ANSWER TO QUESTION 8

Plaintiff alleges a slander claim against both defendants. To prove slander, a plaintiff must produce evidence showing "(1) a false or defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third-party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Plinio v Clio School Dist,* 255 Mich App 60, 72 (2003).

Because Johnson is a private figure plaintiff, a defamation defendant is not provided with the defense of a qualified privilege in the form of an actual malice standard. *J&J Construction Co v Bricklayers and Allied Craftsmen,* 468 Mich 722, 731 (2003). Instead, and as recognized in *J&J Construction,* 468 Mich at 732, pursuant to MCL 600.2911(7) a private figure plaintiff need only prove negligence on the part of the publisher, and has the burden to prove falsity if the statement relates to a matter of public concern. *Id.,* 468 Mich at 732 & n11.

A. Ryan's Motion: Defendant Ryan's motion should be denied, as genuine issues of material fact exist for trial. Plaintiff has provided evidence on all four elements, and a jury must decide whether the evidence proves all the elements. Specifically, defendant Ryan clearly made a false statement concerning Johnson, as he stated he left his house in a condition that violates city ordinances, and no ordinance violation was ever found. The statement was published to third-parties--namely members of the public who remained after the council meeting--and no recognized privilege existed to make the false remark. Evidence also suggests that defendant Ryan knew it was a false statement, as he was present when the city inspector found no violations. Finally, because Ryan stated that plaintiff was in violation of a criminal law, no special harm need be shown. MCL 600.2911(1). Thus, plaintiff' slander claim against defendant Ryan should proceed to trial.

[Note: Although some applicants might argue that an absolute privilege attached to Ryan's statement, the argument should be rejected because (1) Ryan's statements were made after the council meeting ended and no council members were present, and (2) the call of the question indicates that Ryan's motion was only a challenge to plaintiff's ability to establish a question of material fact on the elements of a slander claim, not to any possible defenses.]

B. **Smith's Motion:** Defendant Smith's motion raises an "immunity" defense. Two possible immunity defenses to a defamation claim exist under this fact scenario. One is based on Smith's position as Mayor; the other is based upon his statement being made at a council meeting.

Pursuant to MCL 691.1407(5), the highest elective executive at all levels of government are immune from all tort liability for injuries to persons as long as he was acting within the scope of his executive authority. There is no dispute that the Mayor is the highest elective official of a city. *Bennett v Detroit,* 274 Mich App 307, 319 (2006). Additionally, although Mayor Smith had self-interest in the subject matter, there is no real question but that a statement made by a mayor at a council meeting about an alleged ordinance violation comes within his executive authority. *Id.*

Plaintiff cannot successfully argue that Mayor Smith loses his immunity because he acted with bad intentions. Even though there is evidence he acted with an improper motive, there is no bad motive or intention exception to absolute immunity. *American Transmissions v Atty General,* 454 Mich 135, 143 (1997); *Armstrong v Ypsilanti Twp,* 248 Mich App 573, 594 (2001). And, even though Smith also accused plaintiff of violating the law, which would constitute defamation per se under MCL 600.2911, it is of no avail because defendant Smith was acting within his executive authority when making the statement. *Id.*

Smith can also successfully argue that he was entitled to absolute immunity because his comments were made during the council meeting and arguably dealt with a matter of public concern, i.e., violations of city ordinances. In *Kefgen v Davidson,* 241 Mich App 611, 618 (2000), the court held:

"Communications deemed absolutely privileged are not actionable, even when spoken with malice. *Froling v Carpenter,* 203 Mich App 368, 371; 512 NW2d 6 (1993); *Couch v Schultz,* 193 Mich App 292, 294; 483 NW2d 684 (1992). The doctrine of absolute privilege is narrow and applies only to communications regarding matters of public concern. *Froling,* supra. The absolute privilege has generally been applied to communications made during legislative and judicial proceedings and to communications by military and naval officers. *Id.; Couch, supra.* The doctrine was extended to communications made by a public official in furtherance of an official duty during proceedings of subordinate legislative and quasi-legislative bodies."

The absolute privilege for legislative bodies applies to subordinate bodies such as a city council, so "statements made by

city council members in the course of their duties are absolute privileged." *Froling v Carpenter,* 203 Mich App 368, 372 (1993).

Here, the best argument is that Mayor Smith's statements touched on a matter of public concern because it addressed the possible violation of a city ordinance. Additionally, the statements were made during the council meeting, and were in furtherance of the Mayor's duties to ensure the enforcement of local ordinances. An argument could be made that the statements only addressed a personal issue between the mayor and his neighbor, such that absolute immunity would not apply (elected officials do not have unfettered ability to slander individuals on whatever matters they please), and points can be awarded for that argument, but the better argument is that absolute immunity applies.

Defendant Ryan's motion for summary disposition should be denied, while defendant Smith's should be granted.