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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	THIRTEENTH JUDICIAL CIRCUIT
Andrew Pampu,	)	C.A. NO. 2017-CP-39-00709
Plaintiff,	)	
vs.	)	**ORDER**
Erin Wingo, David Wingo, and Colin J. Gahagan	)	
Defendants.	)	

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This matter was before the Court on October 1, 2021 for Defendants Motions for Summary Judgment. On October 24, 2015, Plaintiff Andrew Pampu ("Plaintiff") and Defendant Erin Wingo ("Wingo") attended a party at the Clemson Phi Delta Theta fraternity house. Before and during the party, Wingo consumed several shots of alcohol. At some point, Plaintiff and Wingo left the party together and had sexual intercourse in a secluded area near a restaurant. On November 11, 2015, Wingo submitted a formal Title IX complaint to Clemson's Office of Community and Ethical Standards ("OCES"), claiming that she did not recall the sexual encounter with Plaintiff and therefore was not able to give consent. Clemson opened a formal investigation into whether Plaintiff violated Clemson's General Student Regulations ("GSR").

Plaintiff and Ms. Wingo attended a hearing regarding this matter on February 26, 2016. Three days later, Clemson sent Plaintiff a letter finding Plaintiff responsible for violating four sections of the GSR, and suspending Plaintiff from school for a period of 6 months. Both Plaintiff and Wingo appealed the decision and sanctions through Clemson's OCES process. On May 27,

2016, Clemson Chief of Staff Max Allen upheld the decision and increased Plaintiff's suspension length to one year.

On January 26, 2017, Plaintiff commenced an action in federal court against Clemson University and several Clemson employees alleging various constitutional violations relating to the process by which Plaintiff was suspended from Clemson. On July 1, 2019, Plaintiff entered into a settlement agreement with Clemson ("Settlement"), dismissing the federal court action.

On January 26, 2017, Plaintiff commenced this action against Wingo, David Wingo ("David"), and Colin J. Gahagan ("Gahagan") (together "Defendants") alleging defamation and civil conspiracy. These motions for summary judgment followed.

I. STANDARD OF REVIEW

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c). SCRCP. "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

An adverse party may not rely on the mere allegations in the pleadings to withstand a summary judgment motion but must set forth specific facts showing there is a genuine issue for trial. *Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E,.2d 581, 584 (Ct. App. 1994). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

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"[W]hen the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997).

II. DISCUSSION

A. Plaintiff's Claims are not Barred by the Doctrine of Judicial Estoppel

Defendants argue that Plaintiff's claims are barred by the doctrine of Judicial Estoppel. Specifically, Defendants claim that Plaintiff's Settlement with Clemson is inconsistent with his claims in this lawsuit. The doctrine of judicial estoppel "precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). In South Carolina, judicial estoppel requires:

> "(1) two inconsistent positions taken by the same party; (2) the positions must be taken in the same or related proceedings involving the same party; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent." *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

Defendants point to a term in the settlement agreement which reads "Clemson University will reinstate the hearing board's decision of February 29, 2016 as upheld by the University Vice President of Student Affairs." As already noted, the hearing board's decision was that Plaintiff was responsible for the sexual assault. Based upon this, Defendants argue that the settlement agreement was, in effect, an admission of that assault. Therefore, according to Defendants, Plaintiff's claims, which essentially allege that Defendants have lied by saying he assaulted Wingo, must fail. On the other hand, Plaintiff points to the first page of the settlement which reads, in part, "Plaintiff denies the allegations of Jane Doe's November 11, 2015 formal Title IX complaint to Clemson

University, the basis of which the hearing board's decision of February 26, 2016 was made." Therefore, the Court must determine whether the settlement agreement, when read as a whole, was an admission by Plaintiff of the assault. The Court finds that it was not.

"General contract principles are applied in the construction of a settlement agreement because . . . a settlement agreement is a contract." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241-42, 672 S.E.2d 799, 803 (Ct. App. 2009). Contract provisions must be interpreted to give effect to all of the contract's provisions, whenever practical. *Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007).

Here, the Court finds that both sections of the settlement agreement can be read in harmony. The Plaintiff completely denies Wingo's allegations on page 1 of the agreement, while agreeing to allow Clemson to reinstate the board's decision on page 2. The page 2 statement does not necessarily mean that Plaintiff is admitting to the sexual assault. Such an admission would make no sense alongside the unequivocal denial that appears on page 1. Rather, the page 2 statement may simply be interpreted as the Plaintiff conceding that Clemson's hearing board made the right decision based on the evidence it had before it, without admitting to the assault itself. Importantly, Plaintiff has repeatedly denied the allegations in front of the Clemson board, the federal court, and this Court. Therefore, the Court finds that Plaintiff's claim that Defendants are lying about the assault is entirely consistent with his previous arguments before the federal court and Clemson board.

B. Plaintiff's Claims are not Barred by Collateral Estoppel

The doctrine of collateral estoppel, or issue preclusion, provides that any issue litigated and decided that was necessary to the judgment in the first case, may not be relitigated in a second action involving a different claim. *Catawba Indian Nation v. State*, 407 S.C. 526, 537, 756 S.E.2d

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900, 906 (2014). Further, under South Carolina law, where a civil action arises out of the same factual scenario as one which has been before a state agency, a finding by that state agency with regard to an element that is critical to recovery in the civil action is binding upon the civil court. *Bennett v. South Carolina Dept. of Corr.*, 305 S.C. 310, 408 S.E.2d 230 (1991).

Defendants argue that Clemson's OCES board is a state agency and that it's decisions are entitled to preclusive effect. In support of this, Defendants first cite the South Carolina Tort Claims Act ("TCA"), which reads that "Agency means the individual office, agency, authority . . . including a state-supported governmental . . . school, college, [or] university . . . which employs the employee whose act or omission gives rise to a claim under this chapter." S.C. Code Ann. 15-78-30 (a). The Court finds that this statute is inapplicable to the current action. The definition of agency in the TCA is specifically limited to entities "which employ the employee whose act or omission gives rise to a claim **under this chapter**." (emphasis added). Neither this action or the action before the OCES had anything to do with a Clemson employee or the TCA. Therefore, this definition of agency, while perhaps instructive, is not binding on this Court.

Defendants also cite S.C. Code 1-23-310 (1), which defines the term "agency" to include "each state board, commission, department, executive department or officer, other than the legislature [or] the courts . . . authorized by law to make regulations or to determine contested cases." This section of the code, titled "State Agency Rule Making and Adjudication of Contested Cases", is more on point in the present action. The Court understands that this is a narrower definition of the term "agency" than the definition which appears in the TCA. However, the TCA was crafted in such a way as to include several entities that would normally not be considered agencies for the purpose of creating a limited carve-out for bringing tort claims against governmental bodies that would otherwise enjoy sovereign immunity. It is illustrative that the

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TCA's definition of "agency" lists several entities to be included in the definition, including an "agency" itself. This further points to the legislature's intent that the TCA definition broadly capture entities that are not agencies otherwise.

Having decided that the definition of "agency" appearing in S.C. Code 1-23-310 (1) is the more appropriate one, the Court must now turn to whether Clemson's OCES board falls under that definition. Defendants have not cited any South Carolina cases which have held that a university board is considered a state agency. Similarly, after an exhaustive review, the Court cannot find a single case in this state holding that a university board is considered a state agency entitled to preclusive effect.

Further, the OCES board does not follow the procedures outlined in the same section in which the definition appears. Section 1-23-330 (3) states that "In contested cases, any party may conduct cross-examination." Plaintiff was entitled to ask a few questions of the witnesses, but these questions were required to be submitted to the chairperson before being asked, making cross-examination limited. It also does not appear that the OCES board followed the rules of evidence as applied in civil cases, which is required by S.C. Code 1-23-330. Simply put, Clemson's OCES board did not conduct itself as a state agency. It would be unfair to allow the OCES board's decisions to be entitled to preclusive effect while at the same time allowing it to operate outside of the rules that other state agencies follow. Further, it is unlikely that the legislature intended for the OCES board to be a state agency "authorized by law to decide contested cases." Therefore, the board's decision is not entitled to preclusive effect and the issue of whether Plaintiff assaulted Wingo is properly before this Court.

C. There Exist Genuine Issues of Material Fact Regarding Plaintiff's Claims Against Defendants Erin Wingo and Colin Gahagan

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The Court has found that the OCES board's findings are not entitled to preclusive effect and that Plaintiff is not judicially estopped from arguing that the sexual encounter with Wingo was consensual. This is a material disputed issue in both of Plaintiff's claims. If the encounter with Wingo was consensual, as the Plaintiff claims, he may be entitled to recover on the grounds of defamation for statements allegedly made by Wingo and Gahagan that Plaintiff was guilty of the assault. If the encounter was nonconsensual, Plaintiff may not be entitled to recover based on the statements because they might be true. As to the civil conspiracy claim, if the allegations are untrue, and the defendants were aware of this, as Plaintiff alleges, a jury might find that Defendants engaged in a civil conspiracy against him to get him expelled from Clemson and his fraternity. These questions of fact are a matter for the jury. Therefore, Defendants Erin Wingo and Colin Gahagan's motions for summary judgment are DENIED.

D. There Exist Genuine Issues of Material Fact Regarding Plaintiff's Claims Against Defendant David Wingo

Defendant David Wingo claims that he is entitled to Summary Judgment because the letter he sent to Plaintiff's fraternity only stated that Clemson found the Plaintiff responsible for the assault. Therefore, David Wingo argues that his letter was true and cannot be actionable. However, Mr. Wingo's letter was not simply a copy of Clemson's decision. Rather, the letter contains numerous allegations, in Mr. Wingo's own words, regarding the Plaintiff and the incident in question, including, among other claims, that Plaintiff "sexually assaulted" Ms. Wingo. Therefore, for the same reasons as above, there exists a genuine issue of material fact regarding whether Plaintiff assaulted Ms. Wingo. This issue is relevant to both the defamation and civil conspiracy claim against Mr. Wingo. Therefore, David Wingo's Motion for Summary Judgment is DENIED.

III. CONCLUSION

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In conclusion, the Court finds that there exist genuine issues of material fact regarding Plaintiff's defamation and civil conspiracy claim against each defendant. Therefore, Defendants Motions for Summary Judgment are DENIED.

IT IS SO ORDERED.

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Letitia H. Verdin
Thirteenth Circuit Court Judge

October ___, 2021

Greenville, South Carolina

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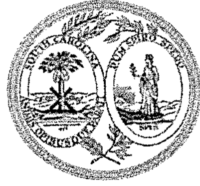

Pickens Common Pleas

Case Caption: Andrew Pampu VS Erin Wingo , defendant, et al

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Type: Order/Summary Judgment

So Ordered

s/Letitia H. Verdin, SC Judge 2162

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