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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Michael S. Holt, Circuit Court Judge

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Appellate Case No. 2023-001000

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Glenn C. Odom……..……..……..……..Appellant,

-v-

John Campolong and A.C. McLeod…….……..……..Defendants,

Of whom John Campolong is the……..……Respondent.

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# REPLY BRIEF OF APPELLANT

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## ARGUMENT

In his Brief, Respondent John Campolong seeks to stretch the scope of the absolute legislative privilege to its furthest reaches and would have the Court believe that the privilege applies to any and all statements made by a member of a town council or other legislative body, no matter the occasion, if the statements have an incidental relationship to any of his duties or a perceived public interest. To the contrary, the law of South Carolina and other jurisdictions provides that the absolute legislative privilege only attaches to statements that are made on proper occasions in the performance of *legislative* duties or in furtherance of *legislative* functions. While Campolong's Brief contains a lengthy recitation of all the reasons the defamatory statements at issue were related to general Town Council interests, he fails to recognize that there is a distinction between the Town Council's legislative duties, interests, and functions, and its administrative or executive duties, interests, and functions in general. Campolong has not satisfied his evidentiary burden by pointing to anything in the record specifically connecting the dots between his statements and their furtherance of a related, legitimate, ongoing *legislative* function such that they would have been protected by the absolute legislative privilege.

Campolong also contends that the record does not contain sufficient evidence of actual malice to survive summary judgment, arguing that the Court, and the Circuit Court, were precluded from viewing the evidence in the light most favorable to Odom, and that therefore the circumstantial and direct evidence of actual malice

is not clear and convincing.[1] Campolong dismisses this evidence by proposing that (1) it is either irrelevant to the actual malice inquiry, or (2) all inferences that can be drawn from it should be resolved in his favor. His position is in contravention of the summary judgment standard and ignores South Carolina and federal precedent dictating that circumstantial and direct evidence of a defendant's subjective knowledge, motive, and failure to investigate his claims are all relevant to the actual malice analysis. Campolong has pointed to no admissible evidence logically supporting that he harbored a good faith, subjective belief that Odom had embezzled $850,000 in tobacco settlement funds, and the Circuit Court's Orders entirely fail to describe any such evidence as well.

Lastly, Campolong argues that the Court should not extend the continuous accrual or continuing violation doctrine to civil conspiracy claims because two prior precedents have only applied the doctrine in "statutory construction decisions" that sought to "effectuate the intent of the South Carolina legislature." However, the Court and the Supreme Court have never stated that these doctrines cannot be applied to common law causes of action. Further, he asserts that any arguments referencing the "last overt act doctrine" are not preserved for review. Campolong ignores that whether referenced as the continuous accrual, continuing violation, or last overt act doctrine, Odom was not required to refer to the doctrine by any specific name to preserve the argument for review, and the Court is not precluded from analyzing

[1] Any direct or indirect evidence relevant to the defendant's state of mind is admissible to demonstrate actual malice. The law of defamation recognizes that a defendant's intent will be very difficult to prove in most cases. *Anderson v. The Augusta Chronicle*, 355 S.C. 461, 478, 585 S.E.2d 506, 515 (Ct. App. 2003).

whether a continuing violation or continuous accrual theory should be extended to the civil conspiracy context, regardless of how the theory is labeled. For these and the following reasons, the Court should reverse the Circuit Court's Orders.

## I. The scope of the absolute legislative privilege should be narrowly construed to only apply to statements made in furtherance of the legislative process, and there is no evidence in the record indicating that Campolong made the defamatory statements on privileged occasions or for the purpose of furthering any relevant ongoing or future legislation.

Campolong's argument for the application of the absolute legislative privilege to his statements is two-fold. First, Campolong argues that statements made outside of official legislative proceedings, sessions, or meetings may be protected by the privilege, citing *Richardson v. McGill*. While this may be true, under the factual circumstances before it, the *Richardson* court did not have the opportunity to address whether the privilege would protect comments made outside of any legislative proceeding, session, or meeting, and the decision seemed to confine itself to its facts. Therefore, *Richardson* is not necessarily dispositive of the issue of privilege under the facts presented by this Appeal.

Second, Campolong argues in a conclusory fashion that regardless of where the statements were made, the defamatory statements accusing Odom of stealing $850,000 that belonged to the Town of McBee were related to the Town Council's interests because they were related to (1) pending litigation involving the Town of McBee, (2) allegations in the pleadings of a lawsuit verified by Campolong, and (3) the budgeting, financing, and rate-setting functions of the Town Council. However, Campolong never directly links the statements to any ongoing or future legislative

processes or functions that they would have furthered. Additionally, Campolong's arguments fail to recognize a distinction between the Town Council's legislative functions and its administrative or executive functions. Case law makes clear that in order to be afforded an absolute legislative privilege, statements must be related to a legislative duty *and* be made in furtherance of a legislative process.

The court in *Richardson* explicitly set forth that the scope of the absolute privilege was narrow and guided by considerations of public policy. *Richardson*, 273 S.C. 142, 145-46, 255 S.E.2d 341, 342-43 (1979). The court found that the occasion upon which the defamatory statements were made was privileged, even if it wasn't a formal legislative session, in part because it was an official joint meeting attended only by a legislative delegation and county recreation commission, such that everyone present had an official interest. *Id.* at 147-48, 255 S.E.2d at 343-44. Here, not only were the alleged statements not confined to formal Town Council meetings and executive sessions, but they were also made on occasions that could not be described in any manner as a legislative meeting and were therefore not made on privileged occasions. *See Adamson v. Bonesteele*, 295 Or. 815, 823, 671 P.2d 693, 697 (Ore. 1983) (noting that the common law privilege extends to work of committees even during legislative recesses but does not extend outside the chamber or meeting place).

Statements were made after meetings and sessions had ended, in the hallways of Town Hall or in Campolong's personal business office, and in front of individuals who were not Town Council members. (Mem. in Opp. to Mot. for Summ. J. Ex. 16, Beulah Bolton Dep. 5:24-7:21, 19:9-11, 20:1-4; Ex. 20, Marion Stephens III Dep.

10:23-11:4, 11:19-21). These occasions are not absolutely privileged, and public policy does not dictate that they should be, because Campolong cannot explain how at those specific times he was advancing a legitimate legislative function or fulfilling a legislative duty in the public interest such that his acts would outweigh Odom's right to enjoy his reputation free from defamatory attacks. This distinguishes the current factual circumstances from those of *Richardson*. To the contrary of Campolong's argument, the Supreme Court has never extended the absolute legislative privilege to comments made outside of a meeting that furthered legislation in some capacity, and the Court should decline to do so here.

The parties and the court in *Richardson* never explicitly made a distinction between the legislative and administrative functions of a legislative body, although in dicta the court did note that a legislator (1) must be engaged in a *legislative* duty or process at the time the defamatory statement was made for the absolute privilege to apply, and that (2) the statements must be concerning a matter related to the legislative duty or process. *Richardson*, 273 S.C. at 146-48, 255 S.E.2d at 343-44 (noting that to qualify for the absolute privilege, a legislator should be "*engaged in a legislative duty or process* at the time the defamatory statements were made."). Campolong asks the Court to solely focus on the relatedness requirement and wholly ignore the furtherance requirement.

Inherent to the privilege is the fact that a member of a local legislative body published the protected statements in the performance of his *legislative* functions, and not in some other functional capacity encompassed by his elected position.

*Hutchinson v. Proxmire*, 443 U.S. 111, 130-33, 99 S. Ct. 2675, 2686-87, 61 L. Ed. 2d 411 (1979) (setting forth that absolute legislative immunity only protects statements made as part of the legislative function or the deliberations that make up the legislative process and not all statements made incidentally related to legislative functions);[2] *Chastain v. Sundquist*, 833 F.2d 311, 321 (D.C. Cir. 1987) (noting that the common law privilege only granted legislators immunity when making law); *Meyer v. McKeown*, 266 Ill. App. 3d 324, 329, 641 N.E.2d 1212, 1215, 204 Ill. Dec. 593, 596 (Ill. App. Ct. 1994) (holding that only statements made within the scope of legislative duties and during the course of legislative proceedings are privileged); Restatement (Second) of Torts § 590 (Am. L. Inst. 1977) ("The privilege does not protect a legislator . . . who engages in other activities incidentally related to legislative affairs *but not a part of the legislative process itself*.").

Other jurisdictions have recognized that a legislative body has administrative, supervisory, and legislative capacities, and that it must be determined which function was being advanced by the defamatory statements, if any were, before the absolute legislative privilege is applied. *See Anderson v. Hebert*, 2013 WI App 54, ¶¶ 12-13, 347 Wis. 2d 321, 329, 830 N.W.2d 704, 708 (Wis. Ct. App. 2013); *Isle of Wight Cnty. v. Nogiec*, 281 Va. 140, 154, 704 S.E.2d 83, 89 (Va. 2011); *Hillman v. Yarbrough*, 936 So.2d 1056, 1062 (Ala. 2006) ("The fact that an action is undertaken in the course of a legislator's fulfilling his or her responsibilities does not necessarily indicate that

[2] *Hutchinson* concerned the Speech and Debate Clause's protection of Member of Congress when making defamatory statements, and not the common law absolute legislative privilege, but the policy concerns and principles underlying the decision are identical to those implicated by this case.

the action was taken in the performance of a legislative duty or act."); *Pierson v. Hubbard*, 147 N.H. 760, 765, 802 A.2d 1162, 1167 (N.H. 2002) (noting that the duties of city councils are both legislative and administrative). All proceedings before a legislative body therefore do not fall under the umbrella of legislative proceedings "to which the attachment of the privilege serves the public interest." *Nogiec*, 281 Va. at 154, 704 S.E.2d at 90.

Only when a legislator or legislative body is acting in a legislative capacity and functioning to promote the creation or passage of legislation does the absolute legislative privilege protect statements made in furtherance of that purpose. *Id.* The investigation of government affairs and receipt of and inquiry into financial and other reports have been found to be administrative duties and functions, and not legislative ones, and are therefore not protected by an absolute privilege. *Id.* at 154-55, 704 S.E.2d at 90; *Anderson*, 347 Wis. 2d at 329, 2013 WI App 54, at ¶¶ 12-13, 830 N.W.2d at 708 (Wis. Ct. App. 2013). In other words, "[A]n absolute privilege should not be extended to members of city council, where there is no pending legislation relating to the subject matter of the alleged defamation and where the publication is beyond the legislative forum." *Costanzo v. Gaul*, 62 Ohio St. 2d 106, 110, 403 N.E.2d 979, 983 (Ohio 1980).

In *Richardson*, the court tied the defendant's statements to his legislative capacity when explaining its reasoning for why the absolute privilege would apply. The court found that because the legislator made the statements in a joint legislative delegation and county recreation commission meeting, and the legislative delegation

had a responsibility to fund the operation of the county government through appropriation bills, the legislator therefore had a legislative duty to review the performance of the commission and the plaintiff (whom he allegedly defamed). *Richardson*, 273 S.C. at 147-48, 255 S.E.2d at 343-44. The court did not extend the absolute privilege to the defendant's statements merely because they were tangentially related to legislative functions such as policymaking and enacting statutes. It was the nexus between his functional capacity at the joint meeting and his duty to make appropriations law based upon information gathered at that meeting that justified the attachment of the absolute privilege to his statements, as his entire reason for being at the meeting was in furtherance of his capacity to advance appropriations legislation. In other words, the court did not attach the privilege to his statements merely because they were related to his general duties as a legislator.

Absolute privilege is an affirmative defense, and the defendant has the burden of proving the existence of circumstances supporting its existence. Restatement (Second) of Torts § 613(2) (Am. L. Inst. 1977). There is no evidence in the record indicating in any sort of detail the circumstances and purpose of the conversations in which the defamatory statements were made, other than that they involved general town business, as opposed to any specific pending or future ordinances. (Mem. in Opp. to Mot. for Summ. J. Ex. 20, Marion Stephens III Dep. 11:2-12:23). The evidence only supports at best that Campolong was acting in an administrative or executive capacity when he made statements to Bolton, her sister, and Stephens reporting his

conclusions from the earlier tobacco settlement fund grant inquiry, if he was even acting within his official capacity as a member of the Town Council at all. Campolong was speaking to communicate his beliefs concerning a matter that (1) had already been reported by the Town Council to the South Carolina Attorney General's Office, (2) had been fully investigated by the Attorney General through the Fourth Circuit Solicitor's Office, which cleared Odom of any wrongdoing four years earlier, (3) was only tangentially related to current litigation involving the Town of McBee, and (4) did not involve the enactment of pending or future town ordinances. Regardless of whether his statements were related to the Town of McBee's "public grant, water, rates, budgets and finances" as has been argued by Campolong at length, there is no evidence in the record that his statements were in furtherance of any particular legitimate, pending *legislative* functions concerning those grants of authority.

The Town Council was not conducting a meeting and there is no evidence it was considering any existing or potential *legislative* action related to the $850,000 grant. Campolong has made no compelling argument that the occasions on which he published the defamatory statements were situations where the public interest was so vital and apparent that they demanded his complete freedom of expression without any inquiry whatsoever into his motives. Because Campolong was not acting in a legislative capacity when he made the defamatory statements, and the occasion was not a legislative proceeding in which the public interest would support the complete eradication of Odom's right to be free from defamatory accusations, his statements are not absolutely privileged.

Campolong's argument that his statements are related to the legislative functions of the Town Council is difficult to follow. The track of Campolong's reasoning seems to be that because (1) the subject of the $850,000 grant concerns water, (2) the Town of McBee commenced an action against Alligator Rural Water & Sewer Co. that contained allegations concerning the $850,000 grant in its amended complaint, (3) the statements at issue in this Appeal are similar to those allegations, and (4) the action also included allegations concerning the Town of McBee's budget, finances, and water system, then (5) Campolong's statements to Stephens, Bolton, and her sister concerning the grant are related to the Town Council's legislative functions.

This reasoning is difficult to follow because it is illogical and makes no sense. Campolong and the Town of McBee's decision to commence a lawsuit against Alligator were executive functions on behalf of the Town incidental to the Town Council's legislative functions.[3] Just because the lawsuit includes allegations related to matters within the scope of the Town Council's authority does not mean that whenever Campolong made defamatory statements they were in furtherance of a legislative function and purpose. Again, the Town Council had completed its "investigation" and reported its suspicions to the Attorney General over four years prior to Campolong making the statements that are before the Court. (Mem. in Opp. to Mot. for Summ. J. Ex. 12, Letter). Filing a lawsuit in his executive capacity as

[3] In fact, the Town Council does not appear to be authorized to commence lawsuits on behalf of the Town of McBee as a legislative power, making such an action an exclusively executive function. *See* S.C. Code Ann. § 5-7-260; McBee, S.C., Ordinance § 2.109 (1994).

Mayor does not necessarily entail the furtherance of legislative functions incidentally discussed within its allegations, and Campolong has pointed to no evidence that the defamatory statements at issue or lawsuit advanced a legislative process. And just because public water, budgeting, and financing are systems and processes legislated by the Town Council does not mean that Campolong's defamatory statements about the tobacco settlement fund grant were in furtherance of the Town Council's capacity to legislate on those areas of public interest.

While the case law indicates that the scope of the absolute privilege should be narrow given its infringement on an individual's right to be free from unjustified reputational harm, Campolong's arguments would have the Court extend the scope of the privilege to any statements made by legislators, whether they are in session or at home, whether they are speaking to constituents or lobbyists, or whether they are speaking to friends in a neighborhood gathering place, so long as the subject matter of the statement has some tangential, incidental relationship with a matter that is of public interest, regardless of whether or not there is any evidence the statement was specifically made in furtherance of any legitimate legislative functions or processes.

> A [legislator] may not with impunity publish a libel from the speaker's stand in his home district, and clearly the [absolute legislative privilege] would not protect such an act even though the libel was read from an official committee report. The reason is that republishing a libel under such circumstances *is not an essential part of the legislative process* and is not part of that deliberative process "by which Members participate in committee and House proceedings."

*Hutchinson*, 443 U.S. at 130, 99 S. Ct. at 2685-86 (emphasis added). Campolong advocates for a complete departure from the policy justifications for the existence of

a legislative privilege, which provides for absolute freedom of speech only to the extent the speaker is in the process of furthering actual legislation. The absolute privilege is not intended to go so far as Campolong would like, and the Circuit Court's Orders should be reversed.

## II. The totality of the evidence, when viewed in the light most favorable to Odom, is sufficient to create a genuine dispute of material fact as to whether Campolong had obvious reasons to doubt that Odom embezzled the $850,000 tobacco settlement fund grant.

### A. The summary judgment standard requires the Court to resolve all factual disputes and reasonable inferences in Odom's favor.

Campolong incorrectly asserts that in constitutional defamation cases involving the standard for proving actual malice as set forth in *N.Y. Times Co. v. Sullivan*, a court should resolve reasonable inferences that may be taken from conflicting or ambiguous evidence *against* the non-moving party on a motion for summary judgment because the standard requires that the plaintiff prove actual malice by clear and convincing evidence. Unsurprisingly, he cites no case law for this proposition. This Court is required by prior precedential authority to resolve all factual disputes in favor of the non-moving party, even when determining whether a plaintiff satisfies the burden of proof concerning constitutional actual malice on a motion for summary judgment.[4] *See George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d

[4] Campolong also seems to argue that since the defamatory statements were ongoing during a political contest between himself and Odom that they should be afforded special protection above and beyond that provided by the *New York Times* standard. This is contrary to South Carolina law, which states that even when defamatory publications are made during a political election, the publications are measured by the *New York Times* actual malice standard, despite the special value of political speech. *George v. Fabri*, 345 S.C. 440, 455, 548 S.E.2d 868, 876 (2001).

868, 874 (2001) (stating that on summary judgment a court must view the facts in the light most favorable to the non-moving party in a case involving constitutional actual malice); *Anderson v. The Augusta Chronicle*, 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct. App. 2003) (stating that when ruling on a motion for summary judgment on the constitutional malice element of defamation, the non-moving party's evidence is to be believed and all justifiable inferences are to be drawn in his favor); *Stokes v. Oconee Cnty.*, 441 S.C. 566, 583, 895 S.E.2d 689, 698 (Ct. App. 2023) (viewing the evidence of constitutional actual malice in the light most favorable to the non-moving party).

Regardless, the majority of the evidence pointed to by Odom in opposition to summary judgment is not even factually disputed by Campolong. Evidence of Campolong's subjective belief that Odom did nothing illegal, the steps (or lack thereof) that were taken by Campolong to "investigate" Odom, and the parties' long and contentious history is not ambiguous or disputed, and in its totality constitutes clear and convincing evidence that Campolong had obvious reasons to doubt the truth of his accusations, without the need to resolve any inferences or facts in Odom's favor.[5] However, the Court should resolve any remaining factual disputes and

[5] Defamation law clearly provides that motive and a failure to investigate, while in themselves are not dispositive of actual malice, are factors that may be considered, especially when there is evidence that the defendant had obvious reasons to doubt the veracity of his claims. *George*, 345 S.C. at 459, 548 S.E.2d at 878 ("[A]ctual malice may be present where the defendant fails to investigate *and there are obvious reasons to doubt the veracity* of the *statement* . . ."); *Elder v. Gaffney Ledger*, 341 S.C. 108, 117, 533 S.E.2d 899, 904 (2000) ("[I]t cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry . . . ."). *Elder* was a constitutional defamation case litigated under the *New York Times* standard.

reasonable inferences in Odom's favor, then determine whether the total weight of the evidence of actual malice meets the clear and convincing burden of proof.

### B. The Circuit Court's Order does not adequately explain why it rejected all the evidence in the record of actual malice.

Campolong next argues that the Circuit Court properly reviewed the entire record in reaching its decision, citing four separate excerpts from the Circuit Court's summary judgment Order in which it states that it reviewed all of the evidence prior to reaching its decision. Campolong misunderstands Odom's argument, which is not that the Circuit Court failed to review the entire record. The argument is that the Circuit Court did not adequately account for all of the evidence in the record in explaining its decision. The Order only addresses Odom's testimony concerning proof of actual malice. However, Odom's personal knowledge of any direct evidence proving Campolong's awareness of the probable falsity of his statements is totally irrelevant to the question of whether the entire record contains any such evidence, and it was error for the Circuit Court to laser-focus on Odom's testimony while failing to consider and explain its rejection of the remaining evidence in the record.

The Circuit Court's Order addresses actual malice as it pertains to Campolong in a roughly one-page discussion. (Order, Feb. 9, 2023 9-11). After stating that Odom was required to prove actual malice by clear and convincing evidence, and that it was a high standard, the Circuit Court recited a segment of Odom's deposition testimony in which Odom stated that he didn't personally have any way of knowing what Campolong knew when he made the defamatory statements. (*Id.* at 10). The Circuit Court then goes on to state that it must "necessarily consider the plaintiff's ability to

prove defamation by clear and convincing evidence" and that it "fails to see how this admission does not support Campolong's motion." (*Id.* at 10-11). With that, the Circuit Court granted summary judgment to Campolong. The Circuit Court clearly did not contemplate or consider any other evidence in the record in making its decision. This was error, and the Circuit Court's reasoning in granting summary judgment is inadequate and must be corrected. At minimum, the Circuit Court's Order should be vacated and remanded so that it may engage in an adequate analysis of all the evidence in the record prior to making a decision, although de *novo* appellate review of the evidence mandates reversal.

### C. Odom does not have to prove the falsity of Campolong's statements, and that they were published to third parties, by clear and convincing evidence.

For the first time in this case, Campolong explicitly argues in his Brief that the evidence of Campolong making defamatory statements, including where they were made, who they were made by, when they were made, and what they were about, does not satisfy the clear and convincing burden of proof.[6] He also argues for the first time that there is not clear and convincing evidence supporting the falsity of Campolong's statements. The first argument concerns the second element of the defamation claim, that is, whether a publication was made to a third party.

[6] In his memorandum in support of summary judgment, Campolong states that Bolton and Stephens alleged that "Campolong accused Odom of misusing $850,000 in grant money which had been awarded to McBee . . . . Per Stephens, Campolong said these statements or variations of them . . . during a single, private conversation between Stephens and Campolong . . . . Per Bolton, Campolong made the statements about money either before or after council meetings . . . ." (Mem. in Supp. of Mot. for Summ. J. 16). Campolong has also admitted that the statements made to Stephens "refer to the use of the $850,000 in grant money." (Reply Mem. 3).

*Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 518, 506 S.E.2d 497, 506 (1998) (Toal, J., concurring). The second argument concerns the first element of the defamation claim, which is whether a false statement was made. *Id.* Neither of these issues were determined by the Circuit Court on the original summary judgment motion or on reconsideration.[7]

Campolong conflates these issues with the actual malice requirement, when in fact they are separate elements that must be determined on their own accord. (Resp't's Br. 27-30). Campolong's assertion that these issues must meet the clear and convincing evidence burden of proof is contrary to the law, which provides that even in a constitutional defamation action involving public officials a plaintiff only has to prove the first two elements of the defamation claim by a preponderance of the evidence, which would only require the plaintiff to demonstrate a genuine issue of fact on summary judgment. *See Stokes*, 441 S.C. at 577, 895 S.E.2d at 695 ("When the element of constitutional actual malice is required *to show fault* . . . 'the appropriate standard at the summary judgment phase on [that] issue . . . is the clear and convincing standard.'").

Bolton's and Stephens' testimony, when reviewed in its entirety, specifically sets out that Campolong made statements to both of them that Odom had stolen or embezzled the grant money outside of Town Council meetings and sessions. Bolton testified that she had heard Campolong and McLeod state that Odom had "embezzled

[7] Since summary judgment for Campolong was granted solely on the basis of actual malice, the Court must assume that the statements at issue were false, defamatory, and published by Campolong. *See George*, 345 S.C. at 456 n.7, 548 S.E.2d at 876 n. 7.

money" on a number of occasions, and that this occurred both before and after Town Council meetings. (Mem. in Opp. to Mot. for Summ. J. Ex. 16, Bolton Dep. 6:13-7:21). Stephens has testified that Campolong told him that Odom "stole money from the town" and that the topic had come up at Campolong's business office, outside of a Town Council meeting or executive session.[8] (Mem. in Opp. to Mot. for Summ. J. Ex. 20, Stephens Dep. 9:9-19, 10:23-11:4). Correspondence from the Fourth Circuit Solicitor states that there is no evidence demonstrating Odom violated any criminal laws regarding the tobacco settlement fund grant.[9] (Mem. in Opp. to Mot. for Summ. J. Ex. 13, Letter). Another letter from South Carolina Secretary of Commerce Charles S. Way to Odom, of which Campolong admitted to having knowledge, states that

> [T]he grant will be used to fund a portion of a water project located in the western portion of Chesterfield County, which is being jointly constructed, by the Chesterfield County Rural Water Company, Inc. and the Town of McBee. The portion of the water project for which the grant moneys will be expended is the construction of water infrastructure facilities, which will provide water to an area of the county north of the Town of McBee and continuing to the Jefferson area.

(Mem. in Opp. to Mot. for Summ. J. Ex. 5, Letter). It is undisputed by Campolong that this is in fact exactly how the grant money was acquired and used while Odom was Mayor. Even if the Court were not required to presume Odom has met the first

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[8] Campolong states that Odom has abandoned the slanderous statements Campolong is alleged to have made concerning whether Odom maliciously punctured Town of McBee water pipes. The Circuit Court never addressed these statements in either of the Orders granting summary judgment. The Circuit Court granted summary judgment to Campolong on the narrow ground of there being no evidence of actual malice, and never reached the issue of whether the statements concerning the water pipes were privileged or were published by Campolong, so for the purposes of this Appeal it should be presumed that they were not privileged and were published by him. *Anderson*, 355 S.C. at 475, 585 S.E.2d at 513.

[9] Contrary to Defendant's arguments there is no evidence in the record of exactly when Campolong first received this document.

two elements of his defamation claim, there is clearly at minimum a genuine dispute as to whether Campolong's statements accusing Odom of crimes were false and were published to third parties.

### D. Campolong relies on circular logic and inadmissible, irrelevant evidence to support that he held a good-faith belief that Odom had committed illegal acts.

The record contains very little to no evidence actually supporting that Campolong himself harbored a good-faith, reasonable belief that Odom had embezzled or stolen the tobacco settlement fund grant from the Town of McBee. First, the Circuit Court's Order contains a factual finding in which the Circuit Court states that "in 2012, Campolong, acting as mayor, and the town council sent a letter to the South Carolina Law Enforcement Division ("SLED") requesting an investigation into Odom's actions during his time as mayor. *Shortly thereafter, the council was informed that no wrongdoing had been found*." (Order, Feb. 9, 2023 3) (emphasis added). This finding has not been appealed by Campolong.

Second, Campolong relies on factual findings of the Town of McBee Municipal Election Commission ("MEC") to assert that Odom engaged in improper conduct and violated state election laws in the first race between Odom and Campolong in 2016, and that presumably Campolong was justified in believing he would engage in illegal acts. The Court should ignore the evidence because it is inadmissible, irrelevant character evidence under Rule 404, SCRE. Additionally, the conduct alleged in that 2016 election contest, which was not appealed to this Court or the Circuit Court, involved an Alligator employee's assistance of McBee residents in delivering absentee

ballots. (Mem. in Supp. of Mot. for Summ J. Ex. H 3). The conduct of that employee was later reviewed by the Supreme Court following a challenge to the 2020 mayoral race and was found not to have violated any state election laws in assisting McBee residents with absentee ballot applications. *See Odom v. McBee Municipal Election Comm'n*, 440 S.C. 367, 891 S.E.2d 663 (2023). More importantly, there is no evidence in the record that Campolong has ever stated that the MEC's findings following the 2016 election challenge informed any belief held by him that Odom had embezzled the tobacco settlement fund grant.

Third, Campolong relies on the allegations of the *Town of McBee v. Alligator Rural Water & Sewer Co., Inc.* lawsuit as evidence that he did not act with actual malice. For starters, the argument that the verified allegations of the lawsuit's amended complaint, which includes an allegation that Odom "diverted an $850,000 grant given to the Town by the Department of Commerce to Alligator", provided a basis for a subjective belief in his accusations is rather circular in its logic, because Campolong is the individual responsible for verifying the allegations of that complaint. Campolong's argument also ignores that in the lawsuit, Campolong never alleged that Odom engaged in criminal conduct such as embezzlement. Instead, it only states that he "diverted" the grant, and that this conduct would be an unfair trade practice. (Mem. in Supp. of Mot. for Summ. J. Ex. E, Am. Compl. ¶ 115). If anything, this indicates that Campolong was not willing to go so far as accusing Odom of criminal illegalities in verified pleadings because he knew that such accusations were not true.

Fourth, Campolong relies on deposition testimony from witnesses who believed that the Town of McBee should have received the tobacco settlement fund grant to support that he believed his accusations. This evidence is irrelevant because the personal beliefs of a select number of McBee residents are in no way probative of Campolong's subjective knowledge. The logic of this argument, much like the previous one, is also circular because there is circumstantial evidence that Campolong and McLeod are the reason that at least some citizens of McBee believe that Odom did something improper. (Mem. in Opp. to Mot. for Summ. J. Ex. 19, Olin Morrison Dep. 16:10-17:4). In addition, the testimony cited by Campolong actually supports why Campolong should have known that the defamatory statements were not true: "And if [Odom] can produce that request which he wrote to the government to get that money, I'll believe anything he says . . . ." (Mem. in Opp. to Mot. for Reconsideration Ex. O Billy Rex Lovelace Dep. 11:6-8). Campolong has admitted to seeing the letter from Secretary Way setting forth that the grant was designated by the State for the exact project it ended up funding, which is at complete odds to the notion that Odom somehow illegally misused the grant.

Lastly, Campolong relies on evidence that Odom was general manager of Alligator in 2001 to support that Campolong did not act with actual malice. This evidence is irrelevant to the issue of actual malice and is not admissible for the purpose of proving that Odom ever did anything illegal concerning the tobacco settlement fund grant. Rules 404, 608 SCRE. The evidence is particularly irrelevant because by Campolong's own admission, he was not cognizant of this evidence until

after this action was filed, so it could not have formed a basis for any subjective belief held by Campolong at the time the statements were made in 2016 and 2017, assuming for the sake of argument that the evidence conclusively demonstrates Odom was in fact general manager of Alligator in 2001. (Resp't's Br. 41).

In total, Campolong's arguments seeking to demonstrate that Campolong had a subjective belief in the truth of the assertion that Odom embezzled the grant from the Town of McBee find very little basis in evidentiary facts. The arguments rely on circular logic, evidence that is inadmissible for the purpose of demonstrating that Odom did anything illegal, and red herring evidence that is irrelevant as to what Campolong's subjective beliefs were at the time he published his defamatory accusations. These arguments are ineffective rebuttals to the circumstantial and direct evidence in the record showing that Campolong had obvious reasons to doubt the veracity of the alleged defamatory statements.

### E. Campolong's reliance on South Carolina case law is ill-founded and does not take into account the factual circumstances and legal analysis of each case.

Campolong references four South Carolina precedents as demonstrative of why the Circuit Court was correct in granting summary judgment and seeks to convince the Court that one pivotal case, *Erickson v. Jones Street Publishers, LLC*, is inapplicable to this Appeal. Campolong's analysis is superficial and does not sufficiently take into account the facts of each of the cited cases. Campolong asserts that the *New York Times* standard was not applied in *Erickson*, therefore its reasoning and holding are inapplicable here. This is completely untrue. *Erickson* did

not involve a public official or public figure, but it did involve a private litigant seeking punitive damages against a media defendant. *Erickson*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006). The court noted that the plaintiff was only entitled to recover punitive damages from a media defendant if she proved actual malice, and that the jury had determined there was clear and convincing evidence of constitutional actual malice. *Id.* Citing *Elder*, the court defined actual malice as a subjective standard testing the publisher's good faith belief in the truth of his or her statements, and that proof of knowledge of falsity or reckless disregard for the truth was required by clear and convincing evidence. *Id.* at 477, 629 S.E.2d at 671. This is the precise definition of the *New York Times* standard. Campolong's argument is nonsensical.

Campolong points the Court to four cases that he claims are more factually analogous to this Appeal. In all four of the cases, the plaintiff primarily alleged that the defendants failed to adequately investigate their defamatory publications, and the court in all three cases primarily rested its analysis on whether the defendants departed from the industry standards of investigation and reporting or otherwise failed to adequately investigate, whether there was proof the defendant subjectively believed their publications, and the fact that there was essentially no other evidence probative of the defendant's subjective knowledge of falsity other than possibly scant, attenuated evidence of motive. *See Elder*, 341 S.C. at 115, 533 S.E.2d at 902 (finding that evidence of a failure to investigate accompanied only by threadbare evidence of motive is not sufficient to prove actual malice); *Peeler v. Spartan Radiocasting, Inc.*,

324 S.C. 261, 266-67, 478 S.E.2d 282, 284-85 (1996) (finding that there was not clear and convincing evidence of actual malice because the evidence showed at best that the defendant may have practiced "sloppy journalism"); *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002) (finding that there was no evidence that a defendant's investigation did not conform with investigatory standards); *George*, 345 S.C. at 457-61, 548 S.E.2d at 877-79 (finding no actual malice where the defendant testified she reasonably relied upon common campaign practices and information gathered from campaign materials, news reports, surveys, and conversations with commissioners and newspaper reporters, and there was evidence in the record probative of her belief in the veracity of her claims). The court's holding in all three cases is consistent with the principle that a failure to investigate or verify information, while probative of actual malice, is not by itself sufficient to prove actual malice, especially when the defendant definitively asserts that they did not know their statements were false. *See Elder*, 341 S.C. at 114, 533 S.E.2d at 902 ("Actual malice may be present, however, where one fails to investigate and there are obvious reasons to doubt the veracity of the informant.").

Here, while there is evidence of a failure to investigate as well as evidence of motive, Odom does not rely solely on this evidence, and has also pointed to evidence in the record, such as Secretary Way's letter, demonstrating that Campolong had obvious reasons to doubt that Odom had "stolen" or "embezzled" money. Further, unlike in the aforementioned case law, Campolong has never provided any testimony setting forth the evidence he relied on in making his defamatory statements, and he

has never testified that he subjectively believed that Odom did anything illegal. Campolong solely relies on the arguments of counsel, and not his own testimony, to link his defamatory statements to the 2016 MEC Order, pleadings from prior litigation, Town Council meeting minutes, the testimony of other fact witnesses, and discovery documents. Campolong has never articulated an evidentiary basis for a subjective belief that Odom illegally used the grant for a purpose that was not designated in the grant application and award, and despite there being obvious reasons for him to know that it was used in conformity with its authorized purpose, Campolong never spoke with public officials or Odom to ascertain the facts. *See Anderson*, 355 S.C. at 480, 585 S.E.2d at 516. In other words, Odom has carried his burden on actual malice by showing Campolong knew of the inaccuracy of the alleged defamatory statements and chose to ignore it. (Mem. in Opp. to Mot. for Summ. J. Ex. 9 Campolong Dep. 24:10-23).

## III. Odom's reference to the "last overt act doctrine" and arguments for the Court to adopt it are preserved for review.

In his Memorandum in Opposition to Campolong's Motion for Summary Judgment, Odom argued that the Circuit Court should adopt a continuous accrual theory within the context of civil conspiracy, citing *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 777 S.E.2d 176 (2015). In his Brief, he has argued that other jurisdictions have recognized the continuous accrual theory within the civil conspiracy context and refer to it as the last overt act doctrine. Campolong believes Odom should be precluded from referencing the last overt act doctrine and the law of other jurisdictions because "Odom has never argued about the

'last overt act' rule before his appellate brief." (Resp't's Br. 47). However, an appellant is not required to use the exact name of a legal doctrine in order to preserve it so long as an argument was presented to the trial court on that ground. *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). The last overt act doctrine is nothing more than the continuous accrual doctrine that has been discussed in South Carolina case law and was argued to the Circuit Court, and Odom's arguments and citations to both doctrines are preserved for the Court's review.

## CONCLUSION

For the aforementioned reasons and those set forth in Appellant's Brief, the Appellant respectfully requests that the Court reverse the Circuit Court's February 9, 2023 and June 13, 2023 Orders.

Respectfully submitted,

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February 12, 2024
Hampton, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Michael S. Holt, Circuit Court Judge

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Civil Action No.: 2018-CP-13-00275

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Glenn C. Odom…… ……..……..Appellant,

-v-

John Campolong and A.C. Mcleod.…..…….....…..……....Defendants,

Of whom John Campolong is the……..……Respondent.

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PROOF OF SERVICE

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The undersigned certifies that a copy of the Reply Brief of Appellant has been served upon the following counsel of record by emailing a copy of the same this 12th day of February 2024.

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SC Court of Appeals

PARKER LAW GROUP

February 12, 2024

*Via Email ctappfilings@sccourts.org*
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*Re: Glenn Odom v. John Campolong, et al*
*Appellate Case No.: 2023-001000*

Dear Ms. Kitchings:

Please find enclosed for filing, Reply Brief of Appellant and Proof of Service.in regard to the above-referenced matter.

By copy of this letter, I am serving copies on all counsel of record of the same by email only.

With kind regards, I am

Sincerely,

John E. Parker Jr.

JAY/cc
Enclosures as stated.

Cc: John L. McCants, Esquire and Kevin D. Maroney, Esquire (via email)
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