

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
Case No. 2016-001198

Kim Murphy.....Appellant,

v.

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

of whom

Bobby Merle Bowers and Robert Gantt are..... Respondents.

INITIAL BRIEF OF RESPONDENT BOWERS

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Lexington, South Carolina
December 22, 2016

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE LOWER COURT PROPERLY FOUND THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT BUT THAT MURPHY HAS FAILED TO PROVIDE EVIDENCE SUPPORTING THE REQUISITE ELEMENTS OF HER CIVIL CONSPIRACY CLAIM AGAINST BOWERS?

STATEMENT OF THE CASE

This matter was commenced with the July 28, 2014 filing of a Summons and Complaint in Richland County by Kim Murphy, the Appellant herein, naming as Defendants the Richland-Lexington School District 5 Board of Trustees (hereinafter referred to as “Board”), Robert Gantt, the former Chairman of the Board, and Bobby Bowers, the Director of Mapping Services of the South Carolina Revenue and Fiscal Affairs Office. *See*, Complaint, p. 1-2, ¶¶ 1-4. In her Complaint, Ms. Murphy alleged that she was a member of the School Board since 2010, that she had been outspoken at School Board meetings and had alienated other School Board members, and that, as a result, there was an attempt to oust her as a School Board member, spearheaded by Chairman Robert Gantt. *See generally, id.*, pp. 2-5, ¶¶ 7-18. She alleged a First Cause of Action against the Defendants Board and Gantt, sounding in Defamation *per se, id.*, pp. 5-6, ¶¶ 20-25; and she alleged a Second Cause of Action against the Defendants Gantt and Bowers sounding in Civil Conspiracy. *Id.*, pp. 6-8, ¶¶ 27-31.

With regard to her allegations against the Respondent Bobby Bowers, Ms. Murphy alleged that Mr. Gantt “wrote to his colleague Defendant Bowers ... with whom he had an alliance, and requested Bowers to determine whether [Murphy’s] status as citizen and resident of Richland County could be called into question for the purpose of ejecting her from the Board,” and that “Bowers himself or one of his employees” visited Ms. Murphy’s property, conducted what she alleged was a precursory and obviously maliciously

perfunctory review” into the location of the boundary between Lexington and Richland Counties, concluded that Murphy resided in Lexington County, not Richland County. *Id.*, pp. 3-4. ¶¶11-13. Murphy further alleged that “Bowers, Gantt, and others met at various times and places, schemed, conspired, and planned in secret” to make a sham determination of her residency, and remove her from the Board. She then alleged “special damages including pain, suffering, and emotional distress directly tied to [her] being blacklisted from Defendant Board, ostracized for her outspoken criticisms that were valid, the loss of her position on the Defendant Board, and other tangible damages including loss or reputation linked to her ability to run for and be elected to the Defendant Board.” *Id.*, pp. 7-8. ¶31. *But see, id.*, p. 6, ¶25 (listing her damages resulting from the defamation *per se* claim against the Board and Gantt as “severe and continuing injury to [Murphy’s] reputation, diminished likelihood of re-election, humiliation, embarrassment, pain and suffering, and other losses.”).

Bowers filed and served his Answer on September 24, 2014, leading with an affirmative defense under to SCRPC 12(b)(6), then interposing a qualified general denial and further affirmative defenses, denying liability. Answer of the Defendant Bobby Merle Bowers. The co-Defendants Gantt and School Board served their Answers October 24, 2014 also denying the allegations in qualified general denials and asserting various affirmative defenses. *See*, Answers of Gantt and School Board.

The parties engaged in discovery, through which Murphy producing over 9,000 documents and 250 hours of audio and video through discovery, Deposition of Kim Murphy, Continuation (July 22, 2015)(hereinafter “Murphy Deposition 2”), p. 169, line 12

to p. 170, line 3, most of which dealt with Murphy's grievances with the School Board and had nothing to do with her civil conspiracy claim against Bowers; and Murphy listed 146 witnesses, few of whom she had contacted about the case, and, based upon summaries by Murphy of their anticipated testimony, even fewer impacting on the civil conspiracy claim. *See*, Murphy Deposition 2, Exhibit 4; *see generally, id.*, p. 77, line 21 to p. 169, line 3. The parties also took several depositions, including four separate sittings with Murphy, totaling approximately 21 hours. *Cf.*, Deposition of Kim Murphy (June 22, 2015)(hereinafter "Murphy Deposition 1"), pp. 1, 148 (started 12:13 pm, adjourned 4:12 pm); Murphy Deposition 2, pp. 1, 229 (reconvened 10:24 am, adjourned 5:19 pm); Deposition of Kim Murphy, Second Continuation (August 10, 2015)(hereinafter "Murphy Deposition 3"), p. 1 (reconvened 10:01 am, adjourned 3:37 pm); Deposition of Kim Murphy, Third Continuation (November 5, 2015)(hereinafter "Murphy Deposition 4"), p. 1 (reconvened 10:04 am, ended 5:01 pm).

Bowers filed his Motion to Dismiss for Failure to State a Claim and for Summary Judgment on January 4, 2016. *See*, Bowers Motion. Robert Gantt filed his Motion for Summary Judgment on January 8, 2016, *see* Gantt Motion; and the Board served its Motion on or about January 20, 2016, filing it shortly thereafter. The Motions were heard by the Honorable Doyet A. Early, III in Richland County on February 29, 2016, and Judge Early issued his Order April 8, 2016, filed April 13, 2016, granting the Defendants' Motions for Summary Judgment and dismissing the case in its entirety with prejudice. Order Granting Defendants' Motions for Summary Judgment (April 8, 2016).

Murphy filed and served a Motion for Reconsideration pursuant to SCRCP Rule 59(e) on April 26, 2016. Plaintiff's Motion to Reconsider Judgment on Appeal. Hearing on the motion was held May 18, 2016 before Judge Early, and a Form 4 Order denying the Motion was signed May 24, 2016 and filed May 31, 2016. Order Denying Motion for Reconsideration (May 24, 2016).

Kim Murphy served her Notice of Appeal June 6, 2016. On June 9, 2016, Murphy filed her Agreement to Dismiss her appeal against the Richland-Lexington County School District No. Board of Trustees, continuing the appeal against the Respondents Bobby Merle Bowers and Robert Gantt.

STATEMENT OF FACTS

Bobby Bowers retired in June, 2015 after 56 years with the State of South Carolina, 28 years of which were as Director of the Office of Research and Statistics (hereinafter “ORS”), a division of the South Carolina Budget and Control Board. Deposition of Bobby Merle Bowers (December 18, 2015)(hereinafter “Bowers Deposition”), p. 9, line 9 to p. 11, line 15. In the fall of 2012, as Director of ORS, Bowers’ duties were supervising a department consisting of up to 79 people performing precinct demography, geodetic mapping, information technology planning and management, finance and budget, redistricting, and one of the largest health and data and manpower systems in the country at one time. *Id.*, p. 13, lines 3-25. *See also*, Deposition of William F. Roberts, Jr. (December 21, 2015)(hereinafter “Roberts Deposition”), p. 9, lines 7-11 (ORS employee Roberts described duties of the office as providing mapping and GIS services to the South Carolina Legislature and to County Voter registration and election offices). Among employees working under Bowers, as Director of ORS, in the fall of 2012 were Will Roberts and Alan-Jon Zupan.

Will Roberts was State Political Cartographer, had been with ORS since 2000, while still in College, and joined fulltime after graduation in 2003. Roberts Deposition, p. 8, line 20 to p. 9, line 6. *See also*, Bowers Deposition, p. 26, line 24 to p. 27, line 1 (“Q: Did you hire Mr. Roberts?” “A: I sure did, part time when he was in college and full time

when he finished college.”). Roberts resided in Richland-Lexington School District 5, his children attended school in that district, and he had voted for Kim Murphy, the Appellant herein, when she ran for the School Board. Roberts Deposition, p. 12, lines 17-21; p. 13, line 25 to p. 14, line 2. Alan-Jon Zupan was a co-worker of Roberts working for ORS in the Geodetic Survey section, which section was responsible for the geodetic network in South Carolina, the aerial photographic program, the orthophotographic program, and for working on political boundaries. Deposition of Alan-Jon Zupan (December 21, 2015)(hereinafter “Zupan Deposition”), p. 9, line 21 to p. 10, line 6. *See also*, Roberts Deposition, p. 11, lines 18-25) (Roberts describing the Geodetic Survey section’s duties as surveying and mapping geodetic control across the state).

In the fall of 2012, Robert Gantt was Chairman of the Richland-Lexington County School District 5 Board of Trustees (hereinafter “School Board”), and Kim Murphy was a Member of the Board, having been elected in 2010. *E.g.*, Complaint, pp. 1-2, ¶¶1-3, 7. The relationship between Murphy and the School Board was best described as strained and often adversarial, with Murphy attributing the reason for the strain as her being outspoken in opposing School Board procurement policies and actions, whether that belief was accurate or not. *E.g., id.*, pp. 2-3, ¶9.

In the fall of 2012, Bobby Bowers knew of Robert Gantt, but had no close personal or professional relationship with him; and Bowers only knew of Murphy, with no animus toward her. Bowers had served as President of the South Carolina School Boards in 1982, for a one-year term. Bowers Deposition, p. 17, lines 8-17. Bowers had served eight years on the School Board for Lexington County School District No. 1—a different school board

from the one Gantt would later serve on—serving one year as secretary and the remaining seven years as Chairman. *Id.*, p. 17, line 24 to p. 18, line 13. Bowers recalled Robert Gantt from when Gantt had worked on the Tax Commission, but never had any professional contact with him, had no interaction with Gantt on a personal level, and was not a member of the School Board Association at the same time that Gantt was a member. *Id.*, p. 18, line 14 to p. 19, line 5. The only contact that Bowers had with Gantt was when the School Board contacted Bowers' ORS Department and asked for an opinion on Murphy's residency. *Id.*, p. 19, lines 11-20. Bowers told them that he would not do anything until he received an official request. *Id.*, p. 19, lines 20-21. Other than that contact, Bowers has had no other reason to have contact with Gantt. *Id.*, p. 19, lines 11-16.

Prior to the depositions taken in this lawsuit, Bowers had never met Murphy, had not spoken with her, nor communicated with her in any manner. Bowers Deposition, p. 22, lines 1-5. Other than a passing inquiry from Stewart Mungo mentioning that Murphy might be in the wrong county well before the Richland-Lexington District 5 inquiry, which Mungo never followed up on with a formal request, Bowers had no knowledge of Murphy until the Richland-Lexington District 5 request in December, 2012. *Id.*, p. 22, line 6 to p. 23, line 20. Although Bowers testified that he was generally aware of "consternation" with regard to the Richland-Lexington County School District No. 5 Board and Murphy, no one ever commented to him about it, he had no specific knowledge of any activities going on, he did not attend School Board meetings, he had not watched meeting footage online, and he had not read any meeting minutes. *Id.*, p. 30, line 9 to p. 31, line 15.

In September 17, 2012, ORS received an email from Kim Murphy requesting a copy of the Richland-Lexington School District Map. Roberts Deposition, p. 24, lines 7-22, purportedly wanting to see the split precincts and the boundary between Districts 5 and 1, and the Lexington County Boundary in her district. *Id.*, p. 25, lines 2-13). Prior to that contact from Murphy, Roberts' office had received no inquiries nor information from anyone about Murphy's residential address or property, and no one from his office had spoken with him about Murphy or her address. *Id.*, p. 25, line 19 to p. 26, line 2).

The first contact ORS had with regard to Murphy's residence began in late September-early October, 2012. *Id.*, p. 14, line 25 to p. 15, line 13. In September-October 2012, under State Budget Proviso 80A.20 in the 2011-2012 Fiscal Year Budget, ORS was responsible for assisting county voter registration offices to make sure that voters were assigned to the correct districts. *Id.*, p. 15, lines 14-21. The office was running files according to the budget proviso before the 2012 election, and Murphy's address was one that got flagged for being in the incorrect district. *Id.*, p. 15, line 22 to p. 16, line 2. According to Will Roberts' deposition testimony, the process involves taking the voter registration database from the State Election Commission and running it through the GIS system, matching addresses at each point based upon the road file provided by each county. The office then overlays the result on top of the current house and senate districts to see what district it falls into compared to what each address is registered for. *Id.*, p.16, lines 3-16. Murphy's address and one other were flagged by the computer, not by anyone personally. *Id.*, p.16, lines 17-20; p. 17, lines 7-13.

After finding two areas of concern in the north-western section of Richland County, Roberts called Lexington County staff, speaking with several members of the staff to discuss the two addresses with them. *Id.*, p. 16, line 21 to p. 17, line 6, p. 17, line 23 to p. 18, line 18. After those conversations, Roberts discussed the matter with the geodetic staff, including Alan-Jon Zupan, who told Roberts that he had previously done field work in that area. *Id.*, p. 26, lines 3-25. Zupan told Roberts that he had coordinates for Rocky Ford—a surveying marker on Wateree Creek off of the Broad River, defined by statute as one of the markers between Richland County and Lexington County, *id.*, p. 47, lines 7-11; *see also*, *S.C. Code Ann.* §4-3-460 (1976), that they had the arc in between Lexington and Richland Counties, and Zupan had the GIS staff send the information to Roberts on October 16, 2012. *Id.*, p. 27, lines 3-17. Roberts then went to Zupan's office to meet with him to discuss the location of Rocky Ford, discovering that Zupan had actually been to the Ford and had stood atop of it with GIS equipment to confirm the longitude and latitude. *Id.*, p. 27 line 19 to p. 28, line 9.

Zupan and his Geodetic Survey section had researched Rock Ford in 1995 incident to a motor vehicle accident near Harbison Boulevard and the interstate, when they were asked to determine whether the accident had occurred in Richland or Lexington Counties. Zupan Deposition, p. 11, line 19 to p. 12, line 6. Since his section had to plat the bearings and distances for that inquiry, as well as set monuments for the county boundary at that location, they extended their 1995 inquiry to other parts of the county boundary, located Rock Ford, and got a GPS coordinate at that time. *Id.*, p. 12, line 10 to p. 13, line 8, p. 25, lines 13-24. *See also*, *id.*, p. 27, line 6 to p. 28, line 19 (detailing what field work Zupan

did in 1995 investigation of Rocky Ford). The next inquiry Zupan received regarding Rocky Ford was Roberts' inquiry in October, 2012. *Id.*, p. 13, lines 9-16. In asking Zupan for assistance, Roberts provided no information as to why he wanted the Rocky Ford location. *Id.*, p. 13, lines 17-21.

Roberts had spoken with Bowers about the matter before meeting with Zupan, and Bowers gave Roberts no direction as to how to proceed forward with the matter. Roberts Deposition, p. 29, lines 3-13. Bowers mentioned neither Murphy's address nor concerns about the address to Roberts. *Id.*, p. 41, lines 11-18. After meeting with Zupan and confirming the location of Rocky Ford by October 16, 2012, Roberts' office took no action, but simply waited, since Roberts did not know how to proceed. *Id.*, p. 30, line 21 to p. 31, line 7. Roberts estimated that, since starting the program in 2003, his office had discovered twenty to thirty thousand people in the incorrect election districts, and his office would provide the information to the voter and to the election offices, which would double check the maps and make changes, if needed. *Id.*, p. 31, line 14 to p. 32, line 8. The difference with Murphy was that her boundary was a county boundary, rather than an election district boundary. *Id.*, p. 32, lines 11-22. The ORS review that affected Murphy's county residency affected others, as well, including residents of the Fernandina Road Apartment Complex and a property owner named Moffat Burriss. Roberts Deposition, p. 77, lines 6-14. The result of the ORS review was that it was determined conclusively that the two addresses—Murphy's and Moffat's—were located within Lexington County, not Richland County. *E.g., id.*, p. 54, line 14 to p. 58, line 5; Exhibit 5 to Roberts Deposition.

On October 30, 2012, Roberts' office received an email from an attorney for Richland-Lexington District 5 School Board wanting to discuss maps the office had of Murphy's area. Roberts Deposition, p. 34, line 14 to p. 35, line 8. Roberts spoke with the attorney and provided him with information, including the 1921 annexation plan that Roberts had received from the Archives and History Department. *Id.*, p. 35, line 11 to p. 36, line 2. Later there was a meeting set with other attorneys with the School Board during which Roberts told them that, based upon the information and the data he had seen, Murphy's residence appeared to be in Lexington County. *Id.*, p. 39, line 12 to p. 40, line 7. Bowers testified on deposition that it was common to receive initial informal inquiry into a matter to determine the process a party was to follow in requesting a determination by the ORS; nor was it unusual for the email request to go to Will Roberts rather than to Bowers. Bowers Deposition, p. 25, line 12 to p. 26, line 1. Although Bowers was at that meeting, Roberts recalls no comments made by Bowers. Roberts Deposition, p. 40, lines 23-25. At the conclusion of the meeting, Roberts understood that the School Board's attorneys were going to make a written request to ORS for information relating to Murphy's residence. *Id.*, p. 40, lines 3-7.

Bowers recalls that Gantt called him to inquire into whether Bowers' office would do an inquiry into Murphy's residence, and he told Gantt that he needed to send a letter making the request. Bowers Deposition, p. 28, line 11 to p. 29, line 13. After the phone call, his office received a draft letter. *Id.*, p. 29, lines 17-20. On December 2, 2012 Roberts received an email request from a paralegal at the office of the attorneys for the Richland-Lexington School District No. 5, to which the paralegal had attached the draft of a

proposed letter requesting a determination of Murphy's residency. *See*, Exhibit 2 to Roberts deposition. Bowers left it to his technical staff and asked them—Roberts, Zupan, and Sid Miller, the State Surveyor—to look the letter over. Bowers Deposition, p. 26, lines 2-12.

ORS received a letter from Robert Gantt, as Chairman of the Richland-Lexington School District 5 Board of Trustees addressed to Director Bobby Bowers, requesting a determination as to whether Murphy resided in Richland County. Exhibit 3 to Roberts Deposition. Bowers turned the letter over to his staff, telling them "I've got a letter, go out and determine where Ms. Murphy lives. Period. I didn't have any other involvement in it." Bowers Deposition, p. 31, line 25 to p. 32, line 13. Bowers testified that he gave his staff neither a time frame nor other direction, remarking that he had professional staff, and he let them do their job. *Id.*, p. 32, lines 14-20.

After receiving the December 20, 2012 letter, Roberts reviewed the material that had earlier been discovered relating to Murphy's residency to confirm, and began drafting a response letter with Alan-Jon Zupan's assistance. *See, generally*, Roberts Deposition, p. 41, line 24 to p. 53, line 14; Exhibit 4 to Roberts Deposition. *See also*, Zupan Deposition, p. 37, lines 19-23 (Zupan had no discussions with Bowers about Zupan's research nor the portion of the letter that Zupan assisted with). The final letter drafted by Roberts for Bowers' signature was dated January 11, 2013, addressed to Robert Gantt, as Chairman of the Board of Trustees for Richland Lexington School District 5, and described the three sources used to determine the county location of Murphy's residence, briefly described the process methodology, and concluded that all three sources showed that Murphy was a

resident of Lexington County. Exhibit 5 to Roberts Deposition. Roberts also drafted a second letter for Bowers' signature bearing the same January 11, 2013 date, addressed to Jasper Salmond, Interim Executive Director for the Richland County Voter Registration and Elections, advising that a recent review of addresses along the Richland-Lexington County lines had discovered multiple addresses of voters then registered to vote in Richland County that were actually located inside Lexington County, and provided Mr. Salmond with the two addresses. Exhibit 6 to Roberts Deposition. In signing the two letters prepared for him by Will Roberts and Alan-Jon Zupan, Bowers had no questions for Roberts or Zupan. Roberts Deposition, p. 54, line 14 to p. 56, line 12.

Roberts had numerous calls, email inquiries, and exchanges with Kim Murphy between January 15-28, 2013, and provided Murphy with documentation and explanation of what had been relied upon in the review. Roberts Deposition p. 58, line 6 to p. 59, line 13. *See also*, Exhibit 1 to Roberts Deposition, pages ORS072 to -097, -114 to -119, and -123 to -142 (email exchanges and material provided).

There apparently was coordination between the School Board and Murphy for purposes of agreeing to a plan for a hearing to be held, *cf.* Exhibit 10 to Roberts' Deposition (attorney Keith Powell email to Roberts, "Ken & John are meeting with Judge Cooper and Kim Murphy on Friday to agree on the plan for the hearing to be held..."); and Bowers, as Director of ORS, was one of the two witnesses who testified at the hearing on behalf of ORS, with Roberts assisting Bowers in preparation for the hearing. Roberts Deposition. Roberts Deposition, p. 69, line 6 to p. 72, line 9. Zupan prepared maps for Bowers testimony at the hearing. Zupan Deposition, p. 20, lines 9-13.

In all of the contact Will Roberts had with regard to the ORS review of Murphy's county of residence, no one ever spoke to him negatively about Murphy, nor that she was being removed from the Board based upon residency in order to "shut her up." Roberts Deposition, p. 76, lines 12-22. Nor had Alan-Jon Zupan heard any negative comments about Murphy from his office. Zupan Deposition p. 53, lines 4-13. Roberts' personal views on Murphy's removal from office were that he was "[a] little upset," because he lived in Murphy's district, had voted for her, and felt that the School Board's action rendered his vote meaningless. Roberts Deposition, p. 75, lines 13-21. Yet he did not speak out or try to influence the School Board "[b]ecause she was found to be in the incorrect county and should never have been able to run for that seat in the first place." *Id.*, p. 75, line 22 to p. 76, line 4. *See also, id.*, p. 88, line 23 to p. 89, line 13 (no one tried to influence Roberts or his office to do anything other than find the truth, he always cooperated with Murphy and provided her with all information she asked for, and he provided only truthful and correct information to whomever he spoke with on the Murphy case.).

Murphy hired a professional surveyor, Ronnie L. Tyler, to assist her as her "expert" consultant and witness incident to this litigation. Deposition of Ronnie L. Tyler (January 21, 2016)(hereinafter "Tyler Deposition"), p. 18, lines 17-22; p. 20, line 5 to p. 22, line 24. While Mr. Tyler's testimony contested the methodology used by ORS in arriving at the determination that Kim Murphy was a resident of Lexington County and not Richland County, he admitted that he could not contest the conclusion that Kim Murphy's residence

was in Lexington County, and that he had no opinion as to whether Murphy does or does not live in Lexington County. Tyler Deposition, p. 98, line 25 to p. 99, line 20; p.167, line 17 to p. 168, line 5. *See also, id.*, p. 103, line 20 to p. 104, line 1 (“I haven’t been asked to render an opinion as to which county she’s actually located in.”).

To the present date, for purposes of this lawsuit, the only determination made by any individual or entity as to Kim Murphy’s county of residence has been that she is a resident of the County of Lexington.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56, SCRPC. *Companion Property and Casualty Ins. Co. v. Airborne Express, Inc.*, 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006), citing *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary Judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* See also, *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998)(In determining whether any triable issue of fact exists as will preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party); *Companion Property*, 369 S.C. at 390-391, 631 S.E.2d at 916 ([appellate court's] standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom).

Summary Judgment is appropriate and should be granted 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 judgment as a matter of law. *See, e.g., Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 329, 673 S.E.2d 801, 802 (2009); *Lanier Construction Company, Inc. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 278, 681 S.E.2d 909, 911 (Ct. App. 2009). Summary Judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *Lanier*, 384 S.C. at 278, 681 S.E.2d at 911. 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 favorable to the nonmoving party. *Hancock*, 381 S.C. at 329-330, 673 S.E.2d at 802.

The moving party in a summary judgment motion need not produce evidence, but simply can argue that there is an absence of evidence by which the non-movant can prove her case. *Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390, 393 (4th Cir. 1994). *See also, Celotex Corporation v. Catrett*, 477 U.S. 317, 325 (1986) (The burden on the non-moving party may be discharged by “showing”—that is, by pointing out to the court—that there is an absence of evidence to support the non-moving party’s case).

In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803. However, under South Carolina case law, the meaning of the “scintilla of evidence rule” is not that, if

there is any relevant testimony, amounting to a scintilla, it must be left to the jury to determine its force and effect; rather, “[t]he meaning of the rule is that there must be some *evidence* arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion. It does not authorize the admission of speculative, theoretical, and hypothetical views.” *Crawford v. Town of Winnsboro*, 205 S.C. 72, ___, 30 S.E.2d 841, 849 (1944) (emphasis in original). *Cited with approval* in *Radcliffe v. Southern Aviation School*, 209 S.C. 411, 420, 40 S.E.2d 626, 630 (1946). *See also, Radcliffe*, 209 S.C. at 421, 40 S.E.2d at 630 (“[if] it be conceded that there may be deduced by a process of unusual *finesse* of reasoning that there is a scintilla of evidence * * * nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.” (emphasis in original)).

ARGUMENT

THE LOWER COURT PROPERLY FOUND THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT BUT THAT MURPHY HAS FAILED TO PROVIDE EVIDENCE SUPPORTING THE REQUISITE ELEMENTS OF HER CIVIL CONSPIRACY CLAIM AGAINST BOWERS.

After having considered the material submitted by Murphy in opposition to Bowers' Motion for Summary Judgment, the Lower Court found and concluded that there was no genuine issue of material fact but that Bowers had no prior relationship or alliance with Robert Gantt for purposes of conspiring against Murphy, and that there was no evidence of prior conflict or animus between Bowers and Murphy that could reasonably be interpreted as leading to an intent to harm Murphy. Order Granting Defendants' Motions for Summary Judgment (April 8, 2016), p. 7. The Court further found and concluded that there was no evidence that Murphy had suffered special damages attributed to a civil conspiracy. *Id.* Finally, the Court found and concluded from the un-contradicted deposition testimony of Will Roberts and Alan-Jon Zupan, both of whom worked for Bowers' agency and actually did the work resulting in the finding that Murphy resided in Lexington County, which finding was only published by Bowers as the Director of ORS,

that Roberts and Zupan did their work correctly, with no one instructing them to do anything in the process improperly or with a particular end result in mind. *Id.*

Based upon those findings, the Lower Court granted Bobby Bowers' Motion for Summary Judgment, and dismissed with prejudice Murphy's civil conspiracy claim against him. *Id.*, pp. 7, 17. The granting of Bowers' Motion and the dismissal of the claim against him was proper, and should be affirmed.

A. Civil Conspiracy.

A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the Plaintiff. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). Civil conspiracy consists of three elements: 1) a combination of two or more persons, 2) for the purpose of injuring the Plaintiff, 3) which causes the Plaintiff special damage. *See, e.g., Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006); *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). It is essential that the Plaintiff prove all of these elements in order to recover. *Pye*, 369 S.C. at 567, 633 S.E.2d at 511.

To be actionable, a conspiracy's primary purpose or object must be to injure the Plaintiff. *Benedict College v. National Credit Systems, Inc.*, 400 S.C. 538, 545, 735 S.E.2d 518, 522 (Ct. App. 2012), citing *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct.App.1986); *see also Pye*, 369 S.C. at 567, 633 S.E.2d at 511 (The essential consideration in civil conspiracy is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the Plaintiff). Conspiracy may be inferred from the nature of the

acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances. *Pye*, 369 S.C. at 567, 633 S.E.2d at 511.

The gravamen of the tort of civil conspiracy is the damage resulting to the Plaintiff from an overt act done pursuant to the combination, not the agreement or combination *per se*. *Id.* 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. *Id.*, citing *Vaught v. Waites*, 300 S.C. 201, 387 S.E.2d 91 (Ct. App.1989). *Cf.*, *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009)(If a Plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed).

B. No Evidence of Bowers-Gantt Relationship nor Bowers-Murphy Animus.

Conspiracy may be inferred from the nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances. *Pye*, 369 S.C. at 567, 633 S.E.2d at 511.

Murphy argues that there is “sufficient evidence” to demonstrate that Bobby Bowers and Robert Gantt acted in concert to harm her, using the “relationship” of Bowers and Gantt as her point of departure. Brief of Appellant, pp. 22-27. While Bowers agrees that the “relationships” Bowers did or did not have with Gantt and Murphy are dispositive of the issues and are an appropriate starting point for this Court’s review, Murphy’s reliance on them to support her argument disregards the evidence, as deposition testimony established that Bobby Bowers *knew of* Robert Gantt, but had no close personal or

professional relationship with him; and Bowers only *knew of* Murphy, with no evidence of any animus toward her.

Bowers had served as President of the South Carolina School Boards in 1982, for a one-year term. Bowers Deposition. p. 17, lines 8-17. Bowers had served eight years on the School Board for Lexington County School District No. 1—a different school board from the one Gantt and Murphy would later serve on—serving one year as secretary and the remaining seven years as Chairman. *Id.*, p. 17, line 24 to p. 18, line 13. Bowers testified that, although he recalled Robert Gantt from when Gantt had worked on the Tax Commission, Bowers never had any professional contact with him, had no interaction with Gantt on a personal level, and was not a member of the School Board Association at the same time that Gantt was a member. *Id.*, p. 18, line 14 to p. 19, line 5.

By way of attempting to establish why Bowers would, out of the blue, engage in a conspiracy with a man he barely knew in order to injure Murphy, a woman he neither knew nor had reason to dislike, Murphy proffers anecdotal evidence of difficulties she claims to have had with Gantt and her fellow School Board members—but not Bowers—for four pages, never positing a reason for the malice and animosity that she asks this Court to infer would have motivated Bowers to want to harm her. *See, generally*, Brief of Appellant, pp. 22-25. Bowers testified that, prior to the depositions taken in this lawsuit, he had never met Murphy, had not spoken with her, nor communicated with her in any manner. Bowers Deposition, p. 22, lines 1-5. Other than a passing inquiry from Stewart Mungo mentioning that Murphy might be in the wrong county well before the Richland-Lexington District 5 inquiry, which Mungo never followed up on with a formal request and

Bowers never acted upon, Bowers had no knowledge of Murphy until the Richland-Lexington District 5 request in December, 2012. *Id.*, p. 22, line 6 to p. 23, line 20. Although Bowers testified that he was generally aware of “consternation” with regard to the School Board and Murphy, he testified that no one ever commented to him about it, he had no specific knowledge of any activities going on, he did not attend School Board meetings, he had not watched meeting footage online, and he had not read any meeting minutes. *Id.*, p. 30, line 9 to p. 31, line 15.

Murphy’s own testimony on the subject was oblique, evasive, unfocused, and, as was the boatload of irrelevant material she dumped on the Defendants under the guise of discovery responses, was conspicuously lacking in evidence supporting her claim of a Bowers-Gantt relationship.

Although Murphy claimed that Bowers and Gantt had a prior relationship and had communicated for purposes of the alleged conspiracy, she was able to cite no evidence supporting those claims beyond her own personal beliefs, hearsay remarks from witnesses whom she could not or would not identify, or her own *ex post facto* conclusions derived from actions by the School Board and Gantt. *See, e.g.*, Murphy Deposition 1, p. 47, line 20 to p. 53, line 1; p. 61, line 3 to p. 73, line 22; p. 76, line 17 to p. 79, line 1; p. 87, line 2 to p. 92, line 1; p. 96, line 1 to p. 103, line 13; p. 105, lines 4-14; p. 109, line 15 to p. 118, line 17; Murphy Deposition 2, p. 14, line 2 to p. 30, line 17; p. 48, line 7 to p. 61, line 9; Murphy Deposition 4, p. 56, line 12 to p. 57, line 3. Even in her argument on appeal, Murphy cites no substantive, direct evidence establishing the alleged relationship between Bowers and Gantt, but instead asks this Court to simply infer the relationship because of

the timing of Gantt's formal request to ORS, Gantt's notification to Murphy, and the ORS communications—through Bowers, its Director—to Lexington and Richland Counties. Brief of Appellant, pp. 23-24. *See also, id.*, p. 26 (extending her unsubstantiated Gantt-Bowers relationship premise further, Murphy further mischaracterizes the facts by arguing that a conspiracy can be inferred because “Gantt chose to seek the help from Bowers – *a friend* – rather than file an appeal with the Election Commission.” [emphasis added]).

Getting any evidence or straight testimony from Murphy proved to be a challenge through discovery, as Murphy listed 146 witnesses, few of whom she had contacted about the case, and, based upon summaries by Murphy of their anticipated testimony, even fewer would have impacted on the civil conspiracy claim. *See generally*, Murphy Deposition 2, p. 77, line 21 to p. 169, line 3. She also produced over 9,000 documents and 250 hours of audio and video through discovery, *id.*, p. 169, line 12 to p. 170, line 3, most of which, if anything, dealt with Murphy's grievances with the School Board and had nothing to do with her civil conspiracy claim against Bowers. Murphy's roughly sixteen hours of deposition testimony was an endlessly stupefying exercise in obfuscation by Murphy in failing and refusing to directly answer even the most basic questions, and, if anything, only obscured, rather than clarified, the gravamen of Murphy's civil conspiracy claim. *Cf.*, Murphy Deposition 1, p. 59, line 18 to p. 73, line 22 (in a typical example of her rambling, evasive responses, Murphy answered the question “[w]hat evidence do you have that Bowers himself or one of his employees visited your 16-acre property?”, by spending fourteen deposition pages citing, without specificity, the transcript of a hearing she did not attend “at the advice of my attorney” for evidence she was never able to identify, before

finally admitting that she did not present any evidence in the hearing she did not attend—although still not identifying what evidence she purportedly had).

Murphy eventually admitted that she had no evidence that neither Bowers nor anyone from his office had any communication with Gantt for any purpose other than the boundary dispute. Murphy Deposition 2, p. 65, lines 5-13. She has never established evidence of a relationship between Bowers and Gantt nor a reason for animosity between Bowers and herself that would warrant Bowers wishing to help Gantt or harm Murphy. Even the scintilla of evidence rule provides no refuge for Murphy is seeking to survive summary judgment on the relationship issue, as “[t]he meaning of the rule is that there must be some *evidence* arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion. It does not authorize the admission of speculative, theoretical, and hypothetical views.” *Crawford v. Town of Winnsboro*, 205 S.C. 72, ___, 30 S.E.2d 841, 849 (1944) (emphasis in original). *Cited with approval in Radcliffe v. Southern Aviation School*, 209 S.C. 411, 420, 40 S.E.2d 626, 630 (1946). *See also, Radcliffe*, 209 S.C. at 421, 40 S.E.2d at 630 (“[if] it be conceded that there may be deduced by a process of unusual *finesse* of reasoning that there is a scintilla of evidence * * * nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.” (emphasis in original)).

With no evidence supporting a Bower-Gantt relationship or a reason for a Bowers-Murphy animus that would reasonably infer a conspiracy, Murphy's attempted inference fails.

C. No Evidence of Special Damages.

Murphy's testimony as to damages she claimed was as oblique, diffuse, and equivocating as the rest of her testimony, claiming undiagnosed medical and psychiatric conditions she claims were related to stress, without attribution to a specific health care provider, Murphy Deposition 1, p. 125, line 6 to p. 131, line 19; nebulous and unquantified "funds ... expended to become elected" by herself and "possibly those who contributed to [her] campaign," and loss of salary for serving on the Board, even though she had chosen not to accept the salary, but might be changing her position, *id.*, p. 134, line 15 to p. 137, line 24; attorney fees, although she appeared to be speaking of fees from a different law suit, *id.*, p. 137, line 25 to p. 139, line 4; a "second car loan" she claimed was incurred for funds for attorney fees, *id.* p. 139, line 12 to p. 142, line 24; a second computer, *id.*, p. 142, line 25 to p. 144, line 9; and "reputational harm," because she claimed she could not seek election in either county. *Id.*, p. 144, lines 10-21. *See also*, Murphy Deposition 3, p. 57, line 8 to p. 65, line 4 (Murphy claiming more stress-related physical and mental maladies, including "computer elbow" that "comes and goes" as a result of having to "work with a mouse for a good bit of time" for discovery in a \$10,000,000 counterclaim against her by the School District in another law suit—p. 63, line 19 to p. 64, line 6).

Murphy's testimony as to damages attributable to the alleged civil conspiracy are no different from and overlap with her damages claimed to have been sustained in the

defamation cause of action in this suit, and in other litigation, and the Lower Court properly concluded that she had not proffered the requisite evidence of special damages proximately caused by civil conspiracy. *Cf., Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009)(If a Plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed).

D. Bowers and his ORS Office acted within the Scope of their Duties.

Murphy testified that she “understood” that Bowers directed his staff “to draw these fictitious lines and attempt to have the counties—county—Richland County remove me from the voter rolls in order to oust [her] from the school board.” Murphy Deposition 2, p. 15, line 21 to p. 16, line 7. That is not what the evidence indicated.

Will Roberts, of Bowers’ ORS Office, testified that the first contact ORS had with regard to Murphy’s residence began in late September-early October, 2012, when, under State Budget Proviso 80A.20 in the 2011-2012 Fiscal Year Budget, ORS was responsible for assisting county voter registration offices to make sure that voters were assigned to the correct districts. Roberts Deposition, p. 14, line 25 to p. 15, line 21. The office was running files according to the budget proviso before the 2012 election, and Murphy’s address was one that got flagged for being in the incorrect district. *Id.*, p. 15, line 22 to p. 16, line 2. Roberts testified that Murphy’s address and one other were flagged by the computer, not by anyone personally. *Id.*, p. 16, lines 17-20; p. 17, lines 7-13. According to the evidence—not Murphy’s beliefs or paranoia-induced misunderstanding—ORS

discovered the residency through the course and scope of its ordinary duties totally unrelated to Murphy or her difficulties with the School Board.

Contrary to Murphy's professed understanding that Bowers directed his staff to draw fictitious lines, Will Roberts testified that he had spoken with Bowers about the matter before meeting with Zupan, and Bowers gave Roberts no direction as to how to proceed forward with the matter. Roberts Deposition, p. 29, lines 3-13. Bowers mentioned neither Murphy's address nor concerns about the address to Roberts. *Id.*, p. 41, lines 11-18. Roberts further testified that, in all of the involvement he had with the ORS review of Murphy's county of residence, no one ever spoke to him negatively about Murphy, nor that she was being removed from the Board based upon residency in order to "shut her up." *Id.*, p. 76, lines 12-22. Nor had Alan-Jon Zupan heard any negative comments about Murphy from his office. Zupan Deposition p. 53, lines 4-13. *See also*, Roberts Deposition, p. 88, line 23 to p. 89, line 13 (no one tried to influence Roberts or his office to do anything other than find the truth, he always cooperated with Murphy and provided her with all information she asked for, and he provided only truthful and correct information to whomever he spoke with on the Murphy case.).

Murphy argues that ORS "did not perform a survey, visit Murphy's property, or examine any physical markers on or around the boundary in dispute." Brief of Appellant, p. 26. Murphy is, again, mistaken. Roberts testified on deposition that he had discussed the matter with the geodetic staff, including Alan-Jon Zupan, who told Roberts that he had previously done field work in that area. Roberts Deposition, p. 26, lines 3-25. Zupan testified that in 1995 he had located the Rocky Ford point in the field. Zupan Deposition,

p. 27, line 6 to p. 28, line 19. *See also*, Statement of Facts, *supra*, pp. 8-10 (setting out in more detail, with deposition cites, what Roberts, Zupan, and the ORS Office did in fulfilling the course and scope of their official duties).

With regard to Murphy's argument questioning the methodology followed by the ORS office, first, this is not a negligence claim, but a civil conspiracy claim; and the methodology or standard of care or what ORD should have done argument is less an appropriate in this Murphy lawsuit and appeal than it might be—or should have been—in another appeal she has currently pending in which Bobby Bowers is not involved. Notwithstanding that, Murphy identified an "expert" through discovery—Ronnie L. Tyler, a professional land surveyor with thirty years experience, but with no experience performing geodetic surveys, whose expertise in testifying as to the methodology of geodetic surveying was questioned by Bowers' attorneys at the outset of his deposition. *See*, Tyler Deposition, p. 6, lines 11-20, p. 8, line 13 to 6, p. 13, line 20 to p. 14, line 8. While Mr. Tyler's testimony contested the methodology of the determination by the Office of Research and Statistics, he admitted that he could not contest the conclusion that Kim Murphy's residence was in Lexington County, and that he had no opinion as to whether Murphy does or does not live in Lexington County. *Id.*, p. 98, line 25 to p. 99, line 20; p.167, line 17 to p. 168, line 5. *See also*, *id.*, p. 103, line 20 to p. 104, line 1 ("I haven't been asked to render an opinion as to which county she's actually located in.").

So Murphy's expert, regardless of his limited credentials to provide an opinion in this particular field, criticized the methodology used by the ORS office, but had nothing to offer with regard to whether the conclusion of the method used was correct or incorrect,

because he said Murphy did not ask him to determine in which county she was actually residing. Two emails from Murphy to her “expert” provide insight into why she did not ask Tyler for that determination—nor for any definitive measurement or survey.

In an October 22, 2015 email to Tyler, Murphy clearly asked Tyler to modify his initial report to better support her conspiracy cause of action. *See*, Exhibit 5 to Tyler Deposition. She also conceded the possibility that “a real boundary survey” could conclusively put her in Lexington County. *Id.*, p. 3 of 4. In a subsequent email to Tyler December 7, 2015 discussing whether or not Tyler should actually measure a particular stake in the ground for purposes of rebutting the ORS finding, Murphy considered not measuring it, acknowledging that “it’s very possible that using the iron stake as the other end of the line, I believe I would be in Lexington County.” *See*, Tyler Deposition, p. 76, lines 11-19, Exhibit 4 to Deposition, p. 2. Tyler testified that he did “look” at the stake, but did not measure it. Tyler Deposition, p. 75, lines 5-17. *See also, id.*, p. 73, line 7 to p. 77, line 1 (for fuller discussion of Exhibit 4 email and the stake discussed).

CONCLUSION.

There is no genuine issue of material fact but that Kim Murphy failed to provide evidence supporting the requisite elements of her civil conspiracy claim against Bobby Bowers, and the Lower Court properly granted Bowers' Motion for Summary Judgment, dismissing Murphy's claims with prejudice. For the foregoing reasons argued in this Brief, and to be argued at oral argument, if afforded, that grant of summary judgment should be affirmed.

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Lexington, South Carolina
December 22, 2016.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

Doyet A. Early, III, Circuit Court Judge

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

Kim Murphy.....Appellant,

v.

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

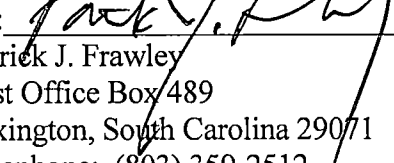
of whom

Bobby Merle Bowers and Robert Gantt are.....Respondents.

CERTIFICATE OF COUNSEL

I hereby certify that this Initial Brief of Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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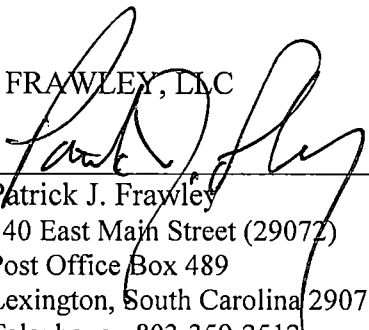
Bobby Merle Bowers and Robert Gantt are..... Respondents.

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Respondent Bowers and Respondent Bowers' Designation of Matter to be Included in the Record on Appeal** on the Appellant, by depositing a copy of each in the United States Mail, postage prepaid, on the 22nd day of December, 2016, addressed to her attorney of record, J. Lewis Cromer, of J. LEWIS CROMER & ASSOCIATES, LLC, PO Box 11675, Columbia SC 29211, and on the Respondent Gantt, addressed to his attorney of record, Michael H. Montgomery, Esquire, MONTGOMERY WILLARD, LLC, PO Box 1186, Columbia SC 29211-1886.

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December 22, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia SC 29201

RE: *Kim Murphy, Appellant, v. Richland-Lexington School District 5 Board of Trustees, Bobby Merle Bowers and Robert Gantt, Defendants, of whom Bobby Merle Bowers and Robert Gantt are the Respondents;*
Appellate Case No. 2016-001198; SCIRF Claim No. 67741; Our File No. 25712.34.

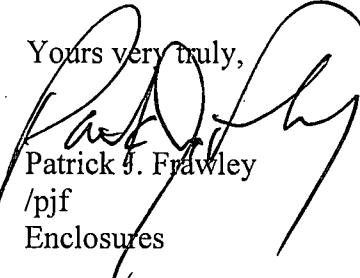
Dear Ms. Kitchings:

Enclosed, please find the original and one copy each of the Initial Brief of Respondent Bowers, Respondent's Designation of Matter to be Included in the Record on Appeal, and Proof of Service for the referenced appeal. Please file the originals, and return the copies to me, clocked in, in the enclosed self-addressed, stamped envelope.

By copy of this letter to the attorneys for the Appellant and the other Respondent Robert Gantt, I am serving them with copies of the enclosed documents as well.

Thank you in advance for your help.

Yours very truly,


Patrick J. Frawley

/pjf

Enclosures

cc: Michael H. Montgomery, Esquire
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The Honorable Jenny A. Kitchings
Clerk of Court

RE: *Kim Murphy, Appellant, v. Richland-Lexington School District 5 Board of Trustees,
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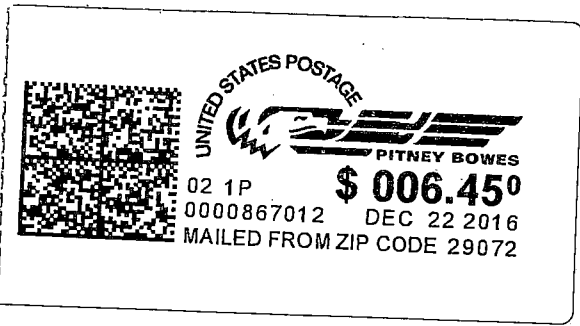
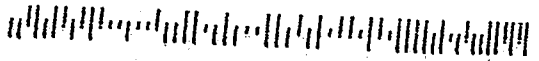
December 22, 2016

Page 2

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