , 393 S.E.2d at 135–137 (finding the charge that the plaintiff was terminated due to incompetence to prejudice him in his profession as an attorney), *Boyce & Isley I*, 568 S.E.2d at 899 (finding libel per se where alleged "statements directly maligned [the] plaintiffs in their profession by accusing them of unscrupulous and avaricious billing practices"), *and Raymond U v. Duke Univ.*, 371 S.E.2d 701, 709 (N.C. Ct. App. 1988) (holding that the allegation that the plaintiff, an Assistant Professor at Duke University, lacked a Ph.D. amounted to libel per se and impeached him in his profession), *with Taube v. Hooper*, 840 S.E.2d 313, 319 (N.C. Ct. App. 2020) (holding that "a statement that [the] plaintiff had been investigated for 'potential misconduct' does not tend to impeach her in her profession as a law enforcement officer as a matter of law" and that a "more concrete accusation[]" of actual workplace misconduct would be necessary), *and Gibson*, 465 S.E.2d at 60 (holding that the allegation that the defendant told another person that the plaintiff "had lied to him and could not be trusted" was not defamatory per se).

Moreover, the nature of the forms themselves emphasize the connection to Plaintiffs' particular trade or profession. Although constrained in our review to the four corners of the separation affidavits, we still "must view the words within their *full context*

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dismissed, review denied, 854 S.E.2d 800 (N.C. 2021); *Stewart v. Nation-Wide Check Corp.*, 182 S.E.2d 410, 415 (N.C. 1971) (explaining that a qualified privilege applies where the communication is "made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest"). Here, however, Mitchell conceded all other factors and raised no relevant privileges.

and interpret them 'as ordinary people would understand' them." *Boyce & Isley I*, 568 S.E.2d at 899 (emphasis added) (quoting *Renwick*, 312 S.E.2d at 410).

Here, the disputed statement appears in an official form entitled "Affidavit of Separation: Law Enforcement Officer." J.A. 40, 42, 44, 46. The form includes Mitchell's check mark indicating that dismissal, not death or retirement, is the reason for separation. Further, the instructions immediately preceding the disputed phrase state: "Do not use generic terminology in this section such as conduct unbecoming, failed to meet agency standards, violation of agency procedures, etc. Detailed information describing the unlawful act or misconduct is needed for efficient processing." J.A. 40–47. The only explanation Mitchell provided in response is that a complaint was filed alleging that Plaintiffs created a hostile work environment, thereby leading to the termination of all Plaintiffs. This additional text and detail, contained within the four corners of the affidavits, further links the defamatory accusation to Plaintiffs' profession in law enforcement.

Thus, we hold that the disputed statement tends to "stain [Plaintiffs'] character[s] as . . . employee[s] of the [Department of Public Safety], and damage [their] chances of securing other [law enforcement positions] in the future." *Presnell v. Pell*, 260 S.E.2d 611, 614 (N.C. 1979).

c.

Lastly, Defendants argue that the separation affidavits are not defamatory per se because the district court impermissibly looked outside the four corners of the forms and consulted the Policy definitions to find Mitchell liable. This argument, however, conflates the analysis of different elements of defamation.

Certainly, for a statement to be defamatory per se, "its injurious or defamatory character [must be] clear and obvious from the words alone." *Morris v. Bruney*, 338 S.E.2d 561, 565 (N.C. Ct. App. 1986); *see also Williams*, 179 S.E.2d at 322 ("Where the injurious character of words appear on their face as a matter of general acceptance they are actionable *per se*."). As explained above, the separation affidavits satisfy this test.

Instead, what Defendants appear to take issue with is the district court's consideration of the Village Policy definitions when determining other, uncontested defamation elements, namely falsity and actual malice. *See Cannon III*, 2019 WL 13115845, at *2; *Cannon IV*, 2020 WL 7041459, at *6–7, *14. But while the injurious nature of the words must be obvious from the publication itself, courts may look outside the four corners of the publication to evaluate the other elements. *See Morris*, 338 S.E.2d at 565; *Lewis v. Rapp*, 725 S.E.2d 597, 603–04 (N.C. Ct. App. 2012) (finding a blog's accusation that a sitting judge violated the Code of Judicial Conduct by campaigning for a candidate to be libelous per se, but considering the North Carolina Code of Judicial Conduct itself, including provisions not contained in or referenced by the blog posts, as well as other outside sources, when determining falsity and actual malice). The district court's consideration of specific Policy provisions to evaluate the *other* required elements of a defamation claim does not invalidate the district court's finding, nor this Court's holding, that the statement is libelous per se.

d.

Because the statements within the separation affidavits are "susceptible of *but one meaning*" which tends to impeach Plaintiffs in their profession, we hold that Mitchell is

liable for libel per se against all Plaintiffs and affirm the ruling of the district court on that point. *Nucor Corp. v. Prudential Equity Grp.*, 659 S.E.2d 483, 486 (N.C. Ct. App. 2008) (quoting *Renwick*, 312 S.E.2d at 409).

B.

We turn next to Defendants' various challenges to the district court's defamation rulings relating to Plaintiffs' termination letters and its ultimate finding of liability against Peck. Unlike with the separation affidavits, Defendants argue that the district court erred in its consideration of nearly every element of defamation stemming from the publication of the termination letters, challenging actual malice, falsity, defamatory nature, and injury. Because we hold that there is insufficient evidence to sustain the district court's finding of actual malice, we need not decide the merits of Defendants' challenges to any other element.

1.

Although the "primary framework of a defamation claim" is state tort law, a robust "[c]onstitutional defamation jurisprudence has developed" which "displace[s]" state law to the extent it conflicts with the U.S. Constitution. *Wells*, 186 F.3d at 521. One such overriding constitutional requirement is that, to recover damages for defamation, a plaintiff who is a public official must demonstrate "actual malice." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *see Wells*, 186 F.3d at 531 (same).

Here, both parties agree with the district court that Plaintiffs are public officials or figures, and that the actual-malice test applies. *See Cannon IV*, 2020 WL 7041459, at *14–15, *15 n.23 (applying actual-malice standard and referring to Plaintiffs as public officials);

Opening Br. at 27 ("Plaintiffs were sworn law enforcement officers, so they [were] considered 'public officials' for the purposes of any defamation claim."); Response Br. at 13 (same) (citing *Phifer v. City of Rocky Mount*, No. 5:08-CV-292-FL, 2010 WL 3860411, at *9 (E.D.N.C. Sept. 28, 2010) (finding the plaintiff, a police officer, to be a public official for defamation purposes where the alleged statement was made to other officers about the plaintiff's "fitness for the job")); *see also Dellinger v. Belk*, 238 S.E.2d 788, 789 (N.C. Ct. App. 1977) (finding a Charlotte Police Officer to be a public official for defamation purposes). We assume without deciding that this is correct. *See Phoenix Trading, Inc. v. Loops LLC*, 732 F.3d 936, 944 n.11 (9th Cir. 2013) (assuming without deciding that the plaintiffs were public figures where neither party contested the district court's finding to that effect).

To show that an alleged defamatory statement was made with "actual malice," a plaintiff must prove by clear and convincing evidence that the defendant made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times*, 376 U.S. at 280; *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Wells*, 186 F.3d at 531. "To be clear and convincing, evidence must 'place in the ultimate factfinder an abiding conviction that the truth of [the party's] factual contentions are "highly probable."'" *United States v. Ali*, 874 F.3d 825, 831 n.2 (4th Cir. 2017) (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)).

For defamation purposes, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Instead, "reckless

disregard" for the veracity of a statement requires the plaintiff to prove that the defendant "in fact entertained serious doubts as to the truth of his publication." *Id.* This "standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.'" *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

Whether there is sufficient evidence of "actual malice" is a question of law that we review de novo. *E.g.*, *id.* at 685; *Horne v. WTVR, LLC*, 893 F.3d 201, 210–11 (4th Cir. 2018). However, this review is not without nuance. Although we are tasked with making an "independent examination of the whole record," we must still give "due regard" to the trial judge's credibility determinations and factual findings. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499–500 (1984) (internal quotation marks omitted). In sum, while "credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses,'" a "reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'" *Harte-Hanks Commc'ns*, 491 U.S. at 688–89 (citation omitted) (some internal quotation marks omitted) (first quoting *Bose*, 466 U.S. at 499–500; and then quoting *N.Y. Times*, 376 U.S. at 285).

2.

Plaintiffs urge this Court to find, as the district court did, that Peck acted with actual malice in publishing the termination letters. The court's stated reasons for finding actual

malice varied by Plaintiff. The district court found that Peck acted with actual malice in publishing Cannon's, Koons's, and Terrell's termination letters because the stated reasons for termination—i.e., "sexual harassment," in Koons's and Terrell's letters, and "harassment," in all three letters[12]—were not the true reasons behind why Peck fired Plaintiffs. *Cannon IV*, 2020 WL 7041459, at *8, *14. The district court found that "Peck recklessly disregarded whether the reasons in the termination letters [sic] because he admitted he fired them because he believed 'they were jerks.'" *Id.* at *14. As for Conner's termination letter, the district court found that Peck acted with actual malice because "Peck was familiar with the Personnel Policy" and knew the Policy's definitions of the terms "inappropriate electronic communications" and "detrimental personal conduct," yet recklessly disregarded those definitions "when he wrote the termination letter for Plaintiff Conner." *Id.* at *15. Plaintiffs assert that the district court's separate actual-malice determinations can apply to all Plaintiffs equally given the similarity of the letters and relevant testimony—i.e., all Plaintiffs were accused of inappropriate communications, discourteous treatment, and detrimental conduct and all Plaintiffs were labeled "jerks" by Peck's testimony.

[12] The district court's opinion also references the "creation of a 'hostile work environment'" as one of the reasons for termination stated in the letters signed by Peck. *Cannon IV*, 2020 WL 7041459, at *14. However, the phrase "hostile work environment" does not appear within any of the four termination letters. *See* J.A. 36–39. Instead, the accusation that Plaintiffs "created a hostile work environment" is found within the Plaintiffs' separation affidavits, for which Mitchell, not Peck, was found solely liable. *See* J.A. 41, 43, 45, 47; *Cannon IV*, 2020 WL 7041459, at *14 & n.19. That finding was not challenged on appeal.

Defendants, by contrast, argue that the district court erred in finding actual malice. They assert that Plaintiffs failed to show by clear and convincing evidence that Peck either knew that Plaintiffs' alleged Policy violations were false or harbored "serious doubts" as to their veracity prior to their publication. Moreover, they contend that the district court erred in finding that Peck's subjective motives for terminating Plaintiffs established actual malice with respect to the defamatory statements at issue. We agree with Defendants.

a.

In making its actual-malice findings against Peck, the district court appeared to give near-dispositive weight to the discrepancy between Peck's testimony that he terminated Plaintiffs because they "were jerks and disrespectful to the chain of command," J.A. 599–600, and the termination letter's allegations that Plaintiffs violated certain Village policies, *Cannon IV*, 2020 WL 7041459, at *14. And Plaintiffs primarily focus on this discrepancy on appeal. But we fail to see how this difference alone establishes *clear and convincing* evidence of actual malice.

Put simply, we do not agree with the district court that a clear and convincing inference arises from this discrepancy alone that Peck *knew* the allegations that Plaintiffs' text-message conversations violated certain Policy provisions were false, or that he "entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731; *see also Harte-Hanks Commc'ns*, 491 U.S. at 689 n.35 (noting that an appellate court may accept the trial court's credibility determinations without adopting the lower court's corresponding inference of actual malice (citing *Bose*, 466 U.S. at 512)). After all, it does not naturally follow that because Peck believed Plaintiffs were "jerks" and "disrespectful,"

he did not *also* believe that the text messages violated the stated Policy provisions. These notions are not mutually exclusive.

To the extent that Peck's testimony may reveal his true subjective "*motive*"—that he wished to fire Plaintiffs because he found them to be disrespectful jerks—"that does not support an inference that [Peck] seriously doubted the truth of the [alleged Policy violations]." *Fairfax v. CBS Corp.*, 2 F.4th 286, 295 (4th Cir. 2021) (emphasis added) (citing *Harte-Hanks Commc'ns*, 491 U.S. at 688). The issue of a speaker's subjective "motive" for publishing, whether it be ill-will, self-interest, or profit, has been much discussed in the context of defamation. However, the Supreme Court has repeatedly stressed that the constitutional requirement of "actual malice" "should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991); *see Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966) (holding that a definition of "actual malice" that "defined malice to include 'ill will, evil motive, [or] intention to injure'" was "constitutionally insufficient where discussion of public affairs is concerned" (internal quotation marks omitted)).

Thus, "evidence of personal hostility does not constitute evidence of 'actual malice' under the standard set forth in *New York Times Co. v. Sullivan*." *Varner v. Bryan*, 440 S.E.2d 295, 300 (N.C. Ct. App. 1994). This does not mean, however, that such evidence is totally irrelevant. "Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." *Harte-Hanks Commc'ns*, 491 U.S. at 668 (citations

omitted). So, while "motive can be relevant to the actual malice inquiry," *Fairfax*, 2 F.4th at 295, it is not dispositive, standing alone. Peck could have self-servingly wanted to fire Plaintiffs to rid himself of some disrespectful "jerks" while *also* believing that Plaintiffs had violated the Policy. The former does not foreclose the latter.

At most, then, the discrepancy between Peck's subjective and stated reasons for termination, and any inference of motive therefrom, is but one fact we may consider when determining actual malice. Despite the district court's near-exclusive reliance on that fact, it alone cannot establish actual malice by clear and convincing evidence. In other words, Peck's belief that Plaintiffs were "jerks" and that he wished to fire them arguably provides some circumstantial evidence supporting the Plaintiffs' proffered inference that Peck may have been less cautious when selecting which policy provisions were supposedly violated and in drafting the letter. But, unlike the district court, we do not believe this alone rises to the level of clear and convincing evidence that Peck *knew* the alleged policy violations were false or entertained serious doubts about their truth.

b.

Nor does the fact that Peck decided to terminate Plaintiffs before figuring out *which* Policy provisions, if any, Plaintiffs may have violated require a finding of actual malice. Plaintiffs were at-will employees; thus, Peck did not need to cite any specific Policy violation in order to fire them.

And Plaintiffs point to no evidence indicating that Peck decided to publish the specific allegations in the termination letters—that Plaintiffs engaged in harassment, sexual harassment, detrimental personal conduct, etc.—prior to speaking with the Human

Resources Director or despite any clearly communicated reasons to doubt the factual or technical accuracy of those allegations. *Cf. Harte-Hanks Commc'ns*, 491 U.S. at 684 (finding the fact that the defendant had published an article "set[ting] the stage" for the defamatory article despite contrary evidence and prior to consulting any relevant witnesses could "indicate that [the defendant] had already decided to publish [the informant]'s allegations, regardless of how the evidence developed and regardless of whether or not [the informant]'s story was credible upon ultimate reflection" which, though "just a small part of the larger picture," weighed in favor of finding actual malice). Thus, this too cannot mandate a finding of knowledge or reckless disregard. It is, however, a fact we may consider in our analysis that may tend to show some circumstantial evidence of recklessness.

c.

Plaintiffs respond that other evidence in the record further demonstrates actual malice. To start, they note that the district court ultimately found that the text messages did not constitute "harassment," "sexual harassment," or "detrimental personal conduct" under the Policy definitions. Response Br. at 25; *see Cannon IV*, 2020 WL 7041459, at *14–15. The district court concluded that, at least with respect to Conner, Peck's "familiar[ity] with the Personnel Policy" meant that he must have "kn[own] the definitions of the terms or recklessly disregarded the definitions of the terms when he wrote the termination letter[s]." *Cannon IV*, 2020 WL 7041459, at *15.

The problem, however, is that this determination of actual malice rests on the district court's findings that the allegations were false based on facts revealed at trial—not based

on what Peck personally knew at the time he signed or published the letters. But critically, "[t]he actual malice standard requires that 'the defendant had a particular, subjective state of mind *at the time the statements were made*.'" *Fairfax*, 2 F.4th at 295 (emphasis added) (quoting *Horne*, 893 F.3d at 211).

By not clearly making this temporal distinction, the district court's analysis impermissibly imputes its knowledge, after a full bench trial, to Peck at the time of Plaintiffs' terminations in 2014. For example, the district court found that Conner did not engage in detrimental personal conduct and that Peck knew or recklessly disregarded that fact because, in part, the job performance of the involved officers was unaffected by the messages. *Cannon IV*, 2020 WL 7041459, at *15. But this holding appears to rest on the district court's finding that neither Officers Hiatt nor Cox were complainants, and that neither Cox nor any of the officers involved in the chain were "offended, upset, or felt picked on, or harassed, sexually or otherwise." *Id.* at *3–5. Therefore, the district court found that "[t]here was no evidence presented that anyone's work performance was affected by either text message chain." *Id.* at *5. And the court appears to have made similar inferences regarding the harassment and sexual harassment allegations. *See id.* at *5–6; J.A. 885.

Giving the district court due deference as the factfinder, we accept these findings as true. But these findings do not establish what *Peck* knew when he issued the termination letters. In fact, the district court *also* found that "Mitchell told Defendant Peck that the text messages had come to her attention when one of the employees in the Public Safety Department complained about them." *Cannon IV*, 2020 WL 7041459, at *8. Moreover, the

district court credited Peck's testimony that he "believed that some of the comments were directed at Defendant Mitchell because of her sexual orientation, which he also found offensive." *Id.* There is nothing in the record to suggest that Peck was ever informed at any time prior to publication that there was, in fact, no complainant and that none of the officers in question felt offended or harassed, sexually or otherwise, by the text messages.

To summarize, at the time Peck signed the letters, Mitchell had informed him that an employee *had* complained about the messages, implying that at least one person was upset or offended and that the messages interfered with that person's work enough to inspire them to file a complaint. He also knew that Mitchell had already spoken with the Command Staff regarding the text messages and that they had recommended terminating the Plaintiffs based on the conduct within the text chains. Peck himself personally found the messages offensive and testified that he believed the Village council members were also offended.[13] Consequently, even if Peck was familiar with the Policy definitions, it is not clear from the record that, based on the information he had *at the time*, he knew or had a "'high degree of awareness of . . . [the] probable falsity'" of the allegedly defamatory

[13] This is not to say that a speaker's testimony that he believed his allegedly defamatory statements were true will always be credited or necessarily prevail. For example, simple testimony that a speaker believed the statements were true is likely to be unpersuasive where "a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call . . . [or] when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." *St. Amant*, 390 U.S. at 732.

statements regarding Policy violations.[14] *Harte-Hanks Commc'ns*, 491 U.S. at 688 (quoting *Garrison*, 379 U.S. at 74).

To be sure, recklessness is not an insurmountable standard. Unquestioning reliance on a source or informant will not automatically preclude a finding of actual malice. *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 670 (4th Cir. 1982). "[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports," *St. Amant*, 390 U.S. at 732, or where evidence indicates "the purposeful avoidance of the truth," *Harte-Hanks Commc'ns*, 491 U.S. at 692.

But Plaintiffs offer clear evidence of neither. Mitchell informed Peck that there had been a "complaint" regarding the text messages and showed him a printed version of those messages. Plaintiffs put forward no evidence to show that Peck would have any reason to doubt Mitchell's word. She was not an anonymous or unverified informant, but someone

[14] The only allegation of a Policy violation that does not implicate facts determined only after trial is that the Plaintiffs engaged in "inappropriate electronic communications." But that allegation also cannot demonstrate actual malice. The Policy defines "inappropriate electronic communications" as "electronic communications or website posting, accessible via the internet or other media outlet, which negatively reflect upon the Village or contain inappropriate comments, images[,] or conduct." J.A. 894. The same section of Policy, however, advises caution "when adding publicly accessible information on internet websites and when *sending electronic communications such as email*." J.A. 894 (emphasis added). The definition, therefore, is ambiguous as to what exactly constitutes an "electronic communication" and whether the Policy covers private text messages. Where a source is "susceptible to at least two rational interpretations," "a speaker or publisher may adopt 'one of a number of possible rational interpretations of [such sources] that [contain] ambiguities' without creating a jury issue of actual malice." *CACI Premier Tech*, 536 F.3d at 296 (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971)). Thus, we do not find actual malice related to the claim that the Plaintiffs had engaged in "inappropriate electronic communications."

with whom Peck worked closely. *Cf. St. Amant*, 390 U.S. at 732 (indicating that a defendant's profession of a good-faith belief that the disputed statements were true when "based wholly on an unverified telephone call" is "unlikely to prove persuasive"). There are no allegations in the record that she was known to be untrustworthy.

Nor is there anything in the record to suggest that *anyone* communicated to Peck, prior to publication, any doubts or disputes regarding the assertions that there was a complaint, that Plaintiffs participated in the text messages, or that the messages ran afoul of the cited Policy provisions. *Cf. Harte-Hanks Commc'ns*, 491 U.S. at 691–93 (finding "purposeful avoidance of the truth" where, prior to publication, (1) there was reason to doubt the informant's story, (2) *all* of the interviewed direct witnesses denied the informant's version of events, (3) the defendant failed to even attempt to question the last remaining witness, and (4) the defendant did not listen to the tapes in its possession which could clear up any doubt as to what was said during the interview); *Desmond v. News & Observer Publ'g Co.*, 846 S.E.2d 647, 664 (N.C. 2020) (finding purposeful avoidance). And, although Peck was certainly involved in the creation of the termination letters, he directed the Human Resources Director, who was well-versed in the Policy, to draft the letters and sought her recommendations as to the sections of the Policy that fit Plaintiffs' fully disclosed text messages. *See Cannon IV*, 2020 WL 7041459, at *9. Plaintiffs offer no contemporaneous evidence as to why Peck's reliance on any such recommendations or his selections therefrom would be suspect or reckless.

Plaintiffs weakly counter that Peck was at least reckless in his approach to the truth since he was unaware at the time of publication that Cannon was not a party to the second

text-message chain. They suggest that Peck should have "confirm[ed]" somehow that Cannon "saw all the text messages." Response Br. at 27.

Perhaps Plaintiffs would be correct if the test was mere negligence. But for a defamation claim by a public official, negligence is not enough. Actual malice "requires much more than a failure to exercise ordinary care." *Fairfax*, 2 F.4th at 293 (internal quotation marks omitted) (quoting *Hatfill v. N.Y. Times Co.*, 532 F.3d 312, 325 (4th Cir. 2008)). The "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks Commc'ns*, 491 U.S. at 688. Thus, the fact that Peck did not investigate or confirm whether Cannon was in fact on both text-message chains cannot establish actual malice—especially because Peck was not aware there *were* two separate chains . *See Varner*, 440 S.E.2d at 301 ("[E]vidence that the defendant failed to verify the veracity of his statements with persons who might have known the true facts fell short of proving the defendant's reckless disregard for the accuracy of his statements."). Something more is needed.[15]

[15] To the extent that the Plaintiffs argue the test for reckless disregard requires a defendant to actually "check[] for truth by the means at hand," such as by conducting some small-scale investigation, when there is no obvious reason for doubt, we reject this standard as inconsistent with Supreme Court precedent. Response Br. at 27 (quoting *Ward v. Turcotte*, 339 S.E.2d 444, 446–47 (N.C. Ct. App. 1986)). In *New York Times Co. v. Sullivan*, the Supreme Court found there to be no actual malice despite evidence that "the Times published the [challenged] advertisement without checking its accuracy against the news stories in the Times' own files." 376 U.S. at 287.

Therefore, what the Court of Appeals of North Carolina meant by the "means at hand" is unclear. *Ward*, 339 S.E.2d at 447. But it cannot require Peck to conduct an investigation when the source of the information at issue is otherwise free from obvious doubt. To the extent state defamation law conflicts with constitutional law as laid out by

The only source of doubt that Plaintiffs point to that could potentially have warranted some form of investigation by Peck is Williams's request to perform a full investigation regarding Plaintiffs' termination letters and Peck's response that "that ship has sailed, it's time to stand down and move on. It is too late now." Response Br. at 26 (quoting *Cannon IV*, 2020 WL 7041459, at *3). If, as Plaintiffs assert in their brief, this conversation took place *prior* to publication of the letters, it might weigh in Plaintiffs' favor. *See id.*

However, all evidence in the record—including direct testimony, the district court's findings of fact, and Plaintiffs' own proposed findings of fact—pinpoints this conversation as occurring only *after* the letters had been handed over to the press. *Cannon IV*, 2020 WL 7041459, at *3 (noting that Williams sent the termination letters to the news outlets on the morning of August 29, 2014, and only "told Defendant Peck [that] she needed to do an investigation" in the afternoon of the same day); J.A. 620–21 (Peck's testimony that "I think it was Friday afternoon after the press had asked for and then received, asked for the termination letters and received termination letters, is when [Williams] got cold feet and told me, I think I need to do an investigation in this. And that's when I told her, that ship

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the Supreme Court of the United States, the state law is displaced. *See Wells*, 186 F.3d at 521 ("Because a Constitutional defamation jurisprudence has developed, the state law of defamation has been displaced to the extent that the state law conflicts with Constitutional law."). However, it is not clear that North Carolina law truly, and consistently, requires any such investigation. In *Varner v. Bryan*—another Court of Appeals case decided eight years after *Ward*—the court expressly "reject[ed the] plaintiff's contention that 'actual malice' may be shown by evidence that defendants failed to avail themselves of available means for ascertaining the falsity of the statements." 440 S.E.2d at 300.

has sailed, it's time to stand down and move on. It is too late now."); J.A. 1225 (Plaintiffs' proposed findings of fact stating, "Karen Williams told Defendant Peck after the terminations and *after the news media had received the termination letters* that she needed to do an investigation and he told her 'that ship has sailed, it's time to stand down and move on. It is too late now.'" (emphasis added)). Again, our focus is on "'the defendant['s] . . . particular, subjective state of mind *at the time the statements were made*.'" *Fairfax*, 2 F.4th at 295 (emphasis added) (quoting *Horne*, 893 F.3d at 211). That Peck declined to conduct a further investigation when the possibility was raised by Williams *after* the termination letters had been provided to third parties cannot show that he was reckless as to the truth of those letters when he produced them.

Finally, Plaintiffs highlight that (1) not all members of the text-message chains were immediately terminated and (2) at trial, Peck was unable to explain why some Plaintiffs were charged with "sexual harassment" and others were not.[16] Response Br. at 27. The fact that not all members of the chain were terminated at most suggests that Peck may have had some ulterior motive to terminate these Plaintiffs over their colleagues, but as explained

[16] In one of their cross-claims, Plaintiffs allege that the district court erred in excluding the August 28 email as additional evidence of actual malice. Response Br. at 43–44; *see infra* Section IV. However, at the motion hearing before the magistrate judge, "Plaintiffs admitted . . . that the Peck email is not admissible for any other purpose" besides a separate defamation claim, which was excluded as untimely. *Cannon III*, 2019 WL 13115845, at *3. Accordingly, the magistrate judge excluded use of the email at trial. *Id.* During trial, Plaintiffs attempted to elicit testimony regarding the email for purposes other than as a separate defamation cause of action but were barred by the court based on the magistrate judge's earlier exclusion. Plaintiffs have failed to show how either the magistrate judge or district court abused their discretion in excluding evidence that Plaintiffs themselves conceded was irrelevant.

above, ill will alone cannot demonstrate malice.[17] Additionally, there are any number of reasons for this discrepancy in treatment, and Plaintiffs have failed to connect the dots between the discrepancy and Peck's subjective belief in the veracity of the alleged policy violations in any meaningful way. And, although Peck's inability to explain the difference in treatment at trial is troubling, it does not show that he knew the allegations regarding Plaintiffs were false when he made them.

In sum, while there is some evidence that could tend to suggest Peck recklessly disregarded the truth of the statements in the termination letters when he signed them, that limited evidence fails to tip the scales in Plaintiffs' favor. Upon our review of the record, and weighing each of the facts laid out above, we hold that there is insufficient evidence to support a finding, *by clear and convincing evidence*, that Peck acted with actual malice.

Because we conclude that Plaintiffs failed to show actual malice, we do not reach Defendants' other challenges to the district court's finding of liability against Peck. Consequently, we reverse the district court's finding that Peck is liable for defamation to Cannon, Conner, Koons, and Terrell stemming from the publication of their respective termination letters.

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[17] Plaintiffs also allege that the magistrate judge erred in excluding evidence of racist Facebook posts made by a different public safety officer, Steve Butler. They contend that this evidence is relevant to show actual malice since Butler was not terminated despite making blatantly racist remarks in violation of the Policy. But actual malice depends on the defendant's knowledge or state of mind about the *specific* statements at issue. Butler's posts, and Defendants' handling of any resulting discipline, is not probative of whether Defendants acted with actual malice in publishing the disputed statements within the termination letters for these Plaintiffs. Consequently, the magistrate judge did not abuse her discretion in excluding such evidence.

III.

Turning to Plaintiffs' cross-appeal, Plaintiffs assert the district court erred in finding that their claims against the Village were barred by sovereign immunity. They argue that since they properly pleaded that the Village waived its sovereign immunity and Defendants did not contest this issue, the district court erred in dismissing their claims. We disagree.

"[T]he existence of sovereign immunity is a question of law that we review de novo." *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332 (4th Cir.2008) (quoting *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002)). When addressing pendant state law claims, "[w]e must look to substantive state law . . . in determining the nature and scope of a claimed immunity." *Gray-Hopkins v. Prince George's Cnty.*, 309 F.3d 224, 231 (4th Cir. 2002); *see Knibbs v. Momphard*, 30 F.4th 200, 229–30 (4th Cir. 2022) (looking to North Carolina law to determine whether the county sheriff's office, as well as the sheriff and deputy, had waived governmental immunity against certain state-law claims); *Anderson v. Caldwell Cnty. Sheriff's Off.*, 524 F. App'x 854, 863–64 (4th Cir. 2013) (same).

Generally, "[u]nder the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Wray v. City of Greensboro*, 802 S.E.2d 894, 898 (N.C. 2017) (quoting *Evans ex rel. Horton v. Hous. Auth.*, 602 S.E.2d 668, 670 (N.C. 2004)). In North Carolina, "that portion of the State's sovereign immunity which extends to local governments" is called "[g]overnmental immunity." *Id.* Governmental immunity typically "protects a municipality and its officers or employees sued in their official capacity for torts committed while performing a governmental function; it is well-established that law enforcement constitutes a governmental function." *Sellers v. Rodriguez*, 561 S.E.2d 336,

339 (N.C. Ct. App. 2002). To overcome a defense of governmental immunity, "[a] plaintiff bringing claims against a governmental entity and its employees acting in their official capacities must allege *and* prove that the officials have waived their sovereign immunity or otherwise consented to suit[.]" *Id.* (emphasis added).

Here, it is undisputed that Plaintiffs' complaint *alleged* that the Village waived governmental immunity by purchasing liability insurance. *See Arrington v. Martinez*, 716 S.E.2d 410, 414 (N.C. Ct. App. 2011) (discussing waiver (quoting *Lunsford v. Renn*, 700 S.E.2d 94, 100 (N.C. Ct. App. 2010))). But Plaintiffs have put forward no evidence to *prove* their allegations.

It is true that in North Carolina, a "town or municipality may waive sovereign immunity through the purchase of liability insurance." *Lunsford*, 700 S.E.2d at 100; *see* N.C. Gen. Stat. § 160A-485; *Hunter v. Town of Mocksville*, 897 F.3d 538, 547 (4th Cir. 2018). However, "immunity is waived only to the extent that the municipality is indemnified by the insurance contract from liability for acts alleged." *Lunsford*, 700 S.E.2d at 100 (cleaned up). In other words, a "governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy." *Id.* (quoting *Patrick v. Wake Cnty. Dep't of Hum. Servs.*, 655 S.E.2d 920, 923 (N.C. Ct. App. 2008)). And Plaintiffs have presented no evidence that the alleged insurance policy covered defamation tort claims. *See Cannon IV*, 2020 WL 7041459, at *13 n.14.

Plaintiffs contend that they were barred from making any reference to Defendants' liability insurance in front of a jury due to a motion in limine ruling pursuant to state

statutory requirements. *See Cannon III*, 2019 WL 13115845, at *1; *see* N.C. Gen. Stat. § 160A-485(d) ("No document or exhibit which relates to or alleges facts as to the city's insurance against liability shall be . . . mentioned in the presence of the trial jury in the trial of any claim brought pursuant to this section[.]"). But they did not contest this ruling. *Cannon III*, 2019 WL 13115845, at *1. And that statutory ruling does not explain why Plaintiffs did not seek to offer any such evidence to the district court judge once the trial was converted into a bench trial. *See* N.C. Gen. Stat. § 160A-485(d) (noting that "[a]ll issues relating to insurance coverage shall be heard and determined by the judge without resort to a jury").

Plaintiffs also claim that Defendants forfeited the opportunity to contest their governmental-immunity waiver by failing to dispute it below. Response Br. at 38–39 ("The issue of Defendant Village of Bald Head Island waiving sovereign immunity by the purchase of insurance was never contested by the Defendants after Plaintiffs properly ple[d] it in the Complaint."). But the Village *did* dispute its alleged waiver of immunity for Plaintiffs' defamation and other state-law claims. Defendants' Answer clearly listed governmental immunity as an affirmative defense. And it specifically stated that the "allegations that the Village has waived governmental immunity through the purchase of insurance are denied." J.A. 50. Moreover, Defendants also asserted the defense of governmental immunity against Plaintiffs' state-law claims in their proposed findings of fact, albeit in the section pertaining to wrongful discharge. J.A. 1320 ("Plaintiffs failed to offer any evidence at trial that the Defendant Village of Bald Head Island had waived its governmental immunity to Plaintiffs' state law tort claims."). In its order, the district court

even explicitly acknowledged the Village's denial of waiver. *Cannon IV*, 2020 WL 7041459, at *13 n.14 (stating that the "Village has denied waiver" and citing to Defendants' Answer). Therefore, we reject Plaintiffs' argument that Defendants forfeited this defense.

Because Plaintiffs failed to *prove* the Village waived its governmental immunity, we affirm the district court's dismissal of Plaintiffs' libel claims against the Village.

IV.

Plaintiffs further argue that the district court erred in prohibiting presentation of a third allegedly defamatory publication at trial—an August 28, 2014, email from Peck to Village employees. Before trial, the magistrate judge excluded the August 28 email as a separate libelous publication because (1) it was not properly included within Plaintiffs' initial complaint and (2) any amendment to the complaint adding it would be futile since a libel claim based on the email would be barred by the statute of limitations. *Cannon III*, 2019 WL 13115845, at *3.

We typically review a district court's denial of leave to amend a complaint for abuse of discretion. *United States ex rel. Ahumada v. NISH*, 756 F.3d 268, 274 (4th Cir. 2014). However, where the denial is based on futility grounds, our review is de novo. *Id.* For the reasons discussed below, we find no error in the district court's exclusion of the August 28 email.

In North Carolina, "each publication of defamatory material is a separate tort," *Gibson*, 465 S.E.2d at 58, which the "plaintiff must specifically allege," *Eng. Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.*, 172 F.3d 862, No. 97-2397, 1999 WL 89125, at *3

(4th Cir. 1999) (unpublished table decision). Because each publication is a different tort, the statute of limitations typically runs separately for each publication. *See id.* at *2–3; *Gibson*, 465 S.E.2d at 58; *Price v. J. C. Penney Co.*, 216 S.E.2d 154, 156 (N.C. Ct. App. 1975). And in North Carolina, "an action for libel . . . must be commenced within one year from the time the action accrues . . . and the action accrues at the date of the publication of the defamatory words, regardless of the fact that [the] plaintiff may discover the identity of the author only at a later date." *Iadanza v. Harper*, 611 S.E.2d 217, 222–23 (N.C. Ct. App. 2005) (cleaned up) (quoting *Gibson*, 465 S.E.2d at 58); *see* N.C. Gen. Stat. § 1-54(3).

Despite Plaintiffs' arguments to the contrary, the initial complaint—which was filed on August 26, 2015—does not include a defamation claim stemming from the August 28, 2014, email. The complaint does not mention the August 28 email, nor does it reference or even imply the existence of *any* defamatory publication by Defendants apart from the termination letters and separation affidavits. As the email is unquestionably a different publication than either the termination letter or separation affidavits, it should have been specifically pled. *See Eng. Boiler & Tube*, 172 F.3d 862, 1999 WL 89125, at *3; *Gibson*, 465 S.E.2d at 58. It was not.

Therefore, to make this claim Plaintiffs would need to amend their complaint. However, there is no dispute that the statute of limitations passed before Plaintiffs so much as mentioned the August 28 email. *Cannon III*, 2019 WL 13115845, at *3 (explaining that Plaintiffs first gave notice of a potential claim based on the email on October 28, 2016, over a year after the statute of limitations had expired in August 2015).

To overcome this obstacle, Plaintiffs argue that they should have been allowed to amend their complaint under the relation-back doctrine. An amendment "relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1). A claim arises out of the same conduct, transaction, or occurrence if: (1) there is "a factual nexus between the amendment and the original complaint," and (2) the "defendants had notice of the claim and will not be prejudiced by the amendment." *Grattan v. Burnett*, 710 F.2d 160, 163 (4th Cir. 1983); *accord Eng. Boiler & Tube*, 172 F.3d 862, 1999 WL 89125, at *3.

Even assuming a factual nexus, we agree with the magistrate judge that Defendants had no notice of this claim. As noted earlier, *nothing* in the complaint alludes to the existence of, or claim related to, a third defamatory publication. There is no evidence that Plaintiffs ever mentioned the August 28 email within the one-year statute-of-limitations period. And the email includes different statements and was published to a different audience than either the termination letters or the separation affidavits, thereby raising different issues. *Cannon III*, 2019 WL 13115845, at *3. Consequently, we hold that the proposed amendment cannot relate back.

Because the amendment cannot relate back and was unquestionably raised only after the applicable statute of limitations, we affirm the magistrate judge's denial of leave to amend the complaint as futile.

V.

Lastly, Plaintiffs argue that either (1) the trial court erred in failing to award them mandatory prejudgment interest under state law, or (2), if it did not err, this Court should grant Plaintiffs' Rule 60(a) motion—which they filed in this Court—and "clarify" the trial court's judgment on the interest awarded. Reply Br. at 5. A district court's rulings on damages are reviewed for abuse of discretion. *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 299 (4th Cir. 2009).

When reviewing state-law claims based on supplemental jurisdiction, "the award of prejudgment interest rests on state law." *Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 133 (4th Cir. 2015). Because North Carolina provides for prejudgment interest on compensatory damages as a matter of right, the district court does not have discretion to deny such an award. N.C. Gen. Stat. § 24-5(b); *see Calderon*, 809 F.3d at 133–34. However, in *Osterneck v. Ernst & Whinney*, the U.S. Supreme Court explained that a postjudgment motion that makes an initial request for prejudgment interest, whether discretionary or mandatory, constitutes a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). 489 U.S. 169, 175–76, 176–77 n.3 (1989). To "avoid waiving pre-judgment interest, a litigant must raise the issue within the time constraints imposed by Rule 59(e)," i.e., no more than twenty-eight days after the judgment. *Dotson*, 558 F.3d at 301 n.9 (citing *Hanson v. Cerrone & Assocs.*, 991 F.2d 789, No. 91-1872, 1993 WL 98777, at *3 (4th Cir. 1993) (table decision)); *see* Fed. R. Civ. P. 59(e); *see also Hanson*, 991 F.2d 789, 1993 WL 98777, at *1, *3 (applying this rule to state-law claims

heard when sitting in diversity); *McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128, 1136 (9th Cir. 2004) (same).

Here, Plaintiffs waived prejudgment interest by failing to properly raise the issue. It is undisputed that Plaintiffs never requested prejudgment interest at any time prior to entry of the judgment. The district court's judgment awards interest at "the post-judgment rate" but never mentions or awards prejudgment interest. *Cannon IV*, 2020 WL 7041459, at *18. Plaintiffs apparently understood this since they filed a motion requesting prejudgment interest thirty-seven days after the entry of the judgment. Thus, Plaintiffs' motion does not seek to "clarify the appropriate amount of interest previously and properly awarded" under Rule 60(a), but instead puts forth an initial request to fix prejudgment interest. *Kosnoski v. Howley*, 33 F.3d 376, 378 (4th Cir. 1994) (emphasis omitted). As such, it is time barred.

We therefore affirm the district court's denial of Plaintiffs' motion as untimely under Rule 59(e). *See Cannon v. Vill. of Bald Head Island*, No. 7:15-CV-00187-M, 2021 WL 3177410, at *2 (E.D.N.C. July 27, 2021).

VI.

For the reasons explained above, we affirm the district court's (1) judgment against Mitchell for libel per se arising from publication of the separation affidavits; (2) dismissal of all defamation claims against the Village; (3) denial of leave to amend to add the August 28, 2014 email as a third publication; (4) exclusion of the August 28 email for other purposes; (5) exclusion of Officer Butler's Facebook posts; and (6) denial of Plaintiffs' untimely Rule 59(e) motion seeking prejudgment interest. We reverse the district court's judgment against Peck on all libel claims stemming from the publication of the termination

letters for lack of actual malice. Finally, we deny Plaintiffs' pending motion, purportedly filed under Rule 60, "for corrections based on clerical mistakes, oversights, and omissions." *Cannon v. Peck*, No. 20-2382 (4th Cir.), ECF No. 19.

AFFIRMED IN PART,
REVERSED IN PART