THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Case No. 2015-CP-32-00170

Joseph W. Owens, Appellant,

v.

Temus C. Miles, Jr., B.J. Unthank, L. Dale Harley, Boyd J. Jones, Tommy G. Parler, Eric L. Fowler, Dennis Tyndall, Ashley S. Hunter And McKay Public Affairs, LLC, Defendants

Of Whom Temus C. Miles, Jr., B.J. Unthank,L. Dale Harley, Boyd J. Jones, Tommy G. Parler, Eric L. Fowler and Dennis Tyndall are Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, Joseph W. Owens, was the mayor of the City of West Columbia, South Carolina at all times relevant to this case, until he was voted out of office on November 3, 2015. He filed this action on January 15, 2015 for defamation against numerous individuals who are – or at the time were – members of the West Columbia City Council (Respondents Miles, Unthank, Harley, Jones, Parler and Fowler), the West Columbia Chief of Police (Respondent Tyndall), a political consultant (Defendant Ashley Hunter) and the political consultation firm for which she works (Defendant McKay Public Affairs, LLC). An Amended Complaint was filed on February 24, 2015, and the final pleading, Plaintiff's Amended Answer to Counterclaim of Defendant Temus C. Miles, Jr., was served on May 19, 2015.

Interrogatories and Requests for Production were served on the Defendants by mail on July 1, 2015. Counsel for the Respondents objected to numerous Requests for Production, primarily based upon attorney-client privilege and work product doctrine. Counsel for the

Respondents neither produced those requested materials to which these privileges do not apply, nor did he agree to produce a privilege log pursuant to Rule 26(b)(5)(A) of the South Carolina Rules of Civil Procedure describing the nature of the documents, communications and/or things not produced. See Rule 26(b)(5)(A), SCRCP. On September 21, 2015, Joseph Owens moved for a motion to compel this discovery, and moved for a scheduling order to better resolve the issues involved in the prosecution of the case, to expedite the discovery process and to establish discovery deadlines.

In the meantime, on July 14, 2015, the parties deposed John Robert Bolchoz, Jr., the attorney who had compiled and summarized the statements in the Memorandum that largely constitute the subject of this litigation. September 9, 2015, less than four months after the last pleadings had been served, Respondents filed a Motion for Summary Judgment in this case. Discovery continued, with the deposition of then-Mayor Joseph Owens taking place on September 28, 2015. Eventually, after questioning had been only partially completed, this deposition was recessed with the intention that it would be reconvened in the near future.

On October 27, 2015, with Joseph Owens' deposition still in recess, a hearing was heard on this motion for summary judgment, along with the motion to compel discovery, before the Honorable Judge Tanya A. Gee. (The Court deferred to the Chief Administrative Judge on the issue of a scheduling order.) During that hearing, the Court instructed Joseph Owens to make particular revisions to his Requests for Production to address the objections, and instructed the Respondents to produce the requested materials in accordance with the rules of Civil Procedure. Plaintiff made the appropriate revisions and served an Amended Request for Production on the Respondents on November 2, 2015. On December 1, 2015, the Court signed an Order Granting

Defendants' Motion for Summary Judgment, and Appellant received written notice of the entry of the Order on December 18, 2015. Notice of this appeal was served on January 6, 2016.

STATEMENT OF FACTS

During the early months of 2014, Respondent Tyndall became concerned that the Mayor and certain council members intended not to renew his contract as Chief of Police and instead to replace Defendant Tyndall with then-Major W. Matt Edwards, who was acting as the Department's second-in-command at that time. (Amended Complaint ¶ 6) Respondent Tyndall began to approach employees and ex-employees of the City seeking information that would either support termination of then-Major W. Matt Edwards or undermine Plaintiff's standing in the community. . (Amended Complaint ¶ 8)

Upon discovery that Respondent Tyndall was potentially performing an investigation of then-Major W. Matt Edwards and/or himself, Joseph Owens convened an ad hoc meeting of city officials – himself, Respondent Tyndall, City Administrator Jennifer Cunningham and Mayor Pro Tem Casey Hallman – on March 10, 2014 in order to determine the nature of this investigation. . (Amended Complaint ¶ 10) Respondent Tyndall surreptitiously recorded this private meeting of city officials. . (Amended Complaint ¶ 11) Between March 10, 2014 and March 17, 2014, Defendant Tyndall informed Defendant Miles of this meeting and an audio file containing the aforementioned recording was provided by Defendant Tyndall to Defendant Miles at some time prior to May 13, 2014. . (Amended Complaint ¶ 12)

On March 17, 2014, West Columbia City Council held an initial vote to remove various mayoral powers from Plaintiff, with Defendants Miles, Unthank, Harley, Jones, and Parler voting in favor of the motion. On April 1, 2014, City Council passed the necessary ordinances

(with amendments) with an identical split vote. . (Amended Complaint ¶ 13) During the March 17, 2014 City Council meeting, Defendant Miles justified the removal of Plaintiff's mayoral powers in part by publically alleging that Plaintiff used abusive, offensive language in executive session and that Plaintiff had violated the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 (1976), et seq., by calling the aforementioned ad hoc March 10, 2014 meeting of city officials, which Defendant Miles mischaracterized as a "special committee" meeting. Owens denied those allegations at that time. . (Amended Complaint ¶ 14) On numerous occasions during the following months, among other things, Respondent Miles publically repeated his allegations regarding purported violation of the state FOIA by Mayor Owens. On all such occasions, Joseph Owens continued to deny these allegations. . (Amended Complaint ¶ 16)

On March 18, 2014, Respondent Tyndall terminated then-Major Edwards, on the alleged basis of a reorganization of the West Columbia Police Department. . (Amended Complaint ¶ 17) On this same date, Respondent Tyndall sent an e-mail to Mayor Pro Tem Casey Hallman mischaracterizing the March 10, 2014 meeting as a "Police Committee meeting." Her e-mail reply clearly informed Respondent Tyndall that neither she nor City Administrator Cunningham considered the referenced ad hoc meeting to be a committee meeting, nor did either consider themselves to be a member of any such committee. (Amended Complaint ¶ 18; see also Amended Complaint Exhibit No. 1, Tyndall/Hallman e-mail chain dated March 18, 2014).

After Joseph Owens was stripped of some of his mayoral powers, many of his supporters initiated a petition for a referendum to take place for a change in municipal government from the council form of government to the mayor-council form of government as defined in the Home Rule Act, S.C. Code Ann. § 5-5-10, et seq. . (Amended Complaint ¶ 20) In response to the

circulation of this referendum petition, in May of 2014, a "community organization" by the name of West Columbia United was established to disseminate propaganda against the push for the mayor-council form of government and to facilitate publication of damaging statements regarding Plaintiff, primarily through Facebook. Defendant Hunter spearheaded the creation and maintenance of this organization and its activities with the advice and assistance of Respondents Miles, Unthank, Harley and Jones, among others. . (Amended Complaint ¶ 21)

Also in response to the groundswell of support for the referendum petition, on May 13, 2014, West Columbia City Council (by a split vote) authorized the retention of an outside attorney, Robert Bolchoz, ostensibly for the purpose of conducting an internal review of incidents and processes, characterized as a procedural audit. This move was spearheaded by Respondents Unthank and Miles, the latter of whom already had connections to that attorney and presented a portion of the audio of the March 10, 2014 meeting recorded by Defendant Tyndall in support of the hiring. Respondents Harley, Jones and Parler joined in passing the resolution. . (Amended Complaint ¶ 22) Mr. Bolchoz's review process eventually produced a Memorandum dated July 29, 2014 (See Amended Complaint Exhibit No. 2, Bolchoz Memorandum) which dealt exclusively with allegations of official wrongdoing and improprieties by Joseph Owens and W. Matt Edwards (the inclusion of whom was obviously intended to directly damage Owens' reputation further by their stated association). (Amended Complaint ¶ 24) This report is based on allegations of (at the time) unidentified former and/or subordinate city employees of the individual Respondents. The report was also presented absent any supporting documentation, though relevant documents were available to Attorney Bolchoz and the Respondents to refute the allegations against Mayor Owens. These documents – such as the aforementioned e-mail string

dated March 18, 2014 – were simply disregarded, as were any statements by interviewees that served to contradict the allegations against Joseph Owens. (Amended Complaint ¶ 27)

Despite obvious procedural deficiencies affecting the fairness of the Bolchoz Memorandum, repeated protests from Appellant and others regarding the falsity of many of the allegations contained in the document, and warnings from others – including the City Attorney's office – regarding waiver of the attorney-client privilege and possible resulting liability of the City and its employees and officials, West Columbia City Council (by a split vote) authorized the release of the report by Bolchoz on August 5, 2014, its first opportunity to do so. Thus, the City of West Columbia knowingly waived any privilege or confidentiality associated with the Memorandum. Council member Respondents Miles, Unthank, Harley, Jones, Parler and Fowler voted in favor of the publication, which was accomplished less than two months in advance of the scheduled referendum to decide whether or not the City would adopt a Mayor-Council form of government. (Amended Complaint ¶ 28) As a result of the defamatory allegations related to the Bolchoz Memorandum, Respondents severely damaged the reputation of Joseph Owens and soundly defeated the movement a change to the mayor-council form of government in West Columbia in the September 30, 2014 referendum on that issue.

ARGUMENTS

1. BECAUSE THE APPLICATION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN REFUSED OR PLAINTIFF SHOULD HAVE BEEN GRANTED A CONTINUANCE TO PERMIT DEPOSITIONS TO BE TAKEN AND FURTHER DISCOVERY TO BE HAD, THE COURT ERRED IN PROCEEDING WITH HEARING AND ULTIMATELY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

There was, and is, a great deal to discovery yet to be produced in this litigation. In opposing this motion for summary judgment, attorney for the Plaintiff, Stephen "Chip" Burn, Esquire, pursuant to Rule 56(f) of the South Carolina Rules of Civil Procedure, filed an affidavit in this case explaining the status of the discovery process. See Rule 56(f), SCRCP. (see Affidavit of Stephen "Chip" Burn)

Interrogatories and Requests for Production were served on defense counsel on July 1, 2015. When the opposing attorneys did not comply within the time allowed under Rules 33 and 34 of the South Carolina Rules of Civil Procedure, Plaintiff's attorney consented to a 30-day extension. David Anderson, Esquire, served the initial responses on behalf of his clients on September 4, 2015. He objected to several discovery requests, most notably those requests for production of "emails, texts, correspondence, documents or other communications, sent or received, to or from" the various defendants from January 1, 2014 to January 15, 2015 containing various names and terms relevant to this case. These objections were based upon the assertion that they "may be interpreted to request the production of materials that are protected pursuant to the attorney-client privilege or the attorney work product doctrine." Based on these objections, Mr. Anderson refused to produce any of the requested materials, whether privileged or not. When requested to produce a privilege log pursuant to Rule 26(b)(5)(A) of the South Carolina Rules of Civil Procedure describing the nature of the documents and communications not produced, Mr. Anderson refused to do so.

Appellant filed a motion to compel discovery due to the Respondents' continued failure to timely and fully respond to discovery requests, and this matter was heard by the Honorable Tanya A. Gee on October 27, 2015, along with the motion for summary judgment, the granting of which is hereby being appealed. After hearing the parties' respective positions regarding the

outstanding discovery, the Court issued an email to counsel in this case indicating her inclination to grant the motion for summary judgment in favor of the West Columbia City officials. On November 24, 2015, Plaintiff's counsel emailed a letter to Judge Gee regarding the Plaintiff's position under Rule 56(f) and pointing out that there was a discovery request pending that had been issued in accordance with the Court's order to address the motion to compel discovery. (See Stephen "Chip" Burn letter dated November 24, 2015) Attached to this correspondence was a copy of a recently-received letter from Captain Shane Phillips of the West Columbia Police Department detailing, among other things, Chief Dennis Tyndall's practice of retaining evidence for use against political enemies such as Plaintiff. (See Phillips Letter to Joseph Owens dated October 26, 2015) This letter was attached simply to be indicative of the nature of the evidence yet to be produced in this case. By way of return email that same day to all counsel and Judge Gee, counsel for the city officials indicated that, due to instruction regarding the Court's position, he did not intend to respond to the outstanding discovery requests. (See David Anderson email dated November 24, 2015) On December 1, 2015, the Court signed the aforementioned Order Granting Defendants' Motion for Summary Judgment. Despite the clear indication of relevant evidence yet to be produced in this case, a case still in the early stages of the discovery process in large part due to the Defendants' failure to cooperate or respond timely to Plaintiff's discovery requests, the trial court disposed of Joseph Owens' request under Rule 56(f) with a single sentence, finding "that additional discovery would be of no use except to unnecessarily delay this matter." (Order Granting Defendants' Motion for Summary Judgment, p. 6)

Subsection (f) of Rule 56 of the South Carolina Rules of Civil Procedure provides as follows:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just. Rule 56(f), SCRCP.

Given the status of discovery in this case, pursuant to Rule 56(f) summary judgment should have been refused or at least continued until such time as the discovery process could be completed.

The South Carolina Supreme Court considered this issue in Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001). Stating that "[s]ummary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues" Id. at 321., the Court affirmed the finding of the Court of Appeals that the trial court had abused its discretion in granting summary judgment before the Plaintiff, Doe, had an opportunity to complete discovery. "Summary judgment," the Court explained "*must not be granted* until the opposing party has had a full and fair opportunity to complete discovery." Id. at 322. In that case, it should be noted, the Court found it relevant that depositions were scheduled for the next week following the hearing, Id.; in this case, the parties were actually in the middle of a deposition (Joseph Owens' recessed deposition) at the time of the hearing of the summary judgment motion.

To resolve this issue, the Doe court applied the analysis from Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991), In Baughman the Court applied a two-part test. First, the Court determined that the Plaintiffs had demonstrated a likelihood that further discovery would uncover additional relevant evidence (in that case involving medical causation) rather than simply being on what it characterized as a "fishing expedition" Id. at 112. The Baughman Court found that while the expert affidavit in that case did not satisfy the "most

Respondents as well as the inability under Rule 4.2 of the Rules of Professional Conduct for Joseph Owens' counsel to approach and interview city employees and officials without the City attorney's consent. Joseph Owens has therefore not been dilatory in seeking discovery.

In the case of McCray v. Maryland Department of Transportation, 741 F.3d 480 (4th Cir., 2014), a case dealt with at more length elsewhere in this brief, the Fourth Circuit Court of Appeals Court vacated and remanded under Federal Rule 56(d) in circumstances very similar to those in this case. The Fourth Circuit found that the lower court's grant of summary judgment was premature and an abuse of discretion because (i) it was granted before the Plaintiff in that case had an opportunity to discover facts essential to her discrimination claim, and (ii) she alleged that certain discriminatory actions had occurred prior to any legislative activity. McCray, supra. Similarly, this case was still in the early stages of the discovery process and evidence of the full scope of Defendants' conduct had not yet been made available to Plaintiff, therefore summary judgment as to the claims and Defendants in this case was premature. This abuse of discretion on the part of the trial court has had the effect of denying Appellant his right to trial of this very important matter, while rewarding the Respondents for their failure to comply with Joseph Owens' properly noticed discovery requests. Respondents should not be permitted to avoid complying with discovery requests and then be granted summary judgment as a reward for failure to comply with the rules of civil procedure.

2. BECAUSE THERE IS SUBSTANTIAL EVIDENCE THAT THE DEFENDANTS HAD KNOWLEDGE OF OR RECKLESS DISREGARD FOR THE FALSITY OF THE ALLEGATIONS INCLUDED IN THE BOLCHOZ MEMORANDUM, THE COURT ERRED IN FINDING THAT PLAINTIFF HAD FAILED TO DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT THESE ALLEGATIONS WERE PUBLISHED WITH KNOWLEDGE OF THEIR FALSITY OR WITH RECKLESS DISREGARD FOR THEIR TRUTH.

The trial court found summary judgment appropriate, determining that Appellant had "failed to demonstrate by clear and convincing evidence that the alleged defamatory statement (the Bolchoz Report) was published with knowledge of its falsity or with reckless disregard for its truth." (Order Granting Defendants' Motion for Summary Judgment, p. 5) In this case, however, the appropriate summary judgment analysis for the trial court to utilize is "whether the evidence in the record *could support* a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-256, 106 S.Ct. 2505 (1986) (emphasis added). An appellate court, in turn, is to utilize the same standard of review as the trial court in reviewing the grant of summary judgment. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001). On appeal from an order granting summary judgment, the appellate court therefore reviews all ambiguities, inferences and conclusions arising from the available evidence in the light most favorable to the non-moving party. USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008).

Here, the trial court compounded its errors in granting summary judgment. Rather than analyze whether "the evidence in the record *could support*" a finding of actual malice by clear and convincing evidence, the trial court instead stepped into the role of the fact-finder, concluding that Appellant "failed to *demonstrate* by clear and convincing evidence that the alleged defamatory statement (the Bolchoz Report) was published with knowledge of its falsity or with reckless disregard for its truth." (Order Granting Defendants' Motion for Summary Judgment, p. 5) (emphasis added) This is the standard to be applied at trial by the fact-finder, and therefore an improper application of the "clear and convincing" standard at the summary judgment stage.

The available evidence undoubtedly indicates that it could support a finding of actual malice by clear and convincing evidence. The evidence shows that:

- Respondent Miles took steps to recruit an attorney to perform an audit and thereby compile damaging allegations against Appellant;
- Respondent Miles and Tyndall took steps to commence compiling "evidence" to support these allegations, regardless of their falsity, even prior to the retention of this attorney by the City of West Columbia;
- once this "procedural audit" was commenced by the attorney, Respondent Miles provided additional instruction regarding the conduct of this process;
- Respondents Miles and Unthank checked in with the attorney regarding the status of the investigatory process and its possible reflection on Appellant;
- Respondent Tyndall and his subordinates provided to the attorney numerous statements defamatory to Appellant during the auditing process;
- upon completion of the document, all Respondents were informed by Appellant that the allegations related to the Bolchoz Memorandum were false;
- Respondents Tyndall, Miles and Jones had independent knowledge of the falsity of specific allegations contained in the document;
- despite having knowledge of the falsity of these allegations, Respondent City Council members voted on August 5, 2014 to publish these defamatory allegations to the public; and
- the Bolchoz Memorandum was then directly published by, at a minimum, Respondent Unthank in an effort to damage Appellant's reputation and thereby undermine

support for push for the mayor-council form of government in the September 30, 2014 referendum.

While the trial court deferred on the issue of the truth or falsity of the allegations included in the Bolchoz Memorandum, (Order Granting Defendants' Motion for Summary Judgment, p. 6, Footnote 1) the available evidence definitively shows that the document does, in fact, contain numerous false and defamatory statements, based primarily on statements from questionable sources and often derived from a single such source. It appears that documentation was often either omitted or misinterpreted in light of these statements. The trial court, however, indicates in its conclusions that "there is no evidence, much less clear and convincing evidence, that Mr. Bolchoz conspired with the Defendants to write a false report...." (Order Granting Defendants' Motion for Summary Judgment, p. 6) While Appellant would disagree on this issue, it should be pointed out that this conclusion does not consider the distinct possibility that Mr. Bolchoz was an unwitting straw man fed false information through the efforts of the defendants in this case. Moreover, the "ambiguities, inferences and conclusions" arising from this substantial evidence of the falsity of these various allegations indicates direction of this investigation through the efforts of the Respondents rather than random mistakes.

To that end, there is no doubt that the Respondents had knowledge of the falsity of the allegations related to the Bolchoz Memorandum. Attorney Robert Bolchoz admitted in his deposition testimony that he was contacted by Respondent Miles in late April of 2014, prior to being retained by the City of West Columbia, regarding Mr. Miles' allegations in connection to the recording of the March 10, 2014 meeting that was provided by Respondent Tyndall. (Bolchoz Deposition p. 85-86, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) Furthermore, he admitted that he received instructions during this audit

process from Respondent Miles regarding the individuals whom he should interview (Bolchoz Deposition, p. 30, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C), as well as calls from Respondents Miles and Unthank for updates regarding the time frame and the impact of the investigation on the Mayor. (Bolchoz Deposition, pp. 94 – 96, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C)

The Bolchoz Memorandum concludes in the Public Works, Procurement, and Personnel section that, in connection with the improper procurement of fence construction, the mayor signed check requests and directed payment of invoices in circumstances which called for the City Administrator's approval. This information was derived primarily from interviews with Charles Garren, a disgruntled employee who held the position of Director of Public Works at the time, but left the City of West Columbia soon after contributing to this report. (See Bolchoz Deposition p. 147, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) However, even a cursory review of the City of West Columbia Check Request payable to Sox Fence Company, included in Robert Bolchoz's materials in support of this allegation, clearly shows that the check request was signed and approved by City Treasurer Rick Hodge, not the Plaintiff, Joe Owens. (see City of West Columbia Check Request dated March 3, 2014, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit D)

Similarly, again based primarily on the assertions of Mr. Garren, the Bolchoz Memorandum concludes that on one occasion the Mayor procured, and committed the city to the purchase of an excavator in March of 2013, which cost the City of West Columbia $68,546.00. The Report further concluded that the purchase was not considered an emergency procurement and alleged that there were no bids taken from other potential vendors for that piece of equipment. (See Bolchoz Memorandum p. 5, Amended Complaint Exhibit No. 2) Again, a

simple review of the City of West Columbia Purchase Order that ultimately committed the City to this purchase (Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit E) clearly shows that City Treasurer Rick Hodge, not Plaintiff Joe Owens, authorized this purchase. A similar review of the Requisition Register related to this purchase (Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit F) indicates that this was in fact classified as an "Emergency" purchase by Assistant Director of Finance Justin Black, and this document – and presumably the transaction itself – was signed off and approved by City Administrator Jenny Cunningham dated March 26, 2013. With regard to the conclusion that no bids were taken from other potential vendors, West Columbia was under the state bid system regarding this transaction, and Robert Bolchoz in his deposition admitted to the fact that under a state bid program there was no requirement for West Columbia to take additional bids for this purchase. (See Bolchoz Deposition p. 174, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) It should also be noted that this purchase was given final approval by a unanimous vote of West Columbia City Council, which included those Respondents who were members of City Council at the time. All of the Council members involved in this case who took part in that vote – Respondents Jones, Fowler, Harley and Parler – therefore had direct knowledge that this purchase was authorized, and that this allegation to the contrary was in fact false.

Furthermore, based on allegations by Respondent Tyndall, the Bolchoz Memorandum concludes that there was more than one payroll or personnel status change form or hiring document which was signed by the Mayor in violation of policy and procedure because the required department head or City Administrator objected to the action and refused to sign. (See Bolchoz Memorandum p. 5, Amended Complaint Exhibit No. 2) A review of past Employee

Change of Status Reports, (Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit G) however, shows that it has not been an uncommon practice for several decades, at least, for City of West Columbia mayors to sign payroll, personnel status change forms, or hiring documents. Robert Bolchoz admitted to knowledge of these documents while compiling his report, agreeing that procedure in this area had been very loosely applied for some time. (See Bolchoz Deposition pp. 175-176, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) In one instance, it should be noted, City Administrator Jenny Cunningham even signed off on her own rehire on September 26, 2012. Irregularities such as this, however, did not warrant mention in the Bolchoz Memorandum.

The Bolchoz Memorandum also concludes that Plaintiff contacted a deputy department head and attempted to interfere with and influence a grievance hearing regarding the termination of a police officer. This allegation is based on information provided by Public Works Director Jamie Hook pursuant to instructions from Respondent Miles that were given on May 2, 2014 – again, prior to the retention of attorney Bolchoz for the performance of this audit. (See Notes by Superintendent of Sanitation Jamie Hook dated May 2, 2014, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit O) This allegation is also untrue. Mr. Bolchoz admits that there was no evidence offered to show that anything was handled differently with regard to the grievance hearing or that there were any objections by this particular employee at the grievance hearing. (See Bolchoz Deposition pp. 178-179, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) Moreover, Plaintiff explains in his deposition that this allegation is obviously derived from a misunderstanding. (See Owens Deposition, pp. 92-93, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit H) Plaintiff could have explained this misunderstanding – along with the other

false statements recited above – to Robert Bolchoz at the time that he was compiling his report, but Mayor Joe Owens was *never approached by Robert Bolchoz* – or anyone else for that matter – regarding these allegations. Mr. Bolchoz contacted Plaintiff by way of an introductory email on June 3, 2014 to invite any input from him at the beginning of the audit process. (See Memorandum in Opposition to Defendants' Motion for Summary Judgment p.8, Email from Robert Bolchoz to Mayor Owen dated June 3, 2014 incorrectly labelled Exhibit H) It should be noted that, by the time this email was issued, Mr. Bolchoz had already met with Defendant Tyndall at least twice, receiving from him the audio file of the March 10, 2014 meeting of city officials, as well as numerous written statements that Defendant Tyndall had compiled with damaging allegations against Plaintiff. (Bolchoz Deposition pp. 32-33, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) Moreover, Mr. Bolchoz reviewed this material – the written statements as well as the audio file – on June 2, 2014, the day before he sent the email to Plantiff. On the very same day that he sent this email, Mr. Bolchoz interviewed Charles Garren and Shawn Ludwig, who provided numerous additional allegations of wrongdoing on the part of the Mayor. (See Bolchoz Hourly Accounting dated July 23, 2014, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit I; City of West Columbia Interview Master List, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit J) There is, however, no mention of these allegations in this email to Plaintiff, nor were there any subsequent attempts to communicate with the Mayor. Robert Bolchoz admits as much in his deposition, and – most tellingly – explains that he believed Plaintiff's statements in such an interview could be incriminating. (See Bolchoz Deposition pp. 157-162, Exhibit C)

Some of the most damning allegations of the Bolchoz Memorandum are its conclusions in a section entitled "Public Safety," in which Bolchoz accuses Plaintiff of "interference with established policies and procedures,...orchestration of questionable personnel actions,...and direct and indirect intimidation of employees." (Bolchoz Memorandum p. 5, Amended Complaint Exhibit No. 2) These allegations are based on assertions by Respondent Tyndall and statements compiled and delivered by Tyndall and employees in his department, including then-Lieutenant Scott M. Morrison. These accusations focused almost exclusively on various alleged wrongdoings of former Major Matt Edwards, who had previously been terminated by way of a "restructuring" of the West Columbia Police Department in March of 2014. The Bolchoz Memorandum listed numerous unprofessional and unlawful activities in which Edwards was alleged to be engaged.

This recitation included the allegation that one police captain was instructed by Major Edwards to sign off on "fraudulent time sheets" for a subordinate officer indicating that that officer was at work when he was actually attending college classes. This officer was, in fact, James Sullivan, who was attending the prestigious Command College of South Carolina at Anderson University. The Command College Candidate Application included a nomination form that explained that:

> The Command College is designed to provide extensive exposure to relevant graduate-level material specifically engineered for professionals in management positions. It is a demanding program that involves advanced study and dedication on the part of the participant as well as the agency. The program requires some 300 hours of classroom instruction, in addition to online and independent study over a 20-month period. There are significant out-of-class assignments to include an independent research project. As such, *candidates must receive the cooperation and support of their employing organization. Because the program carries training and academic credit, normally participants attend class on agency time. By nominating a candidate, the employing organization is making a commitment to support the participant throughout the program.* (italics added)

(See Command College Candidate Application, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit K)

In his deposition, Robert Bolchoz admits that this was in fact a work-related training program, but he states his belief that the 300+ hours of participation should have come out of Sullivan's vacation time. He did, however, balk at again asserting that this situation constituted fraud. (Bolchoz Deposition pp. 198-201, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) Respondent Tyndall obviously knew that this was a work-related program, and that the assertion that this practice constituted fraud was false as well.

Perhaps the most inflammatory accusation against Matt Edwards contained in the Bolchoz Memorandum involves an incident where Edwards is alleged to have had three dogs unnecessarily shot. In support of this conclusion, Bolchoz offers evidence that "more than one officer indicated that the dogs were not threatening and one referred to them as 'docile,'" and "one of the officers indicated that Edwards ordered them to shoot the dogs in a firing squad manner as he raised his arm and lowered it while calling 'Fire!'" (Bolchoz Memorandum p. 6, Amended Complaint Exhibit No. 2) However, Mr. Bolchoz was also in possession of the incident report that related to this allegation, a document that altogether contradicted the version put forth by these officers. According to this report, West Columbia Police Department officers became involved in response to "numerous calls from different complainants along the Wade Street, Leaphart Street, and Holland Avenue area." The pack of dogs involved in this incident (pit bulls) had "charged" or "lunged" at several people and threatened people's animals, and many of these individuals had called in to 911 Dispatch concerning the dangerous pack of dogs. Only after several unsuccessful attempts to capture the dogs was the decision made to dispatch the dogs rather than allow them to continue to threaten people. (See Incident Report No. 1225330, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit L)

There was no mention of this document or any other such contradictory information in the Bolchoz Memorandum.

A couple of items warrant attention regarding this omitted incident report. First, this incident report was approved by then-Lieutenant Scott Morrison, a major contributor of allegations against Matt Edwards and, by association, Plaintiff. Mr. Bolchoz took a statement from Morrison, and interviewed him as well. (See Bolchoz Note No. 1, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit N) Apparently, there was no inquiry made as to why the version of this event included in the Memorandum differs so greatly from the version in this report that Morrison approved in 2012. Moreover, a review of this document indicates that Mayor Pro Tem Casey Hallman was the Complainant, and that the pack of threatening dogs was eventually encountered on her property. The incident report indicates that the dogs "had lunged at her" and "had threatened another animal." (See Incident Report No. 1225330, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit L) Hallman was interviewed at least two times by Mr. Bolchoz, once personally and once telephonically, and neither time was the subject of this contradictory evidence of this incident broached with her. (Bolchoz Deposition, pp. 207-209, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C)

Matt Edward could have corrected these false allegations; however, like Plaintiff, he too was *never approached by Robert Bolchoz* to give his input. (see Affidavit of W. Madison "Matt" Edwards, Exhibit V) The various allegations against former Major Matt Edwards, however, only have relevancy in the Bolchoz Memorandum as they relate to the alleged conduct of Mayor Owens, as Edwards was no longer with the City of West Columbia at the time that this procedural audit was commissioned. Bolchoz states in his report that "[a]ny objection by the

chief to Edwards' activities was met with a threat of termination from the Mayor..." (Bolchoz Memorandum pp. 5-6, Amended Complaint Exhibit No. 2) Upon making this statement, Bolchoz goes on to list in bullet-point summary fashion the various instances of misconduct by Edwards, including the verifiably false allegations included here. (See Bolchoz Memorandum pp. 6-7, Amended Complaint Exhibit No. 2) Contrary to the conclusion in his Memorandum, however, Bolchoz admits in his deposition that there was, in fact, no evidence whatsoever to indicate that the chief ever objected to Mayor Owens regarding any of Edwards's activities specified in the Bolchoz Memorandum. (See Bolchoz Deposition pp. 188 - 193, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) Respondent Dennis Tyndall knew that these allegations were false, but produced this "evidence" – in a process where neither Appellant nor Matt Edwards could defend themselves – to support his assertions regarding Appellant's supposed intimidation and misconduct.

The Bolchoz report went on to purport to verify Defendant Miles's ongoing allegations that the Mayor held a special committee meeting on March 10, 2014, attended by the Mayor, Mayor Pro Tempore Casey Hallman, Chief Dennis Tyndall, and City Administrator Jenny Cunningham, and that this meeting was not publicized in keeping with the requirements of the South Carolina Freedom of Information Act. (see Bolchoz Memorandum, p. 7, Amended Complaint Exhibit No. 2) Mr. Bolchoz appears to have based this conclusion exclusively upon the audio file secretly recorded by Respondent Dennis Tyndall, as well as that individual's interpretation of its contents. He was, in fact, presented with contrary evidence. In his interview of Mayor Pro Tem Casey Hallman, for instance, she indicated that she had no knowledge of having been part of a committee as Bolchoz alleges. Bolchoz also admits that he knew at the time about the email correspondence between Defendant Tyndall and Hallman in which the latter

explained that City Administrator Jenny Cunningham also denied being part of any "special committee." In spite of this information, Bolchoz omitted Hallman's denial and never questioned Cunningham on this issue. (see Bolchoz Deposition pp. 244 – 249, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) Mr. Bolchoz admitted that this email between Defendant Tyndall and Mayor Pro Tem Hallman contradicted his conclusion regarding the FOIA violation, and that any reference to this correspondence was omitted from his Memorandum. (see Bolchoz Deposition p. 251, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C)

One of the most serious false allegations included in the Bolchoz Memorandum is the accusation that Plaintiff had agreed to a vote exchange arrangement with another Council member, an arrangement whereby the Mayor would secure the promotion of a particular officer in the West Columbia Police Department who was related to the Council member. (see Bolchoz Memorandum p. 7, Amended Complaint Exhibit No. 2) This information, in fact, was provided by a disgruntled former officer in the West Columbia Police Department named Jackie Brothers, who provided a written statement (via Respondent Tyndall) to Robert Bolchoz explaining that West Columbia City Councilman Boyd Jones had told her about the arrangement with Mayor Owens. (see Bolchoz Deposition pp. 222 – 224, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) When questioned as to why Appellant's name was included in the report and Respondent Jones' name was not included, Mr. Bolchoz's response was "I don't know." In any event, he never followed up with Respondent Jones to corroborate this very serious allegation of illegal activity.

Upon review of the Bolchoz Memorandum, however, it had to be obvious to Respondent Jones that this allegation was entirely false. By way of Defendant Boyd J. Jones' Responses to

First Requests to Admit, Respondent Jones has admitted that he is the only member of West Columbia City Council related to a West Columbia police officer. He also admits that he never entered into such a vote exchange arrangement with Plaintiff, and he admits to never telling Ms. Brothers that he had entered into such an arrangement with the Mayor. (Defendant Boyd J. Jones' Responses to First Requests to Admit, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit P) In spite of his direct knowledge of the falsity of this allegation, however, Respondent Jones voted in favor of distribution of the Bolchoz Memorandum to the public. (see West Columbia City Council Meeting minutes dated August 5, 2014 p. 10, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit Q)

The available evidence indicates therefore that Respondents Miles, Unthank, Tyndall and perhaps other party defendants were active in helping to compile the spurious information before and during the auditing process undertaken by Mr. Bolchoz. At least as early as May 2, 2014, several days before he even first proposed that an independent attorney be retained for an audit, Respondent Miles was contacting city employees in an effort to compile information that could be used against Plaintiff. (See Notes by Superintendent of Sanitation Jamie Hook dated May 2, 2014, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit O) Attorney Robert Bolchoz admits in his deposition that Respondents Miles and Unthank, and perhaps Respondent Parler contacted him by telephone outside of the context of official council meetings or executive sessions to instruct him as to which city officials and employees he should contact in his investigation. (See Bolchoz Deposition pp. 30, 65-66, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C)

Defendant Ashley Hunter was meeting with Respondents Miles and Unthank (each of whom have been clients of Ms. Hunter and Defendant McKay Public Affairs), and possibly others, during this period to plan opposition to the referendum to change West Columbia City government to the mayor-council form of government; utilization of this collection of false allegations and the materials that had been compiled in its production proved central to this strategy. On July 14, 2014, for instance, then-Mayor Joe Owens walked in on a such a strategy meeting in a conference room in West Columbia City Hall; present at this meeting were Temus Miles, Jr., B.J. Unthank and Defendant Ashley Hunter. (See email string dated July 13-14 , Supplemental Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit No. 1) These individuals were reviewing the lists of names on the petition to have the referendum on local government change. When Plaintiff confronted these individuals regarding their purpose, Defendant Ashley S. Hunter admitted to having a leading role in what he had characterized as a "smear campaign." (Owens Deposition, pp 98-99, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit H)

The trial court points out in this portion of the Order Granting Defendants' Motion for Summary Judgment that Appellant admitted in his deposition "that the defamatory statements about which he complains are all contained in the Bolchoz Report" and that Appellant's deposition testimony was otherwise insufficient to survive summary judgment. (Order Granting Defendants' Motion for Summary Judgment, p. 6) While there are numerous statements throughout Joseph Owens' deposition testimony that are contradictory to these conclusions, it should again be pointed out that *his deposition was in recess at the time that the trial court heard these motions.* (See Owens Deposition Transcript, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit H) Joseph Owens was therefore never afforded the

opportunity to fully characterize or qualify his testimony; summary judgment was granted in the middle of his deposition.

The heightened "clear-and-convincing" standard to be applied can be difficult enough to achieve under normal circumstances. While there is substantial evidence already in the record in this case, the present situation underscores the necessity that the discovery process be complete before its application. The trial court, however, has turned a blind eye to this considerable evidence, in addition to failing to recognize the necessity of ongoing discovery in this case.

3. BECAUSE THIS CASE INVOLVES WEST COLUMBIA CITY COUNCIL MEMBERS UTILIZING AN UNLAWFUL PROCESS TO KNOWINGLY AND RECKLESSLY PUBLISH A REPORT OF FALSE AND DEFAMATORY STATEMENTS TO THE PUBLIC TO DAMAGE PLAINTIFF POLITICALLY AND PERSONALLY, THE COURT ERRED IN FINDING THAT THE COUNCIL DEFENDANTS ENJOYED ABSOLUTE LEGISLATIVE IMMUNITY.

The trial court concludes that Respondents Miles, Unthank, Harley, Jones, Parler and Fowler are entitled to dismissal as they enjoy absolute immunity as members of the West Columbia City Council. In support of this conclusion, the trial court cites Corbin v. Washington Fire and Marine Ins. Co., 278 F. Supp. 393 (D.S.C.) aff'd 398 F.2d 543 (4th Cir. 1968), and Richardson v. McGill, 273 S.C. 142, 255 S.E.2d 341 (1979), stating that "[i]n South Carolina, absolute immunity 'does not depend on the rigid requirement of a strictly legislative or judicial proceeding; its limits are fixed rather by considerations of public policy." (Order Granting Defendants' Motion for Summary Judgment, p. 6 citing Corbin at 396) The trial court asserts that absolute immunity is applicable in this case "because council members are being sued for voting 'yes' during a council meeting to allow an already authorized audit to be made public," (a grossly inaccurate oversimplification of this situation) and some vague notion of waiver of

attorney-client privilege by Appellant. (Order Granting Defendants' Motion for Summary Judgment, p. 6-7)

In this instance, the council member Respondents are not being sued simply for "voting 'yes'" any more than a shooter is prosecuted for "trigger-pulling;' this action, while not sufficient by itself to establish liability if the audit was otherwise properly authorized, was a necessary step in the process that defamed Joseph Owens. As an initial matter, this audit was not properly authorized; it was in fact unlawful under S.C. Code Ann. § 5-7-100 (1976), the statute under which the council member Respondents claim they were authorized to undergo this "auditing process." This issue is dealt with at greater length below. This vote was only the step that finally published the defamatory statements compiled by Respondents, or at their direction. Many of the actions taken in this case by Respondents, both the council members and the police chief, fall outside of their official and legislative duties. Moreover, the vote of a city council in a municipality that has the council form of government (where the council enjoys legislative, executive and administrative powers) requires more analysis to determine into which category this action falls. Furthermore, the Court failed to indicate how a waiver of attorney-client privilege by Joseph Owens in this matter (even assuming that this were to be true) would serve to excuse the publishing of these defamatory statements to the public or otherwise serve to impact the issue of legislative immunity in any way whatsoever.

In the Richardson case the Court cites, the alleged defamatory statements were published only at a joint meeting attended by the Williamsburg County Legislative Delegation and the Williamsburg County Recreation Commission, and concerned "a matter related to legislative duties and, in which, all present had an official interest," Richardson at 147, *i.e.*, the performance of the Director of the Recreation Commission. In this case, by contrast, the intended audience

for publication was the public-at-large. The Richardson Court notes that "the meeting was attended only by the members of the Delegation, the Commission and appellant," Id. at 144, and goes on to characterize the audience at issue as a "private meeting between...participants." Id.

Furthermore, in reaching its final holding, the Court pointed out the following relevant observations: that "the alleged defamatory statements were uttered (1) at a meeting attended only by the legislative delegations and members of the Recreation Commission, and appellant; (2) by respondent, a member of the legislative delegation; and (3) concerning a matter related to legislative duties and, in which, all present had an official interest." Id. at 147. (emphasis added) The audience for such a defamatory statement is therefore obviously a highly relevant issue to the Richardson Court. The Court affirmed summary judgment only "on the ground that the alleged defamatory statements were made on an absolutely privileged occasion," Id. at 148, as delineated above. These are not circumstances similar to the facts of this case. The Respondents did not simply utter defamatory statements about Plaintiff during, for instance, an executive session of Council where only participating government officials were present. Had the false allegations involved here been brought in such a context, the Council members might enjoy legislative privilege. This case, however, involves Council members knowingly and recklessly publishing a report of false defamatory statements to the public to damage Joseph Owens politically and personally.

Moreover, it should be pointed out that the South Carolina Supreme Court, in a subsequent case, Brown v. County of Berkeley, 366 S.C. 354, 622 S.E.2d 533 (2005), cited the Richardson case for the principle that members of the legislature do not, in fact, enjoy absolute immunity. In that case, the Court clearly explained that "[i]ndividual members of a local county council are not entitled to absolute immunity." Id. at 537. At the October 27 hearing, this struck

the trial court as an unusual reading of Richardson v. McGill, as the Richardson Court seems to be in fact expanding immunity beyond "the rigid requirement of a strictly legislative or judicial proceeding." Richardson at 146. The Brown Court is accurate, though, in its assertion that Richardson also stands for the principle that legislative immunity is not absolute, where the Richardson Court states that the limits of this immunity "are fixed...by considerations of public policy. A sound public policy has long recognized an absolute immunity of members of legislative bodies *for acts in the performance of their duties*." Id. (emphasis added) This principle reflects United States Supreme Court decisions on this point, which assert that public officials seeking exemption from personal liability have the burden of showing that such an exemption is justified by overriding public policy considerations. See Forrester v. White, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988); see also Tenney v. Brandlove, 341 U.S. 367, 95 L.E. 1019 (1951). The public policy to be considered is touched upon by the Richardson Court: "the question to be resolved is whether [a legislator's] statements had some relation to, or were part of his duties as a member of the Legislature...." Richardson at 146. The Richardson Court, however, gives little further instruction as to how to analyze whether or not a legislator's behavior falls within the scope of this immunity.

Obviously, the South Carolina Supreme Court in the Brown case considered "the principle of absolute immunity," Brown at 537, and in so doing applied Richardson's consideration of public policy in its evaluation. There, as here, the legislative body in question, the Berkeley County Council, called for a "special audit" – albeit a financial, rather than "procedural," audit – stemming from ongoing allegations against the Berkeley County Clerk of Court, and the Court declined to dismiss on grounds of legislative immunity. In those circumstances, stemming from facts very similar to those in this case, the Supreme Court

determined that absolute legislative immunity was not applicable, and instead applied the statutory protections available under the South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-70(b) (2005). The Brown Court goes on to explain that immunity under the Tort Claims Act is an affirmative defense that must be proved by the defendant at trial. Id. at 537 (citing Frazier v. Badger, 361 S.C. 94, 101, 603 S.E.2d 587, 590 (2004)). As such, the issue was not available for summary disposition. Again, however, the Court did not offer a great deal of direction regarding how it went about determining that this legislative behavior did not qualify for absolute legislative immunity.

On the other hand, the federal courts do offer instruction as to how this issue should be analyzed. The United States Supreme Court, in the case of Forrester v. White, supra, prefaced the issue of absolute immunity for government officials by stating:

> Aware...that the threat of liability may...have the salutary effect of encouraging officials to perform their duties in a lawful and appropriate manner, this Court has been cautious in recognizing absolute immunity claims other than those decided by constitutional or statutory enactment. Accordingly, the Court has applied a "functional" approach under which the nature of the functions entrusted to particular officials is examined in order to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Id. at 219.

The Forrester Court went on to clarify that "immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." Id. at 227 (emphasis included). The Courts of the Fourth Circuit have expanded on these principles in analyzing the issue of legislative immunity. In the case of McCray v. Maryland Department of Transportation, 741 F.3d 480 (4th Cir., 2014), the Fourth Circuit Court of Appeals considered the dismissal of an ex-MTA employee's age discrimination and disability discrimination claims on grounds of legislative immunity. The Court states that "[t]he determination of legislative immunity is based on the function being fulfilled – not the title of the actor claiming immunity. Actions that qualify

as legislative 'typically involve the adoption of prospective...rules that establish a general policy affecting the larger population...." Id. at 485 (citing E.E.O.C. v. Washington Suburban Sanitary Commission, 631 F.3d 174 (4th Cir. 2011).

In Alexander v. Holden, 66 F.3d 62 (C.A.4 (N.C.), 1995), the Court considered legislative immunity in a discrimination case brought against a county commission. The Alexander Court explains that "[l]ocal government bodies often undertake actions in different capacities, including executive, administrative, legislative, and even judicial." Id. at 65. In South Carolina, under the council form of municipal government "[a]ll legislative and administrative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council." S.C. Code Ann. § 5-11-30 (1976). However, legislative immunity, the Alexander Court points out, only attaches to legislative actions; this protection does not extend to executive and administrative actions. Alexander at 65. The Court went on to apply elements of the Eleventh as well as the First and Fourth Circuits in determining that the actions of the county commissioners in refusing to reappoint or rehire Alexander were administrative actions that did not enjoy legislative immunity.

The key inquiry involves making a distinction between general and specific actions. If the underlying facts 'relate to particular individuals or situations' and the decision impacts specific individuals or 'singles out specific individuals' the decision is administrative. On the other hand, the action is legislative if the facts involve 'generalizations concerning a policy or state of affairs' and the 'establishment of a general policy' affecting the general population. Id. at 66.

The Alexander Court determined that legislative immunity did not apply because "[t]he commissioners were not engaged in the process of adopting prospective, legislative-type rules."

Id. at 67. In Front Royal and Warren County Industrial Park Corporation v. Town of Front Royal, Virginia, 865 F.2d 77 (C.A.4 (Va.), 1989), the Fourth Circuit Court of Appeals in turn applied this principle to municipal legislators for failure to provide sewer service to the plaintiffs' properties. The defendants asserted several affirmative defenses, including absolute legislative immunity, but the Court observed "when municipal officials 'do more than adopt prospective, legislative-type rules and take the next step into the area of enforcement, they can claim only the executive qualified immunity appropriate to that activity." Id. at 79. (citing Scott v. Greenville County, 716 F.2d 1409 (C.A.4 (S.C.), 1983).

Given these considerations, it is obvious that the actions of the council member Respondents – including the votes to retain attorney Robert Bolchoz, to extend his contracted work and to publish the Bolchoz Memorandum to the public – do not qualify for absolute legislative immunity. As an initial matter, it should be pointed out that there is no legal authority for the investigation that it authorized, funded and the results of which it would eventually distribute to the media and the public. There is no West Columbia ordinance authorizing such an investigation, nor does any South Carolina state statute confer such a power to a municipal council. The only statute Respondents proposed to authorize investigations of municipal departments by a governing body is S.C. Code Ann. § 5-7-100. That statute, however, is very specific as to the processes involved in such an investigation:

> ...such governing body shall have the same power which a magistrate has to compel the attendance of witnesses and to require them to give evidence under oath in the same manner as is customary in the courts of this State. In case of contumacy of any person or refusal to obey a subpoena issued to any person, any circuit court of this State or circuit judge thereof within the jurisdiction of which the municipality is located, upon application by the governing body of the municipality or its designated agent, may issue to such person an order requiring him to appear before the governing body of the municipality to produce evidence if so ordered or to give testimony on the matter under investigation. Any failure

> to obey an order of the court may be punished as a contempt thereof. Subpoenas shall be issued in the name of the municipality and shall be signed by a majority of the governing body. Subpoenas shall be issued to such persons as the governing body may designate. S.C Code Ann. § 5-7-100 (1976); see also United States v. Fuller, 162 F.3d 256 (C.A.4 (S.C.), 1998) (finding that a mayor's authority to investigate under S.C. Code Ann. § 5-7-100 is "power analogous to municipal judges")

These processes are obviously intended to promulgate an open inquiry into public matters through the presentation of testimony and other evidence before the "governing body." It does not, however, authorize the hiring of a private attorney to initiate a secretive law enforcement style investigation into improper or unlawful conduct by other city officials; certainly, no magistrate or municipal judge could initiate such an investigation. There are sound policy reasons for thus limiting the powers of municipal governing bodies. If this statute authorized municipal governments to perform the kind of investigation involved in this case, as the Respondents assert, the law would be giving license to these government bodies to destroy political enemies with absolute immunity. Assuming the position asserted by Respondents, a bare majority of a city council would therefore be authorized to hire an outside agent to conduct an investigation directed at political enemies without explanation to the public regarding the subject of this "procedural audit;" those individual council members would then be authorized to direct and participate in this investigation, ensuring that damage to the targeted political enemy would be maximized; and these same city council members would then be authorized to vote to publicize these defamatory statements with the understanding that they would enjoy absolute immunity from liability. The actions of the council member Respondents are, however, not in compliance with the procedural requirements placed on a "governing body" in investigating a city department or office pursuant to this statute. Because the West Columbia City Council lacked any legal authority to initiate this "procedural audit," any conduct by the Council

Defendants related to this investigation is, by definition, outside of the scope of any legitimate legislative function that might otherwise confer legislative immunity upon those individuals.

Even if the Council members were able to cite legal authority for the votes which resulted in this investigation and the subsequent publication of the defamatory statements involved in this case – a showing that is the burden of these Council members – they would also have to make the case that this conduct fulfilled a legislative function as delineated in the above-described case law. They are incapable of making such a showing, however, because these actions were taken in an administrative, rather than legislative, capacity. Although the focus was never presented publicly during the investigation process at issue here, the Council members admit that the "matter under inquiry" was, in fact, "the behavior of their Mayor." (Defendants' Memorandum of Law in Support of Motion for Summary Judgment p. 17) The mayor was therefore the sole target of the investigation initiated by the Council Defendants, and he has undoubtedly been the primary recipient of the damaging consequences of the publication of the Bolchoz Memorandum. As the underlying facts here "relate to particular individuals or situations" and the actions by the Respondents have impacted a specific individual or individuals, the conduct of these Council members is administrative in nature. See Alexander, supra at 66. These votes certainly did not constitute legislative conduct, as these actions did not "involve 'generalizations concerning a policy or state of affairs' and the 'establishment of a general policy' affecting the general population." Id.; see also McCray, supra. No general policy has resulted, nor has any legislation whatsoever been enacted as a result of this audit process or the publication of the Bolchoz Memorandum; this document has been utilized instead solely as a political weapon against the mayor-council movement in West Columbia generally, and the Mayor of West Columbia specifically. Clearly, the votes taken by the Council Defendants were in fulfilling an

administrative function rather than a legislative function, and therefore these actions do not enjoy the protections of legislative immunity. At a minimum, where, as here, the underlying facts are not uncontroverted, this issue constitutes a question of fact that should have been properly presented to the fact-finder.

This concept of legislative function, and the criteria necessary to analyze this principle to warrant legislative immunity, were not considered by the trial court in this case. More to the point, the investigative process initiated and directed by the Respondents was not authorized under state law. The council member Respondents were not, therefore protected by legislative immunity in participating in this enterprise to destroy the reputation of then-Mayor Joseph Owens.

4. BECAUSE THE WEST COLUMBIA CITY COUNCIL DEFENDANTS ACTED OUTSIDE OF THE SCOPE OF THEIR OFFICIAL DUTIES AS LEGISLATORS, THE COURT ERRED IN FINDING THAT THE COUNCIL DEFENDANTS ENJOYED ABSOLUTE LEGISLATIVE IMMUNITY.

If the council member Respondents were somehow to meet their burden of showing lawful authority to initiate this investigation process and the subsequent publishing of its findings, and if the council member Respondents were somehow to meet their burden of establishing that these actions fulfilled a legislative purpose, the necessary analysis of their conduct to determine if legislative immunity applies would not be ended. While the Court in Richardson v. McGill, supra, did recognize that South Carolina courts "have 'recognized occasions other than those comprising strictly legislative or judicial proceedings,' where, under considerations of public policy, absolute privilege has been upheld." Id. at 343, it should be noted that the incident under that Court's consideration and to which this protection was extended was a closed, private joint meeting of the Williamsburg County Legislative Delegation

and the Williamsburg County Recreation Commission. The Council Defendants by contrast have acted well outside of the scope of their official duties as legislators.

The Respondents engaged in various conduct outside of their official duties to accomplish the defamation of Joseph Owens. Respondent Miles instructed Robert Bolchoz outside of the context of public City Council meetings and executive sessions as to the true scope of this "internal review," offering the recording Miles had received from Defendant Tyndall to Mr. Bolchoz for review, possibly as early as April of 2014. (Bolchoz Deposition pp. 10 – 13, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) As mentioned previously, Defendant Hunter and Respondents Miles and Unthank planned a lunch as early as May 1st or 2nd of 2014 to "begin taking steps to organize a Citizens Committee to begin educating the public and the media about how bad a strong mayor form of government would be for West Columbia." (See Email String between Defendant Hunter and Defendant Unthank dated May 1, 2014, Supplemental Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit No. 1) This "Citizens Committee" would be West Columbia United and this organization would facilitate publication of the defamatory material damaging to Plaintiff. One of the "steps" that was discussed must have been the compiling of information personally damaging to Joseph Owens, as Respondent Miles was contacting city employees as early as May 2, 2014 for that purpose. (See Jamie Hook's Notes re: Telephonic Conversation with Defendant Miles dated May 2, 2014, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit O) On page 2 of the Bolchoz Memorandum, Respondents Unthank, Parler and Harley are each credited for contributing directly to the report through interviews. (See Bolchoz Memorandum, p. 2, Complaint Exhibit No.2) Contributing in this way to such an investigation cannot be characterized as being within the scope of these individuals'

legislative duties. In addition, Respondents Miles, Unthank and perhaps Defendant Parler took an active part in contacting Bolchoz outside of the scope of any legislative process to direct his investigation to other possible informants. (Bolchoz Deposition pp. 65 – 66, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) Both Respondent Miles and Respondent Unthank were concerned during these telephone calls regarding similar issues, especially how the investigation was reflecting on the Mayor. (Bolchoz Deposition p. 96, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) Some of the Defendants – certainly Mr. Unthank – participated in republishing the Bolchoz Memorandum on their own time after its initial issuance. This document was used in a concerted campaign to oppose Mayor Owens as well as the movement toward the Mayor-Council form of municipal government by destroying Joseph Owens' reputation. It should be noted that political opposition – whether to an individual or a movement – is not "a matter related to legislative duties" that would serve to convey legislative immunity, especially to legislators that are taking action far outside of the scope of the legislative process. The strategic use of the Bolchoz Memorandum as part of this campaign was summarized by Respondent Unthank in a September 7, 2014 email to West Columbia Police Captain Scott Morrison, who had taken an active part in providing defamatory information against Plaintiff. Defendant Unthank states:

> I have been spending almost all of my spare time, and all day on Saturdays handing out 'Vote No' brochures, and in many cases, a copy of the Bolchoz report. That report has a powerful impact on most who read it, but most people simply haven't been exposed to it. Consequently, I had 500 copies printed and stapled to hand out, and boy am I handing them out! There are plenty on hand if you or someone you know might need them.... (see Email from Defendant Unthank to Scott Morrison dated September 7, 2014, Supplemental Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit No. 3)

The Defendants continued to republish this report, even in the face of ongoing evidence establishing the falsity of the allegations that it included. For instance, over two weeks after the Bolchoz Memorandum was published to the public, Respondent Miles received an email from West Columbia Police Captain Scott Morrison which included seven 911 recordings that corroborated the version of the dog-killing incident described above as it had been explained in the incident report. The purpose of this email is unclear – Mr. Miles in turn forwards the email to what appears to be his private email. (see email from Captain Scott Morrison to Defendant Miles dated August 21, 2014, Exhibit 4) He never, however, brought this contradictory information to the public's attention as he did the accusations included in the Bolchoz Memorandum.

There is no public policy, whether one applies Richardson v. McGill, supra, or Brown v. County of Berkeley, supra, which would serve to expand legislative immunity to these activities, even if that protection was available in this case. Even if the act of voting to initiate this investigation, to continue the audit process and to publish the findings of that investigation were protected by absolute legislative immunity, indulging in these additional activities would render these Council Defendants liable.

5. BECAUSE THERE IS SUBSTANTIAL EVIDENCE THAT DEFENDANT DENNIS TYNDALL PARTICIPATED IN THE COMPILATION AND PUBLICATION OF THE ALLEGATIONS INCLUDED IN THE BOLCHOZ MEMORANDUM, THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT DENNIS TYNDALL.

The trial court also found that Appellant had "failed to provide a scintilla of evidence that [Respondent] Tyndall made or published a defamatory statement against [Joseph Owens] as he took no part in publishing the Bolchoz Report." (Order Granting Defendants' Motion for Summary Judgment, p. 7) The production, initial publication and subsequent republication of

these false allegations, however, were the product of a joint enterprise involving all of the named Defendants, each of whom had a role in this process. Respondent Tyndall's role of producing defamatory information, whether in the form of secret recordings or statements from subordinates (some of the particulars of which are provided above), was crucial in producing the final Bolchoz Memorandum.

Respondent Tyndall took it upon himself initially to *break West Columbia Police Department Policy* by secretly recording the March 10, 2014 meeting of city officials (see Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit W); Respondent Tyndall then informed Mr. Miles of the meeting and provided him with an audio recording of the meeting with the understanding and intention that that information would be used to falsely allege that Mayor Owens had violated the South Carolina Freedom of Information Act. (Amended Complaint ¶ 12) Attorney Bolchoz met with Defendant Tyndall on May 19, 2014, just six days after he had been retained. Bolchoz was meeting with other city officials that day to establish the procedure to be followed in the audit, but when he met with Defendant Tyndall, the Police Chief had already compiled materials to be submitted to the project, including numerous statements from subordinates. (Bolchoz Deposition pp. 33, 108 – 111, Memorandum in Opposition to Defendants' Motion for Summary Judgment Exhibit C) Respondent Tyndall, in addition to the information he provided Mr. Bolchoz verbally, also submitted his own written statement regarding the confrontation between Plaintiff and Defendant Jones which was the subject of a discovery leak that occurred in October of 2015 in the lead-up to Tuesday's mayoral election. Interestingly, this statement was drafted on April 30, 2014, two weeks prior to Mr. Bolchoz being retained to conduct this investigation. (see Defendant Tyndall Statement dated April 30, 2014, Supplemental Memorandum in Opposition to Defendants'

Motion for Summary Judgment Exhibit No. 5) As was the case with Respondent Miles (at least), Respondent Tyndall was busying himself with the compilation of damaging material against Plaintiff well prior to the initiation of this procedural audit. Given the history of coordination that Respondents Miles and Tyndall had demonstrated in the production and distribution of the recording of the March 10, 2014 meeting, along with the coincidental allegations of a FOIA violation, the clear inference is that this coordination was ongoing.

Due to this coordination between the Respondents to initiate, produce and publish the Bolchoz Memorandum to damage Plaintiff's reputation, each of the defamatory statements included in that document is therefore attributable to each Defendant, including Defendant Tyndall. The Defendants are joint tortfeasors in this matter, and each is individually liable for the full amount of Plaintiff's loss. See Am. Fid. Fire Ins. Co. v. Hartford Accident & Indem. Co, 251 S.C. 507, 163 S.E.2d 926 (1968)

CONCLUSION

For the reasons stated herein, and to avoid denial of Appellant Joseph Owens' right to trial of this very important matter, this Court should reverse the judgement of the circuit court granting Defendants' motion for summary judgment and remand this case for completion of the discovery process and further litigation.

Respectfully submitted,

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