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**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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**APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS**

**THE HONORABLE ROGER M. YOUNG, CIRCUIT COURT JUDGE**

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**Appellate Case No. 2021-001414**

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**Charleston Advancement Academy High School.. .....Appellant,**

**V.**

**South Carolina Public Charter School District..... Respondent.**

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**FINAL BRIEF OF APPELLANT**

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July 8, 2023

Charleston, South Carolina

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... **i**

**CASES**..... **i**

**CONSTITUTIONS**..... **ii**

**STATUTES**..... **ii**

**Rules**..... **iv**

**TREATISES** ..... **iv**

**STATEMENT OF ISSUES ON APPEAL** ..... **v**

**STATEMENT OF THE CASE** ..... **1**

**FACTS** ..... **2**

**STANDARD OF REVIEW** ..... **12**

**ARGUMENT**..... **14**

**THE TRIAL COURT CLEARLY ERRED IN FINDING THAT IT HAS NO SUBJECT  
MATTER JURISDICTION OVER THIS MATTER BASED ON THE SOUTH CAROLINA  
CHARTER SCHOOLS ACT OF 1996, AS AMENDED** ..... **14**

**Breach of Contract**..... **26**

**Declaratory Judgment**..... **32**

**Due Process**..... **33**

**Circuit Court’s Failure to Grant Proper Relief**..... **34**

**CONCLUSION** ..... **34**

## TABLE OF AUTHORITIES

### CASES

<i>16 Jade St., LLC v. R. Design Constr. Co.</i> , 398 S.C. 338, 728 S.E.2d 448 (2012) .....	17
<i>Anthony v. S.C. State Plastering Llc</i> , 390 S.C. 562, 703 S.E.2d 197 (2011).....	15
<i>Auto Owners Ins. Co. v. Rollison</i> , 663 S.E.2d 484, 378 S.C. 600 (2008).....	25
<i>Beaufort Cty. Bd. of Educ. v. Lighthouse Charter School</i> , 335 S.C. 230, 516 S.E.2d 655 (1999) .....	33
<i>Capital City Ins. Co. v. BP Staff, Inc.</i> , 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009).....	12, 13, 14, 26, 27, 30, 34
<i>Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville</i> , 369 S.C. 498, 632 S.E.2d 864 (2006) .....	30
<i>Chew v. Newsome Chevrolet, Inc.</i> , 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993).....	13
<i>Cribb v. Spatholt</i> , 382 S.C. 490, 676 S.E.2d 714 (Ct. App. 2009) .....	12
<i>Davis v. County of Greenville</i> , 322 S.C. 73, 470 S.E.2d 94 (1995).....	14
<i>Doe v. Marion</i> , 361 S.C. 463, 605 S.E.2d 556 (Ct. App. 2004) .....	17
<i>Felts v. Richland Cty.</i> , 303 S.C. 354, 400 S.E.2d 781 (1991).....	32
<i>Jensen v. S.C. Dep't of Soc. Servs.</i> , 297 S.C. 323, 377 S.E.2d 102 (Ct. App. 1988) .....	32
<i>Freemantle v. Preston</i> , 398 S.C. 186, 728 S.E.2d 40 (2012).....	32
<i>Graham v. Lloyd's of London</i> , 296 S.C. 249, 371 S.E.2d 801 (Ct. App. 1988) .....	12
<i>Harbit v. City of Charleston</i> , 675 S.E.2d 776, 382 S.C. 383 (Ct. App. 2009).....	33
<i>Hodges v. Rainey</i> , 341 S.C. 79, 533 S.E.2d 578 (2000) .....	15, 16
<i>Jeter v. South Carolina Dept. of Transp.</i> , 633 S.E.2d 143, 369 S.C. 433 (2006).....	14
<i>Kiriakides v. United Artists Communications, Inc.</i> , 312 S.C. 271, 440 S.E.2d 364 (1994) .....	16
<i>Murphy v. S.C. Dep't of Emp't &amp; Workforce</i> , Appeal No. 22-ALJ-22-0077-AP (S.C. Ct. App. 2022).....	31

<i>Patel v. BVM Motel, LLC</i> , 433 S.C. 337, 857 S.E.2d 564 (Ct. App. 2021).....	31
<i>Ray Bell Constr. Co. v. School Dist. of Greenville Co.</i> , 331 S.C. 19, 501 S.E.2d 725 (1998) .....	16
<i>Sabb v. South Carolina State Univ.</i> , 350 S.C. 416, 567 S.E.2d 231 (2002) .....	14
<i>Skinner v. Westinghouse Elec. Corp.</i> , 380 S.C. 91, 668 S.E.2d 795 (2008).....	30
<i>Skydive Myrtle Beach, Inc. v. Horry Cty.</i> , 426 S.C. 175, 826 S.E.2d 585 (2019) .....	34
<i>S.C. Bd. of Dental Examiners v. Breeland</i> , 208 S.C. 469, 38 S.E.2d 644 (1946) .....	16
<i>S.C. State Ports Auth. v. Jasper Cty.</i> , 368 S.C. 388, 629 S.E.2d 624 (2006) .....	16
<i>Stanton v. Town of Pawley's Island</i> , 309 S.C. 126, 420 S.E.2d 502 (1992) .....	30
<i>The Town of Mt. Pleasant v. Roberts</i> , 393 S.C. 332, 713 S.E.2d 278 (2011).....	15
<i>Thomas Sand Co. v. Colonial Pipeline Co.</i> , 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002).....	28
<i>Unisys Corp. v. S.C. Budget &amp; Control Bd.</i> , 346 S.C. 158, 551 S.E.2d 263 (2001) .....	30
<i>Wade v. State</i> , 348 S.C. 255, 559 S.E.2d 843 (2002) .....	15
<i>Ward v. State</i> , 343 S.C. 14, 538 S.E.2d 245 (2000).....	28
<i>Ward v. West Oil Co., Inc.</i> , 387 S.C. 268, 692 S.E.2d 516 (2010).....	15

**CONSTITUTIONS**

S.C. CONST. art. I § 22 .....	1
S.C. CONST. art. V § 1 .....	14
S.C. CONST. art. V § 11 .....	14

**STATUTES**

Section 1-23-380, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....	31
Section 1-23-380(5), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....	31
Section 1-23-600(D), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....	31
Section 33-31-101 through 1708, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended. ....	2

Section 33-31-302, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....24

Sections 15-53-10 through 140, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....1

Sections 59-40-10 through 240, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....2

Section 59-40-30, CODE OF LAWS OF SOUTH CAROLINA 1976, as amended .....17

Section 59-40-40, CODE OF LAWS OF SOUTH CAROLINA 1976, as amended .....17

Section 59-40-40(4), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....14, 27

Section 59-40-50, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....6, 18, 20

Section 59-40-50(B)(1), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....3

Section 59-40-50(B)(6), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....6

Section 59-40-55, CODE OF LAWS OF SOUTH CAROLINA 1976, as amended .....19

Section 59-40-55(A), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....26

Section 59-40-55(B)(5), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....7

Section 59-40-55(C), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....7

Section 59-40-60, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....20, 26

Section 59-40-60(E)(2), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....24

Section 59-40-60(F)(13), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....6

Section 59-40-70(C), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....20

Section 59-40-70(F), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....20

Section 59-40-90, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....14, 26, 28, 30, 31

Section 59-40-100(A), CODE OF LAWS OF SOUTH CAROLINA 1976, as amended.....23

Section 59-40-100(E), CODE OF LAWS OF SOUTH CAROLINA 1976, as amended .....23

Section 59-40-110, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....26

Section 59-40-110(A), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....23

Section 59-40-110(B)(3), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....	<b>23</b>
Section 59-40-110(C), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....	<b>21</b>
Section 59-40-110(C)(1), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended. ....	<b>21</b>
Section 59-40-110(C)(2), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....	<b>21</b>
Section 59-40-110(E), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....	<b>21, 23</b>
Section 59-40-110(F), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....	<b>23</b>
Section 59-40-110(H), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....	<b>23</b>
Section 59-40-115, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....	<b>24</b>
Section 59-40-140, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....	<b>26, 27</b>
Section 59-40-140(D), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....	<b>5, 7, 14</b>
Section 59-40-190, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....	<b>24</b>
Section 59-40-190(C), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....	<b>14, 31, 32, 33</b>
Section 59-40-220(A), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....	<b>15</b>
Section 59-40-230, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....	<b>21</b>
Section 59-40-230(B), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended .....	<b>21</b>
Section 59-40-230(E)(1), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....	<b>21</b>
Section 59-40-230(E)(2), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....	<b>21</b>
Section 59-40-230(F), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.....	<b>24</b>

**RULES**

Rules 12, S.C.R.CIV.P. ....	<b>31</b>
Rules 12(b)(1), S.C.R.CIV.P. ....	<b>1, 12, 13</b>
Rules 12(b)(2), S.C.R.CIV.P. ....	<b>1, 12, 13</b>
Rules 12(b)(6), S.C.R.CIV.P. ....	<b>1, 12, 33</b>

Rule 15(a), S.C.R.Civ.P.....33

**TREATISES**

NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.03 at 94 (5<sup>th</sup> ed. 1992).....15

**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE TRIAL COURT ERR IN DETERMINING THAT IT LACKS SUBJECT MATTER JURISDICTION OVER THIS ACTION BASED ON PROVISIONS OF THE SOUTH CAROLINA CHARTER SCHOOLS ACT OF 1996, AS AMENDED?**

## STATEMENT OF THE CASE

This is an action for breach of contract, violation of due process under S.C. CONST. art. I § 22, and declaratory judgment pursuant to Sections 15-53-10 through 140, CODE OF LAWS OF SOUTH CAROLINA, 1976. *R.* pp. 018 – 065, 078 - 150. This matter arises out of dispute between Appellant, Charleston Advancement Academy High School (hereinafter referred to as “CAA”) and Respondent, South Carolina Public Charter School District (hereinafter referred to as the “District”) regarding whether the District has the contractual authority to prevent CAA from terminating its April 2, 2018, agreement with Acceleration Academies, LLC (hereinafter referred to as “AA”), in which AA agreed to provide certain services to CAA. *R.* pp. 018 – 065, 078 - 150.

CAA initiated this action on December 20, 2019, in the Charleston County Court of Common Pleas<sup>1</sup>. *R.* pp. 018 – 065. CAA subsequently amended the Complaint on January 23, 2020<sup>2</sup>. *R.* pp. 018 – 065, 078 - 150. The District filed a Motion to Dismiss pursuant to Rules 12(b)(1), (2) and (6). S.C.R.CIV.P. in lieu of an answer on February 13, 2020. *R.* pp. 304 - 305. A hearing on the District’s motion to dismiss was held on October 26, 2021. *R.*, pp. 011 – 015, 427 and 429<sup>3</sup>. The District’s motion to dismiss was granted November 3, 2021. *R.*, pp. 011 – 015. This appeal followed. *R.*, pp. 419 - 426.

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<sup>1</sup> Concurrent with the filing of the Summons and Complaint, CAA also filed a Motion for Temporary Restraining Order and Preliminary Injunction. *R.*, pp. 066 - 077.

<sup>2</sup> Concurrent with the filing of the Amended Complaint, CAA also filed an Amended Motion for Temporary Restraining Order and Preliminary Injunction. *R.*, pp. 267 - 274. CAA’s Motion for Temporary Restraining Order and Preliminary Injunction was denied on February 26, 2020. *R.*, pp. 001 - 007. CAA moved to alter or amend the Court’s February 26, 2020, Order on March 5, 2020. *R.*, pp. 332 - 327. CAA’s motion to alter or amend the Court’s February 26, 2020, Order was denied on October 24, 2021. *R.*, pp. 008 - 010.

<sup>3</sup> The hearing date is listed in the Order as October 2, 2021. *Order* dated and signed November 3, 2021. The transcript lists the hearing date as October 26, 2021. *R.*, pp. 427- 449. Given that October 2, 2021, was a Saturday and given that the SCCourts.org calendar page lists Judge Young as holding a Non-Jury Common Pleas Term of Court the week of October 25, 2021, the date listed in the transcript of October 26, 2021, is clearly the correct one.

## FACTS

CAA is a nonprofit corporation and a public charter school organized under the South Carolina Charter Schools Act of 1996, as amended (hereinafter referred to as the “Act”)<sup>4</sup>, and the South Carolina Nonprofit Act of 1994, as amended (hereinafter referred to as the “Nonprofit Act”)<sup>5</sup>. *R.* pp. 019, ¶ 1, 275 - 275. CAA is an Alternative Education Campus (hereinafter referred to as the “AEC”). *R.*, p. 080, ¶ 1. CAA first began operating its school at the beginning of the 2018-2019 school year<sup>6</sup>. *R.*, p. 080, ¶ 1. CAA has two campuses located in Charleston County, one of which on the campus of Trident Technical College (hereinafter referred to as “TTC”), which it leases from TTC. *R.*, pp. 080, ¶ 1, 272; 402, ¶ 6.

The District is a charter school sponsor which sponsors more than three dozen charter schools including CAA. *R.*, p. 080, ¶ 2. CAA’s charter was approved by the District on May 20, 2017 (hereinafter referred to as the “Charter”). *R.*, pp. 082, ¶ 8 and exhibit therein referenced, 270; 276. CAA and the District thereafter entered into a charter contract on April 11, 2018 (hereinafter referred to as the “Contract”). *R.*, pp. 082, ¶ 8 and exhibit therein referenced, 270, 276 – 277, 285. The Contract defines the respective authorities and responsibilities of CAA and the District. *R.*, p. 082, ¶ 8 and exhibit therein referenced. The Charter specifically provides, inter alia, that “CAA’s Board of Directors will be able to terminate any management agreement if the Board of Directors determines that academic or operational performance is inadequate,” and that “CAA’s Board of Directors will have final oversight of the school, and may release CAA’s principal or terminate the agreement with

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<sup>4</sup>. Sections 59-40-10 through 240, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.

<sup>5</sup>. Section 33-31-101 through 1708, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.

<sup>6</sup>. CAA’s mission is to provide a comprehensive education to at-risk students with the goal of assisting them in attaining a high school diploma and acceptance to collage or pursuit of a career. *R.*, p. 081. CAA’s guiding educational philosophy is that all students - regardless of past academic performance or personal obstacles - are capable of graduating from high school ready to succeed in the job market or post-secondary education. *R.*, pp 080, ¶1, 081, ¶5.

AA if the Board deems it necessary.” *R.*, 082, ¶ 8 and exhibit therein referenced.

CAA is governed by an independent and autonomous Board of Directors (hereinafter referred to as the “Board”). *R.*, pp. 081, ¶ 4, 276. CAA is statutorily empowered to make its own employment decisions, contract for services, and acquire and manage its own property. *R.*, p. 081, ¶ 6.

On April 2, 2018, CAA entered into an agreement with Acceleration Academies, LLC (hereinafter referred to as “AA”), in which AA agreed to provide certain services to CAA (hereinafter referred to as the “Agreement”). *R.*, pp. 082, ¶ 9; 402, ¶ 3; 267; 277. The services AA contractually agreed to provide included, among other things, developing and implementing a security plan to ensure the safety of all students and personnel<sup>7</sup>. *R.*, p. 082, ¶ 9. The Agreement provides that “[i]n the event that a danger to student health, safety, or welfare exists, at the sole discretion of . . . [CAA], this Agreement may be terminated immediately.” *R.*, pp. 082, ¶ 9, 277.

In October 2019, the Board learned that AA failed to appropriately address and disclose two dozen safety violations on CAA’s TTC campus. *R.*, pp. 082, ¶ 10, 271, 275, 277, 402, ¶ 4. Upon learning that the Board was concerned about the safety violations, AA preemptively gave CAA a 180-day-notice of termination of the Agreement. *R.*, 082 – 083, ¶ 11, 271, 275, 277, 402, ¶ 5.

On October 30, 2019, CAA received a letter from TTC’s President, outlining 24 safety violations on CAA’s TTC’s campus, including numerous crimes which resulted in arrests. *R.*, p. 083, ¶ 12 and exhibit therein referenced, 277, 402 - 403, ¶ 7. The letter concluded that while TTC is highly supportive of CAA’s mission, “if significant change in the number of incidents does not occur over the next two months, we will have to proceed with notification of [CAA’s lease] contract cancellation. We must ensure the safety and security of everyone at our college.” *R.*, pp ¶ 12 and

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<sup>7</sup>. CAA is statutorily obligated to “adhere to the same health, [and] safety . . . requirements as are applied to public schools operating in the same school district or, in the case of the South Carolina Public Charter School District . . . the local school district in which the charter school is located.” Section 59-40-50(B)(1), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.

exhibit therein referenced, 277. Had TTC terminated CAA’s lease mid-year, CAA would have had to close its TTC campus, resulting in disruption to CAA’s students and their families. *R.*, pp. 082 – 083, ¶¶ 11 – 13, 277.

On October 31, 2019, the Board voted unanimously to accept the termination tendered by AA and to immediately terminate the Agreement for just cause based on student welfare and safety concerns and violations pursuant to the terms of the Agreement. *R.*, pp. 083 - 084, ¶¶ 14 & 16, 268, 271, 275, 277, 285, 402, ¶ 8. On November 4, 2019, a Demand for Arbitration was submitted to the American Arbitration Association by AA. CAA promptly filed counterclaims in the arbitration against AA. *R.*, pp. 083, ¶ 15, 403, ¶ 10. The crux of the arbitration was to determine whether either CAA or AA was entitled to monetary damages. *R.*, pp. 083, ¶ 15, 403, ¶ 10.

Immediately after the Agreement was terminated, CAA began developing a plan to replace the services provided by AA with the goal of minimizing disruption to students<sup>8</sup>. *R.*, pp. 083 - 084, ¶ 16, 268, 277, 285, 403, ¶ 9. On November 11, 2019, CAA submitted a Charter Amendment Request (hereinafter referred to as the “Amendment”) to the District removing AA from the Charter. *R.*, pp. ¶ 17, 275, 277, 278. On November 14, 2019, during a regularly scheduled meeting of the District, the CAA leadership team presented the proposed Amendment to the District’s Board of Trustees (hereinafter referred to as the “Trustees”) which included outlining the steps CAA had taken to replace the services previously provided by AA<sup>9</sup>. *R.*, pp. 083- 084, ¶¶ 16 & 18, 268, 278, 403, ¶ 11, 406, ¶

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<sup>8</sup> CAA’s plan included retaining Dr. Robert E. Bohnstengel, an experienced South Carolina charter school leader as its Principal and hiring a well-established charter school financial services provider, Prestige School Solutions, to provide financial management services. *R.*, pp. 084, ¶ 17; 269, 271, 277, 278, 285, 403, ¶ 9, 406, ¶ 2.

<sup>9</sup> Though AA is neither a party to the Charter or the Contract nor a third-party beneficiary under the Charter or the Contract, numerous representatives of AA attended the November 14, 2019, meeting. *R.*, pp. 082 & 084, ¶¶ 8 & 19, and exhibit therein referenced and ¶ 19; 278, 403, ¶ 11. Among the AA employees who attended the District’s November 14, 2019, meeting was CAA’s then-Director, Erin Franey, who disregarded a directive from Dr. Bohnstengel and abandoned her post during the school day to attend the meeting. *R.*, pp. 084,

3. After considering the matter the Trustees voted to “[d]eny amendment and to maintain status quo until CAA presents a plan showing ability to immediately implement all activities in the charter with SCPCSD contract and EMO” because they did not agree with CAA’s termination of the Agreement. *R.*, pp. 083- 085, ¶¶16 & 20, 268, 271, 278, 403, ¶ 12.

On November 15, 2019, CAA terminated Ms. Franey’s employment<sup>10</sup>. *R.*, pp 074, 085, ¶ 21, 269, 272, 278, 285, 406 - 407, ¶5. After CAA terminated Ms. Franey, AA employed her and sought to have her continue working on CAA’s campus pursuant to the District’s purported mandate that CAA continue working with AA. *R.*, pp. 074, 083 – 085, ¶¶ 16, 24, 269, 278.

Shortly after CAA terminated the Agreement and Ms. Franey’s employment, CAA began receiving threatening letters from the District. *R.*, pp. 086, ¶ 25, 278. Specifically, between November 21, 2019, and December 5, 2019, CAA received three disruptive and perplexing letters from the District imposing “sanctions short of revocation” on CAA<sup>11</sup>. *R.*, 086, ¶ 26, 278, 279, 407 - 408, ¶¶ 8, 12. For reasons unknown, CAA’s entire staff were copied on the District’s letters, which undermined the Board’s authority, and diminished the Board’s ability to work constructively with its staff to transition away from AA. *R.*, pp. 068, 069, 074, 086, ¶ 27, 480, ¶ 12.

By letter dated December 6, 2019, CAA responded to the District’s letters expressing

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¶ 19, 278, 406, ¶3. During the meeting the District permitted AA’s representatives, including Ms. Franey, to address the Amendment at which time they made derogatory statements about the Board and its termination of the Agreement. *R.*, pp. 084, ¶ 19, 278.

<sup>10</sup> The basis for the dismissal was insubordination in abandoning CAA’s campus on November 14, 2019, in direct contravention to Dr. Bohnstengel’s directive and for failing to report student safety and welfare concerns. *R.*, pp. 085, ¶ 21; 269, 406 - 407, ¶¶4 and 5.

<sup>11</sup>. The District’s sanctions included (a) withholding state and federal funding in violation of Section 59-40-140(D), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, (b) restricting CAA’s ability to spend any funds without District approval, (c) managing the Agreement, (d) taking authority over and controlling the day-to-day operations of CAA, (e) having final authority over all CAA employment and personnel matters, (f) reinstating Ms. Franey and requiring CAA to pay her pursuant to the Agreement, (g) permitting AA to operate on CAA’s campuses, and (f) outlining additional measures that ultimately stripped the Board and CAA’s Principal of the authority to govern and administer CAA none of which are permitted by the Act, the Charter or the Contract. *R.*, pp. 067, 086, ¶ 26, 276, 279.

confusion over the District’s actions, and requested that the District hold a special meeting as soon as possible to discuss CAA and its governance and operations moving forward. *R.*, pp. 086, ¶ 28, 279. In response the District called and held a special meeting at CAA’s request on December 13, 2019. *R.*, pp. 087, ¶ 29, 279. During this meeting, the Board orally and in writing requested that the District support the Board’s authority to: (1) exercise its statutory, contractual, and fiduciary responsibilities governing the operation of CAA; (2) avoid substantial disruption and ensure the safety and welfare of CAA’s at-risk student population; and (3) comply with the State of South Carolina’s Safe Schools Climate Act. *R.*, pp. 087, ¶ 29, 279. Specifically, CAA asked the District to affirm, among other things:

- a.** That pursuant to Section 4.6(A) of the Charter, AA shall not “interfere with . . . [CAA’s] duty to exercise its statutory, contractual, and fiduciary responsibilities governing the operation of . . . [CAA].”
- b.** That pursuant to page 76 of the Charter “CAA[] . . . will be ultimately responsible for the academic and operational performance of CAA . . . [as] expressed through the ability of CAA[] . . . to hire, evaluate, and fire the principal of CAA. . . [and] to terminate any management agreement if the Board . . . determines that academic or operational performance is inadequate.”
- c.** That pursuant to Section 4.6(O) of the Charter that while the District has the authority and responsibility to approve an agreement between CAA and AA, the Board has the sole authority to terminate the Agreement due to unsatisfactory performance by AA.
- d.** That pursuant to Section 59-40-50, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, and Section 4.6(E) of the Charter, the Board must, in order to fulfill its statutory and contractual obligations and complete its plan to replace the services

provided by AA, have access to financial records, personnel records, educational and technology software and programs, nontangible assets of CAA, and student records pertaining to CAA, which are CAA's property and must be maintained and readily available in a timely manner at CAA's physical location, and express the District's expectation of AA's cooperation to ensure that CAA has timely access to records related to CAA, its students, its employees, its operations, and its public funds.

- e.** That AA is not a third-party beneficiary of the Contract and has no authority under the Charter to operate on CAA's campuses.
- f.** That pursuant to Section 59-40-55(C), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, "[t]he . . . District may retain no more than two percent of the total state appropriations for each charter school it authorizes to cover the costs for overseeing its charter schools."
- g.** That pursuant to Section 59-40-140(D), "after receipt of federal or state categorical aid funds, the . . . [District] shall, within ten business days, supply to the charter school the proportional share of each categorical fund for which the charter school qualifies," so that CAA can fund its operations and planning activities to replace the services of AA.
- h.** Affirm that pursuant to Section 59-40-55(B)(5), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, "[a] charter school sponsor shall conduct or require oversight activities that enable the sponsor to fulfill its responsibilities outlined in this chapter, including conducting appropriate inquiries and investigations, only if those activities are consistent with the intent of this chapter, adhere to the terms of the charter contract, and do not unduly inhibit the autonomy granted to public charter schools."

- i. Affirm that the District has not arbitrated or otherwise decided all or any part of the dispute between CAA and AA, the District has not issued any findings of wrongdoing by CAA, and the District has not determined whether any amounts are owed by CAA to AA or vice versa pending arbitration.
- j. Affirm the CAA's authority to manage its school facilities and operations to avoid any additional disruption to the education of CAA's predominantly low-income at-risk student population.
- k. Affirm the CAA's authority to prevent on-site disputes, disruptions, and communications by prohibiting representatives and employees of AA on CAA's campuses and by prohibiting AA personnel from contacting CAA's employees without explicit written permission of the liaison under the direction of the CAA.

*R.*, pp. 087 – 089, ¶ 30, 279. After hearing from CAA<sup>12</sup>, the Trustees declined to affirm any of the CAA's statutory and contractual authorities outlined above and issued an oral and written statement which, among other things, (a) mandated that AA continue providing services at CAA's campus pursuant to the Charter, (b) affirmed the District's purported authority over CAA's employment and personnel matters, and (c) restated the District's intent to continue withholding federal and state funding from CAA. *R.*, pp. 090, ¶ 32 and exhibit therein referenced, 075, 271, 279, 280.

Using the aforementioned letters imposing sanctions on CAA for support, AA sought injunctive relief in the arbitration action seeking to prevent CAA from terminating the Agreement, requiring CAA to retain Ms. Franey, and requiring members of the Board to provide 24 hours' notice to AA before visiting CAA's campuses. *R.*, pp. 083 – 084, 091, ¶¶16, 36, and exhibit therein

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<sup>12</sup> Once again the District allowed representatives of AA and CAA employees who were upset with the CAA's termination of AA an opportunity to express their displeasure with the Board, despite AA's not being a party to or a third-party beneficiary of the Charter or Contract. *R.*, pp. 089 – 090, ¶ 31.

referenced, 269, 280. Relying on the District's letters and the District's purported legal authority to issue the sanctions stated in the District's letters the arbitrator granted AA requested injunctive relief almost quoting verbatim the language of the District's letters. *R.*, pp. 083 – 091, ¶¶ 16, 36, and exhibit therein referenced, 269, 280. In effect, the District, through its own actions and through the actions of the out-of-state arbitrator relying on the District's letters, negated the Board's authority under the Act, the Nonprofit Act, the Charter, and the Contract to govern and manage CAA and transferred control of a charter school to itself and a Chicago-based for-profit contractor. *R.*, pp. 083 – 091, ¶¶ 16, 36, and exhibit therein referenced, 269, 273, 280.

As a consequence of the District's actions and the injunctive relief issued by the arbitrator, the relationship between the Board and AA became toxic and disputes occurred daily at CAA's campus. *R.*, 074, 083 - 091, ¶¶ 16, 37, and exhibit therein referenced, 268, 281, 403, ¶ 13. CAA informed the District of AA's numerous disruptive actions which interfered with CAA's educational program and operations. *R.*, pp. 074, 091, ¶ 37, and exhibit therein referenced, 269, 281. CAA was unable to effectively address the disruptions because the District effectively stripped CAA's authority to control governance, operational, contract, and employment issues at CAA. *R.*, pp. 091, ¶ 37; 269; 281. Attempts by CAA to remove the disruptive AA representatives from CAA campuses were met with steadfast resistance from the District. *R.*, pp. 091, ¶ 37, 281.

CAA continued to request that the District recognize CAA's statutory and contractual authority which the District had consistently refused to do. *R.*, pp. 091, ¶ 38 and exhibit referenced therein, 281. The District continued to permit AA and Ms. Franey to manage and operate CAA, even though AA sought to establish a new competing charter school in the same market under the sponsorship of the District, a clear conflict of interest giving AA a strong incentive to sabotage CAA's school and recruit CAA's directors, teachers, and students to AA's new competing school. *R.*, 091, ¶

38, 269, 270, 281,405, ¶ 17, 407 – 408, ¶11.

The District in effect substituted itself, a charter school sponsor, and AA, a Chicago-based for-profit contractor, as the governing entities responsible for administering operations at CAA in contravention of the statutory and contractual authority of the Board to govern and control CAA's operations, contracts, employees, property, and federal and state funding. *R.*, p. 92 ¶ 39. Aside from not being statutorily or contractually empowered, permitted, or authorized to manage the operations and finances of CAA, the District is poorly suited and not equipped to do so, especially given that its operations are located one-hundred miles from CAA's campus<sup>13</sup>. *R.*, pp. 092 – 093, ¶¶ 39, 44, 45. Moreover, the District retained CAA's funding for a period of time in violation of state law despite the District having received numerous financial audit findings in recent years as a result of deficient financial practices<sup>14</sup>. *R.*, p. 092, ¶ 40.

As a consequence of the injunctive relief granted by the arbitrator, CAA was forced to pay AA an additional \$57,875.91 in contract payments due under the Agreement. On March 16, 2020, the arbitrator issued an order<sup>15</sup> finding in favor of AA awarding it \$859,140.41<sup>16</sup> in breach of contract

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<sup>13</sup> The District has significant operational deficiencies and was at the time of the events herein described under investigation by several state investigative entities at the direct request of numerous South Carolina Legislators in connection with its operational deficiencies (CAA has no knowledge as to whether the District is currently under investigation). *R.*, p. 092, ¶ 40.

<sup>14</sup> Only after CAA filed its initial Complaint on December 20, 2019, and the South Carolina Department of Education threatened to fine the District for withholding CAA's funding, did the District release CAA's November 2019 and December 2019 funding. *R.*, p. 092, ¶ 40, 280. However, the District continued to take the position that withholding CAA's funding was not illegal or improper and was within the District's authority. The District maintains that moving forward it is authorized to withhold CAA's funding as it deems appropriate. *R.*, p. 092, ¶ 40, 280.

<sup>15</sup> A hearing on the merits in the arbitration action was held on February 20, 2020, and February 21, 2020. *R.*, pp. 409 – 412.

<sup>16</sup> The arbitrator found that AA was entitled to breach of contract damages of \$992,850.53 which was reduced by \$133,708.12 as a consequence of AA's breach of the Agreement arising from its failure to claim grant funding available to CAA. *R.*, pp. 413 – 418.

damages based exclusively on the actions of the District<sup>17</sup>. *R.*, pp. 016, 017, 409 – 412. After exhausting all appeals, CAA paid AA the \$859,140.41 arbitration award<sup>18</sup>.

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<sup>17</sup> Additionally, the arbitrator declined to award attorney fees to either party and required the parties to split the cost of the arbitration equally. *R.*, pp. 409 – 412.

<sup>18</sup> AA filed a second arbitration action against CAA seeking damages for tortious interference with AA’s education management organization contract with Acceleration Education, Inc. a/k/a Low Country Acceleration Academy and for defamation. *R.*, pp. 413 – 418. CAA counterclaimed for breach of the Agreement and for unjust enrichment. By order dated June 13, 2022, the arbitrator found against AA on all of its claims and against CAA on its counterclaim. *R.*, pp. 413 – 418. The arbitrator, likewise, denied both AA’s and CAA’s respective requests for an award of attorney fees and required both to split the cost of the arbitration equally. *R.*, pp. 413 – 418.

## STANDARD OF REVIEW

The basis on which the Trial Court dismissed this action was the District's Motion to Dismiss pursuant to Rules 12(b)(1), (2) and (6). *R.*, pp. 011 – 014, 427, 429. The standards for granting a motion to dismiss for lack of subject matter jurisdiction based on Rule 12(b)(1), S.C.R.CIV.P., a motion to dismiss for lack of personal jurisdiction based on a Rule 12(b)(2), S.C.R.CIV.P. and a motion to dismiss for failure to state facts sufficient to constitute a cause of action based on a Rule 12(b)(6), S.C.R.CIV.P., are of course very different. *See Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009)(discussing standard for motion to dismiss based on Rules 12(b)(1) and (6)); *Cribb v. Spatholt*, 382 S.C. 490, 676 S.E.2d 714 (Ct. App. 2009) (discussing standard for motion to dismiss based on Rules 12(b)(2)). Rules 12(b)(1) and (2) are speaking motions whereas a Rule 12(b)(6) motion is based solely on the Summons and Complaint, or in this case, the Amended Summons and Complaint. *See id*; *Graham v. Lloyd's of London*, 296 S.C. 249, 251 n.1, 371 S.E.2d 801, 802 n.1 (Ct. App. 1988) ("A motion to dismiss for lack of jurisdiction may attack the allegations of the complaint on its face or may be made as a 'speaking' motion attacking the existence of jurisdiction in fact. When the issue is the existence of jurisdiction in fact, the court is not confined to the allegations of the complaint, but may resort to affidavits or other evidence to determine its jurisdiction.")

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCV. In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. 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. Moreover, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. 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.

Pursuant to Rule 12(b)(1), SCRCP, the movant challenges the power of the court over the subject matter. ‘The question of subject matter jurisdiction is a question of law for the court.’

*Capital City Ins. Co. v. Bp Staff, Inc.*, *supra* at \_\_\_, 674 S.E.2d at 528 (citations omitted) (*quoting Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 631 (Ct. App. 1993)).

Though the standard applied by the Circuit Court in dismissing this matter is a bit muddled<sup>19</sup>, it appears – given that it found that it has no subject matter jurisdiction over this case - that the lower court applied the standard applicable to a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction<sup>20</sup>. Irrespective of which standard the lower court applied, the Circuit Court clearly erred in dismissing this case for lack of subject matter jurisdiction.

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<sup>19</sup> With regard to the standard to be applied to the District’s motion, the trial court explained:

‘In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint.’ ‘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.’ The proper procedure for raising lack of jurisdiction is to file a motion to dismiss. In some circumstances, affidavits and other evidence outside the pleadings may be considered in support of a motion to dismiss based on lack of jurisdiction. However, in the present case, no affidavits or evidence outside the pleadings is needed.

*R.*, pp. 11 – 13 (citations omitted).

<sup>20</sup> It goes without saying that the standard for granting a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) is inapplicable to this action. It is self-evident that the Courts of South Carolina have personal jurisdiction over agencies of the state of South Carolina, which are creatures of South Carolina statutory creations, which the District is.

## ARGUMENT

### **THE TRIAL COURT CLEARLY ERRED IN FINDING THAT IT HAS NO SUBJECT MATTER JURISDICTION OVER THIS MATTER BASED ON THE SOUTH CAROLINA CHARTER SCHOOLS ACT OF 1996, AS AMENDED.**

The lower court held that Sections 59-40-40(4), 90, 140 and 190(C), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, preclude any possibility of jurisdiction in this Court. Obviously the trial court misconstrues the nature of this matter, misinterprets Sections 59-40-40(4), 90, 140 and 190(C) and has a fundamental misunderstanding of its subject matter jurisdiction. Consequently the Circuit Court's November 3, 2021, Order must be reversed and this case remanded to the Court of Common Pleas for further proceedings.

"The judicial power [in South Carolina is] . . . vested in a unified judicial system, which shall include a . . . Circuit Court. . . ." S.C. CONST. art. V § 1; *accord Davis v. Cty. of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1995). "The Circuit Court shall be a general trial court with original jurisdiction in civil . . . cases, except those cases in which exclusive jurisdiction shall be given to inferior courts. . . ." S.C. CONST. art. V § 11; *accord Jeter v. S.C. Dept. of Transp.*, 633 S.E.2d 143, 369 S.C. 433 (2006).

"Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 422, 567 S.E.2d 231, \_\_\_ (2002). "[B]reach of contract . . . claims are part of the general class of cases which the court of common pleas has jurisdiction to hear." *Capital City Ins. Co. v. Bp Staff, Inc.*, 382 S.C. 92, \_\_\_, 674 S.E.2d 524, 529; *see Sabb v. S.C. State Univ.*, *supra* (tort cases are part of the general class of cases which the court of common pleas has jurisdiction to hear). Nevertheless, "certain cases may be taken from the trial court's original jurisdiction by the General Assembly." *Sabb v. S.C. State Univ.*, *supra* at 423, 567 S.E.2d at \_\_\_. In other words, the Circuit

Court has subject matter jurisdiction over this case unless the General Assembly has expressed a clear intent to divest it of subject matter jurisdiction. The General Assembly has not done so.

CAA is authorized by the Act and the District is created by the Act<sup>21</sup>. A priori the analysis as to the Circuit Court's subject matter jurisdiction over this action must commence with a legislative journey for edification and enlightenment through the statutes creating and bestowing the respective powers, duties, obligations and authorities of each as these statutes hold the key to determining the nature and purpose of CAA and the District, the nature and scope of the relationship between the two and the Circuit Court's subject matter jurisdiction over this case.

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. . . . '[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.'

*The Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, \_\_\_, 713 S.E.2d 278, 283 (2011). "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.' A court must apply the plain meaning of a statute where its language is unambiguous and conveys a clear meaning." *Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, \_\_\_ (2002)(quoting NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.03 at 94 (5<sup>th</sup> ed. 1992)).

When interpreting statutes, a South Carolina appellate court "'should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation.'" *Anthony v. S.C. State Plastering Llc*, 390 S.C. 562, 571, 703 S.E.2d 197, 201 (2011)(citations omitted)(quoting *Ward v. W. Oil Co., Inc.*, 387 S.C. 268, 273–74, 692 S.E.2d 516, 519 (2010)). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, \_\_\_ (2000).

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<sup>21</sup> Section 59-40-220(A), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended ("The South Carolina Public Charter School District is created as a public body.")

Yet “[t]he question of whether a statute's language is unambiguous and conveys a clear and definite meaning is not always an easy one.” *Ray Bell Constr. Co. v. Sch. Dist. of Greenville Co.*, 331 S.C. 19, 26, 501 S.E.2d 725, \_\_\_ (1998). “A choice of language in a [*sic*] act will not be construed with literality when to do so will defeat the lawmakers’ manifest intention, and a court will reject the ordinary meaning of words used in a statute when, to accept the ordinary meaning, will lead to a result so plainly absurd that it can not [*sic*] possibly have been intended by the legislature.” *S.C. Bd. of Dental Exam’rs. v. Breeland*, 208 S.C. 469, 480, 38 S.E.2d 644, 650 (1946). “If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.” *Kiriakides v. United Artists Commc’ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

Notwithstanding the foregoing,

[i]f the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute. When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning.

While it is true that the purpose of an enactment will prevail over the literal import of the statute, this does not mean that this Court can completely rewrite a plain statute.

*Hodges v. Rainey, supra* at 87 - 81, 533 S.E.2d at 582 (2000) (citations omitted).

“In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. A statute should not be construed by concentrating on an isolated phrase.” *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). “The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd.” *Hodges v. Rainey, supra* at 91, 533 S.E.2d at 582.

“If the statute is in derogation of a common law right, it ‘must be strictly construed and not extended in application beyond clear legislative intent. Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable.’” *16 Jade St., LLC v. R. Design Constr. Co.*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012)(quoting *Doe v. Marion*, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004)).

Further, the legislature has expressed the following intent when interpreting the Act:

In authorizing charter schools, it is the intent of the General Assembly to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating all children within the public school system. The General Assembly seeks to create an atmosphere in South Carolina's public school systems where research and development in producing different learning opportunities are actively pursued and where classroom teachers are given the flexibility to innovate and the responsibility to be accountable. As such, the provisions of this chapter should be interpreted liberally to support the findings and goals of this chapter and to advance a renewed commitment by the State of South Carolina to the mission, goals, and diversity of public education.

Section 59-40-30, CODE OF LAWS OF SOUTH CAROLINA 1976, as amended.

It is now time to review the relevant portions of the Act.

Section 59-40-40, CODE OF LAWS OF SOUTH CAROLINA 1976, as amended, supplies definitions to be used in connection with the Act and provides, in relevant part:

(1) A ‘charter school’ means a public, nonreligious, nonhome-based, *nonprofit corporation* forming a school that operates by *sponsorship* of . . . the . . . District. . . *but is accountable to the board of trustees* . . . of the sponsor which grants its charter. . . .

(2) A charter school:

(a) is, for purposes of state law and the state constitution, considered a public school and part of the . . . District . . . ;

\* \* \* \*

(c) *must be administered and governed by a governing body in a manner agreed to by the charter school applicant and the sponsor, the governing body to be selected as provided in Section 59-40-50(B)(9);*

\* \* \* \*

(e) is subject to the same fixed asset inventory requirements as are traditional public schools.

(3) 'Applicant' means the person who or *nonprofit corporate entity* that desires to form a charter school and files the necessary application with the . . . Trustees. . . . The applicant also must be the person who or *the nonprofit corporate entity* that applies to the Secretary of State to organize the charter school *as a nonprofit corporation*.

(4) 'Sponsor' means the . . . Trustees . . . from which the charter school applicant requested its charter and which granted approval for the charter school's existence. . . . The sponsor of a charter school is the charter school's Local Education Agency (LEA) and a charter school is a school within that LEA. The sponsor . . . shall ensure that students enrolled in its charter schools are served in a manner consistent with LEA obligations under applicable federal, state, and local law.

\* \* \* \*

(7) 'Charter committee' means *the governing body of a charter school* formed by the applicant to govern through the application process and until the election of a *board of directors* is held. After the election, the *board of directors of the corporation* must be organized as the governing body and the charter committee is dissolved.

\* \* \* \*

(9) '*Charter school contract*' means *a fixed term, renewable contract between a charter school and a sponsor that outlines the roles, powers, responsibilities, and performance expectations for each party to the contract. . . .*

(emphasis added).

Section 59-40-50, CODE OF LAWS OF SOUTH CAROLINA 1976, as amended, sets forth, among other things, the powers, authority, duties, obligations, composition, and purposes of charter schools, in this case CAA, and provides, in pertinent part:

(B) A charter school must:

(1) *adhere to the same health, [and] safety . . . requirements as are applied to public schools operating in the same school district or, in the case of the . . . District . . . the local school district in which the charter school is located;*

\* \* \* \*

(3) adhere to the same financial audits, audit procedures, and audit requirements as are applied to public schools;

(4) *be considered a school district for purposes of tort liability under South Carolina law. . . ;*

(5) ***in its discretion*** hire noncertified teachers in a ratio of up to twenty-five percent of its entire teacher staff . . . ;

(6) ***hire or contract for, in its discretion, administrative staff, including a school leader, to oversee the daily operation of the school. . . ;***

\* \* \* \*

(9) *consist of a board of directors. . . :*

(10) . . . . A *board of directors of a charter school* shall notify its sponsor of any regular *meeting of the board* at least forty-eight hours prior to the date on which it is to occur;

(11) . . . . The *charter contract* . . . must contain a statement of assurance of ethical compliance on behalf of the school. . . .

(emphasis added).

Section 59-40-55, CODE OF LAWS OF SOUTH CAROLINA 1976, as amended, sets forth, inter alia, the powers, authority, duties, obligations, and purposes of a sponsor, in this case the District, and provides in regard thereto:

(A) In order to promote the quality of charter school outcomes and oversight, the charter school sponsor shall adopt national industry standards of quality charter schools and shall authorize and implement practices consistent with those standards.

(B) A charter school sponsor shall:

(1) approve charter applications that meet the requirements specified in Sections

59-40-50 and 59-40-60<sup>22</sup>;

(2) decline to approve charter applications according to Section 59-40-70(C)<sup>23</sup>;

(3) *negotiate and execute sound charter contracts with each approved charter school;*

(4) ***monitor**, in accordance with charter contract terms, the performance and legal/fiscal compliance of charter schools to include collecting and analyzing data to support ongoing evaluation according to the charter contract;*

(5) *conduct or require oversight activities that enable the sponsor to fulfill its responsibilities outlined in this chapter, including conducting appropriate inquiries and investigations, **only if those activities are consistent with the intent of this chapter, adhere to the terms of the charter contract, and do not unduly inhibit the autonomy granted to public charter schools**;*

\* \* \* \*

(7) *notify the charter school of perceived problems if its performance or legal compliance appears to be unsatisfactory and provide reasonable opportunity for the school to remedy the problem, unless the problem warrants revocation and revocation timeframes apply;*

(8) take appropriate corrective actions or exercise sanctions short of revocation in response to apparent deficiencies in charter school performance or legal compliance. These actions or sanctions may include requiring a school to develop and execute a corrective action plan within a specified timeframe;

(9) determine whether each charter contract merits renewal, nonrenewal, or revocation;

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<sup>22</sup> If the District approves an application “it becomes the charter school’s sponsor and . . . [must] submit a copy of the *charter contract* to the State Board of Education.” Section 59-40-70(F), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended (emphasis added).

<sup>23</sup> Section 59-40-70(C), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended provides:

A board of trustees . . . shall deny an application only if the application does not meet the requirements specified in Section 59-40-50 or 59-40-60, fails to meet the spirit and intent of this chapter, or adversely affects, as defined in regulation, the other students in the district in which the charter school is to be located, or if, based on the totality of information provided by the applicant, the . . . [T]rustees . . . determine[] that the applicant has failed to demonstrate a substantial likelihood that it has the capacity to establish a viable school based on national industry standards of quality charter school authorization. It shall provide, within ten days, a written explanation of the reasons for denial, citing specific standards related to provisions of Section 59-40-50 or 59-40-60 that the application violates. This written explanation immediately must be sent to the charter committee and filed with the State Board of Education.

\* \* \* \*

(11) permanently close any charter school at the conclusion of the school year after receiving the lowest performance level rating as defined by the federal accountability system for three consecutive years in accordance with Section 59-40-110(E).

(emphasis added). The District, as a sponsor, is required to annually evaluate the charter schools it sponsors to determine whether a charter school’s charter should be nonrenewed or revoked<sup>24</sup>.

Section 59-40-110, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.

Section 59-40-230, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, sets forth additional powers, obligations, and responsibilities with respect to the Trustees. Specifically, the Trustees have “the same powers, rights, and responsibilities with respect to charter schools as other school district boards of trustees. . . .” Section 59-40-230(B), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended. Further, the Trustees are required to “exercise general supervision over . . . charter schools” it sponsors and to “grant charter status to qualifying applicants for public charter schools pursuant to” the Act. Section 59-40-230(E)(1) and (2), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.

Section 59-40-60, CODE OF LAWS OF SOUTH CAROLINA 1976, as amended, makes clear that a charter school is an independent non-profit corporation operated and governed by an independent board and that the relationship between CAA and the District is contractual in nature:

*(A) An approved charter application constitutes an agreement between the charter school and the sponsor.*

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<sup>24</sup> The criteria for determining whether to non-renew or revoke a charter school’s charter is set forth in Section 59-40-110(C), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended. One thing to be considered is when considering if a charter school’s charter should be renewed, non-renewed or revoked is whether the charter school “committed a material violation of the conditions, standards, performance expectations, or procedures provided for in the charter application or *charter school contract*, or both.” Section 59-40-110(C)(1), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended (emphasis added). Another thing to be considered is when considering if a charter school’s charter should be renewed, non-renewed or revoked is whether the charter school “failed to meet the academic performance standards and expectations as defined in the charter application or *charter school contract*, or both.” Section 59-40-110(C)(2), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended (emphasis added).

(B) *A contract between the charter school and the sponsor must be executed and must reflect all provisions outlined in the application as well as the roles, powers, responsibilities, and performance expectations for each party to the contract. . . .* The Department of Education shall develop a contract template to be used by charter schools and the sponsor. The template must serve as a foundation for the development of a contract between the charter school and the sponsor.

(C) *A material revision of the terms of the contract between the charter school and the sponsor may be made only with the approval of both parties.*

(D) Except as provided in subsection (F), an applicant who wishes to form a charter school shall:

(1) *organize the charter school as a nonprofit corporation pursuant to the laws of this State;*

(2) *form a charter committee for the charter school. . . .*

\* \* \* \*

(E) A charter committee is responsible for and has the power to:

(1) *. . . sign a charter school contract . . . ;*

(2) *employ and contract with teachers and nonteaching employees, contract for services . . . ; and*

(3) *decide all other matters related to the operation of the charter school, including budgeting, curriculum, and operating procedures.*

(F) The charter school application, based on an application template with compliance guidelines developed by the State Department of Education, must include:

\* \* \* \*

(8) *a description of the governance and operation of the charter school . . . ;*

\* \* \* \*

(12) *an explanation of the relationship that shall exist between the proposed charter school and its employees . . . ;*

\* \* \* \*

(15) *an assumption of liability by the charter school for the activities of the charter school and an agreement that the charter school must indemnify and hold harmless the sponsor, its servants, agents, and employees, from any and all liability, damage,*

expense, causes of action, suits, claims, or judgments arising from injury to persons or property or otherwise which arises out of the act, failure to act, or negligence of the charter school, its agents and employees, in connection with or arising out of the activity of the charter school; and

(16) a description of the types and amounts of insurance coverage to be obtained by the charter school.

(emphasis added). The Act also permits an existing public school to convert to a charter school in which event, the converted public school is required to have a contract with the sponsor<sup>25</sup>. See Section 59-40-100(A), CODE OF LAWS OF SOUTH CAROLINA 1976, as amended.

A charter school's charter is valid for a period of ten years. Section 59-40-110(A), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended. When seeking to have its charter renewed, a charter school must include, among other things, in its charter renewal application, "any proposed *material* changes to the current charter or charter school *contract* to be implemented in the next ten-year charter term." Section 59-40-110(B)(3), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended (emphasis added). Prior to "renewing or terminating a charter school, the sponsor shall notify in writing *the charter school's governing body* of the proposed action." Section 59-40-110(F), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended (emphasis added). "The charter school's *governing body* may request in writing a hearing before the sponsor within fourteen days of receiving notice of nonrenewal or termination of the charter." Section 59-40-110(H), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended (emphasis added). "A charter school may terminate its *contract* with a sponsor before the ten-year term of *contract* if all parties under *contract* with the charter school agree to the dissolution. A charter school that terminates its *contract* with a sponsor directly may seek application for the length of time remaining on its *original contract*

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<sup>25</sup> "For the duration of a converted charter school's *contract* with a sponsor. . . ." Section 59-40-100(E), CODE OF LAWS OF SOUTH CAROLINA 1976, as amended (emphasis added).

from another sponsor.” Section 59-40-115, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended (emphasis added).

As the Act makes clear, a charter school is a nonprofit corporation, which is what CAA is<sup>26</sup>. As a nonprofit corporation, CAA:

“has the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power:

(1) to sue and be sued, complain, and defend in its corporate name;

\* \* \* \*

(7) to make contracts . . . ;

\* \* \* \*

(11) to elect or appoint directors, officers, employees, and agents of the corporation, define their duties, and fix their compensation;

\* \* \* \*

(17) to carry on a business;

(18) to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

Section 33-31-302, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.

The plain language of the Act, when read and taken as a whole, makes obvious, the District and CAA are separate and distinct entities governed by separate and independent boards. Both CAA and the District have the independent power and authority to contract and sue and each are independently subject to being sued without the permission or authorization of the other. *See* Sections 59-40-60(E)(2), 190, 230(F), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended. The Act makes repeatedly clear that the relationship between CAA and the District is almost

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<sup>26</sup> CAA was formed as a nonprofit corporation by the South Carolina Secretary of State January 17, 2017. *See* [Entity Profile - Business Entities Online - S.C. Secretary of State \(sc.gov\)](#)

exclusively contractual in nature within the confines of the Act<sup>27</sup>. The Act makes abundantly clear that CAA and the District each function independent of the other and are to be administered and governed by separate boards independent of the other, except that as CAA’s “sponsor<sup>28</sup>” the Act requires the District to: (1) “monitor<sup>29</sup>, in accordance with charter contract terms, the performance and legal/fiscal compliance of” CAA “to include collecting and analyzing data to support ongoing evaluation according to the charter contract;” (2) conduct or require oversight<sup>30</sup> activities that enable the sponsor to fulfill its responsibilities outlined in this chapter, including conducting appropriate inquiries and investigations, only if those activities are consistent with the intent of this chapter, adhere to the terms of the charter contact;” (3) notify CAA “of perceived problems if its performance or legal compliance appears to be unsatisfactory;” (4) “take appropriate corrective actions or exercise sanctions short of revocation in response to apparent deficiencies in” CAA’s “performance or legal compliance;” (5) annually evaluate CAA to ascertain whether CAA’s “charter contract merits renewal, nonrenewal, or revocation;” and, (6) “permanently close” CAA “at the conclusion of the school year” if CAA receives “the lowest performance level rating.” Stated succinctly, the District has a limited oversight role as it relates to CAA and is not permitted

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<sup>27</sup> The lower court inaccurately states in the November 3, 2022, Order that the “[t]he operations of CAA and District, and the relationship between them, is governed by the” Act. *R.*, p. 012. This is not altogether correct. While the Act in large measure may govern the independent operations of the District and CAA, as demonstrated repeatedly herein, the relationship between them is almost exclusively governed by the Contract. That said, to the extent any term or provision of the Contract conflicts with any term or provision of the Act, the conflicting term or condition of the Act is controlling *See, e.g., Auto Owners Ins. Co. v. Rollison*, 663 S.E.2d 484, 378 S.C. 600 (2008).

<sup>28</sup> A “sponsor” is “a person who vouches or is responsible for a person or thing.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1843 (2001)

<sup>29</sup> When used as a verb, as it is in the Act, the word “monitor” means “to oversee, supervise or regulate; , keep track of; check continuously.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1242 (2001)

<sup>30</sup> “Oversight” means “supervision watchful care.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1385 (2001)

to “unduly inhibit the autonomy granted to” CAA<sup>31</sup>. It is the Contract, which governs the relationship between CAA and the District, which is at the crux of the instant dispute.

### **Breach of Contract**

CAA’s first cause of action against the District is for breach of contract arising out of a dispute as to whether the District breached the Contract through its actions as set forth in the Amended Complaint<sup>32</sup>. Without question the Circuit Court has subject matter jurisdiction over CAA’s breach of contract action in the absence of clear legislative intent to strip the Circuit Court of subject matter jurisdiction over the same. *See Capital City Ins. Co. v. Bp Staff, Inc., supra*. There is nothing in the Act which divests the Circuit Court over CAA’s breach of contract action.

There is scant discussion in the November 3, 2021, Order explaining why the Circuit Court believes it has no subject matter jurisdiction over this matter. The entirety of the court’s explanation is set forth below<sup>33</sup>:

Four sections of the Act bear directly upon District’s argument. First, Section 59-40-90 provides that a charter school may challenge any final decision of the District in the Administrative Law Court. Second, Section 59-40-40(4) defines sponsors like the District as ‘Local Education Agencies’ or ‘LEAs,’ which are subject to oversight and authority of the State Educational Agency, the South Carolina Department of Education. Third, Section 59-40-140 provides authority for the South Carolina Department of Education to fine District in certain

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<sup>31</sup> Section 59-40-55(A), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.

<sup>32</sup> The Circuit Court incorrectly states that “CAA alleges it incurred damages because the District made rulings against it that infringed on its authority to terminate a private management company with whom it contracted.” *R.*, p. 011 - 015. A simple reading of the Amended Complaint demonstrates that this is, in fact, not the case. *See R.*, p. 078 - 150. What CAA alleges is that the District unjustifiably failed to adhere to its obligations under the Contract.

<sup>33</sup> The Circuit Court notes that CAA’s Motion for Temporary Restraining Order was denied based on lack of jurisdiction. The Court then goes on to explain that “[w]hile the Order denying the Motion for Temporary Restraining Order is not binding in this circumstance, at least part of the reasoning in the Order is persuasive and equally applicable at the motion to dismiss stage.” However, there is nothing in the Circuit Court’s Order denying CAA’s motion for TRO and preliminary injunction which expands upon the Court’s reasoning as to why it has no subject matter jurisdiction over this action. *See R.*, p. 001 - 007. Essentially the Court’s grounds for holding that it has no subject matter jurisdiction in the Order denying CAA’s motion for TRO and preliminary injunction is basically the same as the reasons supplied in the November 3, 2021, Order dismissing this matter.

circumstances if it withholds funds from a charter school. Fourth, Section 59-40-190(C) states that the District is *immune* from civil liability ‘with respect to all activities related to the charter school they sponsor.’

The four sections of the Act cited above preclude any possibility of jurisdiction in this Court. Section 59-40-90 provides exclusive jurisdiction to the Administrative Law Court for any challenge to a sponsor’s final decision by a charter school. Further, actions by the sponsor that are subject to federal grants or administrative processes of the State Department of Education are subject to the State Department of Education adjudicative processes, which would not be subject to challenge in this Court. Finally, the Act’s provisions *immunizing* sponsors from civil liability further indicate the Legislature’s intent to prevent sponsors like the District from being sued in civil court.

R., pp. 002 –003 (emphasis added).

The court’s reliance on Sections 59-40-40(4) and 59-40-140 as a basis for holding that it has no subject matter jurisdiction in this case is bewildering. Neither statute removes subject matter jurisdiction from the Circuit Court in any matter involving either CAA or the District. Taking the Court’s characterization of Section 59-40-40(4) as defining “sponsors like the District as ‘Local Education Agencies’ or ‘LEAs,’ which are subject to oversight and authority of the State Educational Agency, the South Carolina Department of Education” at face value, Section 59-40-40(4) has nothing to do with the court’s subject matter jurisdiction; it does not even mention it. Moreover, whether the South Carolina Department of Education has the “authority . . . to fine District in certain circumstances if it withholds funds from a charter school” in no way affects or impacts the Court’s subject matter jurisdiction over a contractual dispute between CAA and the District arising out of an alleged breach of the Contract, and there is literally no way to interpret Section 59-40-140 as doing so<sup>34</sup>. Section 59-40-140 may give rise to a private cause of action by

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<sup>34</sup> The Court seems to overlook the fact that the South Carolina Department of Education threatened to fine the District for withholding CAA’s funding, which, in combination with the filing of this action, forced the District to relent and release CAA’s November 2019 and December 2019 funding. Consequently, the funding is not an element of damage for which CAA is seeking recovery in connection with its breach of contract cause of action, and, thus, not an aspect of the remedy CAA is requesting; that said, however, it is an aspect of the District’s overall unjustified, improper, and illegal overall conduct which gives rise to this matter.

CAA against the District, but whether it does or it does not in no way impacts the Court's subject matter jurisdiction.

The Court's reliance on Section 59-40-90 is, likewise, misplaced. Section 59-40-90 provides that "[a] final decision of the school district or a public or independent institution of higher learning sponsor may be appealed by any party to the Administrative Law Court." This Court has essentially ruled adversely to the positions of the Court and the District regarding the Administrative Law Court having exclusive jurisdiction over this matter in *Capital City Ins. Co. v. Bp Staff, Inc.*, *supra* stating:

Subject matter jurisdiction is defined as 'the power to hear and determine cases of the general class to which the proceedings in question belong. This authority is distinct from the doctrine of exhaustion of administrative remedies, which 'is generally considered a rule of policy, convenience and discretion, rather than one of law, **and is not jurisdictional.**' Additionally, the doctrine of exhaustion of administrative remedies is often leveraged 'to avoid interference with the orderly performance of administrative functions.' **Consequently, a 'failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction.'**

\* \* \* \*

The South Carolina Supreme Court has indicated that dismissal may be proper under Rule 12(b)(6), SCRCPP, for failure to state a claim where the opposing party is required to exhaust its administrative remedies as a matter of law, but failed to do so. Thus, we must determine whether exhaustion of administrative remedies was required as a matter of law; if not, we next determine whether the court abused its discretion in dismissing the case until exhaustion of the administrative process is complete in order to assist in the disposition of the circuit court proceeding.

Initially, we note '[a] party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body.' For example, in *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002), respondent Colonial argued appellant Sand's failure to exhaust administrative remedies precluded a tort action against third parties. This

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Further, as the District continued to take the position that withholding CAA's funding is not illegal or improper and is within the District's authority, and its position that moving forward it is authorized to withhold CAA's funding as it deems appropriate, a finding that the District's conduct in this regard is improper, illegal, and impermissible is included in the relief being sought by CAA in its declaratory judgment cause of action.

court disagreed and held the following:

If this were an appeal from the denial of the permit through the administrative process in which [the agency] was the appropriate fact finder, Thomas Sand would clearly be required to exhaust its administrative remedies prior to bringing suit. . . . However, in a tort action against a third party, no such exhaustion requirement exists. The question is not whether the permit would have been granted but whether Thomas Sand was damaged. . . . [The agency] is not the appropriate fact finder to answer this question. The jury is.

The basic purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reasons for the permit denial, would not assist the court in this instance. The alleged wrong is not one which the administrative process was designed to redress. 'The doctrine of exhaustion of administrative remedies only comes into play when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy.' A litigant need not exhaust administrative remedies where 'there are no administrative remedies for the wrongs it assertedly suffered.'

Here, although Capital City was a party to an administrative proceeding related to the case at bar at the time of Judge Breeden's first order, its breach of contract and fraud claims are not based on a statute for which the legislature mandates the pursuit of an administrative remedy; in short, Capital City's claims alleging breach of contract and fraud are not wrongs for which the administrative scheme was designed to redress. Accordingly, as in *Thomas Sand*, Capital City was not required, as a matter of law, to exhaust the administrative process regarding the modifier before filing the current action in circuit court for breach of contract and fraud.

\* \* \* \*

In the present case, the trial court dismissed Capital City's breach of contract and fraud claims due to the ongoing administrative proceedings concerning the modifier instead of staying or continuing the circuit court proceeding. However, the court's order does not reflect consideration given to any applicable statute of limitations. A party should not be required to 'roll the dice' on whether a collateral administrative proceeding will conclude prior to the running of an applicable statute of limitations in order to preserve a claim properly within the jurisdiction of the circuit court. Even utilizing an abuse of discretion standard based upon the nonmandatory exhaustion context of the breach of contract and fraud claims, we find Capital City would be prejudiced by dismissal in light of the problem posed by any applicable statute of limitations. Thus, the court abused its discretion in ordering a dismissal as opposed to a stay or continuance due to this prejudice.

As previously indicated, as to the breach of contract and fraud claims, Capital City was not required to exhaust administrative remedies as a matter of law. This case is merely impacted by another administrative proceeding, not one itself requiring the exhaustion of the administrative process. Since the complaint adequately sets forth facts supporting the claims in this case, and since the court erred in its disposition of the exhaustion issue, dismissal under Rule 12(b)(6), SCRCF, was likewise improper.

*Capital City Ins. Co. v. Bp Staff, Inc.*, *supra* at \_\_\_\_, 674 S.E.2d at 528 – 529 (footnotes omitted)(citations omitted except where noted) (*quoting Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93-94, 668 S.E.2d 795, 796 (2008), *Ward v. State*, 343 S.C. 14, 17 n. 5 and 19 n. 7, 538 S.E.2d 245, 246 n. 5 and 247 n. 7 (2000), and *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006)); see *Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (exhaustion of remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute); *Stanton v. Town of Pawley's Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) (“[T]he question of whether to require the plaintiff to exhaust administrative remedies was a matter within the sound discretion of the trial judge,” which will not be disturbed absent an abuse of discretion).

The Amended Summons and Amended Complaint make clear that in its first cause of action CAA seeks damages for the District’s breach of the Contract. *See R.*, pp. 078 - 150. Section 59-40-90 gives CAA the right, but imposes no obligation on CAA to appeal “a final decision” of the District to the Administrative Law Court<sup>35</sup>. A claim seeking damages for breach of contract is not a wrong for which the administrative scheme set forth in Section 59-40-90 – appealing a decision of the District to the Administrative Law Court seeking to have the same overturned -

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<sup>35</sup> Section 59-40-90 provides that CAA “may” appeal.

was designed to redress<sup>36</sup>. CAA is, therefore, not required, as a matter of law, to appeal the District's actions to the Administrative Law Court seeking damages for breach of contract. It is simply not a remedy the Administrative Law Court is authorized to provide.

Furthermore, "a final decision" of the District is not what is in issue in this matter. What is in issue is the unjustified failure perform its obligations under the Contract giving rise to damage to CAA which is in dispute herein. The remedy sought is not to have the court reverse the District's "decision," but rather to award CAA damages for the District's conduct.

The Circuit Court's holding that Section 59-40-190(C) renders the District immune from CAA's breach of contract cause of action is similarly without merit.

Section 59-40-190(C) provides in relevant part that "[a] . . . sponsor, members of the board . . . of a sponsor, and employees of a sponsor acting in their official capacity are immune from civil or criminal liability with respect to all activities related to a charter school they sponsor." In the first instance immunity is not a matter of subject matter jurisdiction, but rather is an affirmative defense which the District has the burden of establishing. *See Sabb v. S.C. State Univ., supra*. Thus, dismissal under a Rule 12(b), S.C.R.CIV.P., motion "is seldom appropriate when the defense

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<sup>36</sup> A review of Sections 1-23-380 and 600(D), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, when read in conjunction with Section 59-40-90 reinforces this. By its plain language Section 59-40-90 vests appellate jurisdiction and nothing more in the Administrative Law Court appellate review of "a final decision" of the District. Sections 1-23-380 and 600(D) address the scope and standard of review in appeals to the Administrative Law Court in appeals to it from administrative agencies and the relief it may grant. *See Murphy v. S.C. Dep't of Emp't & Workforce*, Appeal No. 22-ALJ-22-0077-AP (S.C. Ct. App. 2022). Section 1-23-600(D) sets forth the scope of the Administrative Law Court's appellate jurisdiction and provides in pertinent part that "[a]n administrative law judge also shall preside over all appeals from final decisions of contested cases pursuant to the Administrative Procedures Act, Article I, Section 22, Constitution of South Carolina, 1895, or another law. . . ." Section 1-23-380 sets forth generally the Administrative Law Court's appellate procedure and the relief it may grant when a decision of an administrative body is appealed to it. *Id.* Section 1-23-380(5), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, restricts the relief that an Administrative Law Court can grant to affirming the decision of the agency, remanding the matter for further proceedings, reversing the decision, or modifying the decision. *See Patel v. BVM Motel, LLC*, 433 S.C. 337, 857 S.E.2d 564 (Ct. App. 2021). As the foregoing clearly demonstrates, determining whether a contract has been breached and awarding damages therefore is clearly not within the purview of the Administrative Law Court when considering an appeal of a decision of the District, and does not appear to have the authority to do so in any case before it for that matter.

of immunity is pleaded. In such cases the court must determine whether the public official acted within the scope of his discretionary authority.” *Jensen v. S.C. Dep't of Soc. Servs.*, 297 S.C. 323, 333, 377 S.E.2d 102, 108 (Ct. App. 1988); *accord Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012). Whether the District and/or its Board were acting within the scope of his discretionary authority is at the core of the dispute in this action. Thus, this is a question for the trier of fact. Clearly the Court’s dismissal based on Section 59-40-190(C) was misplaced.

Moreover, the Court clearly misinterpreted Section 59-40-190(C) as it does not render the District immune from suit, but rather from suit arising from civil or criminal liability with respect to the activities of a charter school it sponsors provided it is acting in its official capacity. The clear intention of Section 59-40-190(C) is to shield the district from criminal or civil liability to a third party for CAA’s conduct. Any other interpretation would lead to absurd results. It would essentially permit the District to act with impunity free from liability to charter schools it sponsors irrespective of what damage or harm such conduct causes or the manner in which it causes it as long as it was acting in an “official capacity.” Taken to its logical extreme, the Circuit Court’s interpretation of Section 59-40-190(C) would permit the District and its Trustees to steal and embezzle from CAA and the other schools it sponsors free of any consequence as long as it and/or they were acting in an “official capacity.” Obviously the legislature intended no such absurd result.

### **Declaratory Judgment**

Nothing in the Act divests the Circuit Court of CAA’s declaratory judgment cause of action. “A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue.” *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). The instant case primarily involves the interpretation of a contract. For the reasons discussed above in the preceding section, the Circuit Court, not the Administrative Law Court, has

subject matter jurisdiction over the declaratory judgment as well. The Administrative Law Court sitting in an appellate capacity does not have the power or authority to issue a declaratory judgment.

Additionally, given that a declaratory judgment cause of action does not seek to impose civil or criminal liability on the District, by its very terms, the immunity provisions of Section 59-40-190(C) do not apply to a cause of action for declaratory judgment.

### **Due Process**

Nothing in the Act divests the Circuit Court of subject matter jurisdiction over this cause of action. The fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review. Further, due process is flexible and calls for such procedural protections as the particular situation demands. *Harbit v. City of Charleston*, 675 S.E.2d 776, 382 S.C. 383 (Ct. App. 2009).

Like the breach of contract action, the remedy sought in this cause of action determination of violation of constitutional due process and recovery of attorney fees - is not a wrong for which the administrative scheme set forth in Section 59-40-90 – appealing a decision of the District to the Administrative Law Court seeking to have the same overturned - was designed to redress. In the first instance, the District has no authority to pass upon constitutionality, and by extension, the Administrative Law Court cannot pass on the same either since all it has authority to do is review a decision of the District applying the standard applicable to an appeal and either, for further proceedings, reverses or modifies. *See Beaufort Cty. Bd. of Educ. v. Lighthouse Charter School*, 335 S.C. 230, 241, 516 S.E.2d 655, \_\_\_ (1999) (“an agency has no authority to pass on . . . constitutionality”). Further, since this cause of action does not seek to impose civil or criminal

liability on the District, by its very terms the immunity granted the District in Section 59-40-190(C) does not apply to this cause of action.

### **CIRCUIT COURT’S FAILURE TO GRANT PROPER RELIEF**

Though the Circuit Court’s correct course of action was denial of the District’s motion to dismiss, had it had any reservations concerning the appeal to the Administrative Law Court for consideration of the District’s “decision” such as it was, the proper course of action was to stay the matter pending a determination by the Administrative Law Court. *Capital City Ins. Co. v. Bp Staff, Inc., supra*. The other option available to the Circuit Court was to give CAA leave to amend<sup>37</sup>. See *Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 826 S.E.2d 585 (2019). The Circuit Court failed to do either. In failing to stay the matter or to grant leave to amend the Circuit Court committed clear reversible error. *Capital City Ins. Co. v. Bp Staff, Inc., supra; id.*

### **CONCLUSION**

The Circuit Court improperly dismissed this matter for lack of subject matter jurisdiction. Accordingly, the November 3, 2021, Order of the Circuit Court must be reversed and remanded for further proceedings consistent with the relief sought in the Amended Complaint.

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<sup>37</sup> Upon remand, it is CAA’s plan to seek leave pursuant to Rule 15(a), S.C.R.CIV.P., to amend the Complaint for a second time to include a claim for tortious interference with contractual relations as to the Agreement.

Respectfully Submitted,

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July 8, 2023  
Columbia, South Carolina

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**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

**SC Court of Appeals**

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**APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS**

**THE HONORABLE ROGER M. YOUNG, CIRCUIT COURT JUDGE**

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**Appellate Case No. 2021-001414**

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**Charleston Advancement Academy High School.....Appellant,**

**V.**

**South Carolina Public Charter School District..... Respondent.**

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**CERTIFICATE OF RULE 211(A), SCACR, COMPLIANCE**

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I hereby certify that the *Final Brief of Appellant* complies with Rule 211(b),  
SCACR.

**PRITCHARD LAW GROUP, LLC**

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Edward K. Pritchard, III, Esq.

June 29, 2023  
Charleston, South Carolina

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**Charleston Advancement Academy High School.. .....Appellant,**

**V.**

**South Carolina Public Charter School District..... Respondent.**

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**PROOF OF SERVICE**

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I certify that I have served The *Final Brief* on Respondent, South Carolina Public Charter School District, by e-mailing a copy of it to its attorney of record, Erik T. Norton, Esq., addressed to Harrell, Martin & Peace, P.A., Post Office Box 1000, Chapin, South Carolina 29036, e-mail address Erik@hmp-law.com on June 29, 2022.

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