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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DEC 14 2016

Doyet A. Early, III, Circuit Court Judge

SC Court of Appeals

Case No. 2014-CP-40-4666
Appellate Case No. 2016-001198

Kim MurphyAppellant,

v.

Richland-Lexington School District 5 Board of Trustees, Robert Gantt, and Robert Bowers, in
their individual capacities.Respondents.

INITIAL BRIEF OF RESPONDENT ROBERT GANTT

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Statement of Issues on Appeal

- I. DID THE CIRCUIT COURT CORRECTLY FIND THAT MURPHY WAS NOT ABLE TO IDENTIFY A MATERIAL QUESTION OF FACT TO CREATE A TRIABLE ISSUE ON HER CIVIL CONSPIRACY CLAIM?

- II. DID THE CIRCUIT COURT CORRECTLY FIND THAT MURPHY WAS UNABLE TO PRESENT AN ISSUE THAT CREATED A MATERIAL QUESTION OF FACT AS TO MALICE, PER SE DEFAMATION AND LEGAL PRIVILEGE IN RULING ON GANTT'S MOTION FOR SUMMARY JUDGMENT AS TO HER DEFAMATION CLAIM?

Statement of the Case

On July 29, 2014, Kim Murphy (“Murphy”) filed this action. The Complaint alleged causes of action against Robert Gantt (“Gantt”) and Bobby Bowers (“Bowers”) for civil conspiracy and against Gantt and the Richland-Lexington School District 5 Board of Trustees (“School Board”) for defamation. Bowers moved to dismiss the action against him for failure to state a claim and for Summary Judgment on December 31, 2015. Gantt moved for Summary Judgment on January 8, 2015 on both causes of action against him. The School Board moved for Summary Judgment on the cause of action against it and Gantt on January 20, 2016. Murphy opposed all of these motions. The motions were heard by the Honorable Doyet A. Early, III on February 29, 2016. Judge Early issued an Order on April 8, 2016 granting Summary Judgment to Gantt, Bowers and the School Board on all causes of action. Murphy filed a Motion for Reconsideration on April 26, 2016. The motion for reconsideration was heard by Judge Early on May 18, 2016. Judge Early issued an Order denying Murphy’s motion for reconsideration on May 31, 2016. Murphy filed notice of this Appeal on June 6, 2016. On June 30, 2016, Appellant moved to consolidate this appeal with another appeal she has on a case against the School Board. Gantt and the School Board opposed that motion on July 28, 2016. This Court denied the motion to consolidate by Order dated July 28, 2016. On July 28, 2016, this Court issued its Order dismissing the School Board from the Appeal.

Argument

INTRODUCTION

With this appeal, Kim Murphy continues a pattern of arguably abusive and unfounded litigation against Robert Gantt and the School Board. In her first cause of action she alleges that Mr. Gantt engaged in a conspiracy with Mr. Bowers to have her removed from her seat on the School Board by falsely creating a finding that her residence is located in Lexington, rather than Richland County. The gravamen of her second cause of action is that Mr. Gantt and the School Board defamed her by stating that she lived in Lexington County. The problem with her case as it relates to both causes of action is that she can offer no credible evidence to support her allegations. Instead, this case is an outgrowth of her appeal of a 2014 Decision of the Honorable Michelle Childs finding that she was a resident of Lexington County and was properly removed from the School Board in 2013 because, as a resident of Lexington County, she was unqualified to serve as a representative of Richland County on the Board.¹ Shortly after that Order was issued, Murphy filed this action. While her claims lie in separate torts for which she has been unable to adduce evidence, she has attempted to re-litigate the issue of her residency in this action. Her residency is, at best, a collateral issue which has nothing whatsoever to do with the alleged conspiracy and defamation. A review of the pleadings the record reflects that rather than a serious

¹ Continuing this pattern of litigation, Mrs. Murphy acted to create a third case where she attempts to re-litigate the issues of her residence – which appears to be the true reason for the action before the Court. After the un-stayed findings of Judge Childs holding that she was a resident of Lexington County, she filed to run for the Richland County seat in 2016. Gantt and Edward White, another School Board Member, filed a declaratory judgment action seeking another determination of the location of her residence and an order removing her name from the ballot. In that case, The Honorable Jean H. Toal, acting as a Special Circuit Judge, issued an Order where she found that Mrs. Murphy was a resident of Lexington County and ordered the removal of Murphy's name from the Richland County ballot. Murphy has appealed that case, as well. It is currently before the Supreme Court (Appellate Case No. 2016-002134).

action alleging conspiracy and defamation, this really is an effort by Murphy to relitigate and collaterally attack the previous findings as they relate to her residency.

Mr. Gantt is the former and current Chair of the School Board for School District Five of Lexington and Richland Counties. Murphy, a member removed from the Board due to her not residing in the county from which she was elected brings this action against him in his individual capacity. Her claims arise out of his conduct in his official capacity and lack merit against him individually.

While Mr. Gantt was Chair of the School Board, the South Carolina Office of Research and Statistics (the "Office") discovered in a routine examination that Mrs. Murphy lived in Lexington County rather than Richland County, which was the seat to which she had been elected. After receiving the information from the Office of Research and Statistics, Mr. Gantt consulted with the School District's attorneys. Under their guidance, a request was made with the Office for a formal determination of Mrs. Murphy's residency. The Office formally determined that Mrs. Murphy lived in Lexington County. Mr. Gantt again sought the advice of counsel for the District who created a process designed to fully afford Mrs. Murphy due process in dealing with the residency issue. This process involved two separate proceedings where Mrs. Murphy and her attorneys had the opportunity to appear and present whatever evidence that she had supporting the fact that she resided in Richland County. She also had the opportunity to challenge the process used by the Office and the South Carolina Geodetic Survey in finding that her residence was located in Lexington County. At the conclusion of this process, the Board found that Mrs. Murphy lived in Lexington County and was, therefore, ineligible to serve on the School Board as a Richland County representative. She was removed from the School Board as her residence disqualified her

from holding a Richland County seat. She appealed the Board's decision to the Circuit Court, which affirmed the decision of the School Board.

After the Circuit Court upheld the School Board's decision, she filed this suit which alleges, *inter alia*, causes of action against Robert Gantt for civil conspiracy and defamation. The alleged conspiracy is between Mr. Gantt and Bobby Merle Bowers, who was the Director of the Office of Research and Statistics. Mrs. Murphy alleges that Mr. Gantt and Mr. Bowers² somehow engaged in a conspiracy to harm her by having her removed from the School Board. As the Court will see from the facts in the record, her claim is totally bereft of any evidence supporting the elements of a civil conspiracy in South Carolina.

Mrs. Murphy also alleges that Mr. Gantt defamed her in essence by questioning her qualifications to serve on the School Board based upon the fact that she did not reside in the district from which she was elected. As with the claim for civil conspiracy, her defamation claim is unsupported by fact and the record before this Court lacks any evidence sufficient to create any material question of fact which would have allowed her to overcome his summary judgment motion.

After a review of the exhaustive evidence adduced from the Plaintiff's own testimony, it should be readily apparent to the Court that Mrs. Murphy has no evidence beyond her own unsubstantiated theories and presumptions to support any of her claims against Mr. Gantt. When pressed, she has repeatedly been unable to produce evidence or testimony of any kind from which a reasonable trier of fact, looking at the evidence in the light most favorable to her, can find a

² Although she purports to allege that Gantt and Bowers were acting outside of their official capacities – the facts in the record make it obvious that the actions they took could not have been other than in their official capacities. Bowers as the Director of his office and Gantt as School Board Chair.

material question of fact supporting her contentions. Any evidence that is contrary to her position, she simply does not believe. For example, the Circuit Court issued its Order affirming the decision of the School Board that Mrs. Murphy lives in Lexington County and was not qualified to serve on the School Board because of her residence location. Her response to that, after acknowledging that the Court heard all of the evidence, was "And I believe that was incorrect."³ Mrs. Murphy believes that she has been wronged; however, she cannot provide any evidence or basis in fact that supports her claims. Her claims, to paraphrase Shakespeare, are "full of sound and fury, but signify nothing."⁴ Simply put, she has no case against Mr. Gantt and her Appeal should be denied.

Statement of Relevant Facts

In November 2010, Plaintiff Kim Murphy was elected to serve on the School Board of School District Five of Lexington and Richland Counties. Plaintiff had a history with the District, having been an adverse party in several lawsuits to the District. After her election, she continued as a Plaintiff/Appellant in cases adverse to the School District. Plaintiff was aware that a question had previously been raised as to the location of her residence. She testified that she knew of at least one occasion where she had been told that she did not live in Richland County.⁵

Defendant Robert Gantt was the Chair of the School Board of School District Five of Lexington and Richland Counties from 2008 into 2013.⁶ In 2004, Plaintiff ran for the Board seat against Mr. Gantt. During that period of time, a community member, Stuart Mungo, told Mr. Gantt that Plaintiff did not live in Richland County.⁷

³ Deposition of Kim Murphy 11/5/2015 p. 142 l. 6.

⁴ *MacBeth*, Act 5 Scene 5, William Shakespeare.

⁵ Deposition of Kim Murphy 11/5/2015 p.15 ll. 12-22.

⁶ Deposition of Robert Gantt p. 25 ll. 13- 20.

⁷ Deposition of Robert Gantt p. 28 ll. 13-21.

During October 2012, State Political Cartographer William Roberts, who had voted for Kim Murphy in the 2010 election,⁸ was acting pursuant to budget proviso 80A.20 to assist county voter registration offices in making sure that voters were assigned to the correct districts.⁹ Roberts is employed by the Office of Research and Statistics, which at that time was an arm of the Budget and Control Board. During a routine examination of the files, Mrs. Murphy's address was flagged for being in the incorrect district.¹⁰ This "flagging" was done by the South Carolina Geodetic Survey's computer system.¹¹ The area surrounding Plaintiff's residence was one of two areas in Richland County which were flagged as having errors where voters were registered to vote in a county other than the one where their residence was located; in this case registered in Richland and residing in Lexington.¹² Mr. Roberts communicated with Lexington County officials who advised him that Plaintiff's house "did fall into the tax parcel and what he had for Lexington County."¹³ Mr. Roberts also learned that Lexington County was aware of mapping issues in the area of Plaintiff's residence.¹⁴ Sometime during this period, Mr. Gantt received a telephone message from the Office of Research and Statistics. He returned that call and spoke with Mr. Bowers. Mr. Bowers informed Mr. Gantt that it had been brought to his attention that the Plaintiff did not live in Richland County, but rather lived in Lexington County.¹⁵ After receiving this information in his capacity as School Board Chair, Mr. Gantt contacted the School District's attorney for advice.¹⁶

⁸ Deposition of William Roberts p.14 ll. 1-2.

⁹ Deposition of William Roberts p.15 ll. 17-21.

¹⁰ Deposition of William Roberts p. 15 l. 24 – p. 16-2.

¹¹ Deposition of William Roberts p. 16 l. 20.

¹² Deposition of William Roberts p.16 l. 24 – p. 17 l. 6.

¹³ Deposition of William Roberts p. 19 ll. 5-7.

¹⁴ Deposition of William Roberts p. 23 ll. 12-14.

¹⁵ Deposition of Robert Gantt p. 47 l. 14 – p. 48 l. 9.

¹⁶ Deposition of Robert Gantt p. 54 l. 5.

After the discovery of the issue during the staff's routine boundary examination, Mr. Bowers gave no direction as to how the staff should proceed.¹⁷ There had been other occasions where the office had determined that voters were previously placed in the wrong election districts, and since the program began around 2003, the staff has discovered "twenty to thirty thousand people in the incorrect districts."¹⁸

Counsel for the District began looking into the matter and communicated with the Office of the Geodetic Survey. A meeting with representatives of the Survey and representatives of the School District included the District's legal counsel, Board Chair Robert Gantt and Vice-Chair Beth Watson.¹⁹ At that meeting, Mr. Roberts advised the attendees that "based on the data that I had seen, she [Plaintiff] appeared to be in Lexington County."²⁰

After the meeting with Counsel, representatives of the School Board, Mr. Roberts and Mr. Bowers, the District made a request for a formal determination of the location of the Lexington Richland County line in the area of Mrs. Murphy's residence.²¹ Mr. Gantt signed a letter prepared by the School District's attorneys making the request.^{22, 23} After receiving the request, the Office of Research and Statistics, together with the Office of the Geodetic Survey, which was also an arm of the Budget and Control Board, conducted an examination to determine the county in which Plaintiff resided. The staff determined that Plaintiff resided in Lexington County based upon three

¹⁷ Deposition of William Roberts p. 29 l. 13.

¹⁸ Deposition of William Roberts p. 29 ll. 17-21.

¹⁹ Deposition of William Roberts p. 38 ll. 3-13; Deposition of Robert Gantt p. 54 l. 19 - p. 55 l. 9.

²⁰ Deposition of William Roberts p. 39 ll. 20-22.

²¹ Deposition of William Roberts p. 42 l. 11 – p. 43 l. 8.

²² Deposition of Robert Gantt p. 59 l. 25 – p. 60 l. 1.

²³ See letter dated December 20, 2012 signed by Mr. Gantt requesting a formal determination of the location of the Lexington Richland County line in the area of Mrs. Murphy's residence, (ROA at ___)

methods of examination and then composed a letter for Mr. Bowers to send to the School District responding to the request for a determination.²⁴

Mr. Alan-Jon Zupan was employed by the Office of the Geodetic Survey and was involved in the analysis of the location of Plaintiff's residence. In 1995, Mr. Zupan was involved in locating a survey point on the county line identified as Rocky Ford.²⁵ At Mr. Roberts' request, Mr. Zupan drew the county boundary in the area of Plaintiff's residence as set forth in the South Carolina Code of Laws.²⁶ Mr. Zupan found that the proper location of the line placed Plaintiff's residence in Lexington County.²⁷ The county line affecting the location of Plaintiff's residence was located based upon the applicable statute and law.²⁸

Mr. Roberts testified that he was absolutely certain that the office made a full and complete study of the facts and is very certain that the determination that Plaintiff's home is located in Lexington County is correct.²⁹ Mr. Roberts helped prepare Mr. Bowers to testify at the hearing before Judge Cooper informing him about the census data and official district maps of the area in question.³⁰ Similarly, Mr. Zupan is confident that the location of Plaintiff's residence is Lexington County and even confirmed that based upon a survey prepared for Plaintiff.³¹ Mr. Roberts testified that the situation with Plaintiff upset him as he had voted for her, but concluded that "she was found to be in the incorrect county and should never [have] been able to run for that seat in the first place."³² Mr. Roberts testified under oath that no one tried in any way to influence the

²⁴ Deposition of William Roberts p. 51 ll. 10-17.

²⁵ Deposition of Alan-Jon Zupan p. 11 l. 19 – p. 13 l. 8.

²⁶ Deposition of Alan-Jon Zupan p. 16 l. 23 – p. 17 l. 22

²⁷ Deposition of Alan-Jon Zupan p. 18 l. 14.

²⁸ Deposition of Alan-Jon Zupan p. 18 l. 15 – p. 19 – l. 10.

²⁹ Deposition of William Roberts p. 56 ll. 2-17.

³⁰ Deposition of William Roberts p. 70 ll. 4-17.

³¹ Deposition of Alan-Jon Zupan p. 22 l. 14 – p. 23 l. 6.

³² Deposition of William Roberts p. 75 l. 13- p. 76 l. 4.

determination of the location of Plaintiff's residence.³³ Mr. Zupan gave similar testimony.³⁴ Both Mr. Roberts and Mr. Zupan, testified that neither Mr. Bowers, nor anyone else, asked them to do

³³ Deposition of William Roberts p. 88 l. 24 - p. 89 l. 13.

Mr. Roberts testified

24 Q: Throughout this process, was there ever any
25 effort in your office to do anything but find
1 the truth?

2 A: No.

3 Q: Did anyone ever try to influence you to do
4 anything other than find the truth?

5 A: No.

6 Q: Did you always cooperate with Ms. Murphy and
7 give her every piece of information she asked
8 for?

9 A: Yes.

10 Q: Did you provide anything except truthful and
11 correct information to anyone that you spoke
12 with in this case?

13 A: No.

³⁴ Deposition of Alan-Jon Zupan p. 68 l. 2 - p. 69 l. 2.

2 Q: With regard to the identification of Rocky
3 Ford, that was conducted in 1995, correct?

4 A: Correct.

5 Q: And in 1995, was there ever any question in
6 your mind with regard to a boundary that
7 related to property that ultimately became Ms.
8 Murphy's?

9 A: No. We never dealt with any property
10 boundaries at that time.

11 Q: And during the process that you describe of
12 identifying and locating the line between
13 Richland and Lexington Counties, was there ever
14 any pressure put on you by anyone to make the
15 line anywhere other than where you found it?

16 A: No.

17 Q: And did you use all the tools that you had to
18 make the best determination of the location of
19 that county line?

20 A: In the area that we're talking about?

21 Q: Yes, sir.

22 A: Yes.

23 Q: And do you have any question about where you

anything but locate Plaintiff's residence in the proper county – whatever that was. The Offices of Research and Statistics and Geodetic Survey were confident of their findings. They authored a letter that was mailed from Mr. Bowers to Mr. Gantt responding to the official request dated January 11, 2013.³⁵

After receiving this letter, Mr. Gantt informed his fellow School Board members of the circumstances in an executive session during the next regular School Board meeting on January 14, 2013.³⁶ After the executive session, Mr. Gantt, again acting in his capacity as School Board Chair, issued a statement that was prepared by the School District's attorneys informing the public of the situation.³⁷ Shortly thereafter, Mr. Gantt, still acting in his official capacity, signed another letter prepared by District legal counsel asking Plaintiff to provide a written response to the questions raised about her residency.³⁸ After Plaintiff disagreed about the location of her residence, Mr. Gantt sought additional legal advice on behalf of the District and was advised that, while the Board could conduct a hearing itself, it might be better for all concerned if the Board engaged a retired Circuit Court Judge to conduct a fact finding hearing and make recommendations to the Board.³⁹

After some prehearing discussions with Plaintiff and her counsel, a hearing was scheduled and conducted by Judge Thomas Cooper. Judge Cooper subsequently issued a report and findings

24 ultimately located that county line as being
25 correct with all the information you had at the
1 time?

2 A: No, ma'am. I mean, no, sir.

³⁵ See letter dated January 11, 2013 from Mr. Bowers to Mr. Gantt responding to the official request, (ROA at ___)

³⁶ Deposition of Robert Gantt p. 66 l. 1 - p. 67 l. 5.

³⁷ Deposition of Robert Gantt p. 68 l. 12 – p. 69 l. 8.

³⁸ Deposition of Robert Gantt p. 74 l. 23 – p. 75 l. 10.

³⁹ Deposition of Robert Gantt p. 75 l. 23 - p. 76 l. 9.

which determined that Plaintiff lived in Lexington County and, as such, was ineligible to serve on the School Board as an elected representative from Richland County. Plaintiff had the full opportunity to attend and participate in this hearing, but chose not to.⁴⁰ After receiving Judge Cooper's report and recommendation, the School Board scheduled a special meeting to conduct a hearing on Plaintiff's residency and whether or not she should be removed from the Board. Subsequently, the School Board held a second hearing wherein Judge Cooper's report was presented. Counsel for the District and Mrs. Murphy appeared and made arguments and presented evidence. After hearing the evidence, the Board determined that Plaintiff did not reside in

⁴⁰ Mrs. Murphy engaged counsel in a multi-page colloquy essentially refusing to answer the question as to whether or not she chose to attend the hearing.

Deposition of Kim Murphy 6/22/2015 p. 63 l. 14 – p. 64 l. 8.

- 14 Q All right. Yet, you chose not to show up, correct?
15 A At the advice of my attorney.
16 Q Okay. Well, who was driving the bus: you or your
17 attorney on that one? Who -- who was in charge of
18 making the decision as to whether you went there
19 and contested whatever action they were taking?
20 A I -- I didn't attend at the advice of my attorney.
21 Q Okay. That was your decision based on the legal
22 advice that your attorney gave you, correct?
23 A Yes.
24 Q But you made the decision, didn't you? Not your
25 attorney?

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- 1 A Well, that's at the advice of my attorney.
2 Q The attorney gave you advice, but you made the
3 decision, didn't you?
4 A I was doing whatever my attorney advised.
5 Q Did you have any role in the decision that was made
6 where you did not attend that hearing?
7 A I did not attend that hearing at the advice of my
8 attorney.

Mrs. Murphy admitted that she was ultimately responsible for the decision not to attend the hearing.

Richland County and, therefore, was ineligible to serve as a representative on the Board for Richland County. She was removed from her seat. She appealed that action to the Circuit Court. The Circuit Court affirmed the decision of the School Board.⁴¹ Mrs. Murphy moved for reconsideration and that reconsideration was denied.⁴²

I. STANDARD FOR SUMMARY JUDGMENT

Under South Carolina Rules of Civil Procedure, Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. With respect to an issue upon which the non-moving party bears the burden of proof, as in this case, this initial responsibility “may be discharged by ‘showing’ - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case.” *Celotex Corporation v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L.Ed.2d 265, 275 (1986). The moving party need not support its motion with affidavits or other similar materials negating the opponent's claim.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (quoting Rule 56(c), SCRPC). “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most

⁴¹ See Judge Benjamin's Order filed October 30, 2014 affirming the decision of the School Board, (ROA at _____)

⁴² (See Judge Benjamin's Order filed January 8, 2016 dismissing Mrs. Murphy's Motion for Reconsideration, (ROA at _____)

favorable to the nonmoving party.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

Once the moving party carries its initial burden, the opposing party must, under Rule 56(e), “do more than simply show that there is some metaphysical doubt as to the material facts” but “must come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986) (emphasis in original). The opposing party must “go beyond the pleadings and by . . . affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553.

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.*, 477 U.S. at 322, 106 S. Ct. at 2552, 91 L.Ed.2d at 273.

Accordingly, once Defendant shows the absence of proof on an essential fact of Plaintiff's case, Plaintiff has the burden of presenting evidence of that fact to the Court. If Plaintiff fails to present any competent, admissible evidence that will prove that fact, Defendant is entitled to summary judgment.

A. The Court Correctly Granted Robert Gantt Summary Judgment on Kim Murphy's Cause of Action for Civil Conspiracy.

1. The Elements of Civil Conspiracy in South Carolina

The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *Cowburn v. Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).

It is essential that a plaintiff prove all of these elements in order to recover. *Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938). [emphasis added] "[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); accord *Cowburn*, 366 S.C. at 49, 619 S.E.2d at 453.

2. As a Matter of Law, Mrs. Murphy is Unable to Establish Any of the Elements of Civil Conspiracy Against Robert Gantt

According to her testimony, Plaintiff alleges that Mr. Gantt and Mr. Bowers conspired by scheming to make it appear that she lived in Lexington County as opposed to Richland County for the purpose of depriving her of her seat on the School Board.⁴³

⁴³ Deposition of Kim Murphy 11/5/2015 p. 134 l. 25 - p. 135 l. 5.

25 Q. Okay. And again, we've talked about it, but I've

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1 never gotten an answer from you. Tell me what a
2 conspiracy is, Ms. Murphy.

3 A. They planned behind the scenes to do something
4 wrong to me.

5 Q. And what did they do wrong to you?

The finding that she lives in Lexington County and is not eligible to serve on the School Board as a representative of Richland County has been affirmed by more than one Court Order. Here, the facts in the record establish that it is impossible as a matter of law for Mrs. Murphy to prove any of the elements required to make her case against Mr. Gantt. Looking briefly at these requirements:

a. The combination of two or more people.

In order to survive summary judgment, Mrs. Murphy needed to demonstrate a material question of fact suggesting that Mr. Gantt and Mr. Bowers had a relationship to which a party may reasonably infer the joint assent of their minds to the prosecution of the action for the purpose of injuring Mrs. Murphy. Here, there is no evidence, either direct or circumstantial, that supports an allegation that Mr. Gantt and Mr. Bowers acted together as a combination, much less for the purpose of injuring Mrs. Murphy. Mr. Bowers' testimony is particularly illuminating on this subject:

He states:

- 14 Q: Gotcha. It's on your CV. When was the first
15 time you met Mr. Robert Gantt?
16 A: I remember him working at the Tax Commission,
17 but I never met him down there.
18 Q: When is the first time, if at all, you ever had
19 any time to actually professionally interact
20 with Mr. Gantt?

-
- 6 A. They schemed to make it look like I wasn't in the
7 county where I was elected and disenfranchised the
8 6,000 people that voted for me.
9 Q. And your contention is they made it look like you
10 didn't live in the county which you lived. But a
11 court in that county has actually found you don't
12 live in that county?
13 A. And we're, you know, contesting that. Because the
14 information the judge had to make their opinion was
15 -- was skewed.

21 A: Professionally, none.
22 Q: Did you interact with him on a personal level?
23 A: No.
24 Q: Do you know if you were a member of the School
25 Board Association at the same time that Mr.

19

1 Gantt was?
2 A: No. I got off it after eight years. He's a
3 recent person on the School Board Association.
4 I didn't even know he was chairman until all
5 this came up.
6 Q: Okay. When you say all this, you mean this
7 lawsuit that Ms. Murphy has brought?
8 A: Uh-huh.
9 Q: Is that right? Did you say ---
10 A: Yeah.
11 Q: --- yes? Okay. Thank you. Other than your
12 communications with Mr. Gantt arising out of
13 this issue of Ms. Murphy's residency, have you
14 had any other reason to have any contact with
15 him?
16 A: No. No.
17 Q: Have you had any other contact with him?
18 A: No. The only contact I had is when they asked
19 me and told me about it and said we want an
20 opinion. I said I will not do anything until
21 I get an official request.

Deposition of Bobby Merle Bowers p. 18 l. 14 - p. 19 l. 21.

The Plaintiff cannot point to any evidence that Mr. Gantt and Mr. Bowers had any relationship other than one created by the inquiry in this case. They were not engaged in any activities from which a combination existed or could be inferred, nor did they work together for any joint purpose. Mr. Bowers makes that clear when he states what he did when he got the letter requesting a formal determination:

25 Q: So when you received this letter, I want you to
32
1 walk me through the process that you took or
2 undertook of your staff to try to determine the
3 answer to these questions.
4 A: I turned it over to staff.

5 Q: Okay. So what would you do -- when you say you
6 turned it over to staff, how would you go about
7 doing that?
8 A: I just called them and I said I've got a
9 letter, go out and determine where Ms. Murphy
10 lives. Period. I didn't have any other
11 involvement on it.
12 Q: Do you recall who you gave that directive to?
13 A: Probably Will and Alan-Jon and Sid.
14 Q: Did you give them any type of time requirement?
15 A: No.
16 Q: Did they have to take any other direction from
17 you or were they -- or you just knew they knew
18 what they needed to do?
19 A: I had professional staff, and I let them do
20 their job.
21 Q: Did Mr. Roberts or Mr. Zupan ever come to you
22 to discuss specifically what they were finding
23 out as they were looking into this issue?
24 A: I don't -- not that I remember until they got
25 ready to give me a final report.

33

1 Q: Do you remember when they gave you a final
2 report?
3 A: Some time before my letter went back.
4 Q: Did they give you a report in writing, or did
5 they just discuss their findings with you?
6 A: They gave me a draft, and I told them to finish
7 it, to get the draft ready for me to sign.

Deposition of Bobby Merle Bowers p. 31 l. 25 - p. 33 l. 7.

All of the evidence reflects that the fact that Mrs. Murphy lives in Lexington County was discovered in a routine examination of voter registrations by the State Agency charged with that review. The question was communicated to Mr. Gantt, not as an individual, but as Chairman of the Lexington Richland Five Board of Trustees.⁴⁴ Mr.

⁴⁴ Mrs. Murphy admits that Mr. Gantt was acting in his official capacity with regard to her claims. She states:

5 Q. Okay. And from a standpoint -- the time Mr. Gantt
6 read that statement, was he acting in his capacity

Gantt immediately contacted the District's legal counsel and followed their advice in pursuing the matter. His actions, in his official capacity, included signing a letter making a formal request that the State Agency charged with placement of the County line make a determination. After a determination was made that Mrs. Murphy lived in Lexington County rather than in Richland County, he followed the advice of District Counsel as to how to proceed and what to do. There is no evidence - either direct or circumstantial - in the record that Gantt and Bowers had a meeting, an agreement, a tacit agreement or any other relationship such that they acted together to harm Murphy.⁴⁵ Thus, Murphy's case

7 as chairman of the school board?

8 A. Yes.

9 Q. Now, going back before that, you mentioned the
10 letter that Mr. Gantt wrote to Mr. Bowers asking
11 that they ascertain your residence.

12 A. Yes.

13 Q. When he wrote that letter, was he writing that in
14 his position as chairman of the school board?

15 A. Yes.

Deposition of Kim Murphy 8/10/2015 p. 84 ll. 5- 15.

and

16 Q. So I guess my question is as we sit here today you
17 can't identify any statement he's made outside of
18 his role as a member of the school board; is that
19 correct?

20 A. Not at this time.

Deposition of Kim Murphy 8/10/2015 p. 113 ll. 16 -20.

⁴⁵ Mrs. Murphy's only evidence of even a relationship between Mr. Gantt and Mr. Bowers is indicative of her general lack of evidence in this case. When asked why she believes that they are "buddies" or "involved" with each other, the following colloquy ensues:

9 Q. You say they're involved. What evidence do you
10 have that they're involved?

11 A. Well, Mr. Gantt is president of the South Carolina

fails on the first element of proof required. Her testimony on the issue illuminates the outrageous nature of her claims. In her deposition, she testified as follows, among other lengthy soliloquys:

21 Q. Okay. And so your belief is that Mr. McMullen is
22 going to testify that he knows that Mr. Bowers and
23 Mr. Gantt had a communication during that period of
24 time?

25 A. I think he's going to testify that it's a
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1 conspiracy.

2 Q. And you understand conspiracy is a legal
3 conclusion. Okay? What are the facts that you
4 believe that Mr. May or Mr. McMullen is going to
5 testify to regarding the actions of Bobby Bowers
6 and Robert Gantt?

7 A. What do I think he's going to testify to?

8 Q. Yes, ma'am. What do you believe that -- at this
9 time you can tell me what you believe.

10 A. I believe that -- that he will testify that Mr.
11 Gantt and Mr. Bowers conspired to do this and that
12 when I didn't resign and discovered the letter Mr.
13 Bowers had written to Jasper Salmond to have me
14 removed from the voter rolls and that it was
15 discovered by their lead research person who drew
16 the line that there were some deficiencies in it,
17 they had to scurry to try to make it look legal and
18 right.

19 Q. And when you say they, who are you referring to?

20 A. Mr. Bowers and Mr. Gantt and Mr. Bowers' team.

12 School Board Association. Mr. Bowers was
13 president. He served on -- as chairman of the
14 school board. Mr. Gantt had a similar position.
15 Still on the board.

16 Q. So are you suggesting that everyone who has ever
17 been the chairman of a school board in South
18 Carolina is a member of some cartel that acts
19 together as buddies?

20 A. When they have someone that they'd like to get --
21 get rid of who doesn't think the same way they do
22 when it comes to some things.

- 21 Q. What is your belief that Mr. Gantt had anything to
22 do with where that line was placed?
23 A. Because it was so arbitrary, he could, with his
24 knowledge of plats and boundaries, just encourage -
25 - continue to encourage it, go for it.

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- 1 Q. Well, Ms. Murphy, what interest did Mr. Bowers have
2 in acting such that he would have his agency
3 misplace a line?
4 A. They're buddies.
5 Q. And what evidence do you have that Mr. Bowers and
6 Mr. Gantt are, as you refer to, buddies?
7 A. They are involved with the education -- in
8 education circles and political circles.
9 Q. You say they're involved. What evidence do you
10 have that they're involved?
11 A. Well, Mr. Gantt is president of the South Carolina
12 School Board Association. Mr. Bowers was
13 president. He served on -- as chairman of the
14 school board. Mr. Gantt had a similar position.
15 Still on the board.
16 Q. So are you suggesting that everyone who has ever
17 been the chairman of a school board in South
18 Carolina is a member of some cartel that acts
19 together as buddies?
20 A. When they have someone that they'd like to get --
21 get rid of who doesn't think the same way they do
22 when it comes to some things.
23 Q. Where did you differ that you'd make somebody think
24 they'd like to get rid of you?
25 A. Where do I differ?

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- 1 Q. Yes. I mean, you said people think differently.
2 What do you -- where do you differ to the point
3 that you think makes someone take this intensely
4 personal interest in, quote, getting rid of you, to
5 use your words?
6 A. It seems that people who are involved -- some
7 people who are involved with our education system
8 will do whatever they can do to protect their
9 positions and their personal interests. And I am
10 of the belief that business of the school district
11 -- public school district should be public. And
12 the public ought to know how their money is being
13 spent and about the education of their children. I
14 guess there's, you know, a good old boys in every

15 circle. And I think --

Deposition of Kim Murphy 8/10/2015 p. 124 l. 21 – p. 127 l. 15 (ROA at ____).

Importantly, Mrs. Murphy has been unable to show any evidence that might produce a question of fact as to the fact that Mr. Gantt had any role in the location of the County line on her property – which is the fundamental issue underlying her claim.

12 Q. But as we sit here today you have no evidence that
13 you can produce or no witness that you can tell me
14 who is going to testify that Mr. Gantt had any role
15 in the location of the county line which placed
16 your house in Lexington County; is that correct?
17 A. I think -- I -- at the moment -- not at the moment,
18 we don't.

Deposition of Kim Murphy 8/10/2015 p. 141 ll. 12-18.

Neither Mrs. Murphy, nor any other witness, has offered any evidence whatsoever that Mr. Gantt and Mr. Bowers engaged in any conduct except for the proper exercise of their legitimate public positions. Moreover, their own testimonies clearly indicate that they had no relationship, no mutual desire or even any reason to act jointly to cause her harm.

In addition, Mrs. Murphy cannot proffer any evidence of any combination between Mr. Gantt and Mr. Bowers for the purpose of injuring her. She cannot even produce any evidence that there was communication between them other than the letters in the record.⁴⁶

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20 Q. Okay. But that really wasn't an answer to my
21 question, was it? Because that's what you believe.
22 My question is do you have a document or a witness
23 that you have identified since we last spoke in
24 August of 2015 that gives any evidence or testimony
25 that would support your belief that Mr. Gantt and

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1 Mr. Bowers communicated in some way so as to try to

Thus, she is unable to offer anything that creates even a circumstantial inference of a combination necessary to survive summary judgment as to the first element of her cause of action. Mr. Gantt is entitled to summary judgment on her cause of action for civil conspiracy.

b. For the Purpose of Causing Harm or Injury to Another.

The record reflects that Mrs. Murphy is unable to direct the Court to any evidence in the record from which a reasonable person could conclude that Mr. Gantt and Mr. Bowers acted for the purpose of injuring her. The only evidence adduced in this case is that both acted in their official capacities to ensure that the law was followed. Each piece of correspondence produced signed by Mr. Gantt is on Lexington Richland Five School District letterhead. Likewise, Mr. Bowers' correspondence is solely produced on the letterhead of the Budget and Control Board⁴⁷ – the statutory arbiter in this case for establishing or re-establishing the location of the County line in question. Moreover, Mr. Bowers' office staff did the field work and testified as to his lack of involvement in the process, as did Mr. Bowers. While it may be unfortunate that Mrs. Murphy was not a resident of Richland County as she believed, no combination of Mr. Bowers and Mr. Gantt acted to harm her. Their actions took place only in their official capacities and never with

2 do harm to you in this circumstance?

3 A. At the moment I don't believe I do.

Deposition of Kim Murphy 11/5/2015 p. 56 l. 20 - p. 57 l. 3.

⁴⁷ Since onset of the actions that form the gravamen of this case, State Government reorganization has occurred and the activities relating to mapping and borders are now under the auspices of the State Fiscal Accountability Authority.

a goal other than finding the truth. The testimony of Mr. Roberts and Mr. Zupan clearly confirms this fact.⁴⁸

It will be a challenge (and would certainly result in a novel legal outcome) for a Court to conclude that persons performing their statutory duties and seeking to comply with the law acted to harm another person. If she was harmed at all, which, from a legal point did not happen, the harm was the result of an original misapprehension of the location of her residence, not from a definitive finding of its location. Likewise, had the boundary been correctly established before 2010, she could not have run for or been elected to the School Board from Richland County. This is particularly true since Mrs. Murphy has demonstrated no harm from any wrongful act. Moreover, she seems to revel in the idea that being placed in the correct county for electoral purposes constitutes a harm to her. The line was not moved. It was simply located in the correct place with new technology. As the result of that correction, it was revealed that Mrs. Murphy had never lived in Richland County and had never been eligible to serve on the District Five School Board as a representative from Richland County. Her detrimental reliance on a mistake of fact does not make the persons who discovered and acted upon the mistake conspirators in any way, shape or form.

c. Which Causes Special Damages.

Mrs. Murphy is unable to provide any evidence of required special damages. “Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action.” *Vaught v. Waites*,

⁴⁸ Refer to footnote 33 and 34, which references testimony from both Roberts and Zupan that their only charge in responding to the inquiry as to the location of Mrs. Murphy’s residence was to find the truth. They also testified that no one interfered with their work or conclusions.

300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989). Here, there is some question as to whether Mrs. Murphy can substantiate claims for any damages whatsoever. Her claim for damages consists of allegations that she has undergone "stress" and "stress related" health issues as a result of the alleged conspiracy. She has also suffered these identical damages as a result of the alleged defamation. She has no basis to causally relate these claims to the alleged conspiracy. In that she has been involved in several lawsuits and numerous ugly political battles where she has accused others of numerous kinds of misconduct, it is ironic that she contends that an examination of her residency and subsequent legal determination that she was ineligible to serve due to the fact that her home was located in a county other than the one she believed it was in is the source of all of her medical issues. Her deposition testimony is instructive as to her lack of special damages different and apart from those she alleges in her defamation claim.

- 9 Q. Okay. Now, what -- and I want to make sure I
10 understand. You said you've incurred physical
11 therapy expenses from medical doctors. What
12 medical doctors have you seen for any condition
13 that you attribute to this conspiracy?
14 A. Just the -- the stress and the anguish and the
15 muscle spasms and -- I'm not sure if I got your
16 question.

Deposition of Kim Murphy 8/10/2015 p. 59 ll. 9-16.

- 24 Q. Now, has any physician given you any kind of
25 written medical opinion that ties these conditions
63
1 to what you allege to be the conspiracy by Mr.
2 Gantt and Mr. Bowers?
3 A. I don't think I've asked for that.
4 Q. Has any physician told you that this is a direct
5 result of that issue?
6 A. No. It's been coming on since it happened, and it

Deposition of Kim Murphy 8/10/2015 p. 62 l. 24 – p. 63 l. 6.

- 19 Q. Okay. Now, any other medical conditions or medical

20 issues that you attribute to Mr. Gantt and Mr.
21 Bowers' conspiracy?
22 A. When I had to work with a mouse for a good bit of
23 time for the discovery for the ten million dollar
24 counterclaim, I have sort of like computer elbow
25 that comes and goes.

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1 Q. And that you're not saying though arises from
2 anything that Mr. Gantt or Mr. Bowers did in this
3 alleged conspiracy, because you're saying that
4 relates to your doing work in another case you're
5 involved in, correct?
6 A. Yeah.
7 Q. Okay.
8 A. It's aggravated by.
9 Q. All right. Now, you indicated that you're having a
10 problem of focus or attention. Have you seen any
11 specialist with regard to that condition?
12 A. Only the family doctor.
13 Q. Okay. Has the family doctor given you any
14 diagnosis -- any medical diagnosis of that
15 condition?
16 A. Not really. Just that I have a deficiency.
17 Q. All right. Does he attribute any of that to age or
18 any other factor that might be an explanatory case
19 for it?
20 A. I have not heard him say. .
21 Q. Has he indicated to you in any kind of formal
22 medical belief that he believes that relates from
23 stress that directly proceeds from this complaint?
24 A. Only that I've told him that it's --
25 Q. Now, are there any other physical issues that

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1 you've had that you attribute to the actions of Mr.
2 Gantt and Mr. Bowers in conspiring against you that
3 we haven't talked about?
4 A. I don't -- I think that's it.

Deposition of Kim Murphy 8/10/2015 p. 63 l. 19 – p. 65 l. 4 (ROA at ____).

B. The Lower Court Correctly Granted Robert Gantt Summary Judgment on Kim Murphy's Cause of Action for Defamation.

A person makes a defamatory statement if the statement tends to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him. *Fountain v. First Reliance Bank*, 398 S.C. 434, 730 S.E.2d 305 (S.C. 2012) (quoting *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857, 860 (S.C. 2002)). The tort of defamation therefore permits a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff. *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 629 S.E.2d 653, 664 (2006). A plaintiff must prove the following four elements to state a claim for defamation: (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either action-ability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Id.*, 629 S.E.2d at 664.

1. The record is bereft of any evidence creating a material question of fact that Mr. Gantt made any false statement about the Plaintiff.

Slander, which is involved here, "is actionable per se when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) un-chastity; or (5) unfitness in one's business or profession." *Goodwin v. Kennedy*, 347 S.C. 30, 552 S.E.2d 319, 322-23 (S.C. App. 2001).

In order to prove a material question of fact, it was incumbent upon Murphy to offer evidence from which a reasonable person could conclude that Mr. Gantt published a false

statement about her. A review of Murphy's own sworn testimony makes it clear that no such evidence exists.

7 Q. Is there anything that Mr. Gantt or any board
8 member said in the January 2000 board meeting that
9 was untrue?

10 A. I can't -- I can't recall.

11 Q. So as we sit here today you can't tell me anything
12 they said in that board meeting -- that's very
13 important to you because that's what started this
14 ball rolling to you being removed from the board.
15 And you can't recall anything that was said in that
16 board meeting that was untrue?

17 A. I can recall things that were said that weren't
18 true. But they were different than the residency
19 issue. I'm being accused of costing the district
20 millions of dollars. And that happens almost every
21 board meeting.

22 Q. And that's the subject of another lawsuit, isn't
23 it?

24 A. It's untrue.

25 Q. That's the subject of another lawsuit, isn't it?

15

1 A. Yes.

2 Q. Was there anything in Mr. Gantt's statement that he
3 read at the beginning of the January 2000 board
4 meeting about you and your residency that was
5 untrue?

6 A. I can't recall. If you have a copy I can read.

7 Q. You have filed a lawsuit against Mr. Gantt and the
8 board where you have alleged that they have defamed
9 you, that they have published orally at a public
10 board meeting to attendees at that board meeting
11 issues about your residency status and your
12 competency to perform your job because of your
13 residency status, correct?

14 A. Yes.

15 Q. And as we sit here today you can't tell me whether
16 anything they said in that board meeting was
17 untrue?

18 A. If they said I did not live in Richland County,
19 that was untrue.

20 Q. Anything else?

21 A. Related to the residency?

22 Q. Related to what your lawsuit says in Paragraph 20

23 about your defamation claim that the Defendant,
24 Board and Gantt have published orally in public
25 board meetings to attendees and in writing through

16

1 said meeting minutes to viewers of the minutes that
2 your residency status is questionable, and because
3 it's questionable you're rendered incompetent to
4 perform your duties as an elected board member, and
5 has further harmed the board and her constituents
6 by occupying that position unlawfully, all of which
7 is untrue and dishonest.

8 A. It is -- it is untrue. It is untrue.

9 Q. What statement was it that Mr. Gantt said -- in his
10 statement at the beginning of that board meeting
11 what statement did he make that was untrue?

12 A. I -- he is representing that I don't live in the
13 county where I have been paying taxes and voting
14 and in a manner that was intentionally underhanded.

15 Q. Anything else other than he was representing that
16 you do not live in Richland County? Any other
17 untrue statements made by Mr. Gantt or the board in
18 that statement?

19 A. I'd have to see the statement to answer that.

20 Q. So as we sit here today you can't tell me any other
21 untrue statements that were defamatory to you made
22 in that statement at that board meeting that you
23 are suing over?

24 A. Again, I mentioned the defamation is more than just
25 what was said at that moment.

Deposition of Kim Murphy 9/10/2015 p. 14 l. 7 – p. 16 l. 25.

11 Q. What -- the issue was whether you were qualified to
12 sit on the board if you weren't a resident of
13 Richland County. Isn't that correct? That's what
14 the issue was.

15 A. Yes. But it came across as I had no business being
16 on that board, that I was tricking the --

17 Q. Whether you were --

18 A. -- electors.

19 Q. I'm sorry. Whether you were qualified to hold the
20 seat by virtue of whether you were elected in the
21 right county or not is a different question from
22 whether you are unfit in your profession, isn't it?

23 A. It is. But the way it came across, the words they
24 chose to use, the tone of their voice was that I

25 didn't meet their level of fitness to --

20

1 Q. Tell me what words they used that suggested that
2 you were unfit in your profession.

3 A. By implying that I'm a -- a cheat, that I schemed,
4 that I'm not worthy of having an elected position.

5 Q. Those are the words they used?

6 A. The picture that was painted by the school board
7 painted me as someone who was unfit to serve as an
8 elected official.

9 Q. What words did they use to paint that picture?

10 A. In the letter that Mr. Gantt wrote to Bobby Bowers
11 which was intended to be very public, it was very
12 obvious. Mr. Gantt said that, "As you may be
13 aware, such rumors have been around for years, or
14 for some time," again implying that I'm dishonest.

15 Q. So this defamation lawsuit is in part over your
16 interpretation of the letter that Mr. Gantt wrote
17 to Bobby Bowers where he said there have been
18 rumors about her residency around for years, and
19 you have interpreted that to imply that you were
20 dishonest?

21 A. It's very easy to interpret it that way.

22 Q. Has anyone else ever interpreted it that way that
23 you know of?

24 A. I haven't asked.

25 Q. Has anyone told you they have?

21

1 A. When I have repeated what Mr. Gantt has said, they
2 said that's not something that should be in there -
3 - in that letter if he were actually doing some
4 kind of thoughtful due diligence.

5 Q. That doesn't have anything to do with dishonesty,
6 with alleging that you are dishonest. Has anyone
7 else ever told you that they interpreted Mr.
8 Gantt's remarks as implying that you were
9 dishonest?

10 A. That was what was portrayed.

11 Q. Has anyone else ever told you that they believed
12 that was what was portrayed?

13 A. Yes.

14 Q. Who?

15 A. I can't remember who.

16 Q. So you have no witness in this case to come to
17 court to say that that's the way they interpreted
18 that other than yourself?

19 A. I may.
20 Q. Do you?
21 A. I may.
22 Q. We're entitled to know if you do.
23 A. I believe that if you ask people, my witnesses,
24 that they would likely -- they would say that they
25 were trying to paint me that way.

22

1 Q. That's not the question I asked you. I didn't ask
2 you how anybody was trying to paint you. I asked
3 you if anybody has told you they heard those words
4 and they believed you were being accused of being
5 dishonest. I'm not interested in political cronies
6 who will say they think they were trying to paint
7 you in a certain way. I'm interested in what
8 people heard and thought.
9 A. The comments that I received from the people that I
10 talked with were said in such a way and in such a
11 tone of voice that that's how it was meant to be
12 interpreted.
13 Q. Again, that's not my question. My question is not
14 anybody's intent. My question is not how it was
15 intended to be interpreted. My question is not how
16 your political cronies believe they were attempting
17 to portray you. My question to you was, has
18 anybody that heard those words told -- from any
19 source other than you told you that those words
20 implied that you were dishonest?
21 A. I can't recall right now. But if I think of
22 someone, I will --

Deposition of Kim Murphy 8/10/2015 p. 19 l. 11 – p. 22 l. 22 (ROA at ____).

25 Q. Has any person -- I'll try again. Has any person
24
1 who heard those words from any source other than
2 you ever told you that those words implied that you
3 were unfit in your profession as a board member?
4 And I would like an answer to that question.
5 A. Yes. But I can't recall right now.
6 Q. So you can't name anybody as we sit here today?
7 A. Not at the moment.

Deposition of Kim Murphy 8/10/2015 p. 23 l. 25 – p. 24 l.7 (ROA at _____).

25 Q. Tell me the words. Tell me the words they chose to

- 1 use that accused you of committing a fraudulent
 2 crime to seat yourself on the board by running in
 3 Richland County.
- 4 A. Again, by the statement that Gantt made -- Mr.
 5 Gantt made without more detail.
- 6 Q. So he should have said more, not less?
- 7 A. And he should have allowed me to speak.
- 8 Q. All right. So there were actually no words in his
 9 statement that accused you of committing a
 10 fraudulent crime; is that true?
- 11 A. Not specific words. But again, it's the way the
 12 words are -- came together and they're presented.
 13 The whole situation. It was --
- 14 Q. All right. Well, you --
- 15 A. -- framed around making me look bad.
- 16 Q. You've told me the manner and the way. And I'm
 17 going to come back to that right now. You told me
 18 the manner, the way and the statements made. Right
 19 now I'm concentrating on the statements made. And
 20 from what I'm hearing from you, there were no words
 21 in that statement that said you had committed a
 22 fraudulent crime; is that correct?
- 23 A. I don't believe there were except for using the
 24 words "illegal."

Deposition of Kim Murphy 8/10/2015 p. 37 l. 25 – p. 38 l. 24 (ROA at _____).

- 15 Q. Okay. Is there any statement that you can point to
 16 that Robert Gantt has made at any time since
 17 November of 2012 where he referred to you where the
 18 statement was not true?
- 19 A. Where he said something about me that was not true?
- 20 Q. Yes, ma'am.
- 21 A. Well, first of all, it's not true that it was
 22 conclusive that I live in -- didn't live in
 23 Richland County.

Deposition of Kim Murphy 8/10/2015 p. 154 ll. 15-23 (ROA at _____).

The Plaintiff is unable to point to a defamatory statement or act made or published by Robert Gantt. He is a public official and must also demonstrate actual malice or recklessness. She

can adduce no facts from which a reasonable tier of fact might conclude her claim that she was defamed is based only on her interpretation of an innuendo that she infers from the words.

Appellant spends pages in her brief arguing that Gantt defamed her. The dearth of evidence to create a material question of fact is evident from the brief itself. Her allegations relating to insinuation arise from “the statement that Murphy that (sic) is a resident of Lexington County is not true” is the genesis of Murphy’s claimed defamation⁴⁹ She then cites to her brief for an assertion that Mr. Gantt defamed her when he suggested that she “knew that she did not live in Richland County, that she falsified her candidacy application and oath; and that she should have resigned in the middle of her elected term⁵⁰.” The problem with that assertion is that there is no evidence to support the contention in the record – which is why there is a cite to a memorandum and not to actual testimony or evidence. The actual statement⁵¹ in question uses the following words:

In late October, it came to my attention that Board Member Kim Murphy might not be, in fact, a resident of Richland County, as specifically required by Act No. 326 of 2002 of the South Carolina General Assembly.

Act No. 326 of 2002 addresses the composition of the Board of Trustees of School District Five of Lexington and Richland Counties, specifically providing that three of the Board Members shall be residences of Richland County and four of the Board Members shall be residents of Lexington County. Ms. Murphy is one of three representatives from Richland County, the other two being Robert Gantt (myself) and Edward White.

Based on the information I received, I made a formal inquiry of Bobby Bowers, Director of the Office of Research and Statistics of the South Carolina State Budget and Control Board, whose office has statewide responsibility for election district maps. A copy of my December 20, 2012 letter to Mr. Bowers is attached. I also informed other officers of the Board of my inquiry, along with legal counsel for the District.

On January 12, 2013, I received a formal response to my inquiry from Mr. Bowers. A copy of his response is attached.

⁴⁹ Initial brief of Appellant P. 33.

⁵⁰ Initial brief of Plaintiff P. 33 citing Pl.’s Mem. In Opp’n, Ex. 33 (ROA at ____)

⁵¹ See Public Statement by Mr. Gantt dated January 14, 2013, Exhibit 33 to Plaintiff’s Memorandum in Opposition to Gantt’s Motion for Summary Judgment, (ROA at ____.)

Tonight, in Executive Session, I informed the entire Board of Mr. Bowers' response, along with the District Superintendent and legal counsel for the District. Tomorrow, I will send a letter to Ms. Murphy confirming tonight's discussion. I assume that Ms. Murphy will evaluate the information and, if Mr. Bowers' position is correct, will resign her position as a member of the Board, as she was apparently not qualified to represent Richland County at the time of her election.

If there is a dispute about her qualifications to serve, the District, through legal counsel, will make arrangements to refer the matter to an independent, impartial person with extensive judicial experience to publicly hear the facts and law and make a recommendation to the Board. Individual Board members shall make no further comments on this situation but I, as Board Chair will keep the public informed as events develop . . .

Obviously, this statement is factual and no reasonable person would view it as insinuating anything. As the record reflects, it was authored by the District's lawyers for Gantt to read at the meeting. It is interesting to note that Murphy's response was not nearly so restrained⁵².

She has offered no evidence that the words are defamatory per se or that any other person in the world will testify that they believed the words she cites defamed her.

⁵² In an e-mail sent Sunday January 27, 2013 to her e-mail list, subject "URGENT District 5 update – Tax dollar protection!" Murphy includes the following statements "As you've probably read in the papers, the School Board and specifically its Board Chairman, Robert Gantt, have taken the totally over-the-top approach of getting rid of me and my taxpayer protection attitude by challenging my residency! Now, they are spending YOUR tax money hiring lawyers just to get me kicked off the board so that you have virtually no one looking out for the way they waste our tax dollars. . . . Here's the point, the opposition only fires on you if you're over the target!! I wonder what Gantt and his cronies are cooking up to attempt to slide by YOU – the taxpayer – and why they want me off the board so badly that they have to resort to such desperate means? . . . " (Exhibit 34 Murphy Memo in Opposition to Motion for Summary Judgment , ROA at ____.) Murphy politicized every issue during her tenure on the board with innuendo and character assassination, yet has the audacity to assert that Gantt's public statement defamed her. It must be a case of seeing in others what you yourself are doing – because she is clearly not able to demonstrate a statement that is either untrue or casts her in the light that she contends she was cast into.

2. The record is bereft of any from which a Court might find in Murphy's favor on the legal issue of defaming a Public Official.

In a defamation action involving a "public official" or "public figure", which Appellant concedes to be the case here, the Plaintiff must prove the statement was made with "actual malice," *i.e.*, with either knowledge that it was false or reckless disregard for its truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct.710, 11 L.Ed. 2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed. 2d 789 (1974). *See also Holtzscheiter v. Thomson News, Inc.* 332 S.C. 502, 506 S.E. 2d 497 (1998). Whether the evidence is sufficient to support a finding of actual malice is a question of law. *HarteHanks Communications, Inc. v. Cannaughton*, 491 U.S. 657, 685, 109 S.Ct. 2678, 105 L. Ed. 562 (1989). When reviewing an actual malice determination, the court is obligated to independently examine the record to determine whether the evidence sufficiently supports a finding of actual malice. *Miller v. City of West Columbia*, 322 S.C. 224, 471 S.E. 2d 683 (1996)

- a. The record is bereft of any from which a Court might find that Gantt made the statements Murphy complains about with a "reckless disregard for its truth"

The constitutional actual malice standard requires a public official, such as Murphy, to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. *New York Times Co. v. Sullivan*, *supra*; *Botchie v. O'Dows*, 315 S.C. 126, 432 S.E.2d 458 (1993). The United States Supreme Court has determined that a "reckless disregard" for the truth requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication" *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L. Ed. 262 (1968) There must be evidence the

defendant had a “high degree of awareness of . . . probable falsity.” *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L. Ed. 2d 125 (1964).

Here, the only credible evidence in the record is that Mr. Gantt’s statements were in every case based upon a valid opinion provided by the public officials tasked with making the legal determination as to the location of the county boundary. Those officials opined that: “All three sources show that Ms. Murphy is a resident of Lexington County”⁵³ Because the General Assembly has tasked the then Division of Research and Statistics of the Budget and Control Board with responsibility for preparing and maintaining the official maps for boundary lines, *See. e.g. S.C. Code Ann. §7-7-465(B)* (2016) which addresses the maintenance by the office of the Precinct lines for Richland County, there can be no doubt that Mr. Gantt had a reliable basis for a good faith belief in the truth of his statements. There is absolutely no evidence in the record to even suggest that he entertained any doubt, much less serious doubts as to the truth of his statement prior to its publication. Moreover, the evidence reflects that the statements were vetted by the District’s counsel⁵⁴ prior to his publication of the words about which Murphy complains. So, not only did Mr. Gantt have no doubt about the facts he discussed, he went to the additional trouble of relying on counsel prior to making the statement. The evidence is unambiguous and uncontroverted. Murphy can offer nothing to support the requirement that Gantt had any doubt or

⁵³ Letter from Bobby Bowers to Robert W. Gantt dated January 11, 2013 (ROA at ____).

⁵⁴ Gantt, Robert W. - Vol. I, (Page 69:6 to 69:13) (ROA at ____)

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6 Q: Did you prepare this statement or did someone
7 prepare it for you?

8 A: Prepared by legal counsel.

9 Q: Okay. And this is the statement that you read
10 in the board -- the public board meeting after
11 you came out of the executive session on
12 January 14, 2013?

13 A: That's correct.

for that matter any reason to doubt the accuracy of the fact that Murphy's residence was (and is) located in Lexington rather than Richland County.

- b. Murphy has no evidence that will satisfy the required "Actual Malice" standard as to Gantt's alleged defamation.

Murphy's allegations regarding malice seem to be based upon her perception that Mr. Gantt and other School Board members were inconsiderate to her, ridiculed her and were or became her bitter political enemies. Her allegations in this area can be summarized as: "Gantt didn't vote for her", he (Gantt) limited and contained discussion in Board Meetings, he permitted public participation where citizens "attacked" plaintiff, he voted on resolutions which were critical of her and her conduct; he publicly supported a third party's lawsuit against her and he voted on a resolution to prevent sitting board members from suing the district⁵⁵. Plaintiff's Memorandum in Opposition to Motions for Summary Judgment (ROA at ____). In other words, Gantt engaged in political speech opposing her and he was "rude" or "inconsiderate".

Our Courts have held that the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term. *Harte-Hanks*, 491 U.S. at 666. "There must be evidence at least that the defendant purposefully avoided the truth." *Elder v. The Gaffney Ledger*, 341 S.C. 108, 114, 533 S.E. 2d 899 (2000) quoting *Gaylord Broadcasting v. Francis*, 7 S.W.3d 279 (TX 1999); *American Broadcasting Companies, Inc. v. Gill*, 6 S.W.3d 19 (TX 1999). In *Elder* the court noted "Although evidence concerning motive or care may bear some relation to the actual malice inquiry, "courts must be careful not to place too much reliance on such factors." *Elder* at 341 S.C. 115 (cite omitted). Moreover, our Court has acknowledged

⁵⁵ Even as a sitting Board Member, Murphy was involved in more than one legal action as an adverse party against the School District see e.g. Deposition of Kim Murphy 7/22/15 p. 84 l 25 – p.85 l.5 (ROA at ____)

that ill will, which is Murphy's basis for an argument of actual malice is not what actual malice refers to. *See. e.g. Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991) which found that a jury may not impose liability on the basis of defendant's hatred, spite, ill will, or desire to injure as "ill will" toward the plaintiff, or bad motives are not elements of the *New York Times* standard" citing *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 88 S. Ct. 197, 19 L. Ed. 248 (1967).


The fact that Murphy is unable to provide evidence in the record to satisfy the legal questions of actual malice conclusively establishes the Circuit Judge's correctness in granting Summary Judgment to Mr. Gantt on her defamation cause of action.

CONCLUSION

For the foregoing reasons, Gantt respectfully asks this Honorable Court to affirm the decision of the Lower Court.

Respectfully Submitted,

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Columbia, South Carolina
December 14, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2014-CP-40-4666
Appellate Case No. 2016-001198

Kim MurphyAppellant,


v.

Richland-Lexington School District 5 Board of Trustees, Robert Gantt, and Bobby Bowers, in their individual capacities.Respondents.

PROOF OF SERVICE

I hereby certify that I, the undersigned member of Montgomery Willard, LLC, have caused Respondent Robert Gantt's Initial Brief and Designation of Matter to be Included in the Record on Appeal by service of the same on Counsel for Appellant by depositing a copy of it in the United States Mail, postage prepaid, on December 14, 2016, addressed to J. Lewis Cromer, Esquire, J. Lewis Cromer and Associates, LLC , Post Office Box 11675, Columbia, South Carolina 29211 and by service on Respondent Bowers by depositing a copy of it in the United States Mail, postage prepaid, on December 14, 2016 addressed to Patrick J. Frawley, Esquire, Davis Frawley, LLC, P.O. Box 489, Lexington, South Carolina 29071,

(SIGNATURE FOLLOWS ON NEXT PAGE)



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December 14, 2016

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1120 Senate St.
Columbia, SC 29201

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DEC 14 2016

SC Court of Appeals

Re: *Kim Murphy v Robert Gantt and Bobby Merle Bowers, in their individual capacities*
Appellate Case No. 2016-001198
Our File No: 2155804

Dear Ms. Kitchings:

Enclosed please find the original and (3) copies of the Initial Brief of Respondent Robert Gantt and Respondent's Designation of Matter in the above-referenced matter. Also, enclosed are the original and (2) copies of the Proof of Service. Please file the originals and return the clocked copies to our courier. By copy of this letter, I am serving counsel of record with a copy of same.

Should you have any questions or concerns, please feel free to contact us. Thank you in advance for your assistance in this matter.

With kind regards, I am

Very truly yours,

MONTGOMERY WILLARD, LLC



S. Renee Melton

Paralegal to Michael H. Montgomery

The Honorable Jenny Abbott Kitchings
December 14, 2016
Page 2

MHM/srm
Enclosures

cc w/ encl: J. Lewis Cromer, Esq.
Patrick John Frawley, Esq.