Exhibit 5

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS CASE NO. 2011-CP-07-00013
MAUREEN T. COFFEY, Plaintiff, v. COMMUNITY SERVICES ASSOCIATES, INC., GEORGE F. BREED, JR., SEA PINES RESORT, LLC, and ASSOCIATION OF SEA PINES PLANTATION PROPERTY OWNERS, INC. and THE ADVISORY BOARD Defendants.	DEFENDANTS' MOTION FOR DIRECTED VERDICT

Pursuant to Rule 50(a) of the South Carolina Rules of Civil Procedure, Defendants Community Services Associates, Inc. ("CSA"), George F. Breed, Jr., and Association of Sea Pines Plantation Property Owners, Inc. and the Advisory Board ("ASPPPO") (hereinafter jointly the "Defendants"), by and through their undersigned counsel, respectfully move the Court for a directed verdict on the ground that Plaintiff has failed to present sufficient evidence to prove her claims of libel, slander and civil conspiracy.[1] In moving for directed verdict, the Defendants hereby incorporate all legal arguments contained in their Motion for Summary Judgment filed on March 27, 2012 and their Memorandum in Support of Summary Judgment.

I. LEGAL STANDARD

"[W]hen only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court" and a directed verdict is appropriate. *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997). "In ruling on a directed verdict motion, the trial court is

[1] Plaintiff agreed to withdraw her claim for negligence with prejudice at the hearing on Defendants' Motion for Summary Judgment. Defendants only agree to that withdrawal insofar as it is with prejudice. If it is not, Defendants hereby move for directed verdict on Plaintiff's claim for negligence as well.

concerned only with the existence or nonexistence of evidence." *Long v. Norris & Assocs., Ltd.*, 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct. App. 2000). "[T]here must be some evidence arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion." *Crawford v. Town of Winnsboro*, 205 S.C. 72, 30 S.E.2d 841 (1944) (emphasis added). The evidence upon which a case should be sent to the jury must be "real, material, and pertinent and relevant evidence, not speculative and theoretical deductions." *Johnson v. Metropolitan Life Ins. Co.*, 206 S.C. 415, 34 S.E.2d 757 (1945) (emphasis added). The Court is not authorized to "submit speculative, theoretical and hypothetical views to the jury." *Hanahan*, 326 S.C. 140, 485 S.E.2d 903. Verdicts may not be permitted to rest on surmise, conjecture, or speculation. *Id.*

III. DISCUSSION

A. ASPPPO

There has been no evidence in this case that any individual acting in an official capacity for or on behalf of ASPPPO, rather than on his own behalf or as a representative of CSA, did any of the allegedly wrongful acts Plaintiff contends are indicative of libel, slander or a civil conspiracy. Accordingly, the Court should render a directed verdict for Defendant ASPPPO on all of Plaintiff's causes of action.

B. Libel and Slander

1. No Actual Malice

In a libel and slander causes of action, any publication concerning a public official is constitutionally protected unless the plaintiff shows with "convincing clarity" that the defendants made the statement with "actual malice". *New York Times v. Sullivan*, 376 U.S. 254, 280, 285-

86 (1964); *see, e.g., Miller v. City of West* Columbia, 322 S.C. 224, 471 S.E.2d 683, 686-86 (1996).

> The constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. There must be evidence the defendant had a high degree of awareness of ... probable falsity.

Elder v. Gaffney Ledger, 341 S.C. 108, 114-15, 533 S.E.2d 899, 902 (S.C.,2000)(emphasis added)(internal citations omitted).

The presence or absence of actual malice is a constitutional issue and "[w]hether evidence is sufficient to support a jury's finding of constitutional actual malice in a defamation action is a question of law. The trial court must make such a determination before submitting the issue to a jury." *Id.*, 341 S.C. at 113, 533 S.E.2d 899, 901-02 (internal citations omitted). Unless the evidence presented is of sufficient "caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence", there is no genuine issue of fact and the trial judge should not submit the claim to a jury. *McLain v. Arnold*, 275 S.C. 282, 284, 270 S.E.2d 124 (1980) (holding that the trial court did not err in granting defendant sumamry judgment). *See also, Oswalt v. State-Record Co.*, 250 S.C. 429, ___ S.E.2d 430 (1967) (holding that the defendants' motion for directed should have been granted); *Faltas v. State Newspaper,*

928 F. Supp. 637 (granting defendants' motion for summary judgment on "limited purpose public figure" plaintiff's cause of action for libel). internal citations omitted).

Although direct or indirect evidence relevant to the defendant's state of mind is admissible to prove actual malice (*St. Amant v. Thomson*, 390 U.S. 727 (1968)), "[t]he actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Harte-Hanks*, 491 U.S. at 666. Although some evidence of motive may bear some relation to the actual malice inquiry, "courts must be careful not to place too much reliance on such factors.'" *Elder*, 341 S.C. at 115, 533 S.E.2d at 902 (*citing Harte-Hanks*, 491 U.S. at 668). "It is insufficient to show the defendant made an editorial choice or simply failed to investigate or verify information; there must be evidence at least that the defendant purposefully avoided the truth." *Elder*, 341 S.C. at 114, 533 S.E.2d at 902 (internal citation omitted)(emphasis added). Erasure of a tape recording when done as part of routine practice is not evidence of actual malice. *Peeler v. Spartan Radiocasting*, 324 S.C. 261, 478 S.E.2d 282 (1996).

In *Elder*, the plaintiff introduced various circumstantial evidence in an attempt to prove actual malice, including a failure to investigate or verify information the individual defendant Sossamon received via an anonymous caller; a missing telephone recording the plaintiff alleged the defendant newspaper, Sossamon's employer, had erased; Sossamon's prior guilty plea to manufacturing marijuana; and Sossamon's alleged rudeness to the plaintiff's wife. The South Carolina Supreme Court held "[t]his evidence is patently insufficient to demonstrate [defendant] in fact entertained serious doubts as to the truth of the publication." *Id.* at 115, 533 S.E.2d at 902.

2. No Causation

Plaintiff failed to proffer adequate evidence of proximate cause between her alleged injury and the Defendants allegedly defamatory statements. Plaintiff claims damages related to medical bills for headaches, weight gain, and counseling; babysitting charges related to her headaches; lost income due to Plaintiff not receiving the compensation to which she believes she was entitled in her current agreement with the Town of Hilton Head, and lost future income due to her current contract being a two year term agreement rather than the three year term agreement that Plaintiff desired. Plaintiff has not and cannot prove that but for the alleged defamatory publications (as opposed to learning of Breed's complaint to the Commission on Judicial Conduct which is protected by an absolute privilege) that she would not have suffered from any of her alleged damages.

Although Plaintiff claims Breed published the letter to Greg Deloach in an attempt to have Plaintiff fired, there is no testimony or other evidence to support Plaintiff's contention and Plaintiff did not in fact lose her job. To the contrary, Plaintiff received a new contract with the Town of Hilton Head and a raise following the publication of Breed's letter to Greg Deloach with the Town of Hilton Head. Plaintiff's allegations that her contract is of a shorter duration and her compensation less than what it would have been if Breed had not given his letter to Deloach is speculative and counter to the record. Moreover, Plaintiff's contract with the Town is and has always been a term agreement. Automatic renewal was not available under the contract and the contract gave Plaintiff no right to a particular increase in pay. Accordingly, Plaintiff has no legal right to presume that her contract would be renewed at a particular term or pay. *See, e.g.*, *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911) (distinguished on other grounds by *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414 (2004))(holding perpetual contracts are

not favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract).

3. No Unprivileged Publication To CSA

Defendant Breed's publication of the letter to Cary Kelley and to the CSA Security Committee was subject to a qualified privilege as was Mr. Kelley's publication to the CSA Board of Directors. Communications between servants, business associates, officers, or agents of the same corporation enjoy a qualified privilege if made in good faith and in the usual course of business. *Conwell v. Spur Oil Co.*, 240 S.C. 170, 179-80, 125 S.E.2d 270, 275 (1962). Plaintiff bears the burden of proving that any privileged publication of the George Breed letter was exceeded or abused. *Bell v. Bank of Abbeville*, 208 S.C. 490, 494, 38 S.E.2d 641 (1946).

4. No Other Defamatory Statements Attributable to Breed or CSA

Plaintiff has failed to prove Breed or CSA made any statement that Plaintiff was having an affair with John Jolin. No one has testified that Breed or any other employee of CSA with apparent authority to speak for CSA has stated that Plaintiff was having an affair with John Jolin. A principal may be held liable for defamatory statements made by an agent only if the agent was acting within the scope of his employment or within the scope of his apparent authority. *See Abofreka v. Alson Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986); *Murray v. Honam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001); Restatement (Second) of Agency § 247 (1965) (master is subject to liability for defamatory statements made by servant acting within the scope of his employment, or, as to those hearing or reading the statement, within his apparent authority). There was no testimony alleging that Sergeant Woods was acting within the scope of his employment or within his apparent authority on behalf of CSA when he allegedly accused John Jolin of having an affair with Plaintiff (which alleged statement Sergeant Woods denied) in

speaking to another security guard. To the contrary, the nature of the alleged statement supports finding that such statement could not have been made within the scope of Woods' employment or on any apparent authority given Woods by CSA.

5. Opinion is Constitutionally Protected

The honest expression of critical opinion regarding public officials is constitutionally protected. *New York Times*, 376 U.S. at 292. "[I]njury to official reputation is an insufficient reason for 'repressing speech that would otherwise be free.'" *Elder*, 341 S.C. 108, 114-15, 533 S.E.2d 899, 902. "Under the First Amendment there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

Moreover, South Carolina has long recognized that citizens have a right to criticize public officials and question their fitness for the offices they hold. As long as the criticism is fair, honest and without common law malice (which would have to prove in addition to constitutional, actual malice in this case), it is not actionable. *Oswalt v. State Record Co.*, 250 S.C. 429, 435, 158 S.E.2d 204, 207 (1967); *Cartwright v. Herald Pub Co.*, 220 S.C. 492, 68 S.E.2d 415 (1951). "When a citizen holds a public office he becomes subject to criticism; any citizen ... is privileged to criticize his acts, fitness and qualifications for the office he holds and discuss his work without being liable for damages so long as the criticism is fair and honest and made without malice." *Oswalt*, 250 S.C. 429, 435, 158 S.E.2d at 207. This principle, sometimes referred to as the "fair comment" privilege, applies not only to publications by the media, but also to statements by private citizens. *See* 20 *S.C. Jurisprudence*: *Libel and Slander* § 63 at 158-59 and authorities cited in footnote 2 therein. "Fair comment is a complete defense to a suit for

libel and the words are not made actionable by the fact that the complaining party is injured in his business reputation." *Fisher v. Washington Post Co.*, 212 A.2d 335 (D.C. Appeals 1965)(cited with approval in *Oswalt*, 250 S.C. 429, 434, 158 S.E.2d at 206).

6. No Proof the Factual Statements in the Letter Were False

As a public official, Plaintiff bears the burden of proving that the factual statements contained in Mr. Breed's letter regarding plaintiff are false. *New York Times*, supra. Since Mr. Breed's letter contained statements regarding matters of public concern, plaintiff would bear the burden of proving falsity even if she were not a public official. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). The standard for determining truth is "substantial truth." *Ross v. Columbia Newspapers*, 266 S.C. 75, 221 S.E.2d 770 (1976). That standard is clearly met by plaintiff's admissions regarding the factual assertions about plaintiff in Mr. Breed's letter to the Commission on Judicial Conduct.

7. No Special Damages

As a public official, Plaintiff must prove actual injury arising from the alleged publication of the asserted libel or slander. Although general damages were presumed at common law for libel and slander per se, such a presumption is not allowed when the Plaintiff is a public official. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283-84 (1964)("Such a presumption is inconsistent with the federal rule."), *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506, 506 S.E.2d 497, 518 (1998)(because of constitutional issues plaintiff "may not rely on the common law presumption of general damages arising from a defamation actionable *per se*."). Plaintiff must prove actual damages related to her alleged injury to her reputation as a result of Defendant Breed's publication of his complaint letter to the Commission on Judicial Conduct.

8. No Punitive Damages

Unless Plaintiff proves by clear and convincing evidence that Defendants acted with constitutional actual malice, Plaintiff cannot recover punitive damages and her claim for punitive damages may not be sent to the jury. *See e.g., Erickson*, 368 S.C. 444, 629 S.E.2d 653.

C. No Conspiracy

There is no evidence that Defendants conspired with one another for the purpose of injuring Plaintiff. Under South Carolina common law, a claim for civil conspiracy requires proof of three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which causes the plaintiff special damages. *Lawson v. S.C. Dep't of Corrections*, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000). First, Plaintiff has failed to show a combination of persons conspiring to harm Plaintiff. A corporation cannot be a party to a conspiracy consisting of the corporation and managers, directors or other persons in control of the corporate affairs. *McMillan v. Oconee Mem'l Hosp.*, 367 S.C. 559, 626 S.E.2d 884 (2006). *See also, McClain v. Pactive Corp.*, 360 S.C. 480, 602 S.E.2d 87 (Ct. App. 2004) (Conspiracy claim against corporation and employee failed because corporation cannot conspire with itself). The "essential consideration" in civil conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." *Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006) (quoting *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986)). Plaintiff has failed to prove that the Defendants engaged in any unlawful acts or any otherwise improper or unjustified acts in concert with the primary purpose to injure the Plaintiff. *Swinton Creek Nursery v. Edisto Farm Credit*, 326 S.C. 426, 483 S.E.2d 789 (Ct. App. 1997) (insufficient evidence of motive to injure plaintiff).

To prove special damages, Plaintiff must show that the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in the complaint. *See Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981). Special damages must be properly pled, or the claim for civil conspiracy will be dismissed. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115-16, 682 S.E.2d 871, 875 (Ct. App. 2009); *see also* Rule 9(g), SCRCP (requiring special damages to be specifically stated in the pleadings). Plaintiff has failed to prove damages arising from Defendants' supposed civil conspiracy that are different from the damages that she seeks in her other causes of action against Defendants. Civil conspiracy allegations cannot be "simply an embellishment" of the underlying claims. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). Having failed to present willfulness by clear and convincing evidence, any claim for punitive damages related to the civil conspiracy allegations fails as a matter of law. *See, e.g., Charles v. Texas Co.*, 199 S.C. 156, 174, 18 S.E.2d 719 (1942).

Finally, Plaintiff's claim is barred because she is a public official. As previously argued, in *Angus v. Burroughs & Chapin Co.*, 368 S.C.167, 628 S.E.2d 261 (2006), the Supreme Court of South Carolina held that a public official has no claim for civil conspiracy against those who complained about her performance of her public position. The court specifically held:

> Because of Angus's status as a public official, we conclude her action for civil conspiracy cannot be maintained against any of these defendants.

Id., 628 S.E.2d 261, 262. In contrast to Plaintiff's continued employement as the municipal judge for the Town of Hilton Head Island, Angus was dismissed from her position, but still had no claim for damages against her critics: "[i]n our democratic society, a public official is answerable to the public; members of the public are not third-

party interlopers. Because of Angus's status as a public official, we conclude her action for civil conspiracy cannot be maintained against any of these defendants."[2]

IV. CONCLUSION

For all the foregoing reasons and any others in the record, Defendants respectfully request that the Court issue an Order GRANTING Defendants' Motion for Directed Verdict.

Respectfully submitted,

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Community Services Associates, Inc. Association of Sea Pines Plantation Property Owners, Inc. and George F. Breed, Jr

June 4, 2012
Hilton Head Island, South Carolina

[2] The clarity of the Supreme Court's holding has not been lost on the local federal court. *Reed v. Aiken Co.*, 2010 WL 2985805 (DSC 2010) ("Under South Carolina law, a public official who is employed at-will cannot maintain a civil conspiracy claim against members of the public," citing the Supreme Court's opinion in *Angus*.).