THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

Opinion No. 3744 (S.C. Ct. App. filed Feb. 9, 2004 and refiled May 12, 2004)

Linda Angus,.....Respondent,

v.

Burroughs & Chapin, Co., Myrtle Beach Herald,
Doug Wendel, Pat Dowling, Deborah Johnson,
Chandler C. Prosser, Marvin Heyd,
Chandler Brigham, and Terry Cooper, ... Defendants,

OF WHOM Burroughs & Chapin, Co., Doug Wendel,
Pat Dowling, Myrtle Beach Herald, and Deborah Johnson are, ... Petitioners.

BRIEF OF PETITIONERS BURROUGHS & CHAPIN, CO., DOUG WENDEL, AND PAT DOWLING

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QUESTIONS PRESENTED

I. Assuming South Carolina allows a conspiracy claim based upon termination of an at-will employment contract, the appealed order should be affirmed, because the Public Official failed to show any special damages, and the Court of Appeals erred in refusing to affirm on this ground.

II. Assuming South Carolina law would allow a conspiracy claim based on the termination of an at-will employment contract, this Court should reverse the Court of Appeals and affirm the appealed order, because the Public Official's affidavit fails to satisfy numerous prerequisites for affidavits in opposition to summary judgment, and merely piles inferences upon inferences, all of which the Court of Appeals erroneously refused to consider.

III. Assuming South Carolina allows a conspiracy claim based upon termination of an at-will employment contract, the appealed order should be affirmed, because South Carolina public policy should preclude any claims by a public official that deal with matters of public comment and political debate, and the Court of Appeals erred in refusing to reach this issue.

IV. The Court of Appeals erred in reversing the appealed order, because South Carolina law does not recognize a conspiracy claim based upon termination of an at-will employment contract.

STATEMENT OF THE CASE

This appeal arises from the termination of an at will employment contract. The respondent (Public Official) was the County Administrator for Horry County. The petitioners (Citizens) are citizens of Horry County. It is undisputed that the Public Official's employment contract was at-will and terminable at any time for any reason or no reason. The Horry County Council terminated her, and she sued the defendants under numerous theories that her employment was wrongfully terminated, including a claim for tortious interference with contract. Through various unappealed orders, her complaint was reduced to a single claim for conspiracy. The trial court granted summary judgment to all defendants on the conspiracy claim because: (1) South Carolina law does not allow a conspiracy claim for termination of an at-will employment contract; and (2) there was no genuine issue of material fact. (JA 6-8). The Public Official timely appealed to the Court of Appeals and argued: (1) South Carolina allows her conspiracy claim; and (2) her affidavit creates genuine issues of material facts.

The Court of Appeals reversed the appealed order as to Citizens and the newspaper defendants (Deborah Johnson and Myrtle Beach Herald), but affirmed as to the remaining defendants (members of Council). (JA 271-278). The Citizens filed a timely Petition for Rehearing, which the Court of Appeals denied but issued an amended opinion that differed significantly from the original opinion. (JA 286-298; 299-311). The newspaper defendants also filed a rehearing petition, which the Court of Appeals also denied. (JA 279-285).

The Citizens filed a motion for an extension and leave to file a second petition for rehearing, because the Court of Appeals' amended opinion ruled on grounds different

from that in the original opinion. (JA 312-314). The Court of Appeals denied this request. (JA 315). This Court granted certiorari upon petitions of the Citizens and the newspaper defendants.

STATEMENT OF BACKGROUND FACTS

Horry County Council hired the Public Official on June 3, 1996. (JA 6). Her contract was not for any specified term and expressly stated she was "employed at the will of the County's governing body, Horry County Council." (JA 171, ¶ 2). The Council exercised its contractual right and terminated her employment on June 22, 1999. (JA 6). The only limitation on the Council's termination right was the option of giving 365 days notice or 365 days severance pay. (JA 171, ¶ 2). It is undisputed that the Council paid the Public Official all monies due under the contract, totaling approximately $17,500.00 plus a salary of $117,888.16 during the year after her termination. (JA 6; see also JA 140-148; 188-193).

The Citizens moved for summary judgment upon grounds that the Public Official did not incur special damages as required in a conspiracy claim, and upon the ground that no conspiracy claim lay for termination of an at will contract. (JA 51-52). The Public Official responded with an "affidavit," which is a 56 page transcript of a question and answer session with her attorney, bearing her signature as notarized by her attorney. This "affidavit" violates virtually every requirement for affidavits under Rule 56, SCRCP. It is nothing more than a collection of inadmissible hearsay, double hearsay, triple hearsay, and speculative opinions based on this hearsay. It never mentions any special damages in response to the summary judgment motion on that ground.

ARGUMENTS

Summary of Arguments: An at-will employment contract cannot be the subject of a conspiracy to terminate claim under South Carolina law. Assuming it can be, the Public Official failed to present any evidence of special damages, which is an essential element of any conspiracy claim. The Court of Appeals erred in refusing to reach this ground for affirmance by misconstruing and misapplying this Court's holding in *I'On, L.L.C. v. Town of Mt. Pleasant, infra*. Moreover, the Court of Appeals erred in ignoring the fact that the Public Official's affidavit violated virtually every requirement for affidavits under Rule 56, SCRCP. It is nothing more than a collection of inadmissible hearsay and speculation. To overcome this defect, the Court of Appeals erroneously relied upon and accepted the allegations of the complaint as true, a direct violation of fundamental principles of summary judgment law. Finally, and again assuming South Carolina law would recognize the alleged conspiracy claim, it should not and cannot be allowed in the context of private citizens complaining to their elected representatives about the actions of an appointed public official with principal responsibility for the operation of government.

I. Assuming South Carolina allows a conspiracy claim based upon termination of an at-will employment contract, the appealed order should be affirmed, because the Public Official failed to show any special damages, and the Court of Appeals erred in refusing to affirm on this ground.

When the nonmoving party bears the burden of proof on an issue or claim, the motion for summary judgment need only point out that the party bearing the burden of proof cannot prove her claim. *Richardson v. The State Record Co.*, 499 S.E.2d 822, 824-825 (S.C. App. 1998). The moving party need not support its motion with affidavits or other materials negating the opponent's claim. *Id.* It then becomes the burden of the non-

moving party to come forward with sufficient affidavits or other proper materials to demonstrate there is a genuine issue of material fact on that issue or claim. *Id.* A failure to do so on any essential element in the nonmoving party's claim requires the granting of summary judgment. *Baughman v. American Tel. & Tel. Co.*, 410 S.E.2d 537, 545-546 (S.C. 1991). The nonmoving party cannot merely rest upon the allegations of her complaint, nor can she rely on statements by counsel at the summary judgment hearing. *Higgins v. MUSC*, 486 S.E.2d 269, 272 (S.C. App. 1997) (statements of counsel); *Bravis v. Dunbar*, 449 S.E.2d 495, 496 (S.C. App. 1994) (allegations of complaint).

Special damages are an essential element of any conspiracy claim. *Lee v. Chesterfield Gen. Hosp.*, 344 S.E.2d 379, 382 (S.C. 1986). Here, the Citizens moved for summary judgment upon the ground that the Public Official had not incurred any special damages. (JA 51). It thus became her burden to come forward with some evidence of damages, and she utterly failed to do so. Her 56-page "affidavit" never mentions damages, and she presented no other material in opposition to summary judgment.

Although the trial court did not rule on the basis of the Public Official failing to present any evidence of damages, this Court may affirm for any reason appearing in the record. Rule 220(c), SCACR. The Citizens plainly raised the "no-damages" issue, and the Public Official did not present any evidence of damages. Accordingly, the appealed order should be affirmed, even if South Carolina allows a conspiracy claim for termination of an at will employment contract.

In its original opinion, the Court of Appeals did not mention the damages issue, and the Citizens' rehearing petition included this ground. (JA 271-278; 289-290). The Court of Appeals denied rehearing but ruled in its amended opinion that, pursuant to this

Court's holding in *I'On, L.L.C. v. Town of Mt. Pleasant*, 526 S.E.2d 716, 723 (S.C. 2000): (1) it was within the court's discretion to rule upon grounds to affirm; and (2) the court chose not to address such grounds. (JA 311 n.7). It is respectfully submitted that the Court of Appeals misconstrued and misapplied this Court's holding in *I'On.* An appellate court must rule upon a reason to affirm when that reason was raised to the trial court and the appellate court would otherwise reverse the appealed order. In the alternative, it is respectfully submitted this Court should modify its holding in *I'On* to so hold.[1]

In *I'On,* this Court undertook to explain and harmonize the language and practice surrounding "additional sustaining grounds" used in appellate practice prior to the adoption of the SCACR and its provisions on affirming for any reason appearing in the record. This Court drew a clear distinction between grounds that were and were not raised to the trial court. As to grounds not raised to the trial court, this Court cautioned that not doing so would reduce the chances of obtaining appellate review and affirmance. 526 S.E.2d at 724 n.11.

As to issues raised to the trial court, this Court made two important and controlling observations. First, "[i]t would be inefficient and pointless to require [the party prevailing at trial] to return to the judge and ask for a ruling on other arguments to preserve them for appellate review." 526 S.E.2d at 723. Second, "when the lower court rules in one party's favor, it is not necessary for that party to return to the court and ask

[1] The Court of Appeals also summarily stated that its ruling had rendered "largely moot" the various grounds for affirmance raised by the Citizens. (JA 311, n.7). The meaning and rationale for this ruling is unclear, and the Court denied the Citizens request to file a second rehearing petition on this ground *inter alia*. (JA 313). The Court of Appeals' ruling, which was erroneous in itself, did not moot the other grounds for affirming. Indeed, the precise purpose of these grounds was to argue for affirmance in the event the Court of Appeals reversed on some ground.

for a ruling on remaining issues and arguments to preserve those arguments for use in an appeal." *Id.* at 725. Thus, if a prevailing party raises an issue to the trial court, and the trial court rules on another basis, the prevailing party remains entitled to seek affirmance on the other ground upon an appeal by the losing party. An appellate court, therefore, does not have discretion to not rule on the other ground if it would reverse on the ground ruled upon by the trial court.[2] Thus, the Court of Appeals erred in declining to rule upon the damages issue.

In the alternative, assuming this Court intended an appellate court to have such discretion, it is respectfully submitted this Court should now hold an appellate court must review any reason to affirm that was raised to the trial court and pursued on appeal, even in the absence of a ruling by the trial court. To hold otherwise would force the prevailing party at trial to file a "59(e)" motion to obtain a ruling on its other grounds and, upon the denial of the motion or an adverse order on those grounds, file a cross-appeal if the opposing party appeals. This would be "inefficient and pointless," just as this Court noted in *I'On*. It would also frustrate this Court's recent cases intended to simplify Rule 59(e) practice.

[2] But see *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, 594 S.E.2d 455 (S.C. 2004). In *Helena*, this Court declined to address an additional sustaining ground "on which the trial court did **not** rule." *Id.* at 462 n.6, *citing I'On, supra* (emphasis in original). It is unclear whether the ground had been raised to the trial court.

II. Assuming South Carolina law would allow a conspiracy claim based on the termination of an at-will employment contract, this Court should reverse the Court of Appeals and affirm the appealed order, because the Public Official's affidavit fails to satisfy numerous prerequisites for affidavits in opposition to summary judgment, and merely piles inferences upon inferences, all of which the Court of Appeals erroneously refused to consider.

A. Introduction

The Public Official's unverified complaint summarily alleges the defendants conspired to cause her termination as county administrator via pay-offs to council members and a public smear campaign. (JA 31-32). Her affidavit attempts to "flesh out" these allegations but it fails procedurally and substantively, violating virtually every requirement for affidavits under Rule 56, SCRCP.

B. Overview of the Public Official's "Affidavit" and Background Legal Principles

The "affidavit" is a 56 page transcript of a question and answer session between the Public Official and her attorney, bearing her signature as notarized by her attorney. (JA 64-120). The Public Official faxed an incomplete copy of her statement to opposing counsel after 5:00 p.m. on Friday, October 12, 2001, before the hearing on Monday, October 15, 2001. This fax copy was incomplete and did not include the signature page or notarization. She did not serve a complete copy of her statement with the required signature or notarization until just before the commencement of the summary judgment hearing. This was a direct violation of Rule 56(c), SCRCP, which requires that opposing affidavits be served "not later than two days before the hearing." Thus, assuming the affidavit creates a genuine issue of material fact, the appealed order should nevertheless be affirmed, because the trial court erred in considering the affidavit.

The Public Official never attests in her "affidavit" that the matters stated therein are based on her own personal knowledge. She was not sworn to tell the truth prior to

giving her statement. The affidavit does not affirmatively show that she is competent to testify about the matters therein. All of this is a direct violation of the requirement of Rule 56(e), SCRCP. The reason for these failures is simple. With very few exceptions having no bearing on the issues in this case, nothing in the affidavit is based on the Public Official's personal knowledge, and she was not competent to testify about the matters stated therein.

The Public Official's affidavit is replete with references to numerous documents and papers, which purportedly her claim, but none of them were attached to the "affidavit," served with it, or presented to the trial court. This is a direct violation of Rule 56(e), SCRCP, which requires that "[s]worn or certified copies of all papers or parts thereof referred to in the affidavit" be attached to it or served with it.[3]

Finally, and most importantly, the "affidavit" is riddled with rank hearsay, often double-hearsay or triple-hearsay, and the Public Official's speculative opinions based on that hearsay. An affidavit in opposition to summary judgment, however, must be based

[3] The affidavit referenced at least 10 types of "supporting" documents or papers:

(1) written evaluations of the Public Official, some of which she claimed were new or altered, as well as related "minutes" and personnel file materials;
(2) contract documents relating to the baseball stadium;
(3) various JEDA grant proposals, awards, and submissions;
(4) numerous newspaper articles;
(5) various faxes, letters, and other correspondence;
(6) an ethics complaint authored by the Public Official, and the decision denying it;
(7) the "secret" railroad file maintained in the Public Official's office, and other documents related to the railroad, including a lease, appraisal, and bid proposals;
(8) polls allegedly conducted regarding the Public Official's standing in the community;
(9) documents relating to certain cable companies and their territories, including related correspondence; and
(10) documents and maps relating to a multi-county business park.

(JA 64-117, *passim*). The affidavit also references other documents, which the Public Official does not clearly assert support her claims and theories, but she did not attach any of these documents to her affidavit. Also, her statement is replete with vague accusations of violations of county and city procurement laws, but none of these local laws were attached to or served with the affidavit, nor were they presented to the trial court, nor were they specified in her appellate brief.

upon "such facts as would be admissible in evidence." Rule 56(e), SCRCP; *Saro v. Ocean Holiday Partnership*, 441 S.E.2d 835, 838 (S.C. App. 1994). Hearsay is inadmissible absent the applicability of an exception to the rule. Rule 802, SCRE. Opinion testimony in an affidavit, which would be inadmissible at trial, cannot be the basis for resisting summary judgment. *Baughman v. American Tel. & Tel. Co.*, 410 S.E.2d 537, 543 (S.C. 1991). Lay opinion testimony cannot be based on hearsay. It must be "rationally based on the *perception* of the witness." Rule 701, SCRE (emphasis added). It must be based on the witness's personal observations and not the statements of others. *State v. Bottoms*, 195 S.E.2d 116 (S.C. 1973).

Rule 803, SCRE, sets forth the exceptions to the hearsay rule, but none apply to the Public Official's affidavit. Rule 801(d), SCRE provides that certain types of statements, which superficially appear to be hearsay, are not hearsay under the Rule. Two of these "non-hearsay" statements are a statement by a party opponent and a statement by a coconspirator of a party made during and in furtherance of the conspiracy. Rule 801(d)(2)(A), (E), SCRE. Neither rule applies here. The Public Official's "sources," *i.e.*, the persons whose statements she repeats in her affidavit, are not parties or coconspirators. The complaint does not allege, and the Public Official's affidavit does not assert, the existence or participation of any unnamed coconspirators. (JA 28-33; 64-120).

At times, the Public Official repeats a "source's" statement who, in turn, is repeating a statement allegedly made by a defendant. This hearsay within hearsay does not make the alleged party statement admissible Under Rule 805, SCRE, hearsay within

hearsay is not admissible unless "each part of the combined statements conforms with an exception to the hearsay rule."

C. Analysis of the Public Official's Affidavit

The Public Official's conspiracy claim is based upon the following theory: (1) Burroughs & Chapin was upset with her for interfering with its various plans; (2) so it decided to have her removed from her office; and (3) it then conspired with the other defendants to achieve her removal. To support this theory, the Public Official relates her story about a series of incidents. As demonstrated below, her theory and claim fail as a matter of law, because they rest upon hearsay and her baseless, speculative opinions. As demonstrated above, absent admissible supporting evidence, such arguments are not a valid basis for resisting summary judgment.

1. The Baseball Stadium

The Public Official's "stadium" story has four basic parts vis-à-vis the alleged conspiracy. As demonstrated below, each part is based on inadmissible hearsay and her inadmissible opinion based thereon.

First, the Public Official claims that Burroughs & Chapin was upset with her and considered her an obstructionist to the efforts to bring a baseball team to Myrtle Beach. As admitted in her brief and affidavit, Ray Brown (a council member) purportedly told her that Doug Wendel (of Burroughs & Chapin) had said this to him. (JA 70-71; 200). This is hearsay within hearsay, *i.e.*, Mr. Brown allegedly repeats what Mr. Wendel allegedly said, and the Public Official then repeats what Mr. Brown allegedly said. Assuming Mr. Brown's recitation of what Mr. Wendel said might be admissible as a statement by a party, it would have to come from Mr. Brown directly. The Public

Official, however, did not submit an affidavit from Mr. Brown. Her recitation of Mr. Brown's alleged statement to her is rank hearsay that is not admissible under any exception to the hearsay rule. Thus, it affords no basis for admitting the underlying, alleged statement of Mr. Wendel.

Second, the Public Official contends it was standard procedure for Mr. Wendel to summon council members to his office to tell them what he wanted done. (JA 200). As admitted in her affidavit but not mentioned in her brief, unnamed "council people" purportedly told her this, which is manifestly rank hearsay that is not subject to any exception. (JA 71). She also claims council members were offered an interest in the Green Diamond project in exchange for their votes on the baseball stadium. (JA 200). She admits in her affidavit but not in her brief that she was told this by an unnamed council member. (JA 87-88). This too is rank hearsay that is not subject to any exception and, based thereon, the Public Official speculates Burroughs & Chapin used this "system" to get her fired. (JA 71; 200). Her opinion, being based on hearsay, speculation, and unsupported assumptions, is not admissible.

Third, the Public Official claims no bidding was done on the site work for the stadium, that it was given to A.O. Hardee & Sons, and this was a violation of State, County, and City procurement laws. As admitted in her brief and affidavit, Tom Leath told her this, rendering her statement rank hearsay that is not admissible. (JA 73-74; 200-202). Her opinion on alleged violations of procurement laws is manifestly inadmissible as an impermissible lay opinion. Indeed, her opinion on the law would not be admissible, even if she were a qualified expert on questions of law. *Dawkins v. Fields*, 580 S.E.2d 433, 437 (S.C. 2003), *rev'g* 545 S.E.2d 515 (S.C. App. 2001).

Fourth, the Public Official claims the site work was substantially over budget but, as admitted in her brief and affidavit, Mr. Leath told her this, thereby rendering her statement inadmissible hearsay. (JA 74; 200-201). Finally, she claims Mr. Leath asked her to secretly have the County contribute to the cost overrun, which request she opines was made "on behalf of" Burroughs & Chapin. (JA 75; 201). This is rank hearsay. Assuming Mr. Leath made this request, there is no basis whatsoever for the Public Official's speculation that it was made on behalf of Burroughs & Chapin. The only "basis" for her speculation is a single-line statement in her affidavit that the request "benefited no one else." (JA 75). This is an impermissible lay opinion, and it is based on a manifestly incorrect assumption. Any payment from the County obviously benefited the City, which shared the responsibility for the site work costs. Indeed, the Public Official stated that the County was never again asked to pay anything for the site work. (Id.). In addition, it would benefit the contractor that performed the site work, the baseball team that would use the stadium, and all of the businesses that would benefit directly and indirectly from the baseball team and stadium.

2. The Public Grants

The Public Officials' theory is that Burroughs & Chapin was angry with her, because she interfered with its alleged attempts to mis-use JEDA funds. She believes that Burroughs & Chapin "bought" Governor Hodges and Council Chairman Prosser, and then used them to get the JEDA funds from her. She believes Burroughs & Chapin conspired to have her terminated because of its anger with her. Her theory is based on her inadmissible legal opinions, inadmissible hearsay, and baseless speculation that:

(1) Burroughs & Chapin improperly obtained a JEDA grant when it applied for the grant directly rather than applying through her as the county administrator;
(2) Burroughs & Chapin wanted to use the grant for improper purposes; and
(3) Burroughs & Chapin did not bid the work as required by law.

(JA 77-81). Her legal opinions have no permissible foundation. Her affidavit does not set forth any qualifications rendering her competent to give opinions on the law. Neither her brief, nor her affidavit, specifies the law(s) upon which she bases her opinion. She relies on documents that were not attached to or served with her affidavit. In short, her legal opinions are incompetent and inadmissible, even if she were a qualified expert, which she is not. *Dawkins*, 580 S.E.2d at 437.

The Public Official's belief that Burroughs & Chapin bought the Governor and Council Chairman is based on rank hearsay and baseless speculation:

(1) As to the Council Chairman, her belief is based on what a "friend" told her and newspaper articles. (JA 82-84).
(2) As to the Governor, her belief is based on articles in the paper and fundraisers held that she was "aware of." (JA 85) (emphasis added).

The friend's statement is rank hearsay. The articles were not attached to or served with the Public Official's affidavit Her affidavit does not explain how she was "aware of" the fundraisers for the Governor. In short, her beliefs are incompetent and inadmissible.

3. The Railroad Lease

The Public Official's theory is that:

(1) Burroughs & Chapin wanted to control ownership of the railroad as part of its long-range plan to monopolize the tourist industry in Myrtle Beach;

(2) Burroughs & Chapin became angry when she interfered with its plans; and

(3) Therefore, it conspired to terminate her.

(JA 96; 203). Her theory, again, is based on rank hearsay, baseless speculation and opinion, and documents not attached to or served with her affidavit.

The Public Official relies on a "secret file" kept by her staff prior to her becoming county administrator. (JA 91). The file was not attached to or served with her affidavit, nor was it presented to the trial court. She does not describe the contents of this "secret file" in her affidavit, nor does she disclose who compiled the file (other than unidentified members of the county "staff").

The Public Official also relies on rank hearsay. She related stories allegedly told her by unidentified staff members about threats by council members. (JA 91-92). She also relies on her opinion of the relationship between Burroughs & Chapin and Mr. Pippen, which is based on:

(1) documents not attached to or served with the affidavit;
(2) hearsay (what Mr. Pippen and Mr. McNutt said to her); and
(3) triple hearsay (what the county attorney had told her about what others had told him).

(JA 91-95). She admits, however, that Burroughs & Chapin never approached her about the railroad, and that she has no personal knowledge of it approaching anyone. (JA 96).

The remainder of the Public Official's story is, on its face, baseless speculation and incompetent opinion. She obviously believes that Burroughs & Chapin is the root of all evil, but she presented no proof whatsoever. Her affidavit is nothing more than a series of baseless accusations that are wholly incompetent to prove anything.

4. <u>The Airport</u>

The Public Official's brief contradicts her own affidavit. Citing page 35 of her statement, she argues she was called to a meeting in defendant Wendel's office with representatives of Burroughs & Chapin, and others. (JA 204). In her affidavit, however,

she admits that she met with Peter Winter, representatives from a company named AGI (an airport management company), Steve Gosnell, and Emma Ruth Brittain. (JA 96-97). No defendant was at this meeting. Mr. Winter and AGI presented a proposal for privatizing the county airport through an FAA program. (JA 97). According to the Public Official, at the end of the meeting and in response to her questions about and objections to the proposal, Mr. Winter said he might take the question to Burroughs & Chapin. (*Id.*). This is rank hearsay that is not admissible into evidence.

The Public Official's affidavit also asserts that she "found out later" that Mr. Winter and AGI were representing Burroughs & Chapin at the meeting. (JA 97). Her affidavit never mentions the source of this information or how she came to possess it. Her affidavit fails to assert that this statement was based on her own personal knowledge and, therefore, it does not and cannot present a genuine issue of material fact. On its face, her statement is either based on inadmissible hearsay or an inadmissible opinion.

Finally, the Public Official's brief and affidavit assert that, in another meeting in the fall of 1998, defendant Wendel said that, by the time the airport privatization plan was done, she "was not going to be a problem." (JA 99; 204). The Public Official opines from this statement that plans to terminate her in the near future had already been laid as early as the fall of 1998. (Id.). She admitted in her brief and affidavit that she was not present at this meeting and did not hear defendant Wendel make the alleged "no problem" statement. (JA 99; 204). Rather, her affidavit and resulting opinion are based on what she was told by Marian Foxworth and Mark McBride. (Id.). Thus, the statement in her affidavit is inadmissible hearsay, and her resulting opinion is likewise inadmissible.

5. The Myrtle Beach Herald

Here, the Public Official's theory is that Burroughs & Chapin bought the newspaper and then used it to conduct a smear campaign of her prior to her termination. Her affidavit, however, admits that her statement about this purchase of the newspaper is based on "from what I understand" and "from my understanding." (JA 99, 100). She admits that she has not seen any documents on the sale. (JA 100). Her belief is rank hearsay and speculation.

The only important part of the Public Official's "newspaper" story vis-à-vis her conspiracy theory is that: (1) in the past, the newspaper had written fair stories about her; (2) after the purchase by Burroughs & Chapin, the paper began writing unfair stories about her as part of a smear campaign; and (3) most importantly, these unfair stories were written by defendant Dowling. (JA 102-103, 105; 204-205, 209). As admitted in the Public Official's brief and affidavit, this story is based on rank hearsay.

The statement that defendant Dowling wrote the stories is based on what the Public Official was allegedly told by an unidentified woman allegedly working at the newspaper. (JA 102, 105; 205). This is rank, inadmissible hearsay. As further attempted support for her story, the Public Official also relates statements from an unidentified reporter with the Sun News. (JA 103-106). Again, this is rank, inadmissible hearsay.

6. Council Members Tied to Burroughs & Chapin

Here, the Public Official claims that Burroughs & Chapin controls various council member defendants. She again relies on inadmissible hearsay.

a. Marvin Heyd: Mr. Heyd is a council member and an employee of Burroughs & Chapin. The Public Official claims Burroughs & Chapin did not want to

use his vote on the question of her termination, but he was the deciding vote, and he voted to terminate her, because he was a Burroughs & Chapin employee. (JA 108-109; 205-206). This is rank speculation by the Public Official, with no supporting, admissible evidence in her affidavit.

The Public Official speculates that defendant Wendel called council members during the vote and attempted to persuade them to vote against her. (JA 109; 206). Although not admitted in her brief, she admits in her affidavit that this story is based on the following: Ulysses DeWitt told her, that James Frazier told him, that defendant Wendel called him, and said to vote against her. (JA 109). This is hearsay within hearsay within hearsay, and it is not admissible into evidence.[4]

b. Chad Prosser and Terry Cooper: The Public Official claims these council members owned an interest in cable television companies, and their company was given exclusive cable rights in a Burroughs & Chapin development. Although not admitted in her brief, the Public Official admits in her affidavit that this information is based on a conversation with an unidentified friend who works for Time Warner Cable Company in Myrtle Beach, and a letter from defendant Wendel to Time Warner. (JA 113-113). The conversation is rank, inadmissible hearsay. The statements about the letter are meaningless, since the Public Official failed to attach or serve a copy of the alleged letter, as required by Rule 56(e), SCRCP. Her opinion about why all of this was done is rank, inadmissible speculation.

c. Chandler Brigham: Mr. Brigham is a council member, and the Public Official claims he "apparently" has a contract to sell property to Burroughs &

[4] Although unclear in the affidavit, it may be that the Public Official claims James Frazier also told her this story. Assuming this is true, it remains inadmissible hearsay within hearsay.

Chapin, and this contract was his payoff for voting against her. (JA 206). Although not mentioned in her brief, the Public Official's affidavit demonstrates that her claim is based on her own speculation without any supporting evidence as required by Rule 56, SCRCP. In her affidavit, she admitted she did not know the purported sales price or whether Mr. Brigham would make a profit. (JA 116). She never attests to any personal knowledge of any alleged contract, and she admits that her speculation is based solely on seeing maps, which purportedly included the Brigham property as part of a multi-county business park development. (JA 116-117). None of these alleged maps, however, were attached to her affidavit or served with it. In short, her entire "Brigham property" story is based on rank speculation having no admissible evidentiary support.

D. Summary and Conclusion

The Public Official's affidavit is a collection of inadmissible hearsay statements, baseless speculation, and incompetent opinions that does not prove anything. It is precisely the type of legal farce that cannot be used to resist summary judgment under Rule 56, SCRCP. Moreover, even when a court must view the evidence in the light most favorable to the opposing party, a conspiracy claim cannot be proven by piling inference upon inference. *State v. Gunn*, 437 S.E.2d 75 (S.C. 1993); *State v. Mouzon*, 467 S.E.2d 122 (S.C. App. 1995). As set forth above, the Public Official's affidavit is incompetent to prove the existence of a conspiracy. Assuming her affidavit includes some admissible proof, it manifestly does nothing more than pile inference upon inference to construct the "proof" of a conspiracy. This is prohibited by law and, therefore, the appealed order should be affirmed.

III. Assuming South Carolina allows a conspiracy claim based upon termination of an at-will employment contract, the appealed order should be affirmed, because South Carolina public policy should preclude any claims by a public official that deal with matters of public comment and political debate, and the Court of Appeals erred in refusing to reach this issue.

It is axiomatic that every citizen has a fundamental, constitutional right to complain to his or her elected officials about the performance of a public official such as the Public Official here. The specter of a possible conspiracy claim arising from such complaints or other communications would chill the exchange of ideas and exercise of fundamental rights in our political system. Accordingly, as a matter of public policy, and assuming a claim might otherwise exist under South Carolina law, it is respectfully submitted that no such claim should be allowed by a public official complaining about the loss of her at-will, politically-appointed job.

At bottom, the Public Official complains that the Citizens complained to their elected representatives about her performance. She believes herself to be the font of all wisdom on good government. The Citizens disagreed and complained to County Council, which was their constitutional right. The Council agreed and fired the Public Official. Assuming the Public Official is correct that the Citizens said anything to their elected representatives, and there is no competent proof that they did, the courts should not become embroiled in this political matter.

In addition, the Citizens adopt by reference and incorporate herein the arguments set forth in the Brief of the Myrtle Beach Herald and Deborah Johnson as they pertain to the issue of whether South Carolina law permits a conspiracy claim in the context of complaints about a public official.

IV. The Court of Appeals erred in reversing the appealed order, because South Carolina law does not recognize a conspiracy claim based upon termination of an at-will employment contract.

A. Introduction

In its original opinion (JA 274-275), the Court of Appeals relied heavily on its opinion in *Todd v. S.C. Farm Bureau Ins. Co.*, 321 S.E.2d 602 (S.C. App. 1984) (*Todd* II), misconstruing it as a conspiracy case when, in fact, it was a case on tortious interference with contract. This Court, in a prior appeal, had already stricken the conspiracy claim from the case. *Todd v. South Carolina Farm Bureau*, 278 S.E.2d 607 (S.C. 1981) (*Todd* I). The Citizens pointed this out on rehearing and the Court of Appeals amended its opinion to eliminate the discussion of *Todd* II and insert an analytical reliance on its opinion in *Lee v. Chesterfield Gen. Hosp.*, 344 S.E.2d 379 (S.C. App. 1986). The Court continued to misconstrue and misapply this Court's opinion in *Ross, infra* and numerous other South Carolina and foreign decisions.

B. The Court of Appeals misconstrued and misapplied this Court's decision in *Ross v. Life Ins. Co.*, 259 S.E.2d 814 (S.C. 1979).

This Court's decision in *Ross* is the only South Carolina case on conspiracy claims in the context of at-will employment contracts. An employee sued his former employer for conspiracy to terminate, and tortious interference with, the employment contract. The trial court granted a demurrer on both claims, and this Court affirmed. After emphasizing an at will employment contract could be terminated at any time for any reason or no reason, this Court concluded: "Therefore, [the employee's] allegations of conspiracy fail to state a cause of action." *Id.* at 815.

The Court of Appeals held that *Ross* was limited to employers and, therefore, a conspiracy claim would lie against third parties for termination of an at-will employment

contract. The *Ross* opinion, however, contains no such rationale. Rather, this Court plainly ruled that a conspiracy action simply does not lie for termination of an at will employment contract.

In affirming the demurrer on the tortious interference claim, this Court noted in *Ross* that such claims "have been limited to situations where an action was brought against third persons rather than *parties to the contract*." 259 S.E.2d at 815 (emphasis added). Had this Court intended to carve out a third-party exception to its conspiracy ruling, it would have done so expressly, as it did with its tortious interference ruling. It did not do so, and the reason is simple. In ruling on the conspiracy claim, unlike the tortious interference claim, this Court focused on the type of contract, *i.e.*, an at will employment contract that could be terminated at any time for any reason or no reason. That is precisely the type of contract at issue here, and this Court's ruling applies with full force. In short, South Carolina law does not allow a conspiracy claim based on termination of an at will employment contract and, therefore, the appealed order should be affirmed.

The Court of Appeals used its opinion in *Lee, supra* to support its interpretation of *Ross, supra*. This was error for several reasons. First, *Lee* was not an employment at will case, nor did it involve the termination of any rights or relationships. Rather, it involved the denial of an application for staff privileges at a hospital. Second, *Lee* did not involve the right of every citizen to comment and even complain to elected representatives about public officials. Rather, it involved allegations of unfair business and trade practices amongst competitors. Third, *Lee* did not involve a summary judgment motion, which requires the opposing party to present proof at the hearing.

Rather, it involved a demurrer (motion to dismiss), which assumes the allegations of the complaint are true. Fourth, the Court of Appeals recognized that its holding in *Lee* was somewhat at odds with this Court's holding in *Ross* (JA 306, n.4), but it attempted to rescue this conflict by noting there was no "allegation" that the Citizens had the right to conspire to harm the Public Official. (JA 306-307). Thus, the Court impermissibly assumed the allegations of the complaint were true and relied on the absence of specific contrary allegations. The present case, however, involves summary judgment, not a demurrer. The allegations of the complaint are not accepted as true, and the Court of Appeals violated this fundamental rule on summary judgment. And as noted earlier, the right at issue here, which warrants full prophylactic protection by the Courts, is the right of every citizen to complain to elected representatives about public officials.

To bolster its conclusions, the Court of Appeals relied on the Georgia decision in *Studdard, infra* and the North Carolina decision in *Smith, infra.*. Here again, the Court misconstrued and misapplied foreign legal principles in this South Carolina case.

In *Studdard v. Evans*, 135 S.E.2d 60 (Ga. App. 1964), the Georgia court expressly relied on rights and causes of action granted by Georgia statutes. These foreign statutes do not and cannot have any bearing on South Carolina's common law. Thus, they lend no support to the Court of Appeals' decision, which must be grounded in South Carolina's common law.

In *Smith v. Ford Motor Co.*, 221 S.E.2d 282 (N.C. 1976), North Carolina held that a third party could be liable for tortiously interfering with an at-will employment contract, when the third party threatened the employer with termination of the at-will contract between the third party and the employer unless the employer terminated the

employee. The Court of Appeals' quotation from *Smith* is incomplete; it omits the core concept of the third party using the threat of terminating its at-will contract with the employer. (*Compare* JA 307 *with* 221 S.E.2d at 290). There was no such contractual power exercised (or even alleged) in the present case, thereby distinguishing *Smith* on its holding and facts. Moreover, *Smith* was a tortious interference case, not a conspiracy case.

The Court of Appeals concluded its analysis of its mis-quotation from *Smith* with the observation: "These facts are similar if not identical to those *alleged* by [the Public Official]." (JA 307) (emphasis added). *Smith* involved a motion to dismiss and, therefore, the allegations had to be taken as true. The present case arises from a summary judgment motion and, therefore, the complaint is not accepted as true. Thus, here again, the Court of Appeals violated a fundamental rule on summary judgment.

The Court's acceptance of the Public Official's allegations as true, coupled with its reliance on the tortious interference decision in *Smith*, highlights its use of conspiracy to rescue what was, at most, a tortious interference claim that the Public Official failed to pursue on appeal. This contravenes the jurisprudential underpinnings of this Court's ruling in *Todd v. South Carolina Farm Bureau*, 278 S.E.2d 607 (S.C. 1981) (*Todd I*).

In *Todd I*, this Court held the complaint failed to state a claim for conspiracy, because the complaint sought recovery for the same acts under different claims. In so ruling, this Court relied on the election of remedies rule stated in 15A C.J.S. Conspiracy, § 33, which is designed to prevent a plaintiff from recovering the same damages under

[5] As noted earlier, the Court of Appeals' original opinion relied heavily on its decision in the later *Todd* case, which arose on appeal after this Court's remand in *Todd* I. Although the Court removed its *Todd* analysis in its amended opinion, its continued reliance on the tortious interference ruling in *Smith* demonstrates that the Court of Appeals' mis-reading of its opinion in *Todd* continues to control its analysis in this appeal.

two claims. Rather than follow the general rule of sending the case to the jury on both claims and requiring the plaintiff to make an election after the jury's verdict, this Court held there simply was no cause of action under these circumstances. The only jurisprudential rationale for this ruling is to prevent a civil conspiracy claim from becoming a catch-all claim and, therefore, limiting it to scenarios where the law does not otherwise provide a remedy, as this Court has limited the tort of outrage. Here, the Court of Appeals essentially found a conspiracy claim existed, because a tortious interference claim existed, a claim made by the Public Official but not pursued on appeal. In so doing, the Court violated the jurisprudential underpinnings of *Todd I* by allowing a conspiracy claim to proceed despite the existence of another claim (that could have been pursued but was not).

To bolster its interpretation of *Ross*, the Court of Appeals reviewed but misapprehended or misapplied the decisions in *Mills*, *Kirby*, *McMaster*, *Howle*, and *Truax*, *all infra*.

The Court cited *Mills v. Leath*, 709 F. Supp. 671 (D.S.C. 1988) for the proposition that an employee cannot sue an employer for conspiracy to breach an at-will employment contract. (JA 304). That was not, however, the precise holding in *Mills*. The plaintiff in *Mills* was a former police officer who sued for conspiracy to terminate his employment. He attempted to avoid the rule in *Ross* by claiming an employee handbook had altered his at-will contract. The court rejected this argument and then concluded the plaintiff was "precluded from maintaining an action for civil conspiracy to terminate his employment" because the handbook "did not alter the plaintiff's status as an at-will employee." 709 F.

Supp. at 675. In so ruling, the court did not rely upon the action being against the employer, nor did it focus on whether the defendants were parties to the contract.

There were several defendants in *Mills*, including the City of Myrtle Beach; the city manager (sued in his individual and official capacity); the police chief (sued in his individual and official capacity); and a police lieutenant (sued in his individual and official capacity). The court, however, did not rule on the basis of all defendants being the employer or acting solely in their official capacity. Rather, it ruled solely on the basis of the plaintiff's at-will status, which, it is respectfully submitted, is the plain holding in *Ross* that should have been followed by the Court of Appeals.

In *Kirby v. Gulf Oil Co.*, 94 S.E.2d 21 (S.C. 1956), this Court reversed a jury verdict for the plaintiff on a conspiracy claim.[6] The Court of Appeals distinguished *Kirby* upon reading this Court's opinion as being based on findings that: (1) Whitlock, Sr. had terminated the lease "for his own reasons"; (2) that he had done so "without any prompting from" the other defendants; and (3) that the other defendants had not "played an active role in [plaintiff's] ruin," *i.e.*, in Whitlock's decision to terminate the lease. (JA 308). This was error.

The plaintiff in *Kirby* contended the concerted actions of the defendants, including Whitlock, Sr., gave rise to a conspiracy claim. This Court rejected this argument under the following analysis: (1) only Whitlock, Sr. owned the leasehold and only he had the power to terminate the lease; (2) Whitlock, Sr. needed no assistance in terminating the lease; (3) the actions of the other defendants did not aid Whitlock, Sr. in terminating the lease; and (4) Kirby had assumed the risk that the month-to-month

[6] In its original opinion, the Court of Appeals mistakenly read *Kirby* as sustaining the dismissal of the claim. (JA 276) This was pointed out on rehearing (JA 296, n.1), but the Court continues to misread *Kirby*: "The supreme court dismissed the case ….". (JA 308).

tenancy might be terminated at any time. 94 S.E.2d at 27-28. Contrary to the Court of Appeals' opinion, this Court did not rule on the basis that Whitlock, Sr. had terminated the lease for his own reasons without any prompting by or involvement by the other defendants. Moreover, the key in *Kirby* was the type of contract, a month-to-month tenancy that could be terminated at any time. That is precisely the type of contract at issue here, which, like the contract in *Kirby*, is terminable at will and therefore cannot be the subject of a conspiracy claim.

In *McMaster v. Ford Motor Co.*, 115 S.E. 444 (S.C. 1921), this Court held no valid conspiracy was alleged by the complaint, because it hinged on the defendants' refusal to enter into a contract with the plaintiff, which the defendants had the right to do. Contrary to the Court of Appeals' opinion here, the *McMaster* decision did not rest on a ruling that the other defendants were Ford's agents and, therefore, did not involve third-party action. No such ruling or observation appears in the opinion. Rather, this Court rested its ruling on the right to contract and not contract, which is the same type of right at issue here regarding the termination of an at-will contract. The Court of Appeals also sought to limit this Court's ruling in *McMaster*, holding that only those persons directly involved in the underlying relationship are protected from conspiracy claims, a limitation that does not appear in this Court's opinion. (SA 32). It is respectfully submitted that every citizen is directly involved in the employment contract of a public official who is primarily responsible for the operation of government, hired by elected representatives, and paid with public tax funds.[7]

[7] In an appended footnote, the Court of Appeals cites several cases regarding the "public policy" exception to the right of an employer to terminate at-will contracts. (JA 309, n.6). The Court's purpose is unclear, but the more pertinent and controlling public policy here is the right of every citizen to speak freely to elected representatives about public officials without fear of retaliatory lawsuits.

In *Howle v. Mountain Ice, Co.*, 165 S.E. 724 (S.C. 1932), this Court found there was no evidence of an agreement to injure the plaintiff so as to support the existence of a conspiracy claim. This case, however, did not involve an at-will contract or similar contractual right.

In *Truax v. Raich*, 36 S. Ct. 7 (1915), the Supreme Court of the United States struck down an Arizona statute under Fourteenth Amendment. The case did not involve any claim of conspiracy. At most, the quote relied upon by the Court of Appeals (JA 310-311) goes to a claim for tortious interference, which as demonstrated earlier, is not a valid basis for finding a conspiracy claim, particularly given the Public Officials's failure to pursue a tortious interference claim on appeal.

CONCLUSION

For each and all of the foregoing reasons, and for the reasons set forth in the briefs of all respondents and petitions for rehearing before the Court of Appeals, the certiorari petitions presented to this Court, and the brief of the newspaper defendants, all of which are incorporated herein by reference, it is respectfully submitted that this Court should grant certiorari, reverse the Court of Appeals' opinion and reinstate the appealed order.

Respectfully Submitted,

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