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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2023-000500

The School of Hope Christian Academy, Jacqueline McKie Burden, and Eugene Burden, Sr.,.....Appellants,

v.

South Carolina Department of Education, Ronald Jones, and Shirley Jenerette, ...Respondents.

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF EDUCATION

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COUNTERSTATEMENT OF THE CASE

This appeal arises out of the circuit court's grant of summary judgment in favor of Respondent South Carolina Department of Education (the Department) on Appellants School of Hope Christian Academy (School of Hope), Jacqueline McKie Burden, and Eugene Burden Sr.'s barred claims for breach of contract and defamation.

In 2015 and several years prior, School of Hope—led by the Burdens—participated in the Summer Food Service Program (SFSP), which is funded by the United States Department of Agriculture (USDA) and administered in South Carolina by the Department. (R. p. 50). Through the SFSP, School of Hope was to provide meals to be distributed to eligible children in service institutions in 2017. (*Id.*). But when the Department conducted a federally required audit of School of Hope's participation in the SFSP in September 2017, it uncovered deficiencies, resulting in many questionable and unsubstantiated reimbursement claims. (R. p. 53).

As a result, the Department terminated School of Hope's contract for participation in the SFSP and initially withheld School of Hope's August 2017 reimbursement claim. (*Id.*). Later, the Department barred School of Hope from future participation in the SFSP and imposed fiscal penalties on School of Hope in the amount of $673,203.41—$891,432.88 reduced or offset by the August 2017 reimbursement claim of $218,229.47. (*Id.*).

School of Hope appealed, and a hearing officer within the Department held a hearing on January 29, 2019, January 30, 2019, February 5, 2019, and March 5, 2019. (R. p. 47). Following the hearing, the hearing officer issued a final order on March 12, 2019, upholding the Department's imposition of fiscal penalties and making certain findings of fact against Appellants. (R. p. 63). Appellants never appealed that final order. Instead, Appellants filed this action two years later, asserting breach of contract and defamation claims against the Department. *See* (R. p. 61).

Appellants also asserted a defamation claim against Respondent Ronald Jones, and a civil conspiracy claim against Jones and Respondent Shirley Jenerette.

Although Appellants filed the complaint on March 3, 2021, they did not serve the complaint on the Department until seven months later, on October 11, 2021. The Department moved to dismiss the complaint or, in the alternative, to strike Appellants' $30 million prayer for relief.[1] (R. pp. 24–29, 30–44). The circuit court held a virtual hearing on February 13, 2023, during which all parties—through their counsel—consented to convert the motions into ones for summary judgment so that the circuit court could consider the final order. (R. p. 1); *see also* (R. p. 94:21–25). Appellants filed no brief in opposition to the motions and presented no evidence in support of their position at the hearing.

The circuit court granted summary judgment in favor of all Respondents in a Form 4 order on February 15, 2023, and issued a formal order on March 8, 2023. (R. p. 1). This appeal followed.

STATEMENT OF THE FACTS

On May 1, 2015, School of Hope entered a contract with the Department to participate in the SFSP. *See* (R. p. 50). Through the SFSP, School of Hope was to provide meals to 156 sites within South Carolina to be distributed to eligible children in service institutions during summer of 2017. (*Id.*); (R. p. 95:15–17). In compliance with Title 7, Subsections 225.7 and 225.10 of the Code of Federal Regulations, the Department conducted an administrative audit of School of Hope's participation in the SFSP beginning in September 2017. (R. p. 52); *see also* (R. p. 95:17–20). During the audit, the Department uncovered numerous systemic issues with School of Hope's recordkeeping and failures to comply with the SFSP and contract requirements, resulting in many

[1] Respondents Jones and Jenerette filed motions to dismiss as well.

questionable and unsubstantiated claims for reimbursement submitted by School of Hope to the Department. (R. pp. 53–56); (R. pp. 95:21–96:1).

Because of those issues, on February 14, 2018, the Department notified School of Hope it was terminating School of Hope's contract for participation in the SFSP and withholding the August 2017 reimbursement claim. (R. p. 53); (R. p. 96:2–5). School of Hope appealed. (R. p. 47). Subsequently, School of Hope agreed to withdraw its appeal of the termination and to hold its appeal of the temporary denial of the August 2017 reimbursement in abeyance pending further administrative review by the Department. (*Id.*).

On August 30, 2018, the Department issued a "Serious Deficiency Determination"[2] letter to School of Hope, in which the Department barred School of Hope from future participation in the SFSP and imposed fiscal penalties on School of Hope in the amount of $673,203.41—$891,432.88 reduced or offset by the August 2017 reimbursement claim of $218,229.47—for failure to comply with duties imposed by federal regulations and School of Hope's contract with the Department. (R. p. 53); (R. p. 96:5–11). School of Hope appealed the imposition of fiscal penalties, and the hearing officer held a hearing on the appeal for four days on January 29, 2019, January 30, 2019, February 5, 2019, and March 5, 2019. (R. p. 47).

Following the hearing, the hearing officer issued a final order on March 12, 2019. (R. p. 65). The hearing officer determined the fiscal penalties, offset or reduced by the August 2017 reimbursement claim, was proper due to "School of Hope's failure to comply with duties imposed by federal regulation and its contract with [the Department]." (R. p. 63); (R. p. 96:15–19). Specifically, the hearing officer found "[t]he evidence presented leaves no question that School of Hope failed to maintain accurate records substantiating their claims for reimbursement." (R. p.

[2] *See* 7 C.F.R. § 225.11(c).

63). "[I]t became obvious," the hearing officer found, "that the volume and pervasiveness of the inconsistencies were huge and indicated systematic problems as opposed to minor human error." (R. p. 53). The hearing officer even noted "[t]he presence of altered records presents more serious concerns of a criminal nature." (R. p. 63). So the hearing officer upheld the Department's imposition of fiscal penalties due from Hope of School in the net amount of $654,779.18 after adjustments for amounts due to School of Hope. (R. p. 65). Appellants failed to appeal the Department's final order and the factual and legal conclusions made in it. (R. p. 98:3–6).

Instead, Appellants filed this action two years later, asserting claims against the Department for breach of contract and defamation. (R. p. 15). This matter comes before the Court on the circuit court's order granting summary judgment in favor of all Respondents. (R. p. 1).

STANDARD

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); *see also Gibson v. Epting*, 426 S.C. 346, 350, 827 S.E.2d 178, 180 (Ct. App. 2019) (noting an appellate court uses "the same yardstick as the [circuit] court" in reviewing an order granting summary judgment). Summary judgment is proper when no genuine issue as to any material fact exists, and the moving party is entitled to judgment as a matter of law. *Ellis v. Davidson*, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004); Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a factfinder." *S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 427, 626 S.E.2d 19, 22 (Ct. App. 2005).

As our supreme court recently clarified, the "'mere scintilla' standard does not apply under Rule 56(c). Rather, the proper standard is the 'genuine issue of material fact' standard set forth in

the text of the Rule." *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005). Indeed, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

ARGUMENT

The Court should affirm the circuit court's sound order granting summary judgment in favor of the Department because Appellants failed to appeal the hearing officer's final order, which included many adverse and dispositive findings against Appellants that bar their breach of contract and defamation claims. In fact, Appellants appear to concede that their breach of contract claim is not viable. And despite Appellants' belated attempts to conjure factual issues, they failed to present any evidence to the circuit court.

To begin, it is important to note the nature of the claims alleged against the Department in this lawsuit. *First*, Appellants allege the Department somehow breached its now terminated contract with Appellants by refusing to pay Appellants' August 2017 reimbursement claim. (R. pp. 19–20). As the circuit court noted, that claim necessarily rests on Appellants' contention that "they are owed for services rendered under the now terminated contract with the Department," specifically for the August 2017 reimbursement claim. (R. p. 7). Second, Appellants allege Jones and some other unknown persons, "acting for and on behalf of" the Department, made purportedly

defamatory statements about Appellants. (R. pp. 19–20). As the circuit court properly found, both claims are barred by the law of the case doctrine.[3] For these reasons, as well as the alternate sustaining grounds set forth below, the Court should affirm.

I. The circuit court correctly granted summary judgment in favor of the Department on Appellants' breach of contract claim.

A. Appellants concede the law of the case bars their breach of contract claim against the Department.

Appellants appear to concede the circuit court properly found the law of the case barred their breach of contract claim against the Department. According to Appellants, "a cursory review of [the final order's] findings shows that *only the breach of contract claim* against the South Carolina Department of Education *was being addressed* by" the hearing officer. (Appellants' Br. at 6) (emphasis added). They then say the final order "does not extend to [their] claims *other than* possibly to the School of Hope's *breach of contract claim* against the Department." (*Id.* at 7) (emphasis added).

But Appellants make no arguments that the circuit court erred in applying the law of the case to bar their breach of contract claim. As a result, Appellants have abandoned any argument on that front. *See, e.g.*, *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an appellant abandons an issue on appeal when he fails to "provide arguments or supporting authority" in his initial brief); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (stating one "may not use the reply brief to argue issues not argued

[3] Appellants attempt to separate their issues on appeal into two categories, but as to the Department, they appear to be one. Indeed, their first issue questions the circuit court's application of the law of the case to "all three Defendants," even though some "were not included in the administrative case." (Appellants' Br. at 1 & 5). To the extent that is Appellants' argument in their first issue on appeal, it does not apply to the Department, for it was a party to the administrative proceedings.

in his brief in chief"). The Court should therefore summarily affirm judgment in favor of the Department on the breach of contract claim.

B. In any event, the circuit court properly applied the law of the case to Appellants' breach of contract claim.

Even on the merits, Appellants' perceived challenge to the circuit court's ruling in favor of the Department on their breach of contract claim fares no better.

As noted, Appellants failed to appeal the hearing officer's final order to the administrative law court or to our appellate courts. *See* S.C. Code Ann. § 1-23-380 ("A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1."); (R. p. 98:3–6). Thus, the unappealed findings in the final order became and remain the law of the case. *See Shirley Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case.").

In her 19-page, single-spaced final order, the hearing officer made several factual findings and legal conclusions against School of Hope, including that School of Hope "fail[ed] to comply with duties imposed by federal regulation and its contract with [the Department]." (R. p. 63). Because the hearing officer's final unappealed order meant Appellants, not the Department, breached the contract and the Department properly imposed sanctions against them, Appellants' breach of contract claim is barred by the law of the case. *See Earle v. Aycock*, 276 S.C. 471, 475, 279 S.E.2d 614, 616 (1981) (holding a final decision by the State Grievance Committee not appealed to the courts became the law of the case).

More specifically, as the circuit court noted, "the hearing officer found the Department's 'imposition of fiscal penalties in the amount of $654,779.18 after adjustments for amounts due to School of Hope' and 'offset by the August 2017 reimbursement claim' was proper." (R. p. 7).

Thus, the hearing officer—and later the circuit court—necessarily determined the Department did not breach its contract with School of Hope by refusing to reimburse School of Hope for its August 2017 reimbursement claim. In fact, as the circuit court stated, Appellants breached their contract with the Department "by failing to comply with their contractual duties or state and federal law." (R. p. 7). The circuit court properly found the law of the case—that Appellants breached the contract and the Department properly imposed sanctions offset or reduced by the August 2017 reimbursement claim—prevailed and barred Appellants' breach of contract claim here.

In doing so, the circuit court identified seven unappealed factual or legal conclusions from the final order. (R. p. 7). Those unappealed findings undercut Appellants' breach of contract claim, which "rests on the notion that they 'fully performed' under the contract 'in accordance with all the requirements and conditions thereof.'" (*Id.*). Although they now attempt to point the Court to purported findings that "support[] their compliance with the spirit of the law," (Appellants' Br. at 4), Appellants presented no evidence contradicting the hearing officer's findings to the circuit court. And the hearing officer's findings, which the circuit court incorporated into its order, did not reflect and cannot be construed as "compliance with the spirit of the" SFSP. (R. p. 7).[4] *Cf. Town of Hollywood*, 403 S.C. at 477, 744 S.E.2d at 166 (asserting "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine").

Because the circuit court correctly found the law of the case barred Appellants' breach of contract claim, the Court should affirm the grant of summary judgment in favor of the Department.

[4] Indeed, Appellants admit "School of Hope was overwhelmed with the number of sites and children being served . . . [and] that it was not possible for the School of Hope to prepare and deliver the food and maintain complete records." (Appellants' Br. at 3).

II. The circuit court properly applied the law of the case to bar Appellants' defamation claim.

Contrary to Appellants' assertion, the circuit court did not find that "all causes of action in the Complaint [were] addressed in the Hearing Officer's Order." (Appellants' Br. at 6). In fact, the circuit court expressly stated that "the hearing officer did not specifically rule on a defamation claim." (R. p. 9).

The circuit court did, however, conclude the factual findings in the hearing officer's final order established that the purported false and defamatory statements the Department (or Jones) allegedly made *were in fact true*. (*Id.*). Because truth is an absolute defense to a defamation claim, *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976), the circuit court determined the Department was entitled to judgment as a matter of law because Appellants failed to appeal those adverse findings in the hearing officer's final order. (R. p. 9).

As to their defamation claim, Appellants now put all their eggs in the criminal investigation basket.[5] They now focus only on a purported defamatory statement referring them to the Federal Bureau of Investigation for a criminal investigation based on "false accusations of wrongdoing." (Appellants' Br. at 5, 6, & 9). According to Appellants, "[f]alse statements were made by Ronald Jones to third parties." (*Id.* at 5). They cite no record evidence (they presented none) in support of that proposition, pointing only to a conclusory allegation in the complaint. Appellants then add that "[a] criminal investigation was recommended by a person or persons within the Department

[5] In their complaint, Appellants alleged three defamatory statements: that Jacqueline McKie Burden "was an incompetent manager"; that "funds have not been properly applied, and that [the Burdens] have been guilty of violating state and federal laws"; and that the Department denied reimbursement claims as "fraudulent" and referred Appellants "for criminal investigation . . . for mishandling of funds with full knowledge of the falsity of such claims." *See* (R. p. 20, ¶ 22). The circuit court found all three statements were true under the law of the case established in the hearing officer's unappealed final order. (R. pp. 8–10).

of Education[, and] Appellants have reason to believe that Ronald Jones was one of the people responsible for the initial of the FBI's investigation." (*Id.*).

Yet a "pleading" cannot "be used as evidence to overcome" a properly supported "motion for summary judgment." *Hansen v. DHL Labs.*, 319 S.C. 79, 80, 459 S.E.2d 850, 851 (1995) (per curiam); *see also* Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party *may not rest upon the mere allegations or denials of his pleading*, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, *shall* be entered against him." (emphasis added)). And Appellants "cannot rely on the arguments of counsel to fill in the record." *Owens v. Stirling*, 438 S.C. 352, 359, 882 S.E.2d 858, 862 (2023). "Arguments of counsel [] are not evidence." *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991).

Curiously, Appellants rely on portions of the circuit court's order *relating to the breach of contract claim* to argue that the hearing officer's findings do not relate to the defamation claim. (Appellants' Br. at 6). But the findings on which the circuit court focused in determining the law of the case barred Appellants' defamation claim are distinct. The circuit court observed that the hearing officer found (1) Appellants failed to comply with contract requirements and federal regulations; (2) "substantial evidence that fraudulent claims were being submitted" existed; and (3) "altered records present[ed] more serious concerns of a criminal nature." (R. p. 9); (R. pp. 62–63). Indeed, Appellants themselves reference the hearing officer's finding that "[t]he presence of altered records presents more serious concerns of a criminal nature, however, these concerns are being addressed outside the auspices of this appeal." (R. p. 63). They even concede "[t]he School

of Hope and the Burdens were investigated by the FBI for well over a year." (Appellants' Br. at 7).

The circuit court correctly held these findings show Appellants "did make overstated and unsupported claims for reimbursement, breached the Department's contract, and violated state and federal law in doing so." (R. p. 9). And the truth of these findings necessarily bars Appellants' defamation claim against the Department, which apparently was based on an alleged FBI criminal investigation referral. Thus, the circuit court properly found "the unappealed rulings in the Final Order establish the truth of the statements [Appellants] contend are defamatory here." (*Id.*); *see also Shirley Iron Works, Inc.*, 403 S.C. at 573, 743 S.E.2d at 785.

In any event, Appellants' belated attempt to establish a factual issue as to just one of the alleged defamatory statements—the purported criminal investigation referral—is not preserved for this Court's review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); *I'On, LLC. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.").

Appellants nevertheless claim the truth of the statement "is negated by the dropping of the FBI's investigation against the School of Hope and the return of its records in February 2020." (Appellants' Br. at 9). For one, Appellants failed to present any evidence to the circuit court to establish the Department (or Jones) made any statements against them referring them for criminal

investigation, much less any false and defamatory statement.[6] For another, Appellants present no evidence establishing the FBI "dropp[ed]" any investigation against them. In their own words, they never followed up with the FBI "to see how the investigation was going." (Appellants' Br. at 5). Nor does that point (if it was established) "negate" the findings in the unappealed final order or the validity of any referral for criminal investigation to begin with.[7]

During the hearing before the circuit court, Appellants merely referenced the allegations they made in their complaint. *See* (R. pp. 101:21–25; 102:4–7; 102:11). Even now they reference only their allegations "[a]s set forth in their Complaint." (Appellants' Br. at 9). But again, a party cannot rely on the allegations in the complaint when faced with a properly supported motion for summary judgment. *See* Rule 56(e), SCRCP. Nor can Appellants rely on the unfounded notion that "[t]here is certainly a trace of material evidence presented against the Defendants to withstand summary judgment," (Appellants' Br. at 7), without presenting any evidence. As our supreme court recently clarified, the "'mere scintilla' standard does not apply under Rule 56(c)." *Kitchen Planners, LLC*, 440 S.C. at 463, 892 S.E.2d at 301; *see also Town of Hollywood*, 403 S.C. at 477, 744 S.E.2d at 166.

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[6] Appellants also failed to present a shred of evidence that the purported "defamatory statements made [School of Hope] more difficult to obtain donations and to secure volunteers for assistance in the work of the organization," damaged School of Hope's reputation, or harmed Appellants Burdens' reputation. *But see* (Appellants' Br. at 9–10).

[7] Even if someone within the Department referred Appellants to the FBI for a criminal investigation, the Department and its employees had a legal duty to do so upon learning of Appellants' actions. *See* 7 C.F.R. § 225.10; 7 C.F.R. § 225.12(b). Appellants were also on notice of the potential criminal penalties for failing to comply with the SFSP requirements. *See* 7 C.F.R. § 225.6(a)(4)(i) (allowing state agencies to put Program participants on notice of penalties of noncompliance). Thus, any referral to the FBI for a criminal investigation was privileged. *See Kunst v. Loree*, 424 S.C. 24, 42, 817 S.E.2d 295, 304 (Ct. App. 2018) ("A defendant may assert a conditional or qualified privilege as an affirmative defense in a defamation action when the defamation is made in good faith and with proper motives."); *see also* Rule 220(c), SCACR.

The Court should therefore decline to entertain Appellants' untimely efforts to conjure an issue of material fact. *See First Sav. Bank*, 314 S.C. at 363, 444 S.E.2d at 514; *Fields*, 312 S.C. at 106, 439 S.E.2d at 285. Instead, the Court should affirm the circuit court's decision correctly granting summary judgment in favor of the Department.

III. Alternatively, the circuit court properly applied the doctrines of collateral estoppel and res judicata to bar Appellants' breach of contract and defamation claims.

As the Department argued below, and the circuit court referenced in its order, the doctrines of collateral estoppel and res judicata similarly bar Appellants' breach of contract and defamation claims.[8] (R. pp. 5–6).

"[C]ollateral estoppel prevents the relitigation of issues . . . necessarily determined in a former proceeding regardless of whether the identity of the causes of action in successive lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 556, 684 S.E.2d 779, 783 (Ct. App. 2009). Our appellate courts have repeatedly held collateral estoppel applies to "the decision of an administrative tribunal [and] precludes the relitigation of the issues addressed by that tribunal in a collateral action." *Bennett v. S.C. Dep't of Corr.*, 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991) (emphasis omitted); *see also Crosby v. Prysmian Commc'ns Cables & Sys. USA,*

[8] Appellants make the conclusory statement that the circuit court's reference to these doctrines meant the circuit court "[a]pparently . . . recognized that the parties to the action in Circuit Court were not the same parties as were included" in the final order. (Appellants' Br. at 8). To the extent that proposition relates to their argument below that the Burdens were not named parties to the administrative proceeding, the circuit court expressly rejected that argument in footnote 3 of its order because the Burdens were intimately involved in the administrative hearing. *See* (R. p. 6 n.3). And Appellants did not raise that issue sufficiently in their brief. *See Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 505–06, 812 S.E.2d 438, 441 (Ct. App. 2018) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." (quoting *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001))). Further, the statement ignores the Department's arguments on the applicability of these doctrines below. *See* (R. pp. 26–27, 37–39); (R. p. 99:2–8, 99:16–19).

LLC, 397 S.C. 101, 108, 723 S.E.2d 813, 817 (Ct. App. 2012) ("Our courts have applied the doctrine of issue preclusion to the factual determinations of administrative tribunals.").

Under the related but slightly different doctrine of res judicata, later actions are also barred when brought "by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Res judicata applies when there is "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Judy v. Judy*, 393 S.C. 160, 167, 712 S.E.2d 408, 412 (2011) (citation omitted).

Here, as explained above, the hearing officer necessarily determined Appellants breached their contract with the Department by failing to meet duties imposed on them by the contract and federal regulations. *See supra* Section I.B. The hearing officer also made factual findings that established the statements Appellants alleged to be defamatory were in fact true. *See supra* Section II. Thus, these issues were previously litigated and necessarily determined against Appellants in the administrative hearing.

Further, the identity of parties are identical with respect to claims against the Department. Appellants' breach of contract claim directly involves and arises out of the Department's imposition of a fiscal penalty, offset by the August 2017 reimbursement claim, the hearing officer found the Department properly imposed. And to the extent the Department or any of its employees made defamatory statements against Appellants—which Appellants have not established because they presented no evidence to the circuit court—the final order covers those as well. Again, no appeal was taken from the final order.

In short, the circuit court properly relied on collateral estoppel and res judicata in granting summary judgment in favor of the Department because the hearing officer previously adjudicated

those issues, and her rulings bar Appellants' claims. The Court can thus affirm on the basis of these doctrines too. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

IV. Alternatively, Appellants' claims against the Department are barred by the applicable statute of limitations and service rules.

In its motion and during the hearing, the Department argued Appellants' breach of contract and defamation claims were barred by the applicable statute of limitations. While the circuit court did not find it necessary to rule on this issue, *cf. Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999), the Court can affirm based on the statutory limitations as an alternate sustaining ground. *See* Rule 220(c), SCACR.

An action for breach of contract must be filed within three years of the plaintiff being placed on notice of the alleged injury, *see* S.C. Code Ann. § 15-3-530(1); S.C. Code Ann. § 15-3-535, and an action for defamation must be filed within two years of when the alleged defamatory statement is made, *see* S.C. Code Ann. § 15-3-550(1); *Harris v. Tietex Int'l Ltd.*, 417 S.C. 533, 542, 790 S.E.2d 411, 416 (Ct. App. 2016) ("The limitations period begins when the alleged defamatory statement is made, not when the plaintiff learns of the statement.").

Here, Appellants' breach of contract claim stems from the disputed reimbursement claim from August 2017. *See supra* Section I; *see also* (R. p. 7). The Department initially withheld the August 2017 reimbursement claim on February 14, 2018, but Appellants did not file the complaint in this matter until March 3, 2021. Appellants were well-aware of the alleged injury resulting from the August 2017 reimbursement claim for over three years before initiating this action. The breach of contract claim is therefore barred by the statute of limitations because it was not commenced within three years of Appellants being placed on notice of the alleged injury. *See* S.C. Code Ann. § 15-3-530(1); *see also* Rule 220(c), SCACR.

Similarly, the Court should find the defamation claim is barred by the statute of limitations. Appellants believe the alleged defamatory statement here was the referral of the criminal investigation to the FBI. *See supra* Section II. In explaining that statement in their complaint, Appellants noted that "no criminal charges have been brought in over three years" since those statements were made that triggered a federal criminal investigation. (R. p. 20, ¶ 22). Thus, Appellants themselves admit more than two years had passed. And they still reference the fact that "an FBI agent sat through the entire four days of the administrative hearing" in early January 2019. (Appellants' Br. at 4–5). That means that the alleged defamatory statement referring Appellants to a criminal investigation with the FBI *had to have been made before* the hearing. But Appellants still did not file their complaint until March 3, 2021. Because Appellants did not bring their defamation claim within two years of the alleged statement, it is barred by the statute of limitations. *See* S.C. Code Ann. § 15-3-550(1); *see also* Rule 220(c), SCACR.

Finally, even if Appellants were not already past the statute of limitations on both claims against the Department, they still failed to serve the complaint within 120 days after the statute of limitations expired. *See* Rule 3(a)(2), SCRCP; *see also Mims ex rel. Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 347, 732 S.E.2d 395, 398 (2012) ("When service occurs outside the statute of limitations[,] it must occur within 120 days of filing the complaint."); *see also* S.C. Code Ann. § 15-3-20(B) ("A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing."); Rule 5(d), SCRCP ("Proof of service shall be filed within ten (10) days after service of the summons and complaint. Upon failure to serve the summons and complaint, the action may be dismissed by the court on the court's own initiative or upon application of any party.").

Appellants filed the complaint on March 3, 2021, but did not serve the Department until October 11, 2021—over seven months later. Nor was the Department evading or otherwise playing games with service. Indeed, Appellants' counsel recognized during the hearing before the circuit court that the service issue the Department raised was valid. (R. p. 102:12–25). Therefore, the Court should find the Department is entitled to judgment as a matter of law on the breach of contract and defamation claims because of Appellants' untimely service of the complaint. *See* Rule 220(c), SCACR.

CONCLUSION

For these reasons, the Court should affirm the circuit court's grant of summary judgment in favor of Respondents.

Respectfully submitted,

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