THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

FEB 15 2017

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 Murphy...Appellant,

v.

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

FINAL BRIEF OF APPELLANT

J. Lewis Cromer, Esquire (#1470)
Cromer Babb Porter & Hicks, L.L.C.
1418 Laurel Street, Suite A
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS II
TABLE OF AUTHORITIES III
STATEMENT OF THE ISSUES ON APPEAL 1
STATEMENT OF THE CASE 2
FACTS 2
STANDARD OF REVIEW 18
ARGUMENT 19
I. MURPHY HAS AN ACTIONABLE CIVIL CONSPIRACY CLAIM AGAINST BOWERS AND GANTT. 19
A. There is sufficient evidence to demonstrate Bowers and Gantt acted in concert to harm Murphy. 20
B. There is sufficient evidence to demonstrate that Bowers and Gantt caused Appellant special damages. 25
II. THERE IS SUFFICIENT EVIDENCE THAT GANTT ACTED WITH MALICE, PER SE DEFAMED MURPHY, AND HIS STATEMENTS WERE NOT PRIVILEGED 28
A. Gantt acted with malice. 28
B. Gantt per se defamed Appellant. 30
C. Gantt's statements were not privileged. 34
CONCLUSION 39

TABLE OF AUTHORITIES

Cases

Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986) 35
Allegro, Inc. v. Scully, No. 2014-002055, 2016 WL 4474336 (S.C. Aug. 24, 2016) 25
Anderson v. Augusta Chronicle, 365 S.C. 589, 619 S.E.2d 428 (2005) 28
Anderson v. Southern Ry. Co., 224 S.C. 65, 77 S.E.2d 350 (1953) 38
Argoe v. Three Rivers Behavioral Health, L.L.C., 392 S.C. 462, 710 S.E.2d 67 (2011) 34
Austin v. Torrington Co., 810 F.2d 416 (4th Cir. 1987) 20
Bell v. Bank of Abbeville, 208 S.C. 490, 38 S.E.2d 641 (1946) 35
Benedict College v. Nat'l Credit Sys., Inc., 400 S.C. 538, 735 S.E.2d 518 (2012) 26
Conwell v. Spur Oil Co., 240 S.C. 170, 125 S.E.2d 270 (1962) 34
Costas v Florence Printing Co., 237 S.C. 655, 118 S.E.2d 696 (1961) 30
Crowell v. Herring, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990) 38
Englert, Inc. v. LeafGaurd USA, Inc., 377 S.C. 129, 659 S.E.2d 496 (2008) 19
Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 629 S.E.2d 653 (2006) 28
Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987) 30
Fountain v. First Reliance Bank, 398 S.C. 434, 730 S.E.2d 305 (2012) 28
Gilmore v. Ivey, 290 S.C. 53, 348 S.E.d 180 (Ct. App. 1986) 19
Grady v. Spartanburg Sch. Dist. Seven et. al., No. 7:13-CV-02020-GRA, 2014 WL 1159406 (D.S.C. Mar. 21, 2014) 27
Hackworth v. Graywood at Hammett, LLC, 358 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009) 25
Hancock v. Mid-South Management Co. Inc., 381 S.C. 326, 673 S.E.2d 801 (2009) 19
Holtzscheiter v. Thomson Newspapers, 332 S.C. 502, 506 S.E.2d 497 (1998) 30
Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987) 20
Mains v. K-Mart Corp., 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988) 30
McBride v. Sch. Dist. of Greenville Cty., 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010) 31
McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 626 S.E.2d 884 (2006) 19
Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007) 20
New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct 710 (1964) 29
Parker v. Evening Post Publishing Comp., 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994) 30
Parrish v. Allison, 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007) 33
Pridgen v. Ward, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010) 20
Richardson v. McGill, 273 S.C. 142, 255 S.E.2d 341 (1979) 38
SCNB v. Southern Polymers, Inc., 313 S.C. 246, 437 S.E.2d 148 (Ct. App. 1993) 19
Sea Cove Development, LLC v. Harbourside Community Bank, 387 S.C. 95, 691 S.E.2d 158 (2010) 18
Singletary v. The Aetna Casualty & Surety Co., 316 S.C. 199, 447 S.E.2d 869 (Ct. App. 1994). 18
Smith v Bradstreet Co. 63 S.C. 525, 41 S.E. 763 (1902) 30
Southern Glass & Plastics v. Duke, 367 S.C. 421, 626 S.E.2d 19 (Ct. App. 2005) 38
Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999) 34
Tharp v. Media Gen., Inc., 987 F.Supp. 2d 673 (D.S.C. 2013) 30
Timmons v. News & Press, Inc., 232 S.C. 639, 103 S.E.2d 277 (1958). 30
Tyler v. Macks Stores of South Carolina, 275 S.C. 456, 272 S.E.2d 633 (1980) 30
Vaught v. Waites, 300 S.C. 201, 387 S.E.3d 91 (Ct. App. 1989) 20
Woodward v. S.C. Farm Bureau Ins. Co., 277 S.C. 29, 282 S.E.2d 599 (1981) 33

Statutes

S.C. Code Ann. § 27-2-105 .... 17, 18
S.C. Code Ann. § 41-27-560 38
S.C. Code Ann. § 7-1-25 21
S.C. Code Ann. § 7-5-230 .... 20, 25

Other Authorities

Rule 56(c), SCRCP 18
Rule 59(e), SCRCP 2

STATEMENT OF THE ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN FINDING THAT MURPHY DID NOT HAVE A TRIABLE CIVIL CONSPIRACY CLAIM AGAINST BOWERS AND GANTT?

II. WHETHER THE LOWER COURT ERRED IN GRANTTING SUMMARY JUDGMENT ON MURPHY'S DEFAMATION CLAIM AGAINST GANTT ON THE BASIS OF MALICE, PER SE DEFAMATION, AND ON THE BASIS OF PRIVILEGE?

STATEMENT OF THE CASE

Appellant, Kim Murphy, filed this action on July 28, 2014 alleging civil conspiracy against Respondent Bobby Bowers ("Bowers") and Robert Gantt ("Gantt"), as well as defamation against Gantt. (R. pp. 49-52, ¶¶ 19-31). Murphy is a former Board Trustee for Richland-Lexington School District 5 ("Board"). (R. p. 45, ¶ 1). Gantt served as Chairman and later Vice-Chairman of the Board at all times relevant to this matter. (R. p. 45, ¶ 3). Bowers served as the Director of Budget and Control Board's Office of Research and Statistics at all times relevant to this matter. (R. p. 45, ¶ 4).

Bowers filed a Motion to Dismiss for failure to state a claim and a Motion for Summary Judgment on December 31, 2015, requesting the court to dismiss Murphy's claim for civil conspiracy. (R. p. 246). Gantt filed a Motion for Summary Judgment on January 8, 2016, seeking summary judgment as to both the civil conspiracy and defamation claims. (R. p. 246) Separate counsel for Gantt filed a separate Motion for Summary Judgment on January 20, 2016, which addressed only the defamation claim. (R. p. 246) Murphy opposed those motions. (R. p. 246) Those motions were heard by the Honorable Doyet A. Early, III on February 29, 2016. (R. p. 1). Judge Early filed an order on April 8, 2016 granting summary judgment on both claims. (R. p. 1). Bowers' Motion to Dismiss was not ruled on, but merged into his Motion for Summary Judgement. (R. p. 1) Murphy next filed a Rule 59(e), SCRCP Motion to Reconsider on April 26, 2016; that motion was denied on May 31, 2016. (R. pp. 34; 192-217). The Board was dismissed from this appeal by mutual stipulation of dismissal.

FACTS

Murphy is a former Board Trustee. (R. p. 339). Murphy and her husband have three children, all of whom went to public school in Richland-Lexington School District 5 ("District").

(R. p. 892). Murphy was active in District related activities, attended Board meetings, and kept well-informed of the issues facing the District. (R. p. 1833). Murphy continues to attend Board meetings. (R. p. 345). When she built her home in 2001, located on Old Laurel Lane, in Chapin, South Carolina, Murphy registered to vote and began paying taxes in Richland County. (R. pp. 377-91).

a. Murphy's 2004 Board Campaign

Murphy ran for election as a Richland County candidate to the Board in 2004. (R. p. 1054). Gantt ran against Murphy during this election. (R. p. 1054). Stewart Mungo ("Mungo"), a supporter of Gantt, told Gantt during the campaign that he believed Murphy lived in Lexington County. (R. p. 1054) However, Gantt did not look into Mungo's claim at the time. (R. pp. 1835, 1853). Gantt won the election, and was subsequently re-elected in 2008. (R. p. 1054).

b. Murphy Engaged in Litigation Concerning Construction at Chapin High School

Murphy was active in District issues, particularly a large renovation project at Chapin High School ("CHS"). (R. p. 352). The District approved a bond referendum to raise taxpayer funding for the costly construction needs of the project. (R. p. 1840). Murphy had concerns regarding the environmental impact of the construction on the community and a stream that ran through her property. (R. p. 353). As a result, Murphy filed a legal action to halt a portion of the renovation and force the District to use a more environmentally-friendly solution. (R. p. 353) That litigation began in 2010. (R. p. 353)

A non-profit group, Maggie Stroud and D5 Citizens Ensuring the Implementation of the Referendum, Inc. ("Maggie Stroud"), which included Board Member Jondy Lovelace, formed and filed a lawsuit against Murphy for monetary damages as a result of Murphy's CHS litigation. (R. pp. 351, 645). The Board requested during the September 12, 2011 meeting "that the South

Carolina School Board Association review a TEMPORARY RESTRAINING ORDER AGAINST DEFENDANT MURPHY obtained by [Maggie Stroud] and consider providing assistance to [Maggie Stroud].[1]" (R. pp. 1736-37).

c. Murphy Successfully Runs for a Board Seat in 2010 While CHS Litigation is Pending

Murphy's residence was not an issue during her 2010 campaign. (R. p. 1838). The Richland County Election Commission approved Murphy to run for her seat. (R. p. 1075). Murphy was elected to the Board, despite her ongoing CHS case appeal, and began her four-year term of office in the final quarter of 2010. (R. p. 1837).

d. Murphy was Ostracized by Gantt and Other Board Members Upon Being Elected and Throughout Her Tenure

Gantt and Murphy had their differences during her tenure; the two often opposed one another on issues and engaged in arguments. (R. p. 1055). Murphy sent a letter to Gantt and her Board colleagues in December 2010 regarding her concerns about the District, funding, and student affairs. (R. pp. 1746-54).

Murphy's Board colleagues publically expressed a general frustration with her because of her outspoken views, and Gantt sanctioned her in meetings when she spoke out about various issues. (R. pp. 1062, 1868). Attendees became combative in several Board meetings, especially towards Murphy. (R. p. 1868) Community members reached out to the Board as a whole, and to members individually, to complain that Murphy was being targeted and singled out for her views and statements. (R. pp. 1742-44). Specifically, a citizen wrote an email to Ed White ("White"), a Board member, on June 14, 2011, which stated:

> My wife and I recently moved to Irmo; we attended last night's school board meeting in an effort to become more familiar with

[1]Citing quotation as it was written, including emphasis.

> our new community. We were appalled by the lack of sensitivity shown to [Murphy] during the meeting.
>
> It was most appalling that Mr. Gantt never once cited you for twisting the truth even when you manufactured numbers to make a case that [Murphy] was squandering taxpayer money when she came forward with a concern about location of practice fields.
>
> It was most appalling to listen to your diatribe of being appalled that [Murphy] had released a taped segment of a board meeting to the public – you shrieked about the nerve of her to inform and enlighten members of the community! When a proposal was made to tape future meetings for the purpose of increased community involvement six [of the seven] members of the board voted it down – that was appalling.

(R. p. 1742). This behavior continued to be directed towards Murphy by Gantt and other Board members. (*See* R. pp. 1717-25, 1738-40). Board members singled out Murphy regarding her CHS lawsuit by adding statements to Board minutes that bullied, belittled, and demeaned her for her attempts to ensure that the District considered all cost efficient and environmentally friendly plans for construction. (R. pp. 1717-25). Two Board members stated that Murphy's behavior "[was] shameful and disrespectful" and accused her of lying. (R. p. 1740). Gantt permitted students to personally and viciously attack Murphy during Board meetings, which led to Murphy feeling ostracized, attacked, threatened, and fearful of harm. (R. p. 1741).

Board members, including Gantt, voted on resolutions to prevent Board members from initiating legal actions against the District during the course of Murphy's CHS lawsuit. (R. pp. 1717-25). The Board posted its public condemnations of Murphy's concerns on the District's website, along with documents relating to the CHS litigation, including portions of Murphy's deposition, mediation offers, restraining orders, and other information, but excluded materials that would support Murphy's position. (*See* R. pp. 1787-89). Gantt testified that he knew that deposition testimony from the CHS litigation was posted to the District's website. (R. p. 1056).

This behavior continued throughout the course of Murphy's CHS litigation, including Board members publically complaining about the amount of alleged legal fees Murphy's case was costing the District. (*See* R. pp. 1712-25, 1787-88).

The District posted a message on an elementary school marquee at the conclusion of the CHS litigation that read, "District wins lawsuit." (R. p. 1056). Murphy and others throughout the community reasonably believed the marquee was about her. (R. pp. 887-88). Gantt testified that he is not aware of any other lawsuits or similar announcements posted on school marquees like the one referencing the CHS litigation involving Murphy. (R. p. 1056).

This behavior further escalated when other Board members, including Gantt, publically supported, called upon other agencies to support, and became involved with Maggie Stroud, Murphy's primary opponent in interest in the CHS litigation. (R. pp. 1736-37).

e. **Murphy's Home Residency Reappears on the Board Radar with Gantt**

The next election cycle after Murphy was elected to the Board occurred in 2012, where Gantt ran for re-election and was successful. (R. p. 1845). Gantt testified that the issue of Murphy's residence was brought to his attention, for a second time, in the fall of 2012, and Gantt then looked into the issue. (R. p. 1845)

f. **Gantt and Bowers's Testimony[2]**

1. **Gantt's Testimony Involving Murphy's County of Residence**

Gantt testified that Bowers, a South Carolina Budget and Control Board ("SCB&CB") employee, informed him, on or around October 2012, that an unidentified person informed Bowers that Murphy lived in Lexington County. (R. pp. 1845-46). Bowers did not discuss any

[2]Although sworn testimony reveals that Gantt and Bowers communicated prior to any official inquiries being initiated regarding Murphy's residence, the two witnesses have conflicting stories about whether Gantt or Bowers began the sequence of communications regarding Murphy's residency.

basis for stating that Murphy lived in Lexington County or his source of information during this conversation with Gantt. (R. p. 1057).

Gantt visited Bowers's office approximately a week to ten days after speaking with Bowers to speak with him directly about Murphy's residence, but Bowers was not at the office during that time so Gantt spoke with Will Roberts ("Roberts"), a SCB&CB employee, who reported directly to Bowers. (R. pp. 1057, 1847).

Gantt immediately contacted attorney Ken Childs ("Childs") after speaking with Roberts, legal counsel for the District, to discuss his conversation with Bowers and his brief meeting with Roberts. (R. pp. 1847-48). They scheduled a meeting between Gantt, Bowers, Childs, Beth H. Watson ("Watson") (another Board member), and other attorneys from Childs's law firm. (R. p. 1849).

The meeting occurred approximately a week after Gantt had been re-elected. (R. p. 1849). During the meeting, the participants reviewed several detailed maps that showed the location of Murphy's residence on Old Laurel Lane in Chapin and discussed the location of that residence in relation to the Richland/Lexington County line. (R. p. 1849) Gantt was advised during the meeting that if he wanted to move forward into investigating the location of Murphy's residence, the District would have to make a formal request to Bowers. (R. pp. 1058, 1850). Childs drafted several formal requests for Gantt to sign and sent drafts of the same to Bowers's office for approval before submitting the formal request in December 2012. (R. pp. 1066, 1759-60). Gantt did not inform Murphy about the meeting or that he made the formal request, and she did not learn about any of this information until the January 2013 Board meeting. (R. p. 1857).

2. Bowers's Testimony Involving Murphy's County of Residence

Bowers testified that he initially learned from Stewart Mungo that there could be an issue regarding the county of Murphy's residence years before these events. (R. p. 1099). Bowers testified he later received a call from Gantt about the same issue involving the location of Murphy's home. (R. pp. 1105-07). Gantt told Bowers during this phone conversation that he wanted Bowers to investigate the location of Murphy's residence, and Bowers agreed he would proceed if Gantt made a formal request. (R. p. 1105).

Childs drafted a letter on Gantt's behalf after Gantt's phone conversation with Bowers and sent it to Bowers for review before formally submitting it to Bowers's office to initiate the request. (R. pp. 1759-60). Bowers testified that he did not meet with Gantt or anyone from the District before giving directives to his employees, but Roberts and Gantt testified that they both met with Bowers prior to Gantt making the formal, written request. (R. pp. 1059, 1109, 1204).

g. SCB&CB Investigation into Murphy's County of Residence

Roberts and SCB&CB first experienced dealings with Murphy's residency in September or October of 2012. (R. p. 1181). Roberts served as the State Political Cartographer for SCB&CB and was responsible for assisting the county voter registration offices to ensure that voters are assigned to the correct districts. (R. pp. 1175, 1182). SCB&CB flagged Murphy's residence, along with several other properties, as being in the incorrect county during a routine check in September or October of 2012. (R. p. 1182). Roberts called Lexington County's voter registration office to discuss these properties after learning this information, but he did not call Richland County. (R. p. 1183).

Roberts met with Alan Jon Zupan ("Zupan") for about thirty minutes to discuss maps generated by Zupan and the staff in GIS on October 16, 2012. (R. p. 1194). Zupan worked in the

geodetic survey section ("GIS") of SCB&CB. (R. pp. 1468-69). Roberts and Zupan discussed the location of Rocky Ford, a point delineated by statute to be connected to the Richland/Lexington County line (which has been in dispute for years), situated near Murphy's property on Old Laurel Lane in Chapin. (R. pp. 1194, 1706-08). Roberts learned that Zupan located Rocky Ford years prior[3] by using a global position system ("GPS") to obtain the longitude and latitude of the ford. (R. p. 1194). SCB&CB did not take any further action with regards to Murphy's property until receiving Gantt's formal request to Bowers. (R. pp. 1204-08).

Bowers directed his staff, including Roberts and Zupan, to investigate Gantt's inquiry after receiving the formal inquiry from Gantt on December, 20, 2012. (R. p. 1119). Roberts reviewed official house and senate district maps along with United States Census Bureau County Boundary data to try to determine Murphy's county of residence. (R. p. 1209). Roberts also reviewed the PL 94-171 database, which is used for official redistricting in South Carolina. (R. p. 1211). Roberts did not review any other information, and he did not visit Murphy's property. (R. pp. 1212-14). Roberts and Zupan then met again to discuss Murphy's property, and Roberts informed Zupan that discrepancies existed between the information that Roberts reviewed and the information from the United States Census Bureau. (R. p. 1475). Roberts also testified that the precinct lines, tax lines, and county lines did not match for Richland and Lexington Counties. (R. p. 1252; *see also* R. p. 1820).

Roberts and Zupan then began co-drafting a letter for Bowers to send to Gantt that outlined the sources of the information that were used to make a determination as to the county location of Murphy's residence. (R. p. 1217). SCB&CB did not conduct any further research,

[3]Zupan along with Sid Miller ("Miller") visited the purported location of Rocky Ford in 1995 and learned, after speaking to two different property owners in the area that there were two fords in the general vicinity of Rocky Ford. (R. pp. 1486-87). Zupan ultimately concluded that the northern ford was Rocky Ford; he revisited the site prior to the 2014 hearing before a referee to confirm his findings from 1995 using GPS. (R. p. 1507).

other than Bowers's letter to Gantt dated January 11, 2013. (R. pp. 1119-21). Bowers felt that a survey was unnecessary[4] and did not visit Murphy's property himself. (R. pp. 1119-21) The only land survey that was completed as it relates to Murphy's residence was a survey conducted by Lucius Cobb ("Cobb") done many years before, which indicates that Murphy's home is in Richland County. (R. p. 1481).

Bowers cited to three sources in his letter to Gantt that were used by his office to determine that Murphy lives in Lexington County: (1) information from the U.S. Census Bureau, (2) information from precinct maps, and (3) the maps authored by Zupan from GIS. (R. pp. 1756-57). Zupan testified that the United States Census Bureau and precinct information could not stand alone to support the finding that Murphy's home is located in Lexington County and that he had to rely upon his own maps and GIS information to determine the location of Murphy's residence. (R. pp. 1511-12).

Zupan testified that two of the maps he generated to show Murphy's county of residence had two inconsistent lines, and they did not match.[5] (R. pp. 1518, 1819-20). Zupan testified that as it related to his work regarding the inquiry into Murphy's county of residence, he only used the old statutory description to find the appropriate bearings and shot the bearings from his determined Rocky Ford location allegedly located in 1995 because he did not have the time to do the additional work that would have been required due to his involvement with the North

[4]John Cloyd ("Cloyd"), former Tax Assessor for Richland County, testified that his office was "continuously hav[ing] trouble where the darn thing [Rocky Creek] was. And one of our requests to the Geodetic Survey was, boy, when you get this Rocky Creek thing done, don't stop." (R. pp. 1707-08, 1761-64). Cloyd also discussed that the Rocky Ford boundary was being studied in 2013 but was not a priority for the geodetic surveyors because they were working on the Jocassee Gorge boundary. Gantt knew there was a boundary issue near or around Murphy's property and had previously worked with maps, according to Cloyd's testimony. (R. pp. 1704-05). Cloyd also testified that Murphy is the only public official he knew of being removed from her elected seat mid-term. (R. pp. 1709-11).
[5]The issue of Zupan's maps containing inconsistent lines becomes crucial when one of the maps is later used as evidence in a hearing before a referee as it relates to Murphy's residence; this is discussed *infra*.

Carolina/South Carolina boundary dispute – another project he was currently working on. (R. pp. 1472-73).

Gantt met with Bowers days prior to receiving Bowers's letter dated January 11, 2013, claiming that Murphy is a resident of Lexington County. (R. p. 1110). Gantt received Bowers's letter shortly thereafter. (R. p. 1059).

Roberts's office dealt with similar boundary issues in the past, specifically including one line dispute between Jasper and Beaufort Counties. (R. p. 1198). Roberts testified that he contacted Zupan when dealing with the Jasper-Beaufort issue, and Zupan informed him that the process to resolve the dispute would require him to make a site visit and perform background research. (R. p. 1133). None of these steps were followed during the investigation into Murphy's residence. (R. p. 1133)

h. Expert Opinion on Bowers's Investigation

Murphy hired an expert, Ronnie L. Tyler ("Tyler"), to review and provide an opinion on the methods and procedures that Bowers and his office used. (R. pp. 1790-1813). Tyler is a professional land surveyor, land boundary surveyor, and forensic surveyor. (R. pp. 1790-1813) Tyler also understands geodetic surveying. (R. pp. 1814-18). Tyler provided a detailed report after reviewing Bowers's January 11, 2013 letter to Gantt, Zupan's maps that were used in the hearing before the referee, plats, surveys, and other documents. (R. pp. 1790-1813).

Specifically, Tyler made the following findings as part of his report:

> The maps, by the South Carolina Geodetic Survey, presented at the Hearing of February 15, 2013, . . . are not plats of survey or maps of survey and do not report the accurate location of the existing Richland and Lexington County boundary . . . .
>
> The azimuths reported in the hearing as being for the boundaries from Rocky Ford are not the same bearings that are reported for these boundaries in the Code of Laws and is not the same bearing

> reported on the old plat of survey that created the Richland and Lexington County boundary north from the point at Rocky Ford.
>
> The South Carolina Geodetic Survey division of the South Carolina Budget and Control Board's Division of Research and Statistics had only the authority to assist counties in clarifying and determining the location of county boundaries. The SCGS findings were not binding on the counties as the SCGS did not have any authority to enforce the SCGS's locations of the county's boundaries until June 9, 2014, with the approval into law of the act to amend section 27-2-105, Code of Laws of South Carolina and only then by the procedures specified in that revised code.
>
> The maps by the South Carolina Geodetic Survey presented at the Hearing of February 15, 2013 . . . , are misleading in that there is not a statement on the maps listing the source of the data and there is not any statement on the maps that the maps do not represent a land survey.

(R. pp. 1790-1813). Tyler also made a site visit to Murphy's property and the surrounding area for the purpose of locating ground evidence relating to the original survey that was taken of the Richland/Lexington County line. (R. pp. 1814-18). Tyler located a stake that Bowers's team should have used when they determined the location of Murphy's residence. (R. pp. 1814-18) Tyler reported as follows:

> After I visited the stake that is located on the Spott property, I compared the location of the physical stake with the Spott property plat, deed and other documentation. As a result of this research, it is my opinion that the stake is at the point shown on the Richland County GIS system as the southwest end corner of the county boundary that passes through the Murphy's property. As a surveyor, the stake on the Spott property is ground evidence that should be considered in the resurvey of the county boundary. It is the normal standard of care for a surveyor who is doing a retracement resurvey for an existing boundary to research and investigate ground evidence and markers on record surveys relating to the boundary being surveyed. In the location of the Richland and Lexington county boundaries that were presented on the maps in the hearing . . . ; Mr. Miller nor Mr. Bowers reported that any property surveys of record had been researched or considered.

(R. pp. 1814-18) Ultimately, Tyler concluded the following as it concerned Murphy's property:

> I believe when it concerned Mrs. Murphy's property, the standards and measurements used by Mr. Bowers' team did not meet the standard of care that is required of a surveyor, they did not locate the true retracement of the point at Rocky Ford or the location of the original survey boundary for the Richland and Lexington county lines.

(R. pp. 1790-1813). Tyler also opined that "the standards and measures used by Mr. Bowers's team were not acceptable." (R. pp. 1814-18). In conclusion, Tyler found:

> that the Rocky Point located by SCGS is not the point on the Richland County and Lexington County boundary that is specified as being at Rocky Ford . . . and the point located by SCGS as Rocky Ford is also not the point surveyed at Rocky Ford on the November 25, 1921 plat of survey . . . .

(R. pp. 1790-1813).

i. The Aftermath Following Bowers's Investigation

Gantt, after receiving Bowers's letter, planned to discuss the letter's findings with the Board at the next Board meeting on January 14, 2013. (R. pp. 1059, 1856). However, there was no mention of Bowers's January 11, 2013 letter in the agenda Gantt circulated to the Board members prior to the meeting. (R. pp. 765-66). The agenda did list a topic of discussion as "receipt of legal advice" for executive session, which was edited to reflect that the Board was going to discuss Act 326 during executive session. (R. pp. 398-99, 765-66, 771-72). Gantt did not make any attempt to contact Murphy between the time he received Bowers's letter and the date of the Board meeting[6]. (R. pp. 1857-58).

A District teacher "stomped" upon an American flag during class prior to the January Board meeting, attracting substantial media attention, so Murphy was under the impression that this incident was what was being considered by the Board that night. (R. pp. 770-71). There were

[6]It merits note that the Board cancelled a pre-scheduled Board wide photography session days before the January meeting. (R. pp. 731-32, 1765-67).

more media professionals present at the Board meeting than usual. (R. p. 1859). Gantt informed the Board of his communications with Bowers during an executive session, dating back to October of 2012, and informed them of the process leading up to Bowers's letter to Gantt on January 11, 2013. (R. p. 1857).

The Board closed executive session and returned to the public meeting before Murphy could respond. (R. p. 699). Gantt made a public statement regarding Bowers's findings after executive session closed. (R. p. 1780). He stated that since Murphy was not a resident of Richland County, she needed to "do the right thing" and resign. (R. p. 1780) Gantt did not provide Murphy with an opportunity to respond to his statement during the public meeting. (R. pp. 1060, 1857).

Murphy sent an e-mail to her constituents after the meeting raising her concerns about the process utilized by Gantt and Bowers to try and oust her from her Board position. (R. pp. 1768-72). This was the first and only opportunity Murphy received to address the public about the residency situation because Gantt would not allow her to speak during the January Board meeting. (R. pp. 698-99). Gantt, who received a copy of Murphy's e-mail, forwarded it to the District attorneys, which in turn, was forwarded to Bowers and Roberts with the message: "enjoy the show." (R. pp. 1768-72).

The Board convened again for a public meeting on January 28, 2013. (R. pp. 1781-85). Gantt made another public statement at that time concerning Murphy's residency and said that he regretted Murphy's comments regarding her position, and reiterated that he regretted any distraction from the District's mission. (R. pp. 1781-85) Murphy did not resign from her Board seat. (R. pp. 1781-85)

Gantt spoke with the District's attorneys when Murphy refused to resign and selected a Circuit Judge to conduct an evidentiary hearing as a referee, which would allow both the District and Murphy to present information in support of their opposing positions. (R. pp. 1060, 1758). Gantt notified Murphy on January 22, 2013 about the evidentiary hearing before the Honorable Judge Cooper on February 15, 2016. (R. p. 1758).

Zupan e-mailed a Lexington County staff member, Jack Maguire ("Maguire"), on January 23, 2013 in preparation for the hearing, and exchanged the same maps he provided to Bowers. (R. p. 1773). Maguire circulated the maps around to mapping personnel and then informed Zupan that Lexington County could not match their own maps with those provided to the County by Zupan. (R. p. 1773) The same maps were used in Bowers's determination letter to Gantt. (R. p. 1773)

j. The February 15, 2013, Evidentiary Hearing

The District called witnesses during the evidentiary hearing, including SCB&CB employees, to substantiate Gantt's position that Murphy was not a resident of Richland County. (R. pp. 112-86). Not all Board members attended. (R. p. 1864). Murphy did not participate, upon the advice of her then counsel.[7] (R. p. 374).

The District called Bowers to testify to information that was provided to him by the GIS staff and Zupan. (R. pp. 112-86). The District presented and introduced into evidence one of two maps generated by Zupan. (R. p. 1819). Zupan later admitted in his deposition for this case that the line on the map that the District presented, marked as Exhibit 10, did not match the line he drew on another map to support his findings that Murphy's residence is located in Lexington County. (R. pp. 1516-29, 1819-20).

[7]Murphy contended and then still contends that there was no legal justification for the hearing and no jurisdiction since the proper method for challenging a candidate or office holder's residency is to appeal to the election commission of the county as set forth below.

Roberts e-mailed Dean Crepes ("Crepes") with Lexington County Voter Registration and Elections and Maguire following the hearing in response to an inquiry from Crepes stating that the county boundary issue, as it related to Murphy, needed to be resolved. (R. pp. 1774-76). Roberts acknowledged in his response that the county boundary in the area surrounding Murphy's residence needed to be surveyed and redrawn, both of which did not occur prior to the hearing and still have not occurred. (R. p. 391). Roberts acknowledged to Crepes that he knew Richland and Lexington Counties did not have to accept the findings of Bowers and SCB&CB that were sent to Gantt on January 11, 2013. (R. pp. 1777-79).

k. The March 19, 2013, District Board Hearing to Remove Murphy

Judge Cooper issued his Findings and Recommendations on March 14, 2013 that found Murphy should be removed from the Board, and within five days, the Board held a hearing where they decided to remove Murphy. (R. pp. 1726-35). Gantt reiterated that he thought Murphy would "do the right thing" and resign. (R. pp. 1726-35) Other Board members continued to chide and scold Murphy for not participating in the February hearing. (R. pp. 188-91). The Board failed to replace Murphy after her removal, leaving her constituents unrepresented despite their promises to replace her.[8] (R. pp. 112-86, 1786).

Murphy named two witnesses from Richland County in the course of discovery for this case, both with experience with elections, voting, and the procedures that are used when determining a citizen's residence for the purpose of voting and paying taxes: Ms. Gloria Wilson ("Wilson"), former Chairman of the Richland County Board of Voter Registration, and Mr. John Cloyd ("Cloyd"), former Tax Assessor for Richland County. (R. pp. 76-111).

[8]Gantt, White, and Watson made public promises that they would fill the vacancy left by Murphy's removal from the Board. (R. p. 1786).

Wilson testified that in her more than twenty years of employment with Richland County, she has not experienced an instance when her office was given a map showing an incorrect location for the Richland County line. (R. p. 1069). Wilson has also not had an experience where a resident was placed in the incorrect county. (R. p. 1071). Wilson stated that her office did not make any mistakes as it concerned the residency issue with Murphy. (R. p. 1068). Murphy was certified to run for the Richland County board seat on the Board in 2004 and again in 2010. (R. pp. 1074-75). The offices of voter registration and the election commission certify a candidate for an election. (R. pp. 1070, 1072-73). Wilson is of the opinion that Gantt should have filed his challenge with the election commission when he wanted to question Murphy's qualifications to hold her seat. (R. p. 1076). Wilson further opined that Murphy was removed from her position on the Board because she asked too many questions. (R. p. 1067).

I. Murphy's Property Today

The boundary between Richland and Lexington counties is currently being resurveyed so that it can be re-established. (R. p. 1485). The SCB&CB Office of Research and Statistics is now researching land records and performing field work and historical research. (R. pp. 1485-86). Such processes, if done properly, can take months to finalize. (R. pp. 1777-78). The South Carolina General Assembly passed a law in 2014 giving SCB&CB the authority to determine county boundaries and mediate the same; they lacked that authority in 2013, but attempted to command that authorities the same in regards to Murphy irrespective of governing state law. (S.C. Code Ann. § 27-2-105; Pl.'s Mem. in Opp'n, R. pp. 1821-25). The statute requires in instances, such as Murphy's, where boundaries are ill-defined, unmarked, or poorly marked, that SCB&CB "shall analyze archival and other evidence and perform field surveys geographically to position all county boundaries in accordance with statutory descriptions." (S.C. Code Ann. § 27-

2-105). The statute also provides affected parties, like Murphy, an avenue through which they may contest the findings. (S.C. Code Ann. § 27-2-105) None of these procedures were followed when the boundary surrounding Murphy's property was being investigated.

Murphy testified that she suffered and continues to suffer from numerous and extensive damages as a result of Respondents' actions, including Murphy: (1) seeking aid from a psychiatrist due to severe stress, however, she was unable to afford the same; (2) suffering severe and reoccurring muscle spasms; (3) seeking aid from physical therapists who performed deep tissue massages and dry needling; (4) losing the salary she would have been paid in connection to her Board service for the 2013-2014 school year; and (5) losing the ability to be elected in either Richland or Lexington counties due to the reputational harm caused by Bowers and Gantt. (R. pp. 436, 438-40, 446-47, 454, 570, 641).

Murphy, along with other affected property owners, is still considered a resident of Richland County and still votes and pays taxes in Richland County. (R. p. 1711).

STANDARD OF REVIEW

This is an appeal from the Lower Court's decision to grant the Respondents' Rule 56(c) Motions for Summary Judgment. (Rule 56(c), SCRCP). "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." (*Sea Cove Development, LLC v. Harbourside Community Bank*, 387 S.C. 95, 101, 691 S.E.2d 158, 161 (2010)). "On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party. The judgment may be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." (*Singletary v. The Aetna Casualty & Surety Co.*, 316 S.C. 199, 200, 447 S.E.2d 869, 870 (Ct. App. 1994)). When "the appeal is from the granting of summary

judgment, there must be no genuine issue of fact . . . in order for the judgment to be affirmed." (*SCNB v. Southern Polymers, Inc.*, 313 S.C. 246, 248, 437 S.E.2d 148, 149 (Ct. App. 1993)).

"In determining whether a genuine issue of fact exists, a court must consider everything in the record . . ." (*Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.d 180 (Ct. App. 1986)). "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 v. Mid-South Management Co. Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009)). "Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." (*Englert, Inc. v. LeafGaurd USA, Inc.*, 377 S.C. 129, 659 S.E.2d 496 (2008)).

ARGUMENT

The Circuit Court dismissed Murphey's claim against Gantt and Bowers on every element of civil conspiracy: (1) two or more persons; (2) causing an injury; and (3) causing special damages. (R. p. 11). The Circuit Court held that Murphey's defamation claim against Gantt was dismissed on the grounds of failure to produce evidence of malice, per se defamation, and on the basis of privilege. (R. pp. 9, 11-17). The lower court's ruling was reversible error for the reasons that follow.

I. MURPHY HAS AN ACTIONABLE CIVIL CONSPIRACY CLAIM AGAINST BOWERS AND GANTT.

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. (*Vaught v. Waites*, 300 S.C. 201, 387 S.E.3d 91 (Ct. App. 1989)).

"To establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds or two or more parties to the prosecution of the unlawful enterprise." (*Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010) (citing *Cowburn v. Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005)). A civil conspiracy claim can be shown where a plaintiff pleads that she has been maliciously blacklisted. (*Austin v. Torrington Co.*, 810 F.2d 416 (4th Cir. 1987)). "Conspiracy may be inferred from the nature of the acts committed, the relationship of the parties, the interests of the alleged conspirators, and other relevant circumstances." (*Moore v. Weinberg*, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007)). "Because civil conspiracy is 'by its very nature covert and clandestine,' it is usually not provable by direct evidence." *Id.* (quoting *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987)). "Moreover, the field of admissibility of evidence is broadened in proof of conspiracy." (*Island Car Wash, Inc.*, 292 S.C. at 601) (citing *Hall v. Walters*, 226 S.C. 430, 85 S.E. (2d) 729 (1955)).

The Circuit Court dismissed Murphy's claim against Bowers and Gantt for want of evidence establishing the requisite elements of civil conspiracy. (R. p. 11). However Murphy sufficiently asserts a triable civil conspiracy claim.

A. There is sufficient evidence to demonstrate Bowers and Gantt acted in concert to harm Murphy.

The General Assembly demands that boundary disputes such as Murphy's be determined only after a survey is performed. (S.C. Code Ann § 27-2-105). If an elector's residency is challenged, it must be challenged through the pertinent county board of voter registration. (S.C. Code Ann. § 7-5-230). Factors that could be used to consider residency include: tax returns,

mailing and physical address location, and the address listed on the driver's license. (S.C. Code Ann. § 7-1-25).

Gantt publically exhibited animosity towards Murphy, and also voted to remove her as soon as he was presented with the opportunity. (R. pp. 1062, 1868). Bowers provided Gantt with unsubstantiated ground he presents to the Board for Murphy's removal. (R. pp. 1814-1818). The relationship of Gantt and Bowers, and their respective positions, demonstrates that they worked together to remove Murphy from her position.

Gantt and Bowers conspired together to remove Murphy from the Board by attempting to show that she did not live in Richland County. Gantt and his fellow Board members grew increasingly agitated with Murphy's involvement and activism with District matters following an unsuccessful campaign in 2004 and before the initiation of the investigation into her residence in 2012. (R. pp. 1062, 1868). The District made plans to renovate CHS and Murphy filed a lawsuit in 2010, which halted construction. (R. p. 1060). A non-profit group, Maggie Stroud, was formed in opposition to Murphy's litigation and it filed a lawsuit against Murphy for monetary damages as a result of Murphy's CHS litigation. (R. pp. 351, 645). Board member, Jondy Lovelace, was a member of Maggie Stroud. (R. pp. 351, 645) Murphy continuously brought attention to her concerns regarding perceived procurement violations, questionable uses of District funds, and deviations from proper Board procedures to the Board and the public. She expressed these concerns during Board meetings, via open communications with her constituents, through the media, and even in personal letters to Gantt, copying her Board colleagues. (R. pp. 1746-54).

Gantt and his fellow Board members repeatedly and publically expressed their disdain and opposition to Murphy's actions; they made statements during public Board meetings to the media, posted the District's victory in that appeal on District signage, posted details of the appeal

on the District's website, adopted a resolution calling for support against Murphy, and expressly guaranteed their support of a non-profit organized for the sole purpose of suing Murphy for damages related to CHS litigation. (R. pp. 1056, 1717-25, 1736-37, 1787-89).

The timing of Gantt's formal request and discussions with Bowers regarding Murphy's residence guise an inference of malice. Gantt did not challenge Murphy's residency status through the election commission, which would have been the most proper avenue at the time per Wilson's testimony from her two decades of experience. (R. p. 1080). In 2012, Gantt contacted the one person who could take that information and provide him and his fellow Board members a basis to silence Murphy – Bowers[9]. (R. pp. 1845-46). Gantt claims that the true motivation behind his actions in requesting a review of Murphy's residency and taking action against her were: that he was acting in the best interest of the public, he was protecting the constituents of the District, and he was following the law. (R. pp. 112-86, 1786). Gantt's proffered motivations are questionable when taken into consideration with his timing and knowledge of Murphy's alleged residency status for nearly a decade. If Gantt was acting in the best interest of the public, then he would have immediately investigated the claim that she lived in another county. Gantt should have looked into the matter in 2004 when Murphy was running for the Board, or in 2010 when she ran again, but he waited eight years until he had a purpose to use this information to injure Murphy. (R. p. 1080). Gantt refused to allow Murphy to finish her term – despite the public's request that she be allowed to fulfill her term – and failed to fill her vacant seat. (R. pp. 112-86, 1786). Gantt's actions in "protecting the constituents" left them unrepresented and without a voice on the Board for an extended period of time. (R. pp. 112-86, 1786). Thus

[9]It is apparent that in 2012, after having this information for almost eight years, Gantt suddenly had a reason to use the information originally provided to him by Mungo in 2004.

showing that Gantt's true motivation to remove Murphy from the Board was not to act in best interest of the public, protect the constituents, or to follow the law, but only to harm Murphy.

The timing of Gantt's notification to Murphy and Bowers's subsequent communications to both Lexington and Richland Counties are subject to suspicion. Gantt and Bowers decided against notifying Murphy of the request or the investigation, despite her being arguably the best source for determining her county of residence. (R. p. 1857). Gantt did, however, inform Watson, another Board member, of the investigation into Murphy's property. (R. p. 1849). Gantt inclusion of Watson, but exclusion of Murphy, shows Gantt's motive was to leave Murphy in the dark and unable to defend herself. Gantt met, planned, and conspired with Bowers and others for nearly three months before notifying Murphy of the issue. (R. p. 1857). It was hidden from Murphy for the purpose of preventing her from taking action. Gantt publically ambushed Murphy with the information during a uniquely crowded Board meeting and then refused to allow Murphy to speak or make any rebuttal statements. (R. p. 1780). Gantt's actions silenced Murphy, which he would not have done if his motive had truly been to protect the public, but this would have been his action if his motive had been to harm Murphy.

Gantt requested only that Bowers determine Murphy's residency issue, however Bowers went beyond that request. Bowers's employee contacted Lexington County regarding for Murphy's removal from the voter and tax rolls from Richland County, although he admittedly did not have authority to do the same. (R. p. 1183). Bowers took the conspiracy beyond providing Gantt with a basis for removing Murphy from the Board, he went as far as to provide the same information to the County to try to have Murphy removed from their voter and tax rolls. There is no reason for Bowers to contact the County with this information unless his intention was to harm Murphy.

A 2014 bill gave SCB&CB complete authority over residential county border issues through an appellate-like process, which may, arguably, have justified actions like Bowers's, however this law did not exist during Bowers's investigation on Murphy. (S.C. Code Ann. 27-2-105). Roberts, Bowers's employee, testified that along with Murphy's property, several other properties were flagged as being registered to vote in the wrong county. (R. p. 1182). However, no one under Bower's authority or at SCB&CB took action to address these additional flagged properties; only Murphy's property was singled out and investigated. (R. pp. 1204-08). Bowers did not have a specific reason to only look into Murphy's property, which alludes to the conspiracy between him and Gantt. Gantt and Roberts testimonies' consistently agree that they all met before the formal December 20, 2012 request to discuss Murphy's residence and its investigation. (R. pp. 1059, 1109, 1204). Bowers and Gantt met with District attorneys and others to discuss their plans. (R. pp. 1059, 1109, 1204) Gantt, Bowers, and others, discussed, devised, and determined their course of action well before any formal action was taken or notice given to Murphy. (R. pp. 1059, 1109, 1204)

The methods used by Bowers infer malice because they were not proper. Bowers stated he and his staff relied on three sources to determine that Murphy was not a resident of Richland County. (R. pp. 1756-57). Bowers, Roberts, and Zupan each admitted that they did not perform a survey, visit Murphy's property, or examine any physical markers on or around the boundary in dispute. (R. p. 1199). Zupan testified that he did not locate any ground evidence such as the stake viewed by Tyler. (R. pp. 1472-73). Tyler testified that their actions deviated from standard surveying practice and procedure. (R. pp. 1814-1818). Tyler concluded that SCB&CB's finding regarding Murphy's property was incorrect because: it did not utilize and rely upon recorded surveys; failed to confirm the location of the statutorily defined "Rocky Ford;" failed to inspect

ground evidence on or near Murphy's property; and there were discrepancies in the maps they used to support their findings. (R. pp. 1790-1813).

Based on *McMillan*, Bowers and Gantt's working together for the purpose of injuring Murphy was not only suspicious, but amounts to conspiracy. (*McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 626 S.E.2d 884 (2006)). The Supreme Court of South Carolina held in *Moore* that conspiracy may be inferred by parties' relationships and actions. (*Moore*, at 228, 644 S.E.2d at 750). Applying *Moore*, a conspiracy can be inferred because (1) Gantt chose to seek the help from Bowers – a friend – rather than file an appeal with the Election Commission, which was required by law, (S.C. Code Ann. § 7-5-230); (2) Gantt and Bowers met in advance to discuss their investigation before a formal request letter was sent; (3) Bowers performed a rudimentary investigation into Murphy's residence; and (4) Bowers provided his unsupported findings to Gantt, so he could use the same as grounds to remove Murphy from the Board. *Pridgen* does not require anything more than circumstantial evidence to be produced to establish civil conspiracy. (*Pridgen* at 208, 387 S.E.3d at 95). Based on *Pridgen*, Gantt's motivation for conspiring with Bowers to remove Murphy can reasonably be inferred because she was an outspoken critic of District practices.

Murphy has presented sufficient evidence to demonstrate that Gantt and Bowers acted in concert to harm her.

B. There is sufficient evidence to demonstrate that Bowers and Gantt caused Appellant special damages.

The third element of a proper civil conspiracy requires a plaintiff to show special damages. (*Hackworth v. Graywood at Hammett, LLC*, 358 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009)). "Special damages must be alleged in the complaint to avoid surprise to the other party." (*Allegro, Inc. v. Scully*, No. 2014-002055, 2016 WL 4474336 *4 (S.C. Aug. 24, 2016) (*citing*,

Sheek v. Lee, 289 S.C. 327, 329, 345 S.E.2d 496, 497 (1986)). The primary consideration with respect to special damages, prevention of a double recovery, requires that damages for a conspiracy be distinct from those sought on a plaintiff's other claims. (*See, Allegro, Inc.*, 2016 WL 4474336, at *6 (Pleicones, *dissenting*) ("In *Todd*, the Court created a new rule of pleading for civil conspiracy claims, holding that the plaintiff in a civil conspiracy action must allege damages different from those alleged in any other of her tort causes of action."). Furthermore, the cost of prosecuting an action is a cognizable special damage under South Carolina Law. (*Benedict College v. Nat'l Credit Sys., Inc.*, 400 S.C. 538, 735 S.E.2d 518 (2012)).

Murphy alleged that she suffered reputational harm, diminished likelihood of re-election, humiliation, embarrassment, and pain and suffering as a result of her defamation claim. (R. p. 62, ¶ 25). Murphy alleged that she was blacklisted, ostracized, economic loss from her loss of position on the Board, reputational harm, pain and suffering, and incurred costs and fees from prosecuting this action as a the result of her civil conspiracy claim. (R. p. 64, ¶ 31).

Bowers and Gantt have unlawfully disenfranchised Murphy on paper she is a Richland County resident so she could not run for office as a Lexington County resident; meanwhile, she was blocked from service as a Richland County elected official. Murphy's reputation as a reliable and cognizable Board candidate has been tainted due to Bowers and Gantt's actions. Murphy is unable to conduct a successful campaign or be re-elected to the Board because Bowers and Gantt caused the public to question the status of her residency, and view her as an untrustworthy, burdensome candidate. Murphy was effectively blacklisted from her Board position; the Board forced Murphy out of her position prematurely and prevented her from seeking to regain her former position.

Murphy's civil conspiracy damages are distinct in substance and form from her defamation damages. (*See, Grady v. Spartanburg Sch. Dist. Seven et. al.*, No. 7:13-CV-02020-GRA, 2014 WL 1159406 *14 (D.S.C. Mar. 21, 2014) ("Plaintiff has alleged that these emotional damages came from being ostracized from her peers, distinct from the emotional damages of losing her job"); *Austin v. Torrington Co.*, 810 F.2d 416, 421 (4th Cir. 1987) ("Rather, to effectuate a recovery under a blacklisting theory, the plaintiff must prove that there was a blacklist, a combination of employers who exchanged the information contained on the blacklist, and a willful or malicious use of that blacklist by one or more of the members of the combination, with resultant injury to the plaintiff.") (interpreting South Carolina Law); and, *Benedict Coll. v. Nat'l Credit Sys., Inc.*, 400 S.C. 538, 548-49, 735 S.E.2d 518, 523 (Ct. App. 2012) ("The civil conspiracy claim then explicitly incorporates that assertion and limits the special damages it seeks to 'the costs and attorney's fees associated with the defense of [the College]'s allegations.' . . . NCS does not assert amorphous or unlimited grounds for special damages. The language provides sufficient specificity . . . [as to the] alleged special damages are being sought.")).

Even if Murphy's damages were duplicative, the special damages rule is not applicable here with respect to Bowers. (See, *Allegro, Inc.*, fn. 6). Chief Justice Pleicones, dissenting in the Court's August 24, 2016 decision in *Allegro*, reasoned "even if the Court were to preserve the *Todd* rule, the sole claim asserted against petitioner Corbin was civil conspiracy, and thus as to him the 'special damages' rule created by *Todd* [*v. S.C. Farm Bureau Mut. Ins. Co.*,] does not apply." Notably Chief Justice Pleicones dissent in *Allegro* (joined in concurrence by Justice Beatty) concerned whether or not special damages should even be an element in the civil conspiracy analysis; the *Allegro* majority did not reject Pleicones' position on this point, but

observed that *Allegro*, a 12 year old case, was not the appropriate vehicle to reverse *Todd. Id.* at fn. 3. This Court need not address the propriety of the special damages element, as Murphy properly and sufficiently pled special damages.

Murphy has pled that Bowers and Gantt acted with personal motivation to harm her, and that she suffered special damages as a result of the same. The Circuit Court's holding to the contrary is reversible.

II. THERE IS SUFFICIENT EVIDENCE THAT GANTT ACTED WITH MALICE, PER SE DEFAMED MURPHY, HIS STATEMENTS WERE NOT PRIVILEGED.

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 (2012)). 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 (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 actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. (*Id.* at 465, 629 S.E.2d at 664).

A. Gantt acted with malice.

"To prove fault in a defamation action, a plaintiff who is a public official or public figure must prove by clear and convincing evidence that the defendant acted with actual malice in publishing a false and defamatory statement about the plaintiff." (*Erickson,* 368 S.C. at 468, 629 S.E.2d at 666). South Carolina law a school board member is a public official. (*See Anderson v. Augusta Chronicle,* 365 S.C. 589, 619 S.E.2d 428 (2005)). Constitutional actual malice is a

statement "made with knowledge that it was false or with reckless disregard of whether it was true or false." (*New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct 710 (1964)). To find actual malice, "the court must use a subjective standard to test the 'publisher's good faith belief of the truth of his or her statements.'" (*Anderson* at 595, 619 S.E.2d at 431). A defendant acting in reckless disregard for the truth has a "high degree of awareness of ... probable falsity." (*Erickson* at 477, 629 S.E.2d at 671). If one fails to investigate the truth of material when "there are obvious reasons to doubt the veracity of the informant," then one is recklessly disregarding the truth. *Id.*

Gantt announced to the public in a Board meeting that Murphy was not a Richland County resident before a proper investigation in the boundary line required by law was conducted. (R. p. 1780). Mungo did not provide Gantt any reasons as to why he believed Murphy lived in Lexington County. (R. p. 1054). Under *Erickson*, Gantt acted with reckless disregard to the truth because nothing other than word of mouth supported Gantt's assertions, which supports a high degree of awareness of probably falsity. (*Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 629 S.E.2d 653 (2006)). The statement was a rumor that Gantt took at face value, and he failed to investigate the veracity of Mungo's claim. Gantt took Mungo's statement and went to Bowers, who gave him an unsupported basis for removing Murphy. Applying *Sullivan*, Gantt's reckless disregard of his statement's truthfulness proves constitutional actual malice. (*New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct 710 (1964)).

Murphy has demonstrated that Gantt acted with constitutional actual malice in stating and publishing false statements about her.

B. Gantt *per se* defamed Appellant.

The first element of defamation requires a plaintiff to show that a false and defamatory statement was made about herself. *Id.* A false or defamatory statement must have a defamatory meaning, which can be expressed directly through signs, pictures, etc. and indirectly by innuendo, insinuation, conduct or action. (*Tyler v. Macks Stores of South Carolina*, 275 S.C. 456, 272 S.E.2d 633 (1980)). A defamatory statement impeaches the honesty, integrity or reputation of a person; subjects her to public hatred, contempt, or ridicule; and injures a person's business or occupation. (*See Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (1987); *Smith v Bradstreet Co.* 63 S.C. 525, 41 S.E. 763 (1902)). Extrinsic circumstances can render a statement defamatory when it would not ordinarily be interpreted as such. (*Costas v Florence Printing Co.*, 237 S.C. 655, 118 S.E.2d 696 (1961); *see also Mains v. K-Mart Corp.*, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988)). "Where words used are capable of different meanings, one of which is slanderous, the jury must ascertain [the] sense in which they were published and decide which meaning was, in fact, conveyed." (*Timmons v. News & Press, Inc.*, 232 S.C. 639, 103 S.E.2d 277 (1958)).

Statement's falsity is presumed in common law, but under the First Amendment (such as where the plaintiff is a public official), the plaintiff carries the burden of proving falsity. (*See Tharp v. Media Gen., Inc.*, 987 F.Supp. 2d 673 (D.S.C. 2013); *Parker v. Evening Post Publishing Comp.*, 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994)). The plaintiff may do so by offering evidence that the defendant omitted material information. *Id.*

"The defamatory meaning of a message or statement may be obvious on the face of the statement, in which case the statement is defamatory *per se*." (*Holtzscheiter v. Thomson Newspapers*, 332 S.C. 502, 506 S.E.2d 497 (1998)). A defamatory statement may be actionable *per se* or not actionable *per se.* (*McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 698

S.E.2d 845 (Ct. App. 2010)). "The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve." *Id.*

> When the statement is classified as actionable *per se*, the defendant is presumed to have acted with common law malice, and the plaintiff is presumed to have suffered general damages. When the statement is not actionable *per se*, the plaintiff must plead and prove both common law malice and special damages.

Id. Special damages are tangible losses or injuries to the plaintiffs property, business, occupation, or profession in which it is possible to identify a specific amount of money as damages. (*Erickson* at 465, n.6, 629 S.E.2d at 664, n.6).

The South Carolina Supreme Court has held that an actionable defamatory insinuation may be made by action or conduct, not just by words. (*Tyler v. Macks Stores of South Carolina*, 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980)). Defamation can be actionable when it is indirect. (*See Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (1987); *see also Tyler* at 458, 272 S.E.2d at 634). "To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain." (*Tyler* at 458, 272 S.E.2d at 634) (citing *Timmons v. News and Press, Inc.*, 232 S.C. 639, 644, 103 S.E.2d 277, 280 (1958)).

The statement that Murphy that is a resident of Lexington County is not true. She is still to this day – three years later – a resident of Richland County. (R. p. 1711). Both Counties treat Murphy as a resident of Richland, and neither has taken action to switch her and her family to Lexington's tax or voter rolls. (R. p. 1711). It was false and defamatory for Gantt to suggest that Murphy 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 term. (R. p. 1780).

Gantt insinuated that Murphy's refusal to resign was wrongful conduct when he frequently insisted that Murphy should "do the right thing" and step down from the Board. (R. p. 1780). Gantt prevented Murphy from defending herself during the highly attended Board meeting in which he revealed her residency issue in open session, which permitted the defamatory insinuation to ring aloud to the constituents that were present and serves as evidence of falsity. (R. pp. 1060, 1857). Gantt permitted Board members and the public – including students – to ridicule, humiliate, and single out Murphy during Board meetings. (R. p. 1741). Gantt permitted Board members to make motions which publically, officially, and formally admonished and condemned Murphy. (R. pp. 1062, 1868).

Throughout her tenure on the Board, the Board and Gantt publically published false statements concerning Murphy. (R. p. 1780). The Board and Gantt published that the District won the CHS lawsuit on a marquee located outside Murphy's children school. (R. p. 1056). Gantt was not aware to any other lawsuit pending at the time of the marquee posting, thus, District constituents reading the sign were aware that the lawsuit referenced was Murphy's CHS appeal. (R. p. 1056). It was hardly a secret among the community that this message was displayed to spite Murphy and cause her unnecessary embarrassment and humiliation. The District also posted on its website limited and one-sided information about lawsuits involving Murphy. (R. p. 1056) All such statements and actions harmed Murphy's integrity and reputation. These statements and actions subjected her to public hatred, contempt, and ridicule, so much so that Murphy believes that she will never be re-elected to any seat – whether Richland or Lexington – on the Board.

The conduct of Gantt is actionable *per se* defamation. In *Eubanks*, the Supreme Court of South Carolina held that a defamatory statement impeaches the honesty, integrity or reputation of a person; subjects her to public hatred, contempt, or ridicule; and injures a person's business or occupation. (292 S.C. 57, 354 S.E.2d 898 (1987)). Applying *Eubanks*, Gantt's public statements regarding Murphy's residence and suggestion that she knowing ran under the wrong county are defamatory statements. Applying *Parrish v. Allison*, regarding the innate allegation that Murphy falsified her application and oath of office and *Woodward v. South Carolina Farm Bureau Ins. Co.*, regarding Murphy's fitness for office, Gantt's statements are *per se* defamatory. (*Parrish v. Allison*, 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007) (impugning one as a criminal is per se defamatory); *Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 282 S.E.2d 599 (1981) (challenging one's professional fitness is per se defamation)). Gantt's statements impeached Murphy's honesty, caused the public to question her integrity, subjected her to be ridiculed by the public, and resulted in a loss of income. Even if Gantt's statements are not found to be defamatory under *Eubanks*, they would still be considered defamatory under *Tyler*. The Supreme Court of South Carolina held in *Tyler* that indirect actions can qualify as defamation, thus the false claims are required to be made in a direct, public manner, but that false insinuations made with malice qualifies as defamation. (*Tyler* at 458, 272 S.E.2d at 634). Based on *Tyler*, Gantt's false declaration that Murphy was a Lexington County resident and his insinuation that Murphy ran knowing the same qualifies as defamation because they were both false and under the guise of malice.

Murphy has presented sufficient evidence that the Gantt made false statements about her, and his accusations were *per se* defamatory.

C. Gantt's statements were not privileged.

The second element of defamation is an unprivileged publication to a third party. (*Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 710 S.E.2d 67 (2011). Unprivileged publication is communication, intentionally or negligently, to a third party who is someone other than the person defamed. *Id.* (citing 50 Am. Jur. 2d Libel & Slander § 235 (1995)).

A defendant may assert the affirmative defense of conditional or qualified privilege in a defamation action. (*Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999)). "Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Id.* (citing Restatement (Second) of Torts § 593 (1977).

In South Carolina qualified privilege is defined as:

> [a] communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation. The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.

(*Conwell v. Spur Oil Co.*, 240 S.C. 170, 125 S.E.2d 270 (1962) (citing 33 Am. Jur., Libel and Slander, section 126, 124)). To invoke qualified privilege a defendant has the burden of proving that: (1) the defendant speaker believed in good faith that the information was true when uttered; (2) the information served a legitimate interest; (3) the statement was limited in its scope; (4)

communicated on a proper occasion; and (5) was provided only to an appropriate person who had a legitimate interest in receiving the information. *Id.*

A conditional privilege may be lost or overcome where (1) a defendant makes a statement with common law actual malice; (2) the statement exceeds the scope of the privilege by publishing such statements to unnecessary persons; (3) or if the statement is made in reckless disregard of the victim's rights. (*Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986); *Bell v. Bank of Abbeville,* 208 S.C. 490, 38 S.E.2d 641 (1946); *Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (1987); *Fountain v. First Reliance Bank*, 398 S.C. 434, 730 S.E.2d 305 (2012)).

A qualified privilege is subject to being abused. (*See McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 562, 698 S.E.2d 845, 853 (Ct. App. 2010)). The South Carolina Supreme Court explained the privilege as follows:

> When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. *The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.*

(*Bell,* 208 S.C. at 493-94, 38 S.E.2d at 643 (emphasis added)). Communications between employees are qualifiedly privileged only if made in good faith and in the usual course of business. (*McBride* at 562, 698 S.E.2d at 853 (citing *Murray v. Holnam, Inc.*, 344 S.C. 129, 140-141, 542 S.E.2d 743, 749 (Ct. App. 2001)). The conditional privilege can be lost if the statement is made with malice or with knowledge of its falsity or reckless disregard of whether it is true or false. "In general, the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court. However, the question whether the privilege has been

abused is one for the jury." (*Swinton* at 485, 514 S.E.2d at 134 (citing 50 Am. Jur. 2d Libel and Slander § 276 (1995)).

The general rule has been applied in *Fulton* and in *Swinton*. The South Carolina Supreme Court held in *Fulton* that it was a question for the jury to determine if the publication went beyond what the occasion required and was unnecessarily defamatory. (*Fulton* at 297, 67 S.E.2d at 429). The Court held in *Swinton* that "[a]ssuming the occasion did give rise to a conditional privilege, we believe a question existed for the jury as to whether the privilege was exceeded or abused." (*Swinton* at 486, 514 S.E.2d at 135).

1. **Gantt's statements exceed the scope of the privilege**

Gantt cannot demonstrate the elements of the qualified privilege. Gantt cannot offer evidence to prove that he believed in good faith that Murphy was a resident of Lexington County. Gantt knew Murphy was not a resident of Lexington County because Murphy is still considered a resident of Richland County. (R. p. 1711). Gantt's statements did not serve a *legitimate* interest. Gantt's accusations harmed Murphy and her constituents, and served Gantt's interest of removing Murphy. Gantt's statements were not limited in scope or made in a proper occasion because these statements were published on the website and District signage; they were communicated in open sessions of Board meetings. (R. pp. 1056, 1717-25, 1736-37, 1787-89). Gantt's statements were not only made to the appropriate person who had a legitimate interest of receiving this information because Murphy, was the only appropriate recipient. Gantt told Bowers, Childs, and Watson (another Board member) before he spoke with Murphy about her residence, and then he told the general public moments after informing the only appropriate person.

Gantt failed to prove the elements of qualified privileged required by the Supreme Court of South Carolina in *Conwell*; he has not shown that (1) he believed in good faith that the

information was true when uttered; (2) the information served a legitimate interest; (3) the statement was limited in its scope; (4) it was communicated on a proper occasion; and (5) it was provided only to an appropriate person who had a legitimate interest in receiving the information. (*Conwell v. Spur Oil Co.*, 240 S.C. 170, 125 S.E.2d 270 (1962)).

Applying the Supreme Court of South Carolina's ruling in *Abofreka*, Gantt lost his conditional privilege because: (1) he made statements with common law actual malice; (2) because the statements were published to unnecessary persons; (3) and the statements were made in reckless disregard of Murphy's rights. (*Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986)).

Gantt's statements and actions were made under the guise of actual malice because they were untrue and damaged Murphy's reputation and standing with her constituents. (R. pp. 1717-25, 1787-89). Gantt publically disclosed the information during an unusually high-attended January Board meeting. (R. p. 1780). Murphy was the only necessary person Gantt needed to disclose this information to, so under *Abofreka*, Gantt lost his conditional privilege when he disclosed the accusations to anyone other than Murphy. (*Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986)). Gantt recklessly disregarded Murphy's rights when he prevented her from defending herself after he publically announced that she knowingly ran for the incorrect Board seat because she lived in Lexington County. Gantt also infringed on Murphy's right to possibly be re-elected to the Board because his statements harmed her reputation.

Gantt is not entitled to either qualified or conditional privilege, however if the court decides otherwise, then this issue needs to be taken to a jury for them to determine whether any such privilege has been abused. It is generally a question for the court to determine if something gives

rise to a qualified or conditional privilege, however, it is up to a jury to determine if either privilege has been abused. (*Swinton* at 486, 514 S.E.2d at 135).

2. <u>Gantt's statements and actions were not subject to an absolute privilege</u>

A defamatory statement is granted an absolute privilege if such statement was made in pleadings, sworn or unsworn affidavits, depositions, testimony, briefs, or during trial preparation. (*See* S.C. Code Ann. § 41-27-560 (1986); *Southern Glass & Plastics v. Duke*, 367 S.C. 421, 626 S.E.2d 19 (Ct. App. 2005); *Richardson v. McGill*, 273 S.C. 142, 255 S.E.2d 341 (1979); *Crowell v. Herring*, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990); *Anderson v. Southern Ry. Co.*, 224 S.C. 65, 77 S.E.2d 350 (1953)). An absolute privilege applies in administrative, grievance, or arbitration proceedings. *Id.*

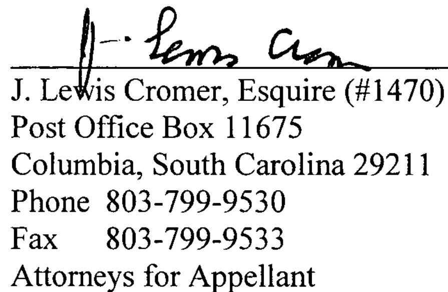
None of Gantt's defamatory statements listed above and discussed in the facts were made within pleadings, sworn or unsworn affidavits, depositions, testimony, briefs, or during trial preparation. All of the statements at issue were made to the media, to the public during board meetings, via public statements read aloud at board meetings, on the District's website, on district signage, and impliedly through their actions. (R. pp. 1056, 1717-25, 1736-37, 1787-89). Therefore, under South Carolina law, Gantt's defamatory statements are not granted an absolute privilege. (*See* S.C. Code Ann. § 41-27-560 (1986); *Southern Glass & Plastics v. Duke*, 367 S.C. 421, 626 S.E.2d 19 (Ct. App. 2005); *Richardson v. McGill*, 273 S.C. 142, 255 S.E.2d 341 (1979); *Crowell v. Herring*, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990); *Anderson v. Southern Ry. Co.*, 224 S.C. 65, 77 S.E.2d 350 (1953)).

CONCLUSION

For the foregoing reasons Murphy respectfully asks this Honorable Court to Reverse the holding of the Circuit Court.

Respectfully Submitted,

J. LEWIS CROMER & ASSOCIATES, LLC



J. Lewis Cromer, Esquire (#1470)
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Fax 803-799-9533
Attorneys for Appellant

Columbia, South Carolina
February 15, 2017