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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS

THE HONORABLE R. FERRELL COTHRAN, JR., CIRCUIT COURT JUDGE

Docket No. 2021-CP-10-00426

Kevin Dion Hollinshead, Senior,..... Appellant,

v.

Thomas J. Bell, individually and as Executive Director of Charleston Coalition for Kids, Charleston Coalition for Kids, a nonprofit Organization, Angelica M. Colwell, Lee P. Deas, Godfrey A. Gibbison, Eric P. Strickland, Loren R. Ziff, Courtney S. Waters, Leeza D. Steward, and Teach for America, Inc.....Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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Charleston, South Carolina

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THE APPEAL WAS TIMELY FILED

Respondents' claim that the appeal was not timely filed is nothing more than a renewal of their previously denied motions to dismiss. *See Amended Motion of Leeza D. Steward to Dismiss Appeal* dated and filed June 8, 2022; *Motion of* Charleston Coalition for Kids, Charleston Coalition for Kids *to Dismiss Appeal* dated and filed June 9, 2022; *Order Denying Motions to Dismiss* July 22, 2022. As this Court clearly was correct in denying the motions the first time, Respondents' previously rejected argument in this regard is without merit.

Respondents maintain that because there were two orders, one issued April 5, 2022, granting summary judgment in favor of Respondents, Thomas J. Bell, individually and as Executive Director of Charleston Coalition for Kids, Charleston Coalition for Kids, a nonprofit Organization, Angelica M. Colwell, Lee P. Deas, Godfrey A. Gibbison, Eric P. Strickland, Loren R. Ziff, Courtney S. Waters, Leeza D. Steward (hereinafter collectively referred to as the "CCK Respondents"), and the other issued April 26, 2022, granting summary judgment as to Respondent, Teach for America, Inc., the failure to file and serve a Notice of Intent to Appeal by May 5, 2022, as to CCK Respondents renders this appeal as to them untimely[1]. Respondents apparently misunderstand appellate procedure in South Carolina, and patently ignore the clear language of the April 5, 2022, and April 26, 2022, Orders.

"As a general rule, only final judgments are appealable." *Culbertson v, Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996)(normally order granting divorce constitutes final judgment,

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[1] The only Respondent to actually move for summary judgment pursuant to Rule 56, S.C.R.CIV.P., was Respondent, Leeza D. Steward. The other Respondents moved only to dismiss for failure to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6), S.C.R.CIV.P. As the Orders are form 4 orders, there is no explanation as to how or why the Trial Court granted summary judgment to any of the Respondents other than Respondent, Leeza D. Steward, given that none of them moved for anything other than a Rule 12(b)(6) motion to dismiss.

but in this instance it was interlocutory because sanctions issue was still pending against Appellants, thus rights of parties had not been completely determined until final sanctions order issued); *accord* Rule 201, SCACR ("Appeal may be taken, as provided by law, from any final judgment or appealable order."); *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008) (*quoting* Rule 201); *SC Dept. of Transp. v. Faulkenberry*, 337 S.C. 140, 522 S.E.2d 822 (Ct. App. 1999). Though there are narrow limited exceptions, none of which are germane to the situation presented[2], unless the order appealed from falls within one of the exceptions, only an order which is final is appealable. *Kriti Ripley, LLC v. Emerald Invs., LLC*, 404 S.C. 367, 746 S.E.2d 26 (2013) ("Generally, only final judgments are appealable, unless a statute provides an exception."); *Doe v. Howe,* 362 S.C. 212, 216, 607 S.E.2d 354, 355 (Ct. App. 2004) ("A fundamental rule of appellate procedure is that a judgment or order must usually be final before it can be appealed;" discussing exceptions to the general rule requiring finality); *Temples v. Ramsey*, 330 S.E.2d 558, 559, 285 S.C. 600, 602 (Ct. App. 1985) ("There are four basic situations from which a party may appeal: (1) intermediate judgments, orders or decrees involving the merits, (2) orders affecting substantial rights when such orders in effect determine the action and prevent a judgment from which an appeal may be taken or when the orders discontinue the action, (3) a final order in special proceedings, and (4) interlocutory orders continuing, modifying or refusing injunctions.")

"'Final judgment' is a term of art referring to the disposition of all the issues in the case. . . . The final judgment rule serves the laudatory goal of preventing piecemeal review of matters that are merely steps toward a final judgment." *Doe v. Howe, supra* at 216, 607 S.E.2d at 355. "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties

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[2] *See, e.g.,* Section 14-3-330, CODE OF LAWS OF SOUTH CAROLINA, 1976.

are determined, is interlocutory [and not final]." *Culbertson v, Clemens*, supra (*quoting Mid-State Distribs. Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993)); *SC Dept. of Transp. v. Faulkenberry, supra.*

> 'At common law *** a writ of error will lie only to a final judgment or an award in the nature of a final judgment, and the statutes generally provide that, except as otherwise provided, appeals, writs of error, exceptions, etc., may be taken only from or to final judgments, orders, or decrees.'
>
> '[A] judgment, order, or decree, although determining the law applicable to the issues of an action, yet, leaving questions of fact unsettled, is not final. . . .' '[I]f the question involved will be inherent in the final judgment and can be presented in an appeal from that judgment, it will be treated as an interlocutory order, review of which can only be had upon the general appeal.'
>
> '[I]t has been laid down that in substance the decision must show intrinsically and distinctly, and not inferentially, that the matters in the record have been determined in favor of one of the litigants, or that the rights of the parties in litigation have been adjudicated.' 'The object of this requirement (that an order or judgment must be final before an appeal will lie) is to present the whole cause for determination in a single appeal and thus to prevent the unnecessary expense and delay of repeated appeals.'
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> . . . 'A judgment, order, or decree, to be final for purposes of an appeal or error, must dispose of the cause, or a distinct branch thereof, *as to all the parties*, reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined. In other words, a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term; that is, it must put the case out of Court, and must be final in all matters within the pleadings.'
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> * * * *
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> . . . . [T]he law frowns upon the practice of bringing cases in fragments to the appellate Courts. . . . The rule in restriction of piecemeal appellate procedure, dating back to the common law, is based upon sound reason and practical utility. If it were, otherwise, endless delays would be encountered--delays which are unnecessary in cases similar to the one now before us, which can be decided upon an appeal from such final judgment as may later be entered by the trial Court.

Good v. Hartford Acc. & Indem. Co., 201 S.C. 32, 40 – 42, 21 S.E.2d 209, 212 - 213 (1942) (citations omitted) (emphasis added) (*quoting* 4 C.J.S., *Appeal and Error* §§ 92, 95(a) & 99 pp. 180, 190 & 195; 2 R.C.L. *Appeal and Error* §§ 10 & 21, pp. 32 & 39; 2 AM.JUR. § 22, p. 860).

The April 5, 2022, Order is irrefutably not a final order for several reasons, First, the April 5, 2022, Order did not dispose of the case, or a distinct branch thereof, as to all the parties, reserving no further questions or directions for future determination. Second, the April 5, 2022, Order did not finally dispose of the whole subject-matter nor was it a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined. Third, the April 5, 2022, Order does not operate to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term; that is, it did not put the case out of Court, and was not final in all matters within the pleadings. Because the April 5, 2022, Order failed to address Respondent, Teach for America, Inc., it failed to meet any of the requisite criteria of finality for purposes of commencing the time for appeal.

Under Section 14-3-330(1), CODE OF LAWS OF SOUTH CAROLINA, 1976, the time for appealing the April 5, 2022, Order began when the April 26, 2023, Order was entered. *See Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990); *see also Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010). Until the April 26, 2022, Order was entered, the April 5, 2022, Order remained "subject to revision under Rule 54(b). . ." which,

incidentally, is exactly what happened[3]. *See Ashenfelder v. City of Georgetown, supra.* Consequently, the time for appealing the order did not begin until April 26, 2022[4].

In any event, a reading of the April 5, 2022, and April 26, 2022, Orders reveal that the April 5, 2022, Order was not a final Order and that the Circuit Court irrefutably intended to retain jurisdiction over the issues surrounding the CCK Respondents until the until the April 26, 2022, Order was entered. The April 5, 2022, specifically states that it does not end the case[5]. *Form 4 Order Granting Motion to Dismiss filed April 5, 2022*, p. 1; *Form 4 Order Granting Motion to Dismiss filed April 26, 2022*, p. 1. The April 26, 2022, Order, on the other hand states first, that it is an "Amended Form 4," that "Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint as to Defendants Thomas J. Bell, individually and as Executive Director of Charleston Coalition for Kids, Charleston Coalition for Kids, a nonprofit Organization, Angelica Colwell, Lee Deas, Godfrey Gibbison, Eric Strickland, Loren R. Ziff, Courtney Waters, Leeza D. Steward, and Teach For America, Inc., is GRANTED," and that the Order ends the case[6]. *Form 4 Order*

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3 This applies irrespective of whether the orders granted Respondents summary judgment or a Rule 12(b)(6) motion to dismiss.

4 This is not to suggest that Appellant had to wait until the April 26, 2022, Order was entered, but only to say that Appellant's time for appealing did not start until the April 26, 2022, Order was entered. *See Link v. School Dist. of Pickens County, supra*; *Id.* Had Appellant appealed the April 5, 2022, Order immediately, the appeal would not have been interlocutory. *Id.* The fact is that the April 5, 2022, Order could have been appealed under either Section 14-3-330(1) or Section 14-3-330(2)(c), CODE OF LAWS OF SOUTH CAROLINA, 1976, exclusive of one another. *Id.* The point is that though Appellant could have been filed immediately following the issuance of the April 5, 2022, Order, the thirty day period for appealing did not actually start until the April 26, 2022, Order was entered. *Id.* Consequently, Respondents position that "[t]he trial court's entering of a second Form 4 Order, for the second time dismissing the SAC as to Respondents the Coalition, the Board Members and Leeza Steward, did not start the clock over for Appellant's time to file a Notice of Appeal as to those parties" is manifestly meritless.

5 Both Orders are Form 4 Orders. Toward the bottom of page 1 of the April 5, 2022, Order under the heading "ORDER INFORMATION" the box indicating that the April 5, 2022, Order does not end the case is checked. *Form 4 Order Granting Motion to Dismiss* filed April 5, 2022, p. 1.

6 Toward the bottom of page 1 of the April 26, 2022, Order under the heading "ORDER INFORMATION" the box indicating that the April 26, 2022, Order ends the case is checked. Form 4 Order Granting Motion to Dismiss filed April 26, 2022, p. 1.

Granting Motion to Dismiss filed April 26, 2022, p. 1. Based on its plain language, the April 5, 2022, Order is incontrovertibly not a final order[7].

Appellant has in no way disregarded the Appellate Court Rules. Rather it is Respondents who disregard well established appellate procedure in raising the timeliness issue. The instant appeal was obviously timely filed[8] so this Court should address the merits of this appeal. .

RESPONDENTS IGNORE THE STANDARDS TO BE APPLIED WHEN PASSING ON A MOTION TO DISMISS PURSUANT TO RULE 12(B)(6) , S.C.R.CIV.P., AND A MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56, S.C.R.CIV.P.

As is the case with the Respondents' timeliness argument, Respondents' arguments as to why the Circuit Court's Order should be affirmed, likewise, ignores well established procedural rules and precedent: particularly Rules 12(b)(6) and 56(b) and (c) and the well-developed case law relating to the same.

"In considering a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the circuit court must base its ruling solely upon the allegations set forth on the face of the complaint." *Charleston Cty. Sch. Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011); *accord Brown v.*

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7 Respondents spuriously chastise Appellant for failing to "to inform this Court that he received the final order as to Respondents the Coalition and Leeza Steward via the e-filing system of the state court on April 5, 2022," in the Notice of Appeal. *Respondent's Joint Initial Brief*, p. 7. Of course, there was no need to mention the April 5, 2022, Order in the Notice of Appeal as that was not the order being appealed. The April 26, 2022, Order specifically states that it is an Amended Form 4 Order which, among, other things, grants the Respondents' motions for summary judgment, and, therefore, supplants the April 5, 2022, Order especially given that the April 5, 2022, states that it does not end the case, whereas the April 26, 2022, order states that it does end the case. What makes Respondents' castigation of Appellant so paradoxical is that nowhere do Respondents bother to mention that the April 5, 2022, Order expressly states that it does not end the case, and, thus, is not a final order, that the April 26, 2022, Order is an amended order or that the April 26, 2022, order states that it does end the case.

8 Respondents implicitly acknowledge this. Respondents do not challenge Appellant's filing of his Notice of Appeal appealing the April 26, 2022, Order in the Office of the Clerk of the Charleston County Court of Common Pleas - which Respondents refer to as "state court;" Appellant was under the impression that this Court and the Charleston Court of Common Pleas are both state courts - on May 12, 2022, and with the Office of the Clerk of this Court on May 17, 2022, as being untimely.

Leverette , 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) ("... solely upon the allegations set forth on the face of the complaint").

> If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. In deciding whether . . . [to grant a] motion to dismiss, the . . . court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. . . [A] complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.

Spence v. Spence, 368 S.C. 106, ___, 628 S.E.2d 869, 874 (2006) (citations omitted).

"The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 674 S.E.2d 524, 528 (Ct. App. 2009). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929, 940-41 (2007) (internal quotations omitted) (*cited with approval Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 180, 826 S.E.2d 585, 588 (2019). A case "should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Capital City Ins. Co. v. BP Staff, Inc.*, *supra* at ___, 674 S.E.2d at 528. "[P]leadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties." *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005) (*citing Stroud v. Riddle*, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973)). "At the Rule 12 stage, therefore, the first decision for the trial court is to

decide only whether the pleading states a claim. . . [A] plaintiff is—entitled to litigate the validity of its original pleading without having to convince the trial court of the merits of its underlying claim." *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, *supra* at 180, 826 S.E.2d at 588. "The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." ." *Capital City Ins. Co. v. BP Staff, Inc.*, *supra* at ___, 674 S.E.2d at 528.

"Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Nelson v. Chas. Co. Parks & Recreation Comm.*, 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Hedgepath v. AT&T*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001). "In determining whether a genuine issue of fact exists, a court must consider everything in the records, pleadings, depositions, interrogatories, admissions on file, affidavits, etc." *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986).

In determining whether to grant summary judgment, the Court must view the facts and inferences in the light most favorable to the non-moving party. *Matsushita Elec. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. *Id.* A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the non-moving party. *Id.* The judge is not to weigh the evidence himself but rather to determine if there is a genuine issue for trial. *Id.* The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

"'The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Harris v. Tietex Int'l Ltd.*, 417 S.C. 533, 540, 790 S.E.2d 411, 415 (Ct. App. 2016) (citations omitted) (*quoting Williams v. Lancaster Cty. Sch. Dist.*, 369 S.C. 293, 302–03, 631 S.E.2d 286, 292 (Ct. App. 2006) and *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002)).

A communication is defamatory if it tends "'to impeach the honesty or integrity or reputation, or publish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or obloquy, or to cause him to be shunned or avoided, or to injure him in his office, business, or occupation.'" *Smith v. "Bradstreet Co,* 41 S.E. 763, 764, 63 S.C. 525, ___ (1902) (*quoting* 18 AM. & ENG. ENC. LAW, at page 861).

> The defamatory character of the words complained of is for the jury if the language is susceptible of two meanings, one defamatory and the other innocent; but if the language is unambiguous the question is for the court. The court determines whether the language is capable of the meaning ascribed to it, and the jury determines whether the language had the meaning ascribed to it.
>
> The South Carolina rule goes further and holds that a demurrer to a complaint (and inferentially a motion for summary judgment) 'will only be sustained where the court can affirmatively say that the publication is incapable of any reasonable construction which will render the words defamatory.' Our courts also hold that any words which raise a strong suspicion of the plaintiff's guilt in the minds of the hearers are sufficient upon which to base a cause of action for slander or libel. And even stronger, our courts hold that if the words are capable of the offensive meaning attributed to them, then an action for libel or slander lies.

Adams v. Daily Tel. Printing Co., 356 S.E.2d 118, 122, 292 S.C. 273, 279 (Ct. App. 1986), *aff'd as modified*, 367 S.E.2d 702, 295 S.C. 218 (1988) (*quoting* 53 C.J.S. *Libel and Slander* § 223(a) (1983) and *citing Flowers v. Price*, 192 S.C. 373, 6 S.E.2d 750 (1940)).

To establish a cause of action for civil conspiracy:

> a plaintiff asserting a civil conspiracy claim 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, ___, 861 S.E.2d 774, 780 (2021).

Quoting with approval the following language from *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148 (Me. 1979), our Supreme Court explained:

> [I]n order to recover for the intentional infliction of emotional distress, a plaintiff must establish that (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community,'; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was 'severe' so that 'no reasonable man could be expected to endure it. Although 'severe' emotional distress is usually manifested by 'shock, illness or other bodily harm,' such objective symptomatology is not an absolute prerequisite for recovery of damages for intentional ... infliction of emotional distress.

Ford v. Hutson, 276 S.C. 157, 162, 276 S.E.2d 776, 778 -779 (1981)

The crux of the libelous statements as alleged in the Second Amended Complaint are that: (1) "Kevin Hollinshead is using our money to help himself. Hollinshead was successfully sued for stealing one-hundred fifty thousand dollars ($150,000) from a local HBCU and lied to cover it up." (2) "Hollinshead was successfully sued for stealing one-hundred fifty thousand dollars ($150,000) from Benedict College." (3) "We can't have someone like that managing the tax dollars for our schools." *2nd AS&C*. The statements in question were fabricated by the defendants and tend "'to impeach the honesty or integrity or reputation'" of Appellant which "'expose him to public hatred, contempt, ridicule, or obloquy, or to cause him to be shunned or avoided, or to injure him in his office, business, or occupation.'" That was obviously the Respondents' intent. On this, reasonable minds cannot differ.

The claim that Appellant is "using our money to help himself" implies that Appellant is misappropriating and/or stealing taxpayer money. This is especially when put into context with the later statement that "We can't have someone like that managing the tax dollars for our schools."

The statement that Appellant is "using our money to help himself" implies that Appellant is misappropriating and/or stealing taxpayer money. The statement that "We can't have someone like that managing the tax dollars for our schools" when coupled with and put in context with the statement that Appellant is "using our money to help himself" cannot be plausibly construed as an opinion: it is a statement to the effect that Respondent is misappropriating and/or stealing taxpayer money. This is unquestionably defamatory.

> [D]efamation need not be accomplished in a direct manner.
>
> 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 v. Macks Stores of S.C., Inc., 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980).

The clear and unequivocable insinuation is that Appellant is misappropriating taxpayer money to his own use; in other words stealing. Appellant has never stolen or misappropriated taxpayer dollars or funds designated for or allocated to a school district, any school or any governmental entity or agency. This representation is pure and simply a lie created by the Respondents out of whole cloth.

It is well settled that this Court is not permitted to consider matters outside of the four corners of the Second Amended Complaint when passing on the Rule 12(b)(6) motions. *See, e.g., Charleston Cty. Sch. Dist. v. Harrell*, *supra* (reversing the trial court's order granting the defendants motion to dismiss because the trial court considered matters outside of the four corners of the complaint when deciding the motion). Rather, when considering the Respondents' motions,

this Court may only consider the allegations contained in the Second Amended Complaint, which it must accept as true and all inferences drawn from the facts alleged in the Second Amended Complaint must be viewed in the light most favorable to Appellant. *See, e.g., Id.*; *Spence v. Spence, supra.* If the factual allegations entitle Appellant to relief on any theory – which is the case here - Respondents' motions must be denied. *Id.* Because the facts alleged and inferences reasonably deducible therefrom as alleged in the Second Amended Complaint entitle Appellant to relief, the Lower Court's Order must be reversed. *Id.*

"When the language alleged to be libelous, or slanderous, is plain and unambiguous, and admits of but one reasonable construction, it becomes a matter of law for the action and determination of the court. If said language be ambiguous, or doubtful of meaning, it should be left to the jury to determine in what sense it was used, and what its meaning is." *Drakeford v. Dixie Home Stores*, 105 S.E.2d 711,714, 233 S.C. 519, 524 (1958). Dismissal of a complaint "'will only be sustained where the court can affirmatively say that the publication is incapable of any reasonable construction which will render the words defamatory.' . . . [A]ny words which raise a strong suspicion of the plaintiff's guilt in the minds of the hearers are sufficient upon which to base a cause of action for slander or libel. . . . [I]f the words are capable of the offensive meaning attributed to them, then an action for libel or slander lies." *Adams v. Daily Tel. Printing Co., supra.*

A reading of Respondents' Brief reveals that their arguments are premised entirely on a view of the evidence and the evidence to be drawn therefrom in a light most favorable to them. This is clearly repugnant to the standards by which both a Rule 12(b)(6) and a Rule 56(b) motion are to be decided. To the contrary all of the evidence and the inferences to be drawn therefrom must be viewed in a light most favorable to Appellant.

Respondents contend that as a public official and public figure, Appellant has the burden of showing falsity of the alleged defamatory statements which he cannot do as a matter of law based on the undisputed facts contained in his own pleading." The burden of proof is an evidentiary standard. *See Jones v. Leagan*, 681 S.E.2d 6, 384 S.C. 1 (Ct. App. 2009). Respondents' position by necessarily require this Court to consider the evidence in this case to reach such a conclusion. It is well settled that the Court is to consider only the allegations of the complaint under consideration when passing on a motion to dismiss under Rule 12(b)(6). Factual considerations are not permitted.

"In a defamation action, the defendant may assert ***the affirmative defense*** of conditional or qualified privilege." *Swinton Creek Nursery v. EFC*, 334 S.C. 469, 484, 514 S.E.2d 126, ___ (1999) (emphasis added). As a consequence, the burden of establishing the defense of qualified privilege is on the party asserting it. *Duckworth v. First Nat. Bank*, 176 S.E.2d 297, 254 S.C. 563 (1970).

> 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. ''The essential elements of a conditionally privileged communication may 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.''. An abuse of the privilege occurs in one of two situations: (1) a statement made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement made in reckless disregard of the victim's rights.

Fountain v. First Reliance Bank, 730 S.E.2d 305, 310, 398 S.C. 434, 444 (2012) (*quoting Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987) *quoting Conwell v. Spur Oil Co. of W.S.C.*, 240 S.C. 170, 178, 125 S.E.2d 270, 274–75 (1962)). "Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the

burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." *Swinton Creek Nursery v. EFC*, *supra* at 485, 514 S.E.2d at ___.

As the parties asserting the affirmative defense of conditional privilege, Respondents have the burden of proving it. That, of course, would necessitate the consideration of evidence outside of the Second Amended Complaint, which is not permitted. Further, in paragraph 80 of the Second Amended Complaint it is specifically alleged that "[t]hat Bell, CCFK, Colwell, Deas, Gibbison, Strickland, [and] Ziff['s] . . . statements were made with constitutional malice." For purposes of a 12(b)(6) motion, this allegation must be accepted as true. Thus, at the Rule 12(b)(6) stage Appellant has established actual malice. *See, e.g., New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, (1964); *see also Scott v. McCain*, 272 S.C. 198, 250 S.E.2d 118 (1978). Accordingly, at this stage, reliance on the affirmative defense of conditional privilege is misplaced.

Finally Respondents take the position that the causes of action for outrage and civil conspiracy fail because the statements which they admit making in concert are true rather than false. This issue has been adequately addressed. They further seem to miss the point that once one is engaged in a conspiracy, the acts of one are the acts of all if made in furtherance of the conspiracy. Thus, the fact that one or more of the particular defendants did not actually make the statement in the d does not absolve him or her from liability for civil conspiracy. As the statements are clearly false, the Respondents' positions with regard to outrage and civil conspiracy are without merit.

A civil conspiracy cause of action presents a question of fact "'so long as there is a possibility that the jury can infer from the circumstances' that the defendants conspired to injure the plaintiffs." *Williams v. Brown*, 269 F.Supp.2d 987, 995 (N.D. Ill. 2003)(holding that the

plaintiff's conspiracy claim presented a jury question because plaintiffs offered circumstantial evidence suggesting a conspiracy)(quoting *Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir. 1979)). The question presented in this appeal is solely whether the Second Amended Complaint presents sufficient allegations to state a cause of action for civil conspiracy when such allegations are accepted as true and viewed in a light most favorable to Appellant. Clearly, the Second Amended Complaint does so.

The same is true of the outrage cause of action. The question presented in this appeal is solely whether the Second Amended Complaint presents sufficient allegations to state a cause of action for outrage when such allegations are accepted as true and viewed in a light most favorable to Appellant. Clearly, the Second Amended Complaint does so.

CONCLUSION

Without question the trial Circuit Court erred in dismissing this action. Clearly the Second Amended Complaint states facts sufficient to constitute a cause of action. Accordingly, the Court's Orders dismissing the case must be reversed and this matter must be remanded for further proceedings.

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April 25, 2023
Charleston, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS

THE HONORABLE R. FERRELL COTHRAN, JR., CIRCUIT COURT JUDGE

Docket No. 2021-CP-10-00426

Kevin Dion Hollinshead, Senior,..... Appellant,

v.

Thomas J. Bell, individually and as Executive Director of Charleston Coalition for Kids, Charleston Coalition for Kids, a nonprofit Organization, Angelica M. Colwell, Lee P. Deas, Godfrey A. Gibbison, Eric P. Strickland, Loren R. Ziff, Courtney S. Waters, Leeza D. Steward, and Teach for America, Inc.....Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a complete and accurate copy of the foregoing INITIAL REPLY BRIEF OF APPELLANT was served upon all counsel of record, as listed below, on April 25, 2023, via e-mail as follows:

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Apr 25 2023
SC Court of Appeals

April 25, 2023

Via e-mail: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings, Clerk
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RE: **Case Caption:** *Kevin Dion Hollinshead, Senior, Appellant v. Thomas J. Bell, individually and as Executive Director of Charleston Coalition for Kids, Charleston Coalition for Kids, a nonprofit Organization, Angelica Colwell, Lee Deas, Godfrey Gibbison, Eric Strickland, Loren Ziff, Courtney Waters, Lezza Steward, and Teach for America, Inc., Respondents.*
Case No.: 2022-000674

Dear Ms. Kitchings:

Please find enclosed for filing the Initial Reply Brief of Appellant in connection with the above.

With warmest personal regards, I am

Yours very truly,

Edward K. Pritchard, III, Esq.
Attorney for Appellant, Kevin Dion Hollinshead, Sr.

cc: Brittany Tanya Bihun, Esq. (via e-mail)
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