

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

The School of Hope Christian Academy,) Civil Action No. 2021-CP-40-01000
Jacqueline McKie Burden, and Eugene)
Burden, Sr.,)

Plaintiffs,)

vs.)

South Carolina Department of Education,)
Ronald Jones, and Shirley Jenerette,)

Defendants.)

ORDER

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Mar 28 2023

SC Court of Appeals

This matter came before the Court on three separate motions to dismiss filed by Defendants South Carolina Department of Education (the Department), Ronald Jones, and Shirley Jenerette against Plaintiffs School of Hope Christian Academy (School of Hope), Jacqueline McKie Burden, and Eugene Burden, Sr. During the hearing on these motions, the Parties consented to the Court converting the motions to dismiss into motions for summary judgment pursuant to Rule 56(c), SCRCF. After carefully reviewing the motions, memoranda, and arguments of counsel, the Court **GRANTS** summary judgment in favor of all Defendants because Plaintiffs' claims are barred by the law-of-the-case doctrine.

BACKGROUND

On May 1, 2015, School of Hope entered into a contract with the Department to participate in the Summer Food Service Program, which is federally funded by the U.S. Department of Agriculture (USDA) and administered in South Carolina by the Department. Through the Program and under the contract, School of Hope was to provide meals to eligible children at 156 sites within South Carolina. In compliance with Title 7, Subsections 225.7 and 225.10 of the Code of Federal

Regulations, the Department conducted an administrative audit of School of Hope's participation in the program beginning in September 2017. During the audit, the Department uncovered numerous inconsistencies with meal count records, which indicated systemic issues with School of Hope's recordkeeping and failures to comply with the Program and contract requirements, resulting in School of Hope submitting many unsubstantiated claims for reimbursement.

Due to the issues revealed in the audit, on February 14, 2018, the Department notified School of Hope it was terminating the contract for participation in the program and withholding School of Hope's August 2017 reimbursement claim. School of Hope initially appealed the termination and withholding of the August 2017 reimbursement within the Department pursuant to the right explained in the February 14, 2018 letter. Subsequently, however, School of Hope agreed to withdraw its appeal of the termination and to hold the appeal of the denial of the August 2017 reimbursement in abeyance pending further administrative review by the Department.

On August 30, 2018, the Department issued a "Serious Deficiency Determination"¹ letter against Plaintiffs, in which the Department barred School of Hope from future participation in the Program and imposed fiscal penalties in the amount of \$673,203.41—which reflected penalties in the amount of \$891,432.88 reduced (or offset) by the August 2017 reimbursement claim of \$218,229.47—for failure to comply with duties imposed by federal regulations and School of Hope's contract with the Department. School of Hope appealed the imposition of fiscal penalties within the Department, and the Department held hearings on the appeal in front of a hearing officer on January 29, 2019, January 30, 2019, February 5, 2019, and March 5, 2019.

The hearing officer issued a Final Order on March 12, 2019. The hearing officer found the imposition of fiscal penalties, reduced (or offset) by the August 2017 reimbursement claim, was

¹ See 7 C.F.R. § 225.11(c).

proper due to “School of Hope’s failure to comply with duties imposed by federal regulation and its contract with [the Department].” Specifically, the hearing officer found “[t]he evidence presented leaves no question that School of Hope failed to maintain accurate records substantiating their claims for reimbursement.” “[I]t became obvious,” the hearing officer found, “that the volume and pervasiveness of the inconsistencies were huge and indicated systematic problems as opposed to minor human error.” Consequently, the hearing officer upheld the Department’s imposition of fiscal penalties due from Hope of School in the net amount of \$654,779.18 after adjustments for other amounts due to School of Hope.

Plaintiffs did not appeal the Department’s Final Order. Instead, Plaintiffs filed this action on March 3, 2021, bringing claims against the Department for breach of contract, the Department and Defendant Jones for defamation, and Defendants Jones and Jenerette for civil conspiracy. Defendants each moved to dismiss Plaintiffs’ complaint under Rule 12(b)(6), SCRCF. The Department and Jones also moved, in the alternative, to strike Plaintiffs’ \$30 million prayer for relief. *See* Rule 12(f), SCRCF.

The Court held a hearing on Defendants’ motions on February 13, 2023, at 9:30 A.M. via WebEx. During the hearing, the Parties—all of whom were represented by counsel—agreed to convert the motions to ones for summary judgment so that the Court could consider the Final Order, which was referenced in Plaintiffs’ complaint and attached to the Department’s motion and memorandum in support, in this decision. At the conclusion of the hearing, the Court took the matter under advisement. The Court then issued a Form 4 Order on February 15, 2023, indicating

its intent to grant summary judgment in favor of Defendants because Plaintiffs' claims are barred by the law of the case.² This Order follows.

STANDARD

Summary judgment is appropriate when “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 disposition of cases which do not require the services of a factfinder.” *S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 427, 626 S.E.2d 19, 22 (Ct. App. 2005). “In determining whether any triable issue of fact exists, the evidence and all reasonable inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (quoting *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006)). But when plain and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted if the moving party is entitled to judgment as a matter of law. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

Although Plaintiffs must “produce only a ‘scintilla’ of evidence to avoid judgment as a matter of law,” our appellate courts have recognized that “a scintilla is a perceptible amount.” *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019). In other words, “[t]here still must be a verifiable spark, not something conjured by shadows.” *Id.*; see also *Crosby v. Seaboard Air Line Ry.*, 81 S.C. 24, 31–32, 61 S.E. 1064, 1067 (1908) (asserting that “a scintilla of

² Because this Court grants summary judgment for Defendants, the Court need not consider the request to strike Plaintiffs' \$30 million prayer for relief. That issue is now moot.

evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror”).

“When opposing a summary judgment motion, the nonmoving party must do more than ‘simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.’” *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (quoting *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 107, 410 S.E.2d 537, 545 (1991)). Further, our supreme “court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.” *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933); *see also S.C. Dep’t of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (“Arguments made by counsel are not evidence.”).

ANALYSIS

Defendants argue Plaintiffs’ claims for breach of contract, defamation, and civil conspiracy are barred by the doctrine of the law of the case. The Court agrees.

“An unappealed ruling is the law of the case.” *Shirley Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). The law-of-the-case doctrine “applies to an order or ruling which finally determines a substantial right.” *Id.* (quoting *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989)). By the same token, “[c]ollateral estoppel . . . prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.” *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). “Our appellate courts have repeatedly held that collateral estoppel applies to “the decision of an administrative tribunal [and] precludes the relitigation of the issues addressed by that tribunal in a collateral action.” *Bennett v.*

S.C. Dep't of Corr., 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991) (emphasis omitted); *see also Crosby v. Prysmian Commc'ns Cables & Sys. USA, LLC*, 397 S.C. 101, 108, 723 S.E.2d 813, 817 (Ct. App. 2012) (“Our courts have applied the doctrine of issue preclusion to the factual determinations of administrative tribunals.”).

In affirming the decision to impose sanctions on Plaintiffs, the Department’s hearing officer issued a detailed Final Order making numerous findings of fact and conclusions of law. The Court finds that order constitutes a final ruling on the merits determining “a substantial right.” *Shirley Iron Works, Inc.*, 403 S.C. at 573, 743 S.E.2d at 785. Plaintiffs, however, did not appeal the Department’s Final Order to the administrative law court and our appellate courts. *See* S.C. Code Ann. § 1-23-380 (“A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1.”).

Because the Department’s unappealed Final Order is now the law of the case, the Court finds Plaintiffs are barred from litigating their claims in this Court.³ The Court will address each claim in turn.

I. Plaintiffs’ breach of contract claim is barred by the law of the case.

First, the Court finds the law-of-the-case doctrine forecloses Plaintiffs’ breach of contract claim against the Department.

³ Plaintiffs nevertheless argue the Final Order—if binding against School of Hope—is not binding as to the Burdens because the fiscal penalties were imposed against the School of Hope, not them. But Plaintiffs overlook that the Department issued the Serious Deficiency Determination against the School of Hope, Eugene Burden as Board Chair, and Jacqueline Burden as Executive Director. Indeed, School of Hope is the Burdens’ company. Further, the Burdens testified during the nonconsecutive four-day hearing in front of the hearing officer, and the hearing officer made findings and rulings against the Burdens. Accordingly, the Court rejects this contention.

Plaintiffs' breach of contract claim is based on an amount Plaintiffs claim they are owed for services rendered under the now terminated contract with the Department. In Plaintiffs' view, the Department breached the contract by not reimbursing them "more than Two Hundred Thousand Dollars (\$200,000)." Notably, Plaintiffs claimed they were owed \$218,229.47 for the August 2017 reimbursement claim before the hearing officer. But the hearing officer found the Department's "imposition of fiscal penalties in the amount of \$654,779.18 after adjustments for amounts due to School of Hope" and "offset by the August 2017 reimbursement claim" was proper.

That was because Plaintiffs breached the contract with the Department by failing to comply with their contractual duties or state and federal law. The hearing officer specifically found:

- a. The imposition of sanctions reduced (or offset) by the August 2017 reimbursement claim was proper "based upon the School of Hope's failure to comply with duties imposed by federal regulation and its contract with [the Department]."
- b. "The evidence presented leaves no question that School of Hope failed to maintain accurate records substantiating their claims for reimbursement."
- c. "Testimony from numerous [Department] employees directly involved in the audit established that the School of Hope's records were in a total disarray."
- d. "In addition, there was clear and convincing evidence that Daily Meal Count forms were being altered."
- e. "The School of Hope [] failed to adequately perform both of the[] duties" "to maintain its own records" and "to train its sites to maintain their records."
- f. "School of Hope received \$654,779.18 in federal meal reimbursements for which it was not entitled based on the available documentation."
- g. "[T]here is substantial evidence that fraudulent claims were being submitted for payment."

Dep't Mot. to Dismiss, Ex. 1, Final Order, at 17–18.

At bottom, Plaintiffs' claim rests on the notion that they "fully performed" under the contract "in accordance with all of the requirements and conditions thereof." But the Department's

hearing officer concluded otherwise, and Plaintiffs never appealed the Final Order. Therefore, Plaintiffs' breach of the contract with the Department and the propriety of the Department's imposition of sanctions—which was reduced (or offset) by the August 2017 reimbursement claim—were previously litigated against Plaintiffs. *E.g.*, *Shirley Iron Works, Inc.*, 403 S.C. at 573, 743 S.E.2d at 785; *Bennett*, 305 S.C. at 312, 408 S.E.2d at 231. Plaintiffs cannot now come before this Court seeking another bite at the apple. Consequently, the Court finds the Department is entitled to judgment as a matter of law on Plaintiffs' breach of contract claim.

II. Plaintiffs' defamation claim is barred by the law of the case.

Second, the Court finds the law-of-the-case doctrine bars Plaintiffs' defamation claim against the Department and Jones.

“The tort of defamation allows 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.” *Swinton Creek Nursery v. EFC*, 334 S.C. 469, 484, 514 S.E.2d 126, 133 (1999). Because the gravamen of a defamation claim is falsity, truth is an absolute defense. *See Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976).

Plaintiffs first allege the Department and Defendant Jones made “statements which implied Plaintiff Jacqueline McKie Burden was an incompetent manager.” Of course, “pointed criticisms” of individual persons do not amount to defamation. *See Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 471, 629 S.E.2d 653, 667 (2006). Nonetheless, Plaintiffs allege Jones and persons acting on behalf of the Department made statements that “funds have not been properly applied, and that [the Burdens] have been guilty of violating state and federal laws.” They further allege the Department denied reimbursement claims as “fraudulent” and referred Plaintiffs “for criminal investigation . . . for mishandling of funds with full knowledge of the falsity of such claims.”

Contrary to Plaintiffs' claims that these statements are false, the Department's unappealed Final Order establishes they are true. The hearing officer found School of Hope "fail[ed] to comply with duties imposed by federal regulation and its contract with [the Department]" and that "there [was] substantial evidence that fraudulent claims were being submitted for payment." Likewise, the hearing officer noted "[t]he presence of altered records presents more serious concerns of a criminal nature." As noted above, Plaintiffs never appealed these findings. Thus, the law of the case establishes that Plaintiffs did make overstated and unsupported claims for reimbursement, breached the Department's contract, and violated state and federal law in doing so.

Plaintiffs are barred from relitigating this claim here because the same underlying allegations were ruled upon by the Department's hearing officer. *E.g.*, *Shirley Iron Works, Inc.*, 403 S.C. at 573, 743 S.E.2d at 785; *Bennett*, 305 S.C. at 312, 408 S.E.2d at 231. The issues of Plaintiffs' mishandling of funds and failures to comply with federal regulations throughout their participation in the Program were extensively litigated before the hearing officer. While the hearing officer did not specifically rule on a defamation claim, as Defendants concede none was before her, the unappealed rulings in the Final Order establish the truth of the statements Plaintiffs contend are defamatory here. *See Carolina Renewal, Inc.*, 385 S.C. at 555, 684 S.E.2d at 783 ("The doctrine of collateral estoppel prevents the relitigation of *issues*, not claims, necessarily determined in a former proceeding regardless of whether the identity of the causes of action in successive lawsuits are the same.").

Put simply, Plaintiffs cannot now claim that the Department and Jones defamed them by making statements that the law of the case demonstrates were true. *Kennedy v. Richland Cnty. Sch. Dist. Two*, 428 S.C. 98, 114, 833 S.E.2d 414, 423 (Ct. App. 2019) (noting a plaintiff must prove "a false and defamatory statement was made" to prove defamation). Because truth is an

absolute defense to defamation, *Ross*, 266 S.C. at 80, 221 S.E.2d at 772, the Court finds the Department and Jones are entitled to judgment as a matter of law.

III. Plaintiffs' civil conspiracy claim is barred by the law of the case.

Third, the Court finds the law-of-the-case doctrine bars Plaintiffs' civil conspiracy claim against Jenerette, Jones, and "other unnamed conspirators."

Our supreme court recently confirmed that, to state a claim for civil conspiracy, a plaintiff "must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021).

Plaintiffs allege that Jenerette conspired with Jones "to seek benefits through the payment of federal and state funds to her own feeding programs and . . . to take sites from the Plaintiffs through contacts that she had made while employed by The School of Hope." What is more, Plaintiffs allege "Individual Defendants" conspired and interfered "with the approval process for the payment of grant money due the Plaintiffs for the administration of its programs." Plaintiffs, however, raised the same arguments before the hearing officer in support of their position that—despite the record-keeping irregularities—Plaintiffs "provided the meals and should be paid." And the hearing officer wholly rejected these arguments.

First, the hearing officer determined Plaintiffs were not reimbursed for the August 2017 claim—and were terminated from participating in the program—because there was "no question" they "failed to maintain accurate records substantiating their claims for reimbursement," and the "records were in total disarray." Second, the hearing officer found there was "no evidence on the record that any leaks [regarding the audit] occurred or that School of Hope ha[d] been prevented

from presenting any evidence otherwise admissible in defense of this matter.” The hearing officer also found that the Department, through Jones as the Director of the Office of Health and Nutrition, “took extreme care to protect the integrity of this audit.” Specifically, the hearing officer noted the Department “invoke[ed] security procedures such as requiring nondisclosure agreements of its staff; maintain[ed] documents in a secure location with access documentation; and recus[ed] any member of its staff with known connections to School of Hope from the audit.”

As the hearing officer determined, the denial of Plaintiffs’ August 2017 reimbursement claim was caused by Plaintiffs’ own actions, not by any alleged conspiracy on the part of Jenerette and Jones. *See Paradis*, 433 S.C. at 574, 861 S.E.2d at 780 (stating a plaintiff must show “damages proximately resulting” to establish a civil conspiracy claim). Defendant Jenerette’s uncontroverted affidavit confirms as much. Plaintiffs cannot replew that field in this Court. *Cf. Shirley Iron Works, Inc.*, 403 S.C. at 573, 743 S.E.2d at 785; *Bennett*, 305 S.C. at 312, 408 S.E.2d at 231. This Court finds Defendants Jenerette and Jones are entitled to judgment as a matter of law on Plaintiffs’ civil conspiracy claim.

CONCLUSION

For these reasons, the Court grants summary judgment in favor of Defendants. Plaintiffs failed to appeal the Department hearing officer’s Final Order and, thus, the factual and legal conclusions therein became the law of the case. Accordingly, Plaintiffs are collaterally estopped from relitigating those issues. Because Plaintiffs failed to establish a genuine issue of material fact as to the claims for breach of contract, defamation, or civil conspiracy, the Court finds Defendants are entitled to judgment as a matter of law. Plaintiffs’ complaint is dismissed with prejudice.

AND IT IS SO ORDERED.

Anderson, South Carolina
March __, 2023

R. Lawton McIntosh
Presiding Judge, Fifth Judicial Circuit



Richland Common Pleas

Case Caption: School Of Hope Christian Academy , plaintiff, et al vs Sc Department
Of Education , defendant, et al
Case Number: 2021CP4001000
Type: Order/Summary Judgment

S/R. LAWTON McINTOSH

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