THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Michael S. Holt, Circuit Court Judge

Appellate Case No. 2023-001000

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

-v-

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

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On April 23, 2018, Appellant Glenn C. Odom filed this action in the Chesterfield County Court of Common Pleas alleging causes of action for defamation and civil conspiracy against Respondent John Campolong and Defendant A.C. McLeod. Of primary relevance to this Appeal, the Complaint alleges that Campolong, who was at the time Mayor of the Town of McBee, published statements to others accusing Odom of misappropriating and illegally using an $850,000.00 grant from state tobacco settlement funds. (R. pp. 28-30). The Complaint further alleges that the statements were made with actual malice, that they accused Odom of a crime, that Odom's reputation was damaged as a result of the publications, and that he suffered emotional distress. (*Id.*). Further, the Complaint states that the defamatory statements were made in furtherance of a civil conspiracy between Campolong and McLeod entered for the purpose of harming Odom, a political rival. (*Id.*).

On April 22, 2021, Campolong filed a Motion for Summary Judgment. (R. pp. 106-07). The Motion set forth that Odom could not meet the burden of proof on summary judgment for demonstrating the statements were made with actual malice,

that the statements were privileged, and that the civil conspiracy claim was barred by the statute of limitations. (*Id.*). On July 26, 2022, Campolong filed a Memorandum in Support of the Motion for Summary Judgment. (R. pp. 108-29). In his Memorandum, Campolong argued that (1) Odom was a public official or public figure, (2) that Odom had not produced clear and convincing evidence of actual malice because he and two witnesses in this action struggled to articulate in their depositions what proof they had that Campolong was aware of the falsity of his statements, (3) that the statements were absolutely privileged because they concerned a matter related to legislative duties, and (4) that Odom's civil conspiracy claim was barred by the statute of limitations because Odom was aware of evidence of an agreement between Campolong and McLeod, in the form of a 2012 letter, more than three years prior to the filing of this action. (R. pp. 113-15, 123-29).

Odom filed a Memorandum in Opposition to Campolong's Motion for Summary Judgment on August 16, 2022. Odom argued that (1) Campolong had published statements from late 2016 through 2017 to at least three witnesses[1] accusing him of illegally transferring the $850,000 grant, of being a crook, and of stealing money, (2) that there was clear and convincing evidence that Campolong knew that the statements were false, purposefully avoided information that would have demonstrated their falsity, or made them with reckless disregard of their falsity, (3) that the statements were not absolutely privileged because they were made outside of an official Town Council session or meeting, were made to individuals who were

[1] These witnesses include Town Council members Beulah Bolton and Marion Stephens III, as well as Bolton's sister who was not a Town Council member or public official.

not Town Council members, and did not serve a legislative function, and (4) that the civil conspiracy claim was not barred by the statute of limitations because it involved ongoing overt acts of defamation that continued up to and well after this action was filed. (R. pp. 291-319).

A hearing on Campolong's Motion was held by the Circuit Court on August 17, 2022. (R. pp. 40-64). At the hearing, the Circuit Court granted the parties leave to file supplemental memoranda offering further arguments in support of their respective positions. (R. p. 2). Campolong filed a Reply Memorandum on August 25, 2022, (1) requesting that the Circuit Court grant summary judgment on any libel claims that Odom may have had that were abandoned by counsel for Odom at the August 17 hearing and (2) arguing that Campolong's statements were protected by the absolute privilege because they concerned issues encompassed in ongoing litigation that had been brought by the Town of McBee against Alligator Rural Water & Sewer Co., of which Odom was general manager, and were made between Town Council members meeting in their official capacities. (R. pp. 1010-18). Odom filed a Sur-Reply Memorandum later that same day, arguing (1) that Campolong's statements were made outside of legislative proceedings and did not serve a legislative function, and thus were not protected by the absolute privilege and (2) that state law did not prohibit the Circuit Court from extending the continuous accrual theory to the civil conspiracy context. (R. pp. 1019-24).

The Circuit Court granted Campolong's Motion for Summary Judgment in a February 9, 2023 Order. The Order finds that (1) Odom was a public figure or public

official for the purposes of addressing defamation, (2) that the McBee Town Council was a legislative body for the purposes of applying the absolute privilege, (3) that Odom had not demonstrated by clear and convincing evidence that Campolong acted with actual malice, based on Odom's own inability to articulate in his deposition what proof existed of actual malice, (4) that statements made by Campolong to Bolton before and after Town Council meetings were absolutely privileged because of "their proximity in time to the actual [Town Council] meetings" and because they were "seemingly in furtherance of a matter relevant to the council", (5) that statements made by Campolong to Bolton and her sister were not made with actual malice because the Circuit Court could not discern who made the statements and because the statements were inactionable opinion, and (6) that the civil conspiracy claim was barred by the statute of limitations because South Carolina courts have not recognized "broad and general applicability of continuous accrual". (R. pp. 1-21).[2] The Circuit Court's Order did not address statements made to another witness, Town Council member Stephens, it did not specifically address what legislative function the out-of-session statements served, and it did not address the totality of the evidence introduced by Odom through undersigned counsel to demonstrate actual malice.

[2] Odom does not dispute that the McBee Town Council is a legislative body for the purposes of the absolute privilege or that he is a public official subject to the constitutional actual malice standard for the purposes of his defamation action. The Town of McBee is a mayor-council form of government with Campolong presiding and having a vote at Town Council meetings. *See* S.C. Code Ann. §§ 5-9-20 & 5-9-30.

On February 14, 2023, Odom filed a Motion for Reconsideration, contending that (1) the Order failed to account for all of the evidence in the entire record in determining whether Odom had produced sufficient evidence of actual malice, and improperly focused on Odom's personal knowledge instead of evidence demonstrating Campolong's subjective belief in the truth of the defamatory statements, (2) that the Order did not account for statements made to Town Council member Stephens outside of Town Council meetings and sessions, (3) that statements of opinion are actionable if they imply undisclosed facts that are capable of being proven true or false, (4) that Campolong had produced no evidence showing that the defamatory statements were made in furtherance of any legitimate legislative purpose of the McBee Town Council, (5) that the defamatory statements, regardless of whether they were encompassed in a Town of McBee lawsuit against Alligator, were only incidentally related to the Town Council's legislative functions and not part of the legislative process itself, and (6) that the doctrine of continuous accrual would apply to the civil conspiracy claim and even if it did not, the claim did not accrue until 2016 when Campolong and McLeod began publishing defamatory statements concerning Odom. (R. pp. 1025-40).

Campolong filed a Memorandum in Opposition to Odom's Motion for Reconsideration on April 6, 2023, making many of the same arguments that had previously been made to support the Order's findings on absolute privilege, actual malice, and the statute of limitations. (R. pp. 1177-1211). Odom's Motion for Reconsideration was heard by the Circuit Court on April 19, 2023. (R. pp. 65-105). On

June 13, 2023, the Circuit Court denied Odom's Motion in a Form 4 Order. (R. pp. 22-24). This Appeal followed on June 16, 2023. (R. pp. 1248-50).

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact . . . ." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 524, 787 S.E.2d 485, 489 (2016). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000) (emphasis added). Summary judgment is a drastic remedy that should be cautiously granted. *BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). Once the moving party carries its initial burden, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

ARGUMENT

The Circuit Court's February 9, 2023 Order erroneously finds that the allegedly defamatory statements made by Campolong concerning Odom and the

tobacco settlement fund grant were either protected by the absolute legislative privilege or were not supported by clear and convincing evidence of actual malice, despite there being no direct evidence in the record indicating that the statements were made in conversations concerning legislative duties or functions and there being ample evidence in the record, when viewed in the light most favorable to Odom, supporting a reasonable inference that Campolong had a high degree of awareness of the probable falsity of his statements. Further, the Order erroneously finds that under South Carolina law, a plaintiff is barred by the statute of limitations from bringing a civil conspiracy cause of action for injuries inflicted by a defendant in the three-years preceding the commencement of the action if some evidence of the conspiracy originated at a more distant point in the past. For the following reasons, the Court should reverse the Circuit Court's Orders granting summary judgment and denying Odom's Motion for Reconsideration.

I. Statement of Facts.

The conduct giving rise to this Appeal is part of ongoing discontent between the parties that began over twenty years ago and has given rise to numerous lawsuits and appeals. Glenn Odom served as Mayor of the Town of McBee from 2000 to 2002. (R. p. 343, lines 6-7). During that time, the Lynches River, which was the water supply for the nearby Town of Jefferson, had gone dry as a result of a drought. (R. p. 393, lines 19-21; R. p. 545). Jefferson needed water for its approximately 200 families and to supply a defunct industrial facility in the hopes that it would assist in attracting a new buyer, which could provide jobs for 500 Chesterfield County citizens.

(R. p. 546; R. p. 377, lines 4-5). The Mayor of Jefferson contacted Odom and Charlie Gray, who operates Chesterfield County Rural Water Company ("CCRWC"), in an effort to procure water for the Town. (R. p. 393, line 21-p.394, line 1; R. p. 374, lines 17-20).

CCRWC serviced the Town of Jefferson and purchased its water from Alligator Rural Water & Sewer Co., a non-profit entity associated with Odom that has provided water and sewer services to a majority of Chesterfield County since 1987.[3] (R. p. 288). The United States Department of Agriculture's Rural Utilities Service had funded a 10-inch water line for CCRWC to provide water to Jefferson, but the line needed $850,000.00 to upsize it to 16 inches, which was necessary to accommodate Jefferson's water needs. (R. p. 545). Odom, Gray, and the Mayor of Jefferson, understanding that this would be a project that would benefit the entire County, then met with Senator Donald Holland and later with Governor Jim Hodges' Chief of Staff to formulate a plan to raise the necessary funds. (R. p. 373, lines 19-24; R. p. 394, lines 7-10). Senator Holland contacted Charles S. Way, the South Carolina Secretary of Commerce, to see if the project would qualify for a grant from the Tobacco Settlement Revenue Management Authority Act Water and Wastewater Infrastructure Fund.[4] (R. pp. 288, 545).

The culmination of these discussions was a decision that the Town of McBee would apply for a tobacco settlement fund grant. (R. p. 376, line 24-p. 377, line 3; R.

[3] Odom has at various times throughout its existence served as a board member or general manager of Alligator.
[4] *See* S.C. Code Ann. §§ 11-49-10 *et seq.* & 13-1-45.

p. 547). CCRWC as a non-profit corporation could not apply for the grant, but the Town of McBee did qualify to apply. (R. p. 288). The Town of McBee was to act as the project sponsor and a pass-through for the grant, with CCRWC building and maintaining the supply line. (R. p. 545; R. p. 396, line 2-p. 397, line 6). Alligator was designated to supply the water that would be provided to the Town of Jefferson. (R. p. 545).

On May 9, 2001, the South Carolina Secretary of Commerce, Charles S. Way, Jr., wrote a letter to Odom stating that the grant had been awarded and that it was to be used by CCRWC for the construction of water improvements and infrastructure in an area of the county north of the Town of McBee, continuing to Jefferson. (R. p. 548).[5] The grant was approved by the Town Council of McBee at public special council meetings on May 9 and May 16, 2001 without opposition. (R. pp. 549-50; R. p. 379, lines 6-21). The minutes reflect that there would be no expense to the Town of McBee and that the grant funds would be used to upgrade the water main to 16 inches. (R. pp. 288, 549).[6] On February 7, 2002, William O. Spencer, Jr., Town Attorney for McBee, sent a letter to Secretary Way setting forth his opinion that the Town of McBee was qualified to receive the proceeds of the grant for the purposes outlined in the application. (R. pp. 551-52).

[5] In his deposition, Campolong admitted to having knowledge of the contents of this letter, which sets forth that the tobacco settlement grant had a legitimate purpose. (R. p. 578, lines 18-23).

[6] The minutes erroneously reflect that Alligator was to receive the grant money, when in reality the Town of McBee conveyed the funds to CCRWC, who in turn constructed the water main to Jefferson as proposed in the grant application. (R. p. 288).

Odom resigned as Mayor and took an appointment as Chesterfield County Magistrate in August of 2002 and served in this position until August of 2006. (R. p. 344, lines 7-12). Campolong was elected Mayor of the Town of McBee in 2008 and served as Mayor until February of 2023. (R. p. 108). One year later, in 2009, Odom and Campolong were at odds over a proposed sewage treatment facility that would be located in McBee. (R. pp. 553-58; R. p. 614, line 12-p. 615, line 8).

Alligator and Odom, who was now general manager of the utility, sought to build the treatment facility in order to facilitate industry interest, including a Nestle bottled water plant, that could have created jobs in rural Chesterfield County. Campolong publicly opposed the project and believed it would harm the Town's aquifer. Subsequently, Odom and Alligator brought an eminent domain action against a business entity belonging to Campolong, J.B.C. Limited Partnership, for a water line easement and sewer line easement across Campolong's family property. (R. p. 651, line 23-p. 653, line 19). Campolong sought payment for the easement through an action filed against Alligator. (R. p. 653, lines 21-24). After this series of events, Patricia Wise, Campolong's daughter, began "reviewing documents" concerning Odom and Alligator. (R. p. 651, lines 19-22).

On July 9, 2012 Campolong, along with McLeod and three other Town Council members, sent a letter to W. Allen Myrick, Jr., an Assistant Attorney General with the South Carolina Attorney General's Office, requesting an investigation into Odom. (R. pp. 817-19). In the letter, McLeod and Campolong alleged that the Town of McBee had been harmed by Odom, and that he had engaged in illegal activities. Specifically:

(1) the letter implies that Odom stole or misappropriated $850,000 from the tobacco settlement fund grant, (2) that he wrongfully accepted $2000 while serving as Magistrate to "take care of" a traffic fine, and (3) the letter implies that Odom had improperly received or misappropriated millions of dollars from Alligator that had been granted by the USDA for certain projects.

The letter also generally alleges that "millions" of McBee's tax dollars had been spent, presumably by Odom, with no benefit to the Town. The letter concludes by stating that Wise had conducted an investigation into the conduct alleged in the letter. Wise, on the other hand, has stated that she did not "substantially" investigate Odom, and that she had only looked at "certain facts." (R. p. 651, lines 6-10; R. p. 654, lines 14-24). Campolong has stated that he did not authorize Wise to conduct an investigation. (R. p. 581, line 3-p. 582, line 2).

Wise did have discussions with McLeod and met with him and Campolong to review the letter prior to publishing it. (R. p. 657, lines 10-19). According to Wise, this was not the first letter that had been written to the Attorney General alleging that Odom had engaged in illicit or inappropriate conduct: in 2009, while Campolong was Mayor and McLeod a Town Council member, another letter was written to the Attorney General suggesting that Odom was responsible for certain Town of McBee funds that were missing. (R. p. 660 line 4-p. 663, line 23; R. p. 774, lines 10-12). The 2012 letter initiated a SLED investigation into Odom. (R. p. 371, lines 10-16).

On January 23, 2013, William B. Rogers, Jr., Solicitor for the Fourth Judicial Circuit, wrote to Senior Special Agent Michael Anderson, who was conducting the

investigation into Odom's conduct, informing him that there was no evidence in the Investigative File demonstrating violations of criminal laws and that the case did not warrant prosecution. (R. p. 820). McLeod admitted that he learned that the SLED investigation found no wrongdoing and that it was told to him, although he claimed not to remember who informed him. (R. p. 806, lines 18-24). Curiously, Campolong claimed that he was never told that Odom was cleared of the accusations, and that he never bothered to inquire as to the results of the investigation, despite the fact that he participated in the investigation of Odom, a political opponent, along with Wise and Town Attorney Everett Kendall, and met with SLED on at least one occasion. (R. p. 589, line 23-p. 591, line 19).

According to Campolong, as of the date of his deposition in 2019, he assumed that the investigation was still open, seven years later. (R. p. 610, lines 11-20). However, testimony provided by Wise indicates that Campolong did at some point receive the 2013 letter exonerating Odom, although she does not specify when this occurred. (R. p. 752, lines 10-14). Campolong has testified that he does not actually have any personal knowledge of anything illegal that Odom has done with regards to the grant. (R. p. 632, lines 22-24).

In 2015, Campolong as Mayor verified a Complaint filed by the Town of McBee against Alligator alleging that it was curtailing or limiting the Town of McBee's ability to supply water to customers including a business that provided 70% of the Town's water system revenue.[7] In 2016, Campolong as Mayor verified an Amended

[7] *Town of McBee v. Alligator Rural Water & Sewer Co., Inc. et al*, Civil Action No. 2015-CP-13-00379.

Complaint adding Odom individually as a defendant and claiming that he had "diverted" a grant given to the Town to Alligator. (R. pp. 213, 225). The same year, Odom ran for Mayor against Campolong.[8] (R. pp. 109). A campaign flyer paid for by Campolong falsely asserted that Odom used the $850,000 grant to build a water line belonging to Alligator. (R. p. 821).

These assertions falsely imply that Odom stole money that was intended for the Town of McBee's use and used it to his own benefit as an employee of Alligator, despite the fact that the allegations reported by Campolong and McLeod nearly four years earlier had not resulted in an indictment, arrest, or conviction, despite the fact that Solicitor Rogers had concluded that there was no evidence of criminal wrongdoing, and despite the fact that Campolong had seen Secretary Way's 2001 letter stating that the grant was being issued to the Town of McBee to be legitimately used for the construction of water improvements by CCRWC for the benefit of Jefferson. (R. p. 578, lines 18-23). In 2018 Odom was elected to Town Council. *See Odom v. Town of McBee Election Commission*, 427 S.C. 305, 831 S.E.2d 429 (2019). In 2020 Odom successfully ran for Mayor. *See Odom v. McBee Municipal Election Commission*, 440 S.C. 367, 891 S.E.2d 663 (2023).

Beyond the statements made in the 2012 letter and 2016 campaign flyer (which are not the subject of this Appeal), the record in this case contains numerous examples of slanderous statements made by Campolong. Beulah Bolton, who became a member of the Town Council in September of 2016, has testified that Campolong

[8] The 2016 election resulted in an election challenge by Campolong in which he accused Odom of misconduct and illegal activity regarding the election. (R. pp. 239-244).

told her that Odom embezzled money on a number of occasions. (R. p. 828, line 24-p. 830, line 10). These statements were not made in council sessions but were made both before and after sessions. (R. p. 830, lines 15-21). Bolton also stated that either Camplong or McLeod told her either before or after council sessions that Odom had damaged water pipes in the town. (R. p. 831, line 4-p. 832, line 1; R. p. 833, line 17-p. 834, line 1). Bolton agreed that Campolong told her that Odom had illegally used $850,000 that was received from tobacco settlement funds for the upgrade of the water line to Jefferson. (R. p. 832, line 25-p. 833, line 9). These statements were made continuously by Campolong and McLeod while Bolton was a member of Town Council. (R. p. 838, line 13-p. 839, line 14).

These statements were also made outside of Town Hall and Town Council meetings or executive sessions and were made in the presence of Bolton's sister, who was not a member of Town Council or a town official. (R. p. 842, lines 9-11; R. p. 843, lines 1-4). Campolong also made statements to Marion Stephens III, another Town Council member, that Odom was a crook and that he had stolen money. (R. p. 984, lines 3-6). These statements were made outside of Town Hall or Town Council meetings or executive sessions and occurred as recently as 2017. (R. p. 985, line 23-p. 986, line 4; R. p. 986, lines 19-21). The record contains no evidence of what the remaining portions of the encompassing conversations concerned, whether the conversations concerned Town Council business and legislative processes, or whether they just consisted of attacks on Odom.

Odom filed this action asserting claims for defamation and civil conspiracy against McLeod and Campolong on April 23, 2018. Of primary importance to this Appeal is one allegation of the Complaint that Campolong, with malice, on numerous occasions has falsely accused Odom of illegally using $850,000 in tobacco settlement funds for his own purposes that were designated for use by the Town of McBee.

II. When viewed in the light most favorable to Odom, the record contains clear and convincing evidence that Campolong acted with reckless indifference to the truth, purposefully avoided the truth, and had a high degree of awareness of the falsity of his claims that Odom was embezzling funds and had illegally converted the tobacco settlement fund grant.

The tort of defamation requires a plaintiff to prove the following elements: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 518, 506 S.E.2d 497, 506 (1998) (Toal, J., concurring) (citing Restatement (Second) of Torts § 558 (Am. Law Inst. 1977)). When an allegedly defamatory statement concerns a public figure or official in a matter of public concern, the plaintiff must demonstrate fault by producing clear and convincing evidence of actual malice. *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 467, 629 S.E.2d 653, 666 (2006).

The actual malice standard introduced in *New York Times v. Sullivan* requires that the plaintiff provide evidence that the defendant published the defamatory material (1) with the knowledge it was false or (2) with reckless disregard as to whether it was false. *Anderson v. The Augusta Chronicle*, 365 S.C. 589, 595, 619

S.E.2d 428, 431 (2005) (citing *Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686 (1964)). Courts should use a subjective standard to test whether the defendant had a good faith belief in the truth of his statements. *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 266, 478 S.E.2d 282, 284 (1997). The plaintiff must present evidence that the defendant had a high degree of awareness of probable falsity. *Elder v. Gaffney Ledger*, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000).

In the alternative, a defendant may act with reckless disregard for the truth when there are obvious reasons to doubt the veracity of his information. *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S. Ct. 1323, 1326 (1968). Any direct or indirect evidence indicating the defendant's state of mind is admissible to prove actual malice. *Anderson*, 365 S.C. at 596, 619 S.E.2d at 432. A plaintiff may present competent circumstantial evidence of bad faith to establish actual malice despite a defendant's contention that the publication was made "with a belief the statements were true." *St. Amant*, 390 U.S. at 732, 88 S. Ct. at 1326. The Supreme Court of South Carolina has articulated that actual malice may be demonstrated by evidence of: (1) a failure to investigate before publishing when there are obvious reasons to doubt the veracity of the information, (2) a motive to publish false information concerning the plaintiff, and (3) the absence of a good faith belief in the truth of the publications. *Erickson*, 368 S.C. at 478, 629 S.E.2d at 671; *Elder*, 341 S.C. at 115, 533 S.E.2d at 902; *St. Amant*, 390 U.S. at 732, 88 S. Ct. at 1326.

A. The Circuit Court erred in finding that Odom had not produced clear and convincing evidence of actual malice based solely on the testimony of Odom.

In its February 9, 2023 Order granting summary judgment to Campolong, the Circuit Court finds that "Odom seemingly admits that he cannot prove actual malice by clear and convincing evidence", based on testimony from Odom's deposition in which he states that personally he does not know of any smoking gun evidence demonstrating that Campolong knew the statements made to Bolton and Stephens were false. (R. pp. 9-11). Upon being questioned by counsel for Campolong, Odom stated that Campolong would have known his statements were false due to the results of the SLED investigation, but that he had no way of personally knowing what Campolong believed since "he doesn't confide in me." (R. p. 369, line 24-p. 370, line 9). Based solely on this testimony, the Order goes on to state "The Court must necessarily consider the plaintiff's ability to prove defamation by clear and convincing evidence . . . . Even in a light most favorable to the nonmovant, the Court fails to see how this admission does not support Campolong's motion. **On the action for defamation, the court does grant summary judgment in favor of Campolong**." (R. pp. 10-11).

This finding is in error because the Circuit Court was "**obligated** to independently examine **the entire record** to determine whether the evidence sufficiently supports a finding of actual malice." *Miller v. City of W. Columbia*, 322 S.C. 224, 228, 471 S.E.2d 683, 685 (1996) (emphasis added). The Circuit Court's Order does not consider the entire record as mandated by South Carolina law in making its determination. There are numerous portions of the record containing evidence probative of whether Campolong knew or should have known that his statements

were false. The Circuit Court's Order ignores this evidence and any reasonable inferences that could arise from it, and instead places undue importance on Odom's subjective beliefs. This is clearly in error, as South Carolina authorities dictate that in determining actual malice trial courts must review all evidence in the entire record, in the light most favorable to the nonmoving party.

B. The record contains clear and convincing evidence that Campolong did not adequately investigate his claims that Odom embezzled, stole, or misappropriated the tobacco settlement funds, that he did not subjectively believe that Odom had done anything illegal, that he had a motive to publish false statements concerning Odom, and that he and his co-conspirator McLeod were aware of facts indicating that their claims were not substantiated by the conditions of the grant and the SLED investigation.

In determining whether a triable issue of fact existed as to the issue of actual malice, the Circuit Court was first required to view the evidence and all reasonable inferences in the light most favorable to Odom. *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). Next, the Circuit Court was required to assess whether the evidence of actual malice and any reasonable inferences that could be drawn therefrom met the clear and convincing standard; that is, whether the degree of proof was more than a mere preponderance but less than that required for proof beyond a reasonable doubt. *State v. Simmons*, 384 S.C. 145, 159 n.3, 682 S.E.2d 19, 26 n.3 (Ct. App. 2009).

In finding that Odom had not met this burden of proof, the Circuit Court's Order (1) erroneously focused on Odom's subjective knowledge instead of Campolong's, (2) ignored evidence in the record that Campolong had never meaningfully inquired into the factual circumstances surrounding his claims despite

the fact that there were obvious reasons for him to doubt their veracity, (3) ignored Campolong's testimony demonstrating that he did not subjectively believe that Odom had done anything illegal, (4) ignored evidence of any motive Campolong may have had to make false statements concerning Odom, and (5) ignored evidence that Campolong and McLeod were aware that the funds had been granted for the benefit of the Town of Jefferson and that the SLED investigation resulted in a finding of no wrongdoing by Odom. Additionally, the Order fails to analyze statements made by Campolong to Stephens to determine if they were made with actual malice or were privileged, views evidence of statements made to Bolton and her sister in a light most favorable to Campolong, and it erroneously finds that the statements were protected opinion as a matter of law. Essentially, the Order makes a finding of no actual malice based on Odom's inability to articulate a basis for actual malice in his deposition, and Campolong's self-serving denial that he had any knowledge of the results of the SLED investigation, ignoring the remaining evidence in the record and resolving all inferences in Campolong's favor.

The decisions of the Supreme Court of South Carolina have found clear and convincing evidence of actual malice in constitutional defamation cases when (1) the publisher has failed to investigate his claims, (2) the publisher did not subjectively believe the truth of his statements, (3) there is evidence of a bad motive or ill-will towards the plaintiff, and (4) there were obvious reasons to doubt the veracity of the publications. *Erickson*, 368 S.C. at 477-78, 629 S.E.2d at 671; *Elder*, 341 S.C. at 114-15, 533 S.E.2d at 902. "Malice may be proved by direct or circumstantial evidence."

Hainer v. Am. Med. Int'l, Inc., 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). The Circuit Court's Order ignores all evidence in the record supporting these factors with regards to Campolong's publications.

1. **The Circuit Court ignored evidence in the record demonstrating that Campolong has never meaningfully investigated his claims or inquired into the factual circumstances surrounding them.**

Actual malice may be present where one fails to investigate and there are obvious reasons to doubt the veracity of the information. *Elder*, 341 S.C. at 114, 533 S.E.2d at 902. In *Erickson*, the Charleston City Paper published a front-page news story concerning the South Carolina guardian ad litem program. *Id.* at 455, 629 S.E.2d at 659. In the article, the paper recounted the claims of a Summerville grandmother who stated that a private, non-lawyer guardian assigned to her granddaughter's Department of Social Services case had manipulated a family court judge, had a sexual relationship with the father of the granddaughter, and did not properly investigate the case, amongst other accusations. *Id.* at 456-57, 629 S.E.2d at 660. The guardian, DSS, physicians, and a psychologist found no evidence that the granddaughter had been abused and concluded that the grandmother had coached the granddaughter to gain an advantage in the divorce and custody proceedings. *Id.* at 457, 629 S.E.2d at 660. Approximately two years prior to the publication of the article, the family court in a divorce decree had ordered that visitation of the grandmother was denied with the granddaughter due to issues with the grandmother coaching the granddaughter and interfering with the relationship of the parents and child. *Id.*

The author of the article testified that he had no source for the article other than the grandmother. *Id.* at 458, 629 S.E.2d at 661. There was no evidence that the author ever contacted the guardian or that he tried to contact attorneys involved in the matter, and he could have obtained the divorce decree but did not. *Id.* There was no evidence that the author ever had actual knowledge of the divorce decree or conclusions of the guardian, DSS and physicians. Despite this evidence being admitted at trial, the trial court granted the defendant's directed verdict motion on the issue of actual malice. *Id.* at 462, 629 S.E.2d at 663. The Supreme Court reversed the trial court, finding that there was clear and convincing evidence of actual malice:

> Evidence supporting the jury's finding of actual malice includes (1) the fact that the portion of the article pertaining to Appellant was based solely on a fifteen-to thirty-minute telephone conversation with [the grandmother] Pat Beal, an admittedly "incensed" person; (2) the fact Newspaper purportedly failed to even try to contact Appellant to discuss the matter with her; (3) the fact Newspaper failed to contact attorneys or others involved in the *Litchfield* case; and (4) the fact Newspaper failed to even try to obtain the publicly recorded divorce decree in the *Litchfield* case, a reading of which would have called into question or refuted Pat Beal's allegations. This evidence does not indicate merely a failure to investigate which, standing alone, would be insufficient to uphold a finding of actual malice. This evidence constitutes a failure to investigate before publishing an article when there were obvious reasons to doubt the veracity of Pat Beal or the accuracy of her report. Thus, the evidence indicates Newspaper's subjective awareness of probable falsity of the report and is sufficient to support the jury's finding of actual malice.

Id. at 478, 629 S.E.2d at 671.

The facts in this case make an even stronger showing of actual malice than those in *Erickson*. The first instance in the record of Campolong making any allegations of illegal activity occurred in the July 9, 2012 letter to the Attorney

General's office. While the letter states that it was based on an investigation into Odom's conduct by Patricia Wise, Wise has stated that she did not substantially investigate Odom:

> Q. And when did you become involved with the Town of McBee and investigating Mr. Odom?
>
> MR. LAY: Object to the form of the question.
>
> THE WITNESS: I don't understand your question.
>
> Q. What is it you don't understand about it?
>
> A. I don't know that I did – what do you mean by become involved with the Town of McBee in investigating Mr. Odom?
>
> Q. Well, didn't you investigate Mr. Odom?
>
> A. Not – not substantially.

(R. p. 650, line 22-p. 651, line 10).

Campolong has admitted that he also never personally investigated his claims, and that he had no personal knowledge of any wrongdoing by Odom. (R. p. 580, line 24-p. 581, line 13; R. p. 589, lines 13-16). Campolong never spoke to Odom nor any of the other individuals involved in the grant process to determine if any wrongful conduct had occurred. (R. p. 589, lines 9-12). Campolong never spoke or followed up with anyone at SLED or the Solicitor's Office to determine the ultimate outcome of the investigation. (R. p. 589, lines 13-16; R. p. 590, lines 9-11). In fact, both Campolong and McLeod testified that they did not know how the grant was obtained. (R. p. 589, lines 13-16). The Fourth Circuit Solicitor's investigation, the results of which are publicly available, found no evidence of any criminal wrongdoing by Odom

over three years prior to the defamatory statements that are at issue in this Appeal. (R. p. 820).

A fellow Town Council member has testified that Campolong did not have any proof to substantiate any of his claims. (R. p. 980, lines 7-21, R. p. 983, lines 10-15). Despite this, Campolong stated to Bolton and Stephens that Odom had "embezzled" money from the government, that Odom had "illegally" used the tobacco settlement funds, and that Odom was a crook who had stolen money. (R. p. 829, line 13-p. 831, line 3; R. p. 832, line 25-p. 833, line 4; R. p. 984, lines 3-6).

In *Erickson*, the evidence demonstrated that the author of the defamatory article had at least based his article on a fifteen- to thirty-minute discussion with the source. *Id.* at 478, 629 S.E.2d at 671. Here, a reasonable inference from the evidence is that Campolong did not personally do anything to substantiate his claims, and that they were entirely based upon conjecture that there may have been something illegal about the way the $850,000 grant was obtained and put to use. While this evidence, standing alone, may not be sufficient to support a finding of actual malice, it is sufficient when considered alongside the remaining evidence in the record. The Circuit Court's Order is erroneous in that it failed to consider any of this remaining evidence.

2. <u>The Circuit Court ignored evidence in the record demonstrating that Campolong subjectively does not have a good faith belief that Odom embezzled, stole, or did anything illegal concerning the $850,000 grant.</u>

"Actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements." *Erickson*, 368 S.C. at 477, 629 S.E.2d at 671.

The Circuit Court's Order ignores evidence in the record demonstrating that Campolong did not actually believe in the truth of his statements. On summary judgment, the testimony of Bolton and Stephens stating that Campolong had accused Odom of embezzling, stealing, and illegal misconduct should be construed as true for the purposes of summary judgment, as there is no evidence impeaching their testimony or calling their credibility into question. *See David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) (stating that the trial court is not to consider the merits of competing testimony).

Thus, the question becomes whether Campolong subjectively believed that any statements he made concerning embezzling, stealing, and illegal misconduct were actually true. In granting summary judgment, the Circuit Court wholly ignored testimony in the record demonstrating that Campolong did entertain any such belief. Campolong has stated that he does not personally believe that Odom has done anything illegal. (R. p. 568, lines 2-24; R. p. 570, lines 4-12; R. p. 632, lines 22-24).

> Q. What do you know of that Mr. Odom has done illegal that you have personal knowledge of?
>
> A. Illegal, I do not know.

(R. p. 632, lines 22-24). The testimony of Campolong, when viewed alongside the testimony of Bolton and Stephens, is clear and convincing evidence that Campolong did not have a good faith belief in or basis for the assertion that Odom was embezzling and stealing funds, yet he told Bolton and Stephens that Odom did so anyways. It was error for the Circuit Court's Order to ignore this evidence and resolve the

discrepancies between Bolton's, Stephens', and Campolong's testimony in favor of Campolong.

3. The Circuit Court ignored evidence in the record supporting a reasonable inference that Campolong harbored ill-will toward Odom and had a motive to make the defamatory statements.

While a court should not place too much emphasis on motive, evidence concerning motive is relevant to the constitutional actual malice inquiry. *Elder*, 341 S.C. at 115, 533 S.E.2d at 902. In *Erickson*, the court found that a newspaper acted with actual malice when it relied solely on a source who had a motive to publish false and damaging statements about the plaintiff. *Id.* at 478, 629 S.E.2d at 671. Here, comprehensive evidence was presented to the Circuit Court of the long history of conflict between Odom and Campolong preceding the 2016-2017 defamatory publications that are at issue in this Appeal, and this evidence was ignored in the Circuit Court's Order.

This history, referred to as a "blood feud" by some observers, originates in 2009, when Odom and Campolong took opposing positions over the proposed sewage treatment facility in McBee, which in turn led to Odom and Campolong commencing legal actions against one another involving Campolong's family property. (R. pp. 553-558; R. p. 614, line 12-p. 615, line 8; R. p. 651, line 23-p. 653, line 19). That same year, and later in 2012, Campolong along with McLeod sent letters to the Attorney General requesting an investigation into Odom and accusing him of illegal misconduct. (R. pp. 817-819; R. p. 660, line 4-p. 663, line 23; R. p. 774, lines 10-12).

In 2015, while Campolong was Mayor, the Town of McBee commenced an action against Alligator, and subsequently Odom, accusing him of diverting the grant, destroying Town records, and sabotaging the Town's water system. (R. pp. 213-14, 216-19, 224-25). Campolong verified the Complaint on behalf of the Town. In 2016, Odom and Campolong were in another battle, this time as mayoral candidates. Campolong's campaign accused Odom of depleting the Town of McBee's funds, of lying about the Town's water supply, and of using the tobacco settlement grant money for Alligator's benefit instead of the Town's. (R. p. 821). The election resulted in a challenge by Campolong in which he accused Odom of illegally tampering with the election. (R. pp. 240-44). All of these events transpired prior to the defamatory publications that are at issue in this case. As a political opponent and opposing party in litigation, Campolong had ample reason and motive to seek to damage Odom. While the Court cannot place too much reliance on this evidence, it does bear relevance to the actual malice analysis and is sufficient to survive summary judgment when taken in conjunction with the totality of the circumstances. The Circuit Court erred by failing to take this evidence into account.

4. <u>When viewed in the light most favorable to Odom, the evidence demonstrates that Campolong purposefully avoided the truth and had reason to doubt the veracity of his publications.</u>

Actual malice may be present where the defendant fails to investigate *and there are obvious reasons to doubt the veracity* of the statement or supporting information. *George v. Fabri*, 345 S.C. 440, 459, 548 S.E.2d 868, 878 (2001). There are three reasons that Campolong should have doubted the veracity of his statements

that Odom embezzled money and stole from the Town of McBee. First, at the time of the late-2016 through 2017 slanderous publications it had been over seven years since Campolong's initial letter to the Attorney General and over four years since his second letter, yet no one in law enforcement had made any findings of criminal wrongdoing. Although Campolong claimed he was "going to let the attorney general's office make a decision and SLED", the evidence demonstrates that he did not wait for them to make a decision and came to his own conclusions by purposefully ignoring those of the Fourth Circuit Solicitor. (R. p. 574, lines 20-21). Campolong made no efforts to speak to Odom or anyone involved in the grant process and never reviewed the grant application. (R. p. 577, lines 15-16).

Second, Campolong acknowledges seeing the May 9, 2001, letter from Secretary Way to Odom stating that the grant had been awarded to the Town of McBee and that it was to be used by CCRWC for the construction of water improvements and infrastructure in an area of the county north of the Town of McBee, continuing to Jefferson, which is what the grant was undisputedly used for. (R. p. 578, lines 18-23; R. p. 548). Lastly, there is direct and circumstantial evidence demonstrating that Campolong was aware of the 2013 letter from the Fourth Circuit Solicitor indicating there was no evidence of illegal or criminal wrongdoing. In the light most favorable to Odom, at some point Campolong received the letter exonerating Odom. (R. p. 752, lines 10-14).

Counsel for Campolong has argued that he received the letter through discovery, and that Wise in her testimony was referring to the fact that the letter had

recently been received through discovery. However, these are arguments of counsel, which are not evidence, and any inference from Wise's testimony that is favorable to Campolong does not rule out all other reasonable inferences that could be drawn from the testimony on summary judgment, such as an inference that Campolong had possessed the letter for some longer period of time. Additionally, Campolong's co-conspirator, McLeod, admitted to having knowledge of the letter. (R. p. 806, lines 18-22). Presumably, this is the basis for the Circuit Court's finding that shortly after the 2012 letter to the Attorney General that "the council was informed that no wrongdoing had been found." (R. p. 3). Confusingly, based on this finding and the above-described evidence, the Order then concludes that there is no evidence of actual malice as to Campolong, while there is sufficient evidence for a finding of actual malice as to McLeod.

Thus, the evidence demonstrates that Campolong (1) had ample reason to know that Odom had not engaged in any misconduct, (2) failed to investigate or make any attempts to ascertain the truth of his statements despite contrary knowledge, (3) admitted that he did not think that Odom had actually engaged in any illegal misconduct, and (4) had a political motive for his defamatory statements. Despite this, Campolong published statements to Bolton and Stephens accusing Odom of embezzlement and stealing.

This is practically the same evidence that was presented to the Court regarding McLeod, yet in McLeod's case the Order finds that there is clear and convincing evidence that he acted with actual malice. This inconsistency is created because the

Circuit Court's Order confusingly ignores the above-described evidence regarding Campolong and solely focuses on Odom's testimony, thereby punishing Odom personally for not understanding or articulating in his deposition how this evidence was relevant to the actual malice analysis. The Order is erroneous as to its actual malice inquiry and should be reversed.

C. The Order erroneously finds that the statements made by Campolong to Bolton and her sister were made by an unknown speaker and were pure opinion.

Bolton testified that defamatory statements were made to her and her sister at Campolong's office in his factory:

Q. So he was in his office?

A. I know he mentioned it one time there. He mentioned what –

Q. What did he say?

A. Well, Mr. Odom, how he's messed this town up. He's ruined it.

(R. p. 842, lines 9-25). The Order then concludes that because this testimony is unclear as to the identity of the speaker that it fails to demonstrate actual malice. Ignoring that the context of the testimony makes it obvious that the speaker was Campolong, the Circuit Court's Order is in error because it views the evidence in the light most favorable to Campolong in reaching its conclusions.

Additionally, the Order states that Campolong's accusations that Odom had ruined the town were pure opinion and not actionable. (R. p. 16). Regardless of whether the statements at issue were couched as opinion, opinions may imply an assertion of objective fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S. Ct.

2695, 2705, 111 L. Ed. 2d 1 (1990). "In *Milkovich*, the United States Supreme Court rejected the creation of an artificial dichotomy between opinion and fact, holding that the Constitution does not require a wholesale defamation exemption for anything that might be labeled 'opinion.'" *Goodwin v. Kennedy*, 347 S.C. 30, 40-41, 552 S.E.2d 319, 325 (Ct. App. 2001).

> [W]e do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact.
>
> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth . . . . Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."

Milkovich, 497 U.S. at 18-19, 110 S. Ct. at 2705-06.

Therefore, the question for the Circuit Court was not whether Campolong's statement that Odom had ruined the town was phrased as an opinion, or whether Bolton believed it was an opinion, but whether the statement implied underlying facts that were capable of being proven false, or implied that Odom had engaged in embezzlement and other illegal acts to the detriment of the Town. The Circuit Court's Order fails to engage in such an analysis of the testimony and as such is in error. Not only does the additional testimony in the record indicate that the entire thrust and context of Campolong's repeated accusations against Odom concerned allegations of illegal acts, the question of whether Odom "ruined the town" certainly implies that Campolong is aware of facts tending to prove that Odom's term as Mayor harmed the

town financially, which is unquestionably capable of being proven true or false. The Order endorses the notion that all "opinion" is protected without delving into the underlying facts. This is contrary to binding precedent and mandates a reversal of the Order.

III. The Circuit Court erred in finding that the absolute privilege would protect the statements made to Bolton and Stephens when there is no evidence in the record that the statements were specifically made in furtherance of a legitimate, ongoing legislative function.

Bolton and Stephens provided in their deposition testimony that Campolong had called Odom a crook and accused him of embezzling and stealing money from the Town of McBee from September of 2016 through 2017. Neither witness nor Campolong provided any remaining details as to the content and purpose of the conversations in which the defamatory statements were made. In contraversion of the summary judgment standard and Campolong's burden of proof, the Circuit Court's Order draws all inferences in favor of Campolong and determines that the statements were "necessarily relevant to the council", "necessarily related to council function", and "in furtherance of a matter relevant to the council", without any further analysis. These findings are in error and should be reversed.

In *Richardson v. McGill*, 273 S.C. 142, 255 S.E.2d 341 (1979), the Supreme Court of South Carolina delineated what as of today is the farthest extension of the absolute legislative privilege within the context of defamation actions in South Carolina. In response to allegedly defamatory statements that were made by a South Carolina legislator during an official meeting between a legislative delegation and a county recreation commission, the court noted that "a sound public policy has long

recognized an absolute immunity for members of legislative bodies for acts in the performance of their duties." *Id.* at 146, 255 S.E.2d at 343 (emphasis added). Thus, in order for the privilege to be applicable, a legislator must be "engaged in a legislative duty or process at the time the defamatory statements were made." *Id.* The *Richardson* court confined its holding to the facts before it, stating that the alleged statements were privileged in part because they were made "at a meeting attended only by the legislative delegation, the members of the Recreation Commission, and appellant . . . concerning a matter related to **legislative duties** and, in which, all present had an official interest." *Id.* at 147, 255 S.E.2d at 343 (emphasis added).

The Restatement (Second) of Torts provides further guidance on the application of the absolute privilege to legislative proceedings. "The privilege does not protect a legislator who in private or public discussion outside of his legislative function . . . engages in other activities incidentally related to legislative affairs but not a part of the legislative process itself." Restatement (Second) of Torts § 590 (Am. Law Inst. 1977). This principle derives from the common law, which protected "a member of Parliament, of Congress or of a state legislature in his speech in the course of debate, legislative reports and in committee by granting him immunity from actions for damages for defamatory remarks made in such speech." *Adamson v. Bonesteele*, 295 Or. 815, 822, 671 P.2d 693, 696 (Ore. 1983). In other words, "[w]hat a member of Parliament says on the floor of the House is privileged, but repetition of the same words outside is not . . . ." *Id.* at 819, 671 P.2d at 695.

The burden of proof in demonstrating the application of the absolute privilege lies with Campolong. *See Crain v. Smith*, 22 S.W.3d 58, 60 (Tex. Ct. App. 2000) ("Because privilege is a defense, appellees had the burden to establish it as a matter of law."). Therefore, it was Campolong's burden to demonstrate through evidence in the record that the conversations in which the defamatory statements occurred served a legitimate legislative function and furthered a legislative purpose. A legislative function is generally defined as "[t]he determination of legislative policy and its formation as [a] rule of conduct." *Black's Law Dictionary* (6th ed. 1990). Legislative power is defined as "[t]he lawmaking powers of the legislative body, whose functions include the power to make, amend and repeal laws." *Id.* Legislative acts necessarily involve policymaking rather than the execution or administration of existing policies. *Crymes v. DeKalb Cnty., Ga.*, 923 F.2d 1482, 1485 (11th Cir. 1991).

Other courts have found that speaking to a legislative body during a formal legislative meeting, promulgating ordinances pursuant to integral steps in the legislative process, making statements concerning discretionary, policymaking decisions, and statements made with reference to proposed budgets are legislative functions. *Sanchez v. Coxon*, 175 Ariz. 93, 97, 854 P.2d 126, 130 (Ariz. 1993); *Maynard v. Beck*, 741 A.2d 866, 871 (R.I. 1999); *Issa v. Benson*, 420 S.W.3d 23, 27 (Tenn. Ct. App. 2013). This is in keeping with *Richardson*, in which the court found that the statements of the legislator were absolutely privileged because they were necessarily in furtherance of the legislator's duty to appropriate funds for the operation of the

county government and occurred in an official meeting convened for that purpose. *Richardson*, 273 S.C. at 147, 255 S.E.2d at 343.

Campolong's statements were not related to any legitimate legislative function of the McBee Town Council. South Carolina law and McBee ordinances authorize the Town Council to:

1. Adopt or amend an administrative code or ordinances, create, alter or abolish any department, office or agency;

2. Provide for a fine or other penalty or establish a rule or regulation in which a fine or other penalty is imposed for the violation thereof;

3. Appropriate funds and adopt a budget;

4. Grant, renew or extend franchises, licenses or rights in public streets, or in public property, and close abandoned streets;

5. Authorize the borrowing of money or the issuance of bonds;

6. Levy taxes, assess property for improvements or establish charges for services;

7. Annex areas;

8. Convey or lease or authorize the conveyance or lease of any lands; and

9. Amend or repeal any ordinance described in subparagraphs 1 through 8 above.

S.C. Code Ann. §§ 5-7-30 & 5-7-260; McBee, S.C., Ordinance § 2.109 (1994). According to the Town of McBee, the Town Council's legislative function is to set policies, approve budgets, determine tax rates, and determine water rates.[9]

[9] *See* Town Council, Town of McBee, South Carolina, https://www.townofmcbeesc.com/government/elected_officials/town_council.php.

Stating that Odom was a crook who embezzled and stole the tobacco settlement grant funds *over 20 years ago*, years after he had been cleared of any wrongdoing by law enforcement, was in no logical way related to the 2016-17 legislative functions of the McBee Town Council. The statements had nothing to do with adopting ordinances or creating departments, they had nothing to do with appropriating funds or budgets, they had nothing to do with levying taxes, issuing bonds, conveying land, or annexing areas. There is no evidence that the Town Council was actively engaged from 2016-17 in an investigation of incidents that occurred over 20 years prior and had already been looked into and cleared by the Attorney General, SLED, and the Fourth Circuit Solicitor.

Campolong argues and the Order seems to confirm that no matter where or why Campolong made his statements, they were related to the Town of McBee's business, i.e., the Town's lawsuit against Alligator, and as such they deserve the protection of the absolute legislative privilege regardless of the circumstances in which he made the statements. However, it is not the content of the speech, but the occasion in which it is made, that provides the absolute privilege. *Polson v. Davis*, 635 F. Supp. 1130, 1148 (D. Kan. 1986); *Grady v. Scaffe*, 435 So.2d 954, 955 (Fla. Dist. Ct. App. 1983). Second, it is irrelevant if the statements were related to Town business if they were not made in furtherance of a legislative function.

Campolong has produced no evidence that the occasions in which the statements were made, which included instances outside of official meetings, at places located outside of Town Hall, and in the presence of at least one individual

who was not a member of the Town of McBee municipal government, were in furtherance of any stated legislative function. The record is entirely devoid of evidence that these statements were made in conversations that were necessary to determining a legislative policy, enacting ordinances, or carrying out the ordinances and policies of the Town Council. The Town Council did not verify the Alligator lawsuit, and there is no evidence in the record that it was actively involved in the litigation or resolution of the Town of McBee's water problems with Alligator. Campolong signed the verification in his executive function as Mayor.[10]

While the lawsuit and its allegations that Odom misappropriated the grant may have been in furtherance of Campolong's executive functions as Mayor, which do not enjoy an absolute privilege, there is no evidence that they have any bearing on the Town Council's legislative functions or that they were made as part of the legislative process. *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989). The Restatement (Second) of Torts explicitly states that just because a matter is incidentally related to the affairs of the Town Council or concerns a subject of general interest to the Town Council does not mean that a discussion of that matter is part of the legislative process itself. An incidental discussion of a matter related to "Town business" but not in furtherance of legislative functions or processes is exactly what occurred in this case. There is no evidence that *the Town Council* was actively engaged in passing resolutions, enacting law, or commencing litigation concerning the 2001 tobacco settlement fund grant at the time the statements were made by

[10] The executive function includes enforcing the law in both law enforcement and prosecutorial capacities. *See State v. Stephens*, 664 S.W.3d 293, 295 (Tex. Crim. App. 2022).

Campolong in 2016 and 2017. Campolong's statements to Bolton, Stephens, and Bolton's sister were not necessary to any legitimate legislative purpose, there is no evidence that Campolong was engaged in a legislative duty or process at the time they were published, and the Circuit Court's determination that the statements were protected by the absolute privilege is in error and should be reversed.

IV. The Circuit Court erred in failing to acknowledge that the continuous accrual theory, also known as the last overt act doctrine, would permit Odom to make a civil conspiracy claim for overt acts of defamation occurring in furtherance of the conspiracy within the three-year statute of limitations.

The Circuit Court's Order misunderstands Odom's arguments as to why a continuous accrual or last overt act theory would permit Odom to bring civil conspiracy claims for defamatory statements made in furtherance of the conspiracy occurring within three-years prior to the commencement of his action. The Order states that on summary judgment, Odom argued that the civil conspiracy began in 2012 and that the claim was preserved and had not run because of the continuing defamatory statements that were made. (R. p. 17). This is not in fact what Odom argued and does not adhere to the doctrine's principles. Odom's argument was that one of the elements of the civil conspiracy claim required an overt act by McLeod and Campolong, that the claim did not accrue until all of the cause of action's requirements, including the overt act element, had been satisfied, and that under the continuous accrual doctrine that each overt act in furtherance of the conspiracy would refresh the three-year limitations period for the civil conspiracy claim as to that defamatory publication only. Thus, the civil conspiracy claim would not be preserved

for any defamatory statements or other overt acts completed outside their relevant statute of limitations.

The Order misstates South Carolina civil conspiracy law. The Order sets forth that "South Carolina recognizes a civil conspiracy where there is (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes the plaintiff special damage." (R. p. 18). This articulation of the civil conspiracy claim was overruled in *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021). The current elements of the civil conspiracy claim are (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff. *Id.* This is important, because a large part of Odom's argument was that under the discovery rule, Odom's civil conspiracy claims for the statements at issue in this Appeal did not actually accrue until 2016-17, because the subject defamatory statements did not satisfy the overt act and damages elements until they were made to Bolton, Bolton's sister, and Stephens in the latter half of 2016.

There is no evidence in the record demonstrating that Campolong and McLeod made any defamatory statements prior to the 2016 election in furtherance of the conspiracy. The statements made in the 2012 letter and the allegations made in the 2015 lawsuit were not defamatory because they were subject to the qualified and absolute privilege, respectively. Therefore, Odom's civil conspiracy claim did not accrue until at the earliest the second half of 2016, which is the first evidence in the

record of unprivileged defamatory statements, and his civil conspiracy claim was commenced on May 4, 2018, well within the three-year statute of limitations for the civil conspiracy claim and the two-year statute of limitations for his defamation claim. Therefore, even without the application of the continuous accrual doctrine, Odom's claims are not barred by the statute of limitations under the discovery rule.

As argued to the Circuit Court, the 2012 letter does not represent the instant that Odom's civil conspiracy claim accrued, nor was he put on notice of a civil conspiracy such that he could have commenced an action at that time; the 2012 letter is only evidence of an agreement between McLeod and Campolong, is privileged as to any defamatory content, and satisfies only the first element of the civil conspiracy cause of action. The only reasonable conclusion supported by the evidence was that the existence of a claim could not have been discovered or commenced by Odom prior to the 2016-17 publications.

In the alternative, the statute of limitations for the civil conspiracy claim would renew for each newly published defamatory statement under a continuous accrual theory. In *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 777 S.E.2d 176 (2015), the court found that "where a claim involves a series of ongoing violations, recovery is limited to a period coextensive with the applicable statute of limitations." *Id.* at 79, 777 S.E.2d at 200. The court explained the theory as follows:

> The principles of this type of continuous accrual respond to the inequities that would arise if the expiration of the statute of limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or

> misconduct; parties engaged in long-standing malfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing malfeasance. In addition, where misfeasance is ongoing, a defendant's claim to repose, the principal justification underlying the limitations defense, is vitiated . . . . [Accordingly,] separate, recurring invasions of the same right can each trigger their own statute of limitations . . . . Generally speaking, continuous accrual applies whenever there is a continuing or recurring obligation: [w]hen an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.

Id. at 78, 777 S.E.2d at 199-200. While the court limited its application of the continuous accrual theory within the context of the South Carolina Unfair Trade Practices Act, it has not had the opportunity to consider it within the meaning of civil conspiracy. The continuous accrual theory should apply within the civil conspiracy context just as it does in the SCUTPA context because by its nature a civil conspiracy is likely to consist of a series of discrete, independently actionable wrongs.

Other jurisdictions recognize the continuous accrual theory within the specific context of a civil conspiracy claim, referring to it as the "last overt act doctrine". Because the plaintiff's damages in a civil conspiracy flow from the overt acts, and not the agreement, the statute of limitations applies to the overt act element, barring recovery only for acts that are alleged to have occurred outside the limitations period. *Scherer v. Balkema*, 840 F.2d 437, 442 (7th Cir. 1988).

> It does not follow, however, that the statute of limitations excludes those same allegations from the determination of whether an agreement existed. To permit the statute of limitations to bar consideration of allegations from which a jury could infer an agreement would prevent recovery for damages suffered within the limitations period merely because the defendants formed their agreement too early. Indeed, crafty conspirators could agree to injure and then wait out the statutory limitations period before inflicting the injury to avoid civil liability for

> their conduct. This is wrong. If a plaintiff is injured within the applicable limitations period by an act committed in furtherance of a civil conspiracy entered into outside that period, he should be able to recover for that injury.

Id. at 442. The timeliness of a cause of action for conspiracy is determined by reference to the underlying overt acts since the accrual date of the civil conspiracy is linked to the accrual date of the underlying tort. *Sterenbuch v. Goss*, 266 P.3d 428, 436 (Colo. Ct. App. 2011). Under the last overt act doctrine a civil conspiracy claim accrues from the date of discovery of the last overt act done in furtherance of the conspiracy. *Dunn v. Rockwell*, 225 W.Va. 43, 61 n.19, 689 S.E.2d 255, 273 n.19 (W. Va. 2009); *Wesbrock v. Ledford*, 464 F. Supp. 3d 1094, 1099-1100 (D. Ariz. 2020).

The Circuit Court relied on *Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, 437 S.C. 343, 878 S.E.2d 896 (2022), to conclude that the continuous accrual theory should not be extended to the facts of this case and civil conspiracy claims under South Carolina law. However, *Poly-Med* involved a completely different set of circumstances and concerned a continuous breach theory involving a contract. *Poly-Med* is distinguishable because there, the court decided that the continuing breach theory would not be adopted as part of South Carolina law because the overriding controlling factor was whether the parties' intentions and contractual relationship supported a finding that separate breaches triggered a new, separate statute of limitations. *Id.* at 346, 878 S.E.2d at 897. Here, the elements of civil conspiracy contemplate that a conspiracy may consist of a single agreement to harm the plaintiff followed by numerous overt acts.

In fact, the Fourth Circuit, which certified the issues addressed in *Poly-Med*, observed that "fixing the deadlines on the date of the first instance of misconduct when there is repeated wrongdoing would allow 'parties engaged in long standing malfeasance . . . [to] obtain immunity in perpetuity from suit even for recent and ongoing malfeasance'", and that it was clear that at a minimum, "the Supreme Court of South Carolina's endorsement of the continuing violation doctrine is not limited to the SCUTPA context, and will extend at least to some other contexts as well." *Poly-Med*, 841 Fed. App'x 511, 516-17 (4th Cir. 2021).

Clearly, the misconduct alleged by Odom falls into the category of acts that would be encompassed by the continuous accrual doctrine as adopted by South Carolina in *State ex. rel. Wilson*. The publishing of separate, distinct defamatory statements consists of separate, actionable wrongs by Campolong in furtherance of an alleged conspiracy that continued unabated until after the filing of this action. Obviously, the Order's conclusion regarding the statute of limitations has lead to unequitable, unjust results. Campolong will be allowed to continue inflicting damage and engaging in other conspiratorial conduct in perpetuity if he wishes, since the origins of the conspiracy began over three years prior to the filing of this action. The Supreme Court has clearly recognized the unfairness of this type of reasoning, and Odom should have been permitted to pursue his civil conspiracy claim for all acts and occurrences that are within three-years of the filing of his action.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that the Court reverse the Circuit Court's February 9, 2023 and June 13, 2023 Orders granting summary judgment to Respondent in their entirety.

Respectfully submitted,

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March 12, 2024
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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Michael S. Holt, Circuit Court Judge

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

Glenn C. Odom…… ……..……..Appellant,

-v-

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

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief complies with Rule 211(b), SCACR.

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