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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr., Circuit Judge

Case No. 2020-CP-26-05790

Appellate Case No. 2023-01499

Major Jason J. MacDonald,

Appellant,

-vs-

Horry County School District, Dr. Rick Maxey, in his individual and official capacities, Michael McCracken, in his individual and official capacities, Brandon Todd, in his individual and official capacities, and Mary Anderson, in her individual and official capacities,

Respondents.

FINAL BRIEF OF APPELLANT

June 27, 2024

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II. Did the circuit court err when it granted summary judgment in favor of Respondent on Appellant's claims for Intentional Interference with Prospective Contract when Appellant established a genuine dispute of material fact that Respondent intentionally interfered with his prospective employment contract?

STATEMENT OF THE CASE

This action arises out of the conduct of Respondent Horry County School District (the "District") in its suspension, investigation, and termination of Appellant Major Jason MacDonald ("Major MacDonald"), a process that lasted almost two years. The District's handling of its suspension and termination of Major MacDonald devastated his reputation in the community, caused great pain to him and his family, and interfered with prospective employment outside of the District.

Consequently, on October 8, 2020, Major MacDonald filed suit against the District and several District leaders, including Dr. Rick Maxey, the Superintendent; Michael McCracken, Principal of Aynor High School ("Aynor"); Brandon Todd, Aynor Assistant Principal; and Mary Anderson, District Chief Human Resources Officer, for claims of tortious interference with contractual relations, tortious interference with prospective contractual relations, defamation, and intentional infliction of emotional distress. (R.p.001; Compl., dated October 8, 2020).

The District and the individually named Defendants filed an Answer to the Complaint on December 14, 2020, denying Major MacDonald's claims and asserting affirmative defenses. (R.p. 019). After the completion of discovery, on February 14, 2023, they filed a Motion for Summary Judgment on all Major MacDonald's claims. (R.p. 031). They argued that the court should grant summary judgment on the grounds that:

1. The individually named defendants are entitled to immunity pursuant to the South Carolina Tort Claims Act for conduct that occurred within the scope of their official duties and should be dismissed.

2. Major MacDonald's claims against the District are subject to judgment as a matter of law as there is no genuine issue of material fact.

(*Id.*; R.p. 034;). On August 3, 2023, Major MacDonald submitted a memorandum in opposition to the motion. (R.p. 198). The court heard the motion on August 14, 2023, and after hearing the arguments of counsel and reviewing the submitted memoranda of counsel, the court accepted the voluntary stipulation of dismissal of the claims against individual defendants and the claim of Intentional Interference with Contractual Relations against the District and the individual defendants. (R.p. 579). Furthermore, the court granted the motion for summary judgment on Major MacDonald's claims of Interference with Prospective Contractual Relations, Defamation, and Intentional Infliction of Emotional Distress. (R.p.579, 585-86, 590).

This appeal followed.

STATEMENT OF THE FACTS

Major MacDonald is a retired Army Major who served in the armed forces for seventeen years, during which time he was deployed to Korea, Kuwait, and Iraq, including three deployments in an active combat zone. (R.p. 072-73). While in the Army, Major MacDonald earned the Meritorious Service Medal, the Army Achievement Service Medal, the Joint Service Medal, and a Bronze Star for his service. (R.p.073).

As a young boy, Major MacDonald grew up in Horry County, attending Horry County Schools from fourth to twelfth grades and graduating from Socastee High School in 1993. (R.p. 067). He then attended the Citadel, graduating in 1997. (R.p. 495). While serving in the Army, Major MacDonald also earned a Master of Science in Environmental Management and a Master of Science in Business Administration. (*Id.*).

Major MacDonald developed a reputation in the community as being a leader who was trustworthy and respectful, especially with respect to children and youth. (R.pp. 500-01). He regularly assumed leadership roles with children, and he was an assistant coach for a girls' competitive gymnastics team, a girls' soccer coach, and a youth leader at his church. (R.pp. 164, 500-01).

Not only has Major MacDonald been a leader in the community, but he also had years of leadership experience overseeing programs seeking to address or prevent sexual harassment and assault. During his time in the Army, Major MacDonald worked with a team to write the Sexual Harassment/Assault Response and Prevention (SHARP) order that directed subordinate units to submit timely and accurate reports of sexual harassment and sexual assault data; oversaw his battalion's sexual assault program, with responsibilities including coordinating prevention efforts, victim response,

and advocacy efforts; oversaw efforts to prevent re-victimization of sexual assault victims; coordinated sexual assault investigations; and enforced policies to prevent retaliation against victims. (R.pp.495-98).

After Major MacDonald's retirement from the Army, he pursued a career in education, seeking to be a leader to youth and to serve his community. (R.p.495). In January 2015, he began working as the Director of Military Programs at Fayetteville Technical Community College, he also sought and received Army pre-certification to become a JROTC instructor. (R.pp. 072-73).

In 2018, Lt. Col. James Davis, the Horry County JROTC Director, reached out to Major MacDonald about a Senior JROTC position at Aynor High School. (R.pp. 273, lines 5-8; 274, lines 17-24). After successfully completing the interview process, Lt. Col. Davis and Aynor Principal Michael McCracken hired Major MacDonald, and he signed a one-year contract with the District for the 2018-2019 school year. (R.pp. 261-63; 274, line 20 – 275, line 25). Major MacDonald looked forward to a position that provided him with an opportunity to invest in the very schools where he spent his formative years. (R.pp. 004-05, ¶ 14; 067, lines 5-21; 495; 503).

The JROTC program at Aynor was staffed by two instructors: Major MacDonald and Sgt. David Jones, who held the non-officer JROTC position. (R.pp. 5, ¶¶ 15-18; 201; 318-19.). Sgt. Jones had joined the program about a year and a half prior to Major MacDonald, and he had become very close with many of the students, particularly the students who held leadership positions in the program. (R.pp. 082-83, 138-39). The dynamic between Major MacDonald—a new instructor with no familiarity with the program or students—and the JROTC students was complicated by the fact that he and

Sgt. Jones taught many of their classes together, and the instructors taught their classes in a combined setting at least two days a week, both in a classroom setting and in physical fitness. (R.pp. 025-27, 320-22).

Major MacDonald took his role as JROTC instructor seriously—he required students to adhere to the uniform policy, gave students graded assignments, and emphasized physical training. (R.pp. 004, ¶ 14 - 005, ¶18; 037-38). However, Sgt. David Jones had a very friendly rapport with students; Major MacDonald observed that the JROTC students would frequently comment that they loved Sgt. David Jones and often gave him hugs. (R.p. 138, lines 6-23). From Major MacDonald's observations, students preferred Sgt. Jones because he was more lenient than Major MacDonald. (R.pp.005, ¶¶17-18; 037-38; 138). Many of the students who were particularly close to Sgt. Jones were also JROTC leaders, including A.P. and A.A. (R.pp.138, line 22- 139, line 8; 348).

On or about November 29, 2018, Principal McCracken and Assistant Principal Todd called Major MacDonald into a meeting. (R.pp. 294, line 13- 296, line 8). There, McCracken and Todd revealed that students had made various allegations about Major MacDonald, but they did not provide him with copies of the statements. (*Id.*). The students' statements alleged that Major MacDonald:

1. Made a reference to a student's underwear brand when she bent over;
2. Remarked that a student had drawn herself in a low-cut top;
3. Whistled at the same time a student walked past his classroom; and
4. Questioned, "When?" after a student uttered "F-me" while doing pushups.

(R.pp.348-67). McCracken and Todd permitted Major MacDonald to respond verbally to the allegations during the meeting, and he categorically denied each. (R.pp. 044; 100,

line 8 – 101, line 4; 368). Major MacDonald then submitted a response in writing on November 30, 2018, in which he repudiated each allegation. (R.p. 368). On December 4, Richard Neal and Roger Gray interviewed Major MacDonald at District headquarters at the direction of Mary Anderson, the District's Chief Human Resources Director. (R.pp. 007, ¶26; 043-44; 099, line 19 - 100, line 25; 387, lines 9-15). Neal and Gray handed Major MacDonald a letter, drafted prior to his arrival, placing him on administrative leave (R.p. 099, lines 19-22; 264).

Despite numerous inconsistencies with the allegations, Major MacDonald's categorical denial of the allegations, student statements that denying that any of the allegations ever happened, and the presence of ulterior motives by a group of students, not a single representative of the District interviewed any student again. In fact, after Major MacDonald left the District headquarters on December 4, 2018, not a single additional step was taken to investigate the accusations against him. (R.pp. 346, lines 5-18; 378, lines 5-23).

Instead, relying entirely on the word of the students who made the allegations and dismissing the statements of both MacDonald and students who denied that the events ever took place, the District's entire "investigation" consisted of a folder that included an email from Sgt. Jones, to whom two students—A.P. and A.W.—had made allegations, fourteen statements of students interviewed by Todd, Major MacDonald's written statement, and student J.C.'s drawing. (R.pp. 346, lines 5-18; 348; 378, lines 5-23; 381). Todd kept not a single note of what the students told him during his conversations. (R.pp.338, line 14 – 340, line 7).

The students' statements contained trivial and unsubstantiated or contradictory accounts. Regarding an alleged statement that Major MacDonald said, "You're drawing yourself in a lowcut top" about [Student J.C.]'s drawing, J.C. herself acknowledged that she was perhaps being "paranoid," while other students who were present testified that they never heard Major MacDonald say anything inappropriate, and in fact had only given J.C. a compliment about her drawing. (R.p. 348, 353-57).

As to the allegation that Major MacDonald whistled at a student, not a single student observed him whistle, and the accuser only speculated that the sound had come from him. (R.p. 358-63). Similarly, as to the allegation that Major MacDonald spoke the name of a student's underwear brand, no student saw Major MacDonald say anything, and student A.P. herself indicated she thought she was "hearing things." (R.p.349-52).

As to the allegation that Major MacDonald responded, "When?" to a student who had muttered "f-me" under her breath, several students indicated that the entire situation was likely a misunderstanding, and that Major MacDonald was not responding to the student at all. (R.p. 364-67).

The statement of Sgt. Jones, who co-taught with Major MacDonald, includes accusations exclusively reported to him by the students he was close to. (R.pp. 369-70). In fact, he unnecessarily inflamed those students' concerns when he indicated to them that law enforcement would be involved, despite the absence of any indication to that extent from administration. (R.p. 369) Despite teaching alongside Major MacDonald several times a week, Sgt. Jones did not report a single incident of wrongdoing that he witnessed himself. (*Id.*).

In fact, no staff member at Aynor made a statement or testified that Major MacDonald engaged in any of the alleged conduct, harassing conduct, or even *unprofessional* conduct at any time. (R.pp. 205, 369). The District never treated the accusations as serious enough to require a Title IX investigation, and the Title IX coordinator was never involved. And yet, despite the absence of any substantive indication that Major MacDonald engaged in wrongdoing, and the District's own policy requiring prompt investigations, the District left Major MacDonald on administrative leave for a total of *twenty months* before the final determination by the board that there was insufficient evidence of wrongdoing. (R.pp. 265-67, 308-09, 432).

On April 30, 2019, five months after the conclusion of the investigation, Superintendent Dr. Rick Maxey wrote Major MacDonald a letter informing him that he intended to recommend to the District Board that Major MacDonald's contract not be renewed. (R.pp. 265-66). Dr. Maxey also wrote, "Prior to the Board acting on my recommendation at its next regularly scheduled meeting, you may request to address the Board to appeal my recommendation, provided that you do so in writing and within ten (10) work days of the date of this letter." (*Id.*) On May 9, 2019, by and through his prior counsel, Major MacDonald timely submitted a written appeal and request for hearing at the Board's next scheduled meeting. (R.p.488).

However, the District did not take up Major MacDonald's appeal at its next regularly scheduled Board meeting on May 20, 2019. In fact, the Board met for ten regularly scheduled meetings over the course of *fifteen* months before it granted Major MacDonald a hearing on August 17, 2020. (R.p. 300). At that meeting, the Board heard from McCracken, JROTC Director Davis, and Major MacDonald. (R.p. 405, lines 8-20)

The Board found insufficient evidence that Major MacDonald committed any wrongdoing. (R.pp. 267-68; 309; 405, lines 8-20). Despite this finding, the District issued a letter on August 26, 2020 terminating its relationship with him. (R.pp. 267-68).

While awaiting the determination from the District, Major MacDonald pursued other JROTC positions. Around August 2019, he interviewed for an open position with Hannah-Pamplico High School in neighboring Florence County School District Two ("FCSD2"), and the principal there, Sterling Mosby, recommended him for hire to Superintendent Dr. Neal Vincent. (R.p.493, lines 1-6). Dr. Vincent made reference requests to Dr. Maxey by email on August 12, 2019, called and left him a voicemail on August 13, 2019, and emailed him again on August 15, 2019. (R.pp. 517-18). Dr. Vincent also called Dr. Maxey's assistant, Heidi Oates, in pursuit of Dr. Maxey's recommendation, but she directed him away from the Superintendent. (R.pp. 511, line 18 – 512, line 13). Oates also forwarded an email from Dr. Vincent directly to Dr. Maxey when he once again contacted her after the two spoke on August 16, 2019. (R.p. 517). At no point did Dr. Maxey respond to Dr. Vincent's requests, despite the typical practice of superintendents to communicate with one another. (R.pp. 511, line 18 – 512, line 13; 513, lines 9-19).

Because JROTC instructors are not certified through the South Carolina State Department of Education, the only way for a hiring district to confirm that the potential JROTC instructor had appropriate certification would be to contact the district where the instructor was currently employed. (R.pp. 134, line 25 - 136, line 12; 511, line 18 – 512, line 13; 513, lines 9-19). Consequently, because the District refused to provide even a neutral reference for Major MacDonald, FCSD2 could not hire him, and FCSD2's

JROTC position remained open for almost a full year. (R.pp. 493, line 10-19; 512, line 14 – 513, line 15). Unfortunately, by the time that the District issued its final termination letter to Major MacDonald, Hannah-Pamplico had filled the position. (R.p.163, lines 3-6).

As a result of the District placing and leaving Major MacDonald on administrative leave for twenty months—and terminating him—after baseless allegations of sexual misconduct, the community shunned and ostracized Major MacDonald. (R.pp. 164, line 6 – 167, line 25). Rumors spread, and his three young daughters were approached by school and church members regarding the allegations and suspension. (*Id.*). Major MacDonald's oldest daughter heard from friends all around the area—including Myrtle Beach and Conway—who were also under the impression that he had done something wrong. (R.pp. 166, line 21 - 167, line 3). Additionally, Major MacDonald and his family were ostracized by his church community, ultimately changing churches. (R.pp. 077, line 10 - 78, line 6; 165, line 12-167, line 18).

Moreover, the District's handling of the allegations wrought havoc within Major MacDonald's family, nearly destroying his marriage and causing great distress to his daughters who thought he was going to jail or being placed on the sex offender registry. (R.pp. 164, line 20 - 166, line 6; 168, lines 4-25). Additionally, Major MacDonald, who had no prior history of mental illness, was diagnosed with major depression and anxiety, and had to start prescription medication for those diagnoses as a result of the District devastating his reputation. (R.pp. 078, line 13 - 80, line 14; 113, line 19 – 24; 568, lines 16-20).

In sum, the District conducted a cursory investigation of student allegations, then placed Major MacDonald in career limbo for twenty months while taking no steps to

resolve the matter. Major MacDonald's absence from the classroom for such an extended period, paired with knowledge of an investigation, devastated his reputation in the community—which had previously been one of upmost integrity. Not only did the District refuse to resolve the matter within the District for twenty months, but it also prevented Major MacDonald from acquiring a job in any other district. Consequently, Major MacDonald initiated the underlying action seeking a remedy for these harms.

STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure allows a court to grant summary judgment only if the moving party can establish "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 459, 892 S.E.2d 297, 298 (2023) (quoting Rule 56, SCRCP). As summary judgment is a "'drastic remedy' which should be 'cautiously invoked,'" a court must deny the motion for summary judgment where—viewing the evidence and factual evidence in a light most favorable to the nonmoving party—the nonmoving party establishes a genuine issue of material fact. *Bloom v. Ravoira*, 339 S.C. 417, 425, 529 S.E.2d 710, 714 (2000) (quoting *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991); *See Kitchen Planners*, 440 S.C. at 462, 892 S.E.2d at 298 (citing *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166); *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 634 (Ct. App. 2006).

When reviewing the denial of a summary judgment motion, the appellate court applies the same standard which governs the circuit court under Rule 56(c), SCRCP: summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

ARGUMENTS

The trial court erred by granting summary judgment on Major MacDonald's Defamation and Intentional Interference with Prospective Contract claims because Major MacDonald established a genuine dispute of material fact on each claim.

More specifically, with respect to Major MacDonald's claim of Intentional Interference with Prospective Contract, the trial court erred by evaluating whether there was a genuine issue of material fact by applying a negligence theory of duty rather than considering the District's intent within an intentional tort framework. The question of duty is appropriate for a negligence claim, but inapposite and misplaced in a consideration of intent in tort.

With respect to the defamation claim, the trial court erred by failing to find that Major MacDonald presented a genuine issue of material fact that the District made a false and defamatory statement through conduct.

I. The trial court erred in granting summary judgment on Major MacDonald's defamation claim because he has established a genuine dispute of material fact that he was defamed by the District's conduct.

Major MacDonald is entitled to reversal of summary judgment on his claim for Defamation because he established a genuine issue of material fact and the District failed to establish that it was entitled to judgment as a matter of law.

A plaintiff establishes a claim of defamation where he shows: (1) a false and defamatory statement concerning another; (2) an unprivileged communication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 518, 506 S.E.2d 497, 506 (1998).

First, a plaintiff must establish that the defendant made a false and defamatory statement. *Id.* "A communication 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 with him." *Parrish v. Allison*, 376 S.C. 308, 321, 656 S.E.2d 382, 389 (Ct. App. 2007) (citing *Holtzscheiter*, 332 S.C. at 530, 506 S.E.2d at 513 (Toal, J., concurring)). It is not necessary that the statement "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 South Carolina, Inc.*, 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980) (citing *Timmons v. News and Press, Inc.*, 232 S.C. 639, 644, 103 S.E.2d 277, 280 (1958). Importantly, while a defamatory statement is typically associated with spoken or written words, South Carolina courts have consistently recognized that "a defamatory insinuation may not only be made by word, but also by actions or conduct." *Tyler*, 275 S.C. at 458, 272 S.E.2d at 634; *Holtzscheiter*, 332 S.C. at 517-18, 506 S.E.2d at 505 (citing Restatement (Second) of Torts § 568 (Am. Law. Inst. 1977)) ("Slander . . . consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those defined as part of libel."); *see also Williams v. Lancaster County Sch. Dist.*, 369 S.C. 293, 302, 631 S.E.2d 286, 292 (Ct. App. 2006); *Cruce v. Berkley Cty. Sch. Dist.*, 435 S.C. 7, 18, 865 S.E.2d 391, 397 (Ct. App. 2021); *Erickson v. Jones St. Publrs. LLC*, 386 S.C. 444, 465, 629 S.E.2d 653, 664 (2006).

In *Tyler v. Mack Stores of South Carolina, Inc.*, the court held that, under the circumstances presented, the discharge of the plaintiff employee could itself constitute a defamatory statement because the manner of termination "gave fellow employees and

others the feeling and belief that [the plaintiff] had been discharged for some wrongful activity." *Tyler*, 275 S.C. at 458, 272 S.E.2d at 634. There, the defamatory statement consisted of the defendant employer giving the plaintiff employee a polygraph test, then terminating him immediately after. *Id.*

Here, just as in *Tyler*, the District's manner of suspending and terminating Major MacDonald gave fellow employees and members of the community the impression that Major MacDonald had committed a serious wrong. (R.pp.164, line 6 – 167, line 25; 168, line 25 – 169, line 13). Just as the colleagues of the plaintiff in *Tyler* knew of an investigation and polygraph test prior to the termination, so too did Major MacDonald's school community know that there were allegations of a sexual nature and an investigation just prior to the twenty-month suspension and termination, which communicated the message that Major MacDonald had engaged in serious wrongdoing with students. (*Id.*).

Moreover, the context of the administrative leave and termination constitutes defamation by insinuation because the message that Major MacDonald had engaged in wrongdoing with students was false and the meaning plain.

First, the message that Major MacDonald had engaged in wrongdoing or sexual misconduct with students was false. Major MacDonald has always maintained that he did not commit a single act of which he was accused. (R.pp. 044; 100, line 8 – 101, line 4; 368). The accusations originated from two students who had a motivation to fabricate allegations due to their dislike for Major MacDonald's teaching methods. These students initially *made* allegations to the JROTC instructor whom they preferred to Major

MacDonald and regularly hugged. (R.pp R.pp.005, ¶¶17-18; 037-38; 138, line 6-139, line 8; 380).

Additionally, student statements taken by assistant principal Todd contradict one another. Regarding the alleged statement, “You are drawing yourself in a low cut top,” the student acknowledged that she was perhaps being “paranoid,” while other students who were present testified that not only did they not hear Major MacDonald say anything inappropriate, he had in fact been kind to J.C. and complimented her drawing skills. (R.pp. 353-56).

As to the allegation that Major MacDonald whistled at a student, no student observed him whistle, and the witnesses only speculated that the sound had come from him. (R.pp. 357-63). Similarly, no student saw Major MacDonald say anything about a student’s underwear brand, and several students indicated that the reply to the student’s “f-me” statement was a misunderstanding, and that Major MacDonald was not responding to the student at all. (R.p. 364-67). Sgt. Jones, who co-taught with Major MacDonald and was present during most of the time when these events are alleged to have occurred, never observed any evidence of wrongdoing. (R.pp. 007, ¶¶ 24-25; 205; 346, lines 1-4; 369-70).

Additionally, the District’s ultimate disposition of the matter supports the falsity of the message, and it is no surprise that the District found that there was insufficient evidence to find Major MacDonald had engaged in any wrongdoing. (R.p. 267, 309). Viewing the evidence in the light most favorable to Major MacDonald, a reasonable jury could find that the message communicated by the District’s 20-month suspension of Major MacDonald his termination was false.

Furthermore, the length of the investigation and suspension sent a message with a plain meaning to the community. The District took five months to issue its initial termination letter, not taking any steps to investigate the veracity behind the initial student statements, all while leaving Major MacDonald on administrative leave. (R.pp. 265-66; 346, lines 5-24; 377, line 3 - 378, line 23). The message to the school community was plain: in November, Major MacDonald was present, and in December, after Todd sought out students to interview and after Sgt. Jones represented to students that law enforcement would be involved, Major MacDonald was gone. Major MacDonald's absence under the circumstances was plainly connected to the student accusations and the interviews conducted. Furthermore, Major MacDonald's long absence while he was left on administrative leave for a further *fifteen months* without the District affording him a hearing continued to convey the plain message to the community that he had engaged in such serious wrongdoing that it required him to be suspended for over a year. Consequently, the District's handling of the allegations sent the plain and false message to the community that Major MacDonald had engaged in wrongdoing with students, which constitutes defamatory publication by insinuation.

Second, a plaintiff must establish that the statement was unprivileged. *Holtzscheiter*, 332 S.C. at 518, 506 S.E.2d at 506. A statement may be absolutely or conditionally privileged. *Bell v. Bank of Abbeville*, 208 S.C. 490, 493, 38 S.E.2d 641, 642 (1946). South Carolina courts have narrowly defined this category to include statements made in consideration of public policy, such as those made by legislative or judicial officials in their public capacity and statements offered as sworn testimony. *See Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) (finding that

absolute privilege is viewed through a public policy lens, and thus generally includes, but is not wholly limited to, legislative and judicial proceedings and acts of State); *Lybrand v. State Co.*, 179 S.C. 208, 184 S.E. 580 (1936) (finding statements offered to the Court subject to absolute privilege). Because there is no involvement of judicial or legislative officials, absolute privilege is inapposite here.

As to qualified privilege, "regard must be had to the occasion and the relationship of the parties." *Bell*, 208 S.C. at 494, 38 S.E.2d at 643. Qualified privilege is established only through "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." *Prentiss v. Nationwide Mut. Ins. Co.*, 256 S.C. 141, 147, 181 S.E.2d 325, 327 (1971). However, because

> qualified privilege arises by reason of the occasion of the communication, a communication which goes beyond the requirement of the occasion loses the protection of the privilege, for it lacks the requisite element of good faith. When the protection of the privilege has been thus lost, the communication falls within the rule, applicable to unprivileged communications, that the defamatory language, in itself, may warrant the inference of malice.

Id. at 148, 181 S.E.2d at 327.

The District's conduct, by suspending Major MacDonald then leaving him on administrative leave for twenty months without ever taking a step to investigate the truth of the students' allegations beyond an investigation that was complete on December 4, 2018, cannot be characterized as limited in scope to the requirement of the occasion. The only proper purpose for placing an employee on administrative leave for twenty months is to engage in a thorough investigation. And yet, the District did not lift a finger for almost twenty months, all the while sending the message to the community that Major MacDonald had engaged in serious wrongdoing that would require an exhaustive

undertaking to resolve. As a result, the defamatory conduct lacked any good faith effort on the part of the District, and the District enjoys no qualified privilege for the conduct.

Third, the plaintiff must establish fault of the publisher. *Holtzscheiter*, 332 S.C. at 518, 506 S.E.2d at 506. South Carolina law requires a private plaintiff to establish common law malice to satisfy the element of fault in a defamation claim.[1] *Erickson*, 368 S.C. at 475-76, 629 S.E.2d at 670. The law presumes common law malice where the plaintiff establishes slander per se. Slander—including defamation by conduct—is "actionable per se when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." *Fountain v. First Reliance Bank*, 398 S.C. 434, 442, 730 S.E.2d 305, 309 (2012) (quoting *Goodwin v. Kennedy*, 347 S.C. 30, 36, 552 S.E.2d 319, 322-23 (Ct. App. 2001). Where the statement is actionable per se, the "defendant 'is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages.'" *Fountain*, 398 S.C. at 442, 730 S.E.2d at 309 (quoting *Erickson,* 368 S.E. 444, 465, 629 S.E2d 653, 664 (2006)). In South Carolina, the Supreme Court has acknowledged criminal sexual conduct with a minor—of any degree—as a crime of moral turpitude. *Baddourah v. McMaster*, 433 S.C. 89, 109, 856 S.E.2d 561, 571 (2021) (citing *State v. Ball*, 292 S.C. 71, 74, 354 S.E.2d 906, 908 (overruled on other grounds by *State v. Major*, 301 S.C. 181, 391 S.E.2d 235 (1990)).

[1] The District has made no contention that Major MacDonald is a public figure or subjected to a heighted standard under the First Amendment.

Here, as established, the defamatory conduct of the District, in placing Major MacDonald on administrative leave immediately after the students' allegations and investigation, leaving him on that suspension for twenty months, and finally terminating him despite lack of evidence of wrongdoing, sent the message to the students, their families, and the community at large that the allegations the students made to Sgt. Jones and District administrators were true.

By conveying the false message that the allegations were true, particularly considering Sgt. Jones' indication to students that law enforcement would be involved, the District conveyed the false message that Major MacDonald had committed a crime of moral turpitude, namely criminal sexual conduct with a minor. (R.p.369-70). Similarly, the false message that Major MacDonald had engaged in wrongdoing with the accusers charged him with unchastity. Finally, these allegations can also be construed as a charge that Major MacDonald was unfit for his profession. Accordingly, the defamation is actionable per se, it is presumed that the District acted with malice, and Major MacDonald can establish fault of the publisher.

Additionally, in *Kennedy v. Richland County School District Two*, the Court found that the plaintiff employee could establish fault on behalf of the publisher where the employer had made a statement about the employee but had only conducted an "incomplete and cursory investigation." *Id.*, 428 S.C. 98, 116, 833 S.E.2d 414, 424 (Ct. App. 2019) (petition for review dismissed by *Kennedy v. Richland Sc. Dist. Two*, No. 5669, 2020 S.C. LEXIS 34 (Mar. 9, 2020)).

Here, like the communication in *Kennedy*, the District's communication to the community—that Major MacDonald had engaged in wrongdoing that warranted an

extended suspension—was based on a cursory investigation that lasted a matter of days. Therefore, Major MacDonald can establish fault in an additional manner beyond the presumption available through per se actionability.

Fourth, the plaintiff must establish "either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Holtzscheiter*, 332 S.C. at 518, 506 S.E.2d at 506. As addressed above, where the statement is actionable per se, the "defendant 'is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages.'" *Fountain*, 398 S.C. at 442, 730 S.E.2d at 309 (quoting *Erickson,* 368 S.E. 444, 465, 629 S.E2d 653, 664 (2006)).

Here, because the District's defamatory conduct charged Major MacDonald with a crime of moral turpitude, unchastity, unfitness for his profession, the defamation is actionable per se, it is presumed that the District acted with malice and that Major MacDonald has suffered general damages.

Moreover, notwithstanding the presumption of general damages, Major MacDonald has sufficiently established special harm resulting from the District's publication. Major MacDonald and his family were ostracized by his church community, suffered harm to his reputation as an upstanding leader, and experienced severe emotional distress. (R.pp. 079, line 7 - 80, line 14; 164, lines 6 – 169, line 13). Major MacDonald's marriage was strained almost to the breaking point, and he was also diagnosed with major depression and anxiety resulting from the harm to his reputation. (*Id.*). Consequently, Major MacDonald has established both a presumption of damages under a theory of slander per se as well as special harm from the publication.

Because Major MacDonald has established a genuine dispute of fact on each element of his defamation claim, the District was not entitled to summary judgment as a matter of law. Accordingly, this Court should reverse the trial court's order of summary judgment on Major MacDonald's Defamation claim.

II. The trial court erred in granting summary judgment on Major MacDonald's Intentional Interference with Prospective Contract claim because he established a genuine dispute of material fact that the District intentionally interfered with his prospective employment by refusing to provide his prospective employer a reference.

To establish a claim of Intentional Interference with Prospective Contract, the plaintiff must show: (1) the defendant intentionally interfered with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; (3) causing injury to the plaintiff. *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990) (citing *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982); *Blake v. Levy*, 191 Conn. 257, 464 A.2d 52 (1983); *Straube v. Larson*, 287 Or. 357, 600 P.2d 371 (1979); Restatement (Second) of Torts § 766 and 766B (Am. Law. Inst. 1977)); Restatement (Second) of Torts § 766B (Am. Law Inst. 1979).

To establish the first prong of intentional interference with a prospective contract, the plaintiff must demonstrate that he had a prospective contract with a third party and that the defendant intentionally interfered with that relationship. *United Educ. Distribs., L.L.C. v. Educ. Testing Serv.*, 350 S.C. 7, 14, 564 S.E.2d 324, 329 (Ct. App. 2002); *Crandall*, 302 S.C. at 266, 395 S.E.2d at 180. To establish that he had a prospective contract, a plaintiff need not establish the presence of an enforceable contract, but rather a reasonable probability that contractual relations would be realized had the defendant not interfered. *United Educ.*, 350 S.C. at 16, 564 S.E.2d at 329 (citing *SNA, Inc. v. Array*, 51 F.Supp. 2d 554, 567 (E.D.Pa. 1999); *Kachmar v. Sungard Data Sys.,*

Inc., 109 F.3d 173, 184 (3d Cir. 1997); *Landry v. Hornstein*, 462 So. 2 844, 846 (Fla. Dist. Ct. App. 1985); *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 563 A.2d 31, 36 (N.J. 1989).

In *Santoro v. Schulthess*, the court found that there was no prospective contract, but only speculation, where the plaintiff testified that several people had looked at her property but could identify no prospective purchaser, much less a prospective purchaser who would have purchased the property but for the defendant's actions. *Id.*, 384 S.C. 250, 263, 681 S.E.2d 897, 904 (Ct. App. 2009).

Here, Major MacDonald can establish a reasonable probability that he and FCSD2 would have entered contractual relations had the District not interfered. Unlike *Santoro*, where potential buyers had toured the plaintiff's property but had not taken any steps to pursue purchase of the property, here, Hannah-Pamplico High School Principal Mosby had recommended to the FCSD2 superintendent that FCSD2 hire Major MacDonald as a JROTC instructor, and Dr. Vincent had secured all but one of the necessary references for Major MacDonald's hire. (R.pp. 512, line 14 – 513, line 5). FCSD2 Superintendent Dr. Vincent acknowledged that had he received a neutral reference from the District, he would have moved forward with Principal Mosby's recommendation. (*Id.*). Dr. Vincent indicated that the only thing remaining to take that next step was a reference from the District, considering Mosby's recommendation and the "outstanding" references that Major MacDonald had, otherwise. (R.pp. 502-03; 513, lines 2-5). Consequently, Major MacDonald can establish that, but for the District's refusal to provide even a neutral reference for him, he would have entered into a contractual relationship with FCSD2.

Turning to the issue of intentional interference as an intentional tort, intent is established “by showing the actor acted willingly (volition) and that he knew or should have known the result would follow from his act.” *Snakenberg v. Hartford Casualty Ins. Co.*, 299 S.C. 164, 173, 383 S.E.2d 2, 7 (Ct. App. 1989); *see also* Restatement (Second) of Torts § 766B cmt. d (Am. Law Inst. 1979) (“The intent required for this Section is that defined in § 8A.”); Restatement (Second) of Torts § 8A (Am. Law Inst. 1979) (The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”); Restatement (Second) of Torts § 8A cmt. b (Am. Law Inst. 1979) (“Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.”)

In the context of intentional interference with prospective contract, “interference with the other’s prospective contractual relation is intentional if the actor desires to bring it about or he knows that the interference is certain or substantially certain to occur as a result of his action.” Restatement (Second) of Torts § 766B cmt. d (Am. Law Inst. 1979) (stating that the standard for intent; *see also Crandall*, 302 S.C. at 266, 395 S.E.2d at 180 (adopting the Restatement Second of Torts § 766B). The defendant need not intend to harm the plaintiff through the interference. *Edelco, Inc. v Charleston County Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007) (“Although it is true that harm may result from an intentional interference with existing or prospective contractual relations, it is not necessary that the interfering party intend such harm. Instead, it is

only necessary that they intend to interfere with either an existing contract or intent to interfere with a prospective contract.").

Importantly, intent is distinguishable from breach of duty of care. *See Snakenberg*, 299 S.C. at 174, 383 S.E.2 at 7. "The gist of negligence is failure to observe a duty of care owed by the plaintiff by law. . . . Failure to exercise due care, *not intent*, is the critical element in negligence." *Snakenberg*, 299 S.C. at 174, 383 S.E.2 at 7 (emphasis added). Accordingly, intent and duty are not interchangeable, and the question of whether a defendant owed the plaintiff a duty has no bearing on whether he intentionally interfered with a prospective contract. *See id.* (distinguishing between the concepts of intent and duty of care).

Because the South Carolina Supreme Court has adopted § 766B of the Restatement (Second) of Torts, the trial court erred by adopting the District's proposed negligence standard for intent rather than the substantial certainty standard raised by Major MacDonald.

Here, Major MacDonald has established that the District acted with volition and knew or should have known that its refusal to provide a reference to FCSD2 would have the certain or substantially certain result of FCSD2 declining to enter the employment contract with Major MacDonald.

First, viewed in the light most favorable to Major MacDonald, there is sufficient evidence for a reasonable jury to find that the District acted voluntarily when it refused to fulfill Dr. Vincent's repeated requests for a reference from Dr. Maxey. Dr. Vincent made reference requests to Dr. Maxey by email on August 12, 2019, called and left him a voicemail on August 13, 2019, and emailed him again on August 15, 2019. (R.p.517-

18). Notably, when Dr. Vincent called Dr. Vincent's assistant to follow up on the reference request, she directed him away from the Superintendent. (R.pp. 511, line 18 – 512, line 13). Oates also forwarded an email from Dr. Vincent directly to Dr. Maxey when he once again contacted her after the two spoke on August 16, 2019. (R.p. 517) Accordingly, a reasonable jury could infer that Dr. Maxey repeatedly ignoring Dr. Vincent, particularly in light of Oates' turning him away *and* her forwarding the email to Dr. Maxey rather than responding directly to Dr. Vincent constitute volitional acts of the District.

Second, the District acted with substantial certainty that its refusal to provide even a neutral reference of Major MacDonald to Dr. Vincent would interfere with Major MacDonald's prospective contract with FCSD2. As a superintendent, Dr. Maxey would be aware of the unique nature of JROTC certification that required confirmation of credentials between districts. Dr. Maxey would also be aware of the standard practice among superintendents, which was to return calls to neighboring superintendents. (R.pp. 511, line 18-22; 513, lines 9-19). Consequently, the District would be substantially certain that refusal to respond to Dr. Vincent's request would terminate Major MacDonald's prospective contract with FCSD2, constituting an intentional interference with Major MacDonald's contractual relationship with FCSD2.

Moreover, the case at hand is distinguishable from instances where the court has found that a defendant's non-action did not constitute interference. In *Love v. Gamble*, the Court of Appeals held that a pickle production company and shed operator did not intentionally interfere with a prospective contract by failing to give a cucumber farm timely notice that they would not order further cucumbers. *Id.*, 316 S.C. 203, 207, 215,

448 S.E.2d 876, 882 (Ct. App. 1994). There, the defendant cucumber buyer and defendant pickling company did give the cucumber farmer notice that they would not purchase any further cucumbers from the plaintiff. *Id.* at 207, 448 S.E.2d at 878. In that case, there was no voluntary act of the defendants in their failure to provide a timely notice. *Id.* By contrast, in the instant case, the District actively *avoided* responding to Dr. Vincent's request for a reference from Dr. Maxey. Viewed in the light most favorable to Major MacDonald, there is sufficient evidence for a reasonable jury to find that the District intentionally withheld a reference for Major MacDonald, knowing with substantial certainty that the refusal would interfere with his ability to contract with FCSD2.

To establish the second prong, a plaintiff may establish that the defendant's interference was for an improper purpose or by improper methods. *Crandall*, 302 S.C. at 266, 395 S.E.2d at 179. Alternatively, "the plaintiff may prove the defendant's method of interference was improper under the circumstances." *Id.* (citing *Duggin v. Adams*, 234 Va. 221, 360 S.E.2d 832 (1987)). "Methods may also be improper because they violate an established standard of a trade or profession." *Love*, 316 S.C. at 215, 448 S.E.2d ay 883 (citing *Duggin*, 234 Va. at 227-228, 360 S.E.2d at 836-837); Restatement (Second) of Torts § 767 (Am. Law Inst. 1979).

Here, Major MacDonald has demonstrated that the District violated an established standard of the educational profession in refusing to respond to Dr. Vincent or provide a neutral reference. As mentioned, it is standard practice for superintendents of neighboring districts to respond to requests for references, and at the very least, to return calls to one another. (R.pp. 511, line 18-22; 513, lines 9-19). Furthermore, the refusal to provide a reference for Major MacDonald is uniquely improper under the

circumstances, as the reference of the prior school district is even more important in the case of a JROTC instructor. Again, the standard practice for ensuring that a potential JROTC hire has proper certification *necessitates* that the hiring district contact the prior district, as the South Carolina Department of Education does not maintain records of JROTC instructors. (*Id.*; R.pp. 510, line 22 – 511, line 3; 513, lines 11-12). Accordingly, the District's refusal to respond to Dr. Vincent's requests for a reference violated an established standard of the education profession and was therefore an improper method of interference.

Finally, a plaintiff must establish that the defendant's intentional interference with the prospective contract resulted in injury to the plaintiff. *Crandall*, 302 S.C. at 266, 395 S.E.2d at 179. Damages arising out of intentional interference with a prospective contract include "the pecuniary loss of the benefits of the contract [or the prospective relation]; consequential losses for which the interference is a legal cause; and emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference." *Collins Music Co. v. Smith*, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998) (citing *Ross v. Holton*, 640 S.W.2d 166, 173 (Mo. Ct. App. 1982); *Charles River Constr. Co. v.* Kirksey, 20 Mass. App. Ct. 33, 480 N.E.2d 315 (Mass. App. Ct. 1985)); Restatement (Second) of Torts § 774A (Am. Law Inst. 1979); *see also* Restatement (Second) of Torts § 766B cmt. g (Am. Law Inst. 1979) (adopting standard for damages available in § 766, comments t and u); Restatement (Second) of Torts § 766 cmts. t & u (Am. Law Inst. 1979) (adopting standard for damages in § 774A).

Major MacDonald's certification as a JROTC instructor was dependent on continuous employment as an instructor, and because he could not move his

certification over to FCSD2 when the opportunity arose, his lost his qualifications to be a JROTC instructor, entirely. (R.pp.136, lines 1-25). Because the District terminated Major MacDonald and precluded him from securing the contract with FCSD2, his letter of qualification with JROTC lapsed, and he could no longer secure a job as a JROTC instructor. The District's interference with Major MacDonald's prospective contract resulted in a lost contract for employment with FCSD2 for the 2019-2020 school year, the expiration of Major MacDonald's JROTC qualification, and great emotional distress. In refusing to provide Dr. Vincent with a simple, neutral reference, the District foreclosed Major MacDonald from moving on from the career purgatory in which the District had placed him. Consequently, Major MacDonald can establish that the District's intentional interference with his prospective contractual relationship with FCSD2 resulted in injury to him.

CONCLUSION

For the reasons set forth above, Major MacDonald respectfully requests that this Court reverse the circuit court's order granting summary judgment for the District on Major MacDonald's claims of Defamation and Interference with Prospective Contractual Relations because Major MacDonald has established a genuine dispute of material fact on each of these claims.

(Signature block on following page)

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Columbia, South Carolina

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal complies with Rule 211(b), SCACR.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr., Circuit Judge

Case No. 2020-CP-2605790

Appellate Case No. 2023-01499

Major Jason J. MacDonald,

Appellant,

-vs-

Horry County School District, Dr. Rick Maxey, in his individual and official capacities, Michael McCracken, in his individual and official capacities, Brandon Todd, in his individual and official capacities, and Mary Anderson, in her individual and official capacities,

Respondents.

PROOF OF SERVICE

I certify that the **Final Brief of Appellant and Final Reply Brief of Appellant** were served on the following counsel of record for Respondents on June 27, 2024, via electronic mail under Paragraph (d)(1) of Order re: Methods of Electronic Filing and serve under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447.

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June 27, 2024
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Subject:	Major Jason MacDonald vs. Horry County School District et al Case No. 2020-Cp-2605790
Attachments:	Final Reply Brief of Appellant.pdf; Final Brief of Appellant.pdf; 2024-05-06--Proof of Service.pdf

Dear Counsel,

Please find attached, for service upon you, The Final Brief of Appellant and Final Reply Brief of Appellant for the above-referenced matter. The Proof of Service has also been attached, reflecting service of same upon all counsel of record.

Thank you,
Traci Wolfe, PP