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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No.: 2022-000674

Kevin Dion Hollinshead, Senior, ... Appellant,

v.

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

RESPONDENTS' JOINT FINAL BRIEF

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STATEMENT OF THE CASE

Pursuant to S.C. App. Ct. R. 208(b)(2), Respondents present their own Statement of the Case:

This appeal involves a public official, Appellant Kevin Dion Hollinshead, Senior ("Appellant") who ran for public office (a school board) suing over statements made in a political advertisement created by a non-profit organization (Respondent Charleston Coalition for Kids). In addition to suing the non-profit, its board members, and then executive director, Appellant sued Respondent Leeza Steward, an individual citizen, for a statement made in the advertisement. Appellant also sued Respondent Leeza Steward's employer, Respondent Teach for America, and another employee of Respondent Teach for America, Respondent Courtney Waters, who was running for the same political office. Respondents request that this Court affirm the circuit court's dismissal of Appellant's Second Amended Complaint based on the four corners of the document and documents referenced therein.

I. Appellant's Allegations in the Second Amended Complaint

This appeal arises from Appellant's allegations regarding a campaign advertisement. Appellant, a public official and/or public figure, asserts claims for defamation, civil conspiracy, and outrage based on a political advertisement. The Second Amended Complaint alleges that Appellant, a then-current member of the Charleston County School Board, was running for re-

election on November 3, 2020. (R. p. 40 ¶ 17 [hereinafter, "SAC"].) Respondent Courtney Waters was also a candidate in the election. (*Id.* ¶ 18.) Appellant alleges that Respondent Courtney Waters was employed by Respondent Teach for America, Inc. ("TFA") at the relevant time. (R. p. 41 ¶ 27.) Appellant alleges that Respondent Leeza Steward was also employed by TFA and was supervised by Respondent Courtney Waters. (R. p. 42 ¶¶ 30, 33.) Respondent Charleston Coalition for Kids (the "Coalition") is a non-profit 501(c)(4) that is committed to the mission of "improving our schools and bringing more opportunities to our students." *See* https://www.chskids.org/about-our-coalition, last visited on March 22, 2021. Respondent Thomas J. Bell was at the relevant time the executive director of the Coalition, and Respondents Bell, Colwell, Deas Gibbison, Strickland, and Ziff were members of the board of directors for the Coalition (collectively, the "Board Members"). (R. pp. 39-40 ¶ 3, 16.) Due to its work in support of children's education, the Coalition had a vested interest in the outcome of the election. Because the Coalition believed that Waters' vision for children's education in the region was more consistent with its mission than Appellant's views, it endorsed Waters in the election. (R. p. 41 ¶ ¶ 19.)

As part of its support for Waters' candidacy, the Coalition funded the creation of a political ad that was critical of Appellant. The ad aired on various television networks and was uploaded to the Coalition's Youtube channel. (*Id.* ¶ ¶ 20- 22.)[1] As relevant here, the ad opened with Respondent Leeza Steward speaking about the election. Then the ad stated, in an anonymous voiceover:

[1] The ad is no longer available on Youtube.

> [B]ut Kevin Hollinshead is using our money to help himself. Hollinshead was successfully sued for stealing [nearly] one-hundred fifty thousand dollars ($150,000) from a local HBCU[2] and lied to cover it up.

(R. p. 42 ¶ ¶ 38.) During the voiceover, the ad displayed the following text:

> Hollinshead was successfully sued for stealing [nearly] one-hundred fifty thousand dollars ($150,000) from Benedict College.

(*Id.* ¶ 39.)[3] At the bottom of the text, the ad referenced the case number of the lawsuit in question ("Case 2006-CP-10-3980, Charleston County 10/9/06"). The ad then went back to Respondent Steward, who states "We can't have someone like that managing the tax dollars for our schools." (*Id.* ¶ 40.)

II. The SAS Lawsuit

The lawsuit referenced in the ad is captioned *Student Assurance Services, Inc. v. Kevin Hollinshead, Sr., et al.* (hereinafter, "SAS Lawsuit"). A copy of the Complaint in the SAS Lawsuit is attached to Respondent's Motion to Dismiss as Exhibit A ("SAS Complaint"). The SAS Lawsuit is referenced *extensively* by Appellant in his SAC. (*See* R. pp. 42-45 ¶¶ 41-69.)

The SAS Lawsuit pertains to Appellant's dealings with a company called Student Assurance Services ("SAS") and Benedict College in the early 2000s. In its Complaint, SAS alleged it procured health and accident insurance coverage for Benedict College and its students. (R. pp. 265-266 ¶¶ 3-7.) The insurance carrier appointed Appellant as the insurance agent. (*Id.* ¶ 7.) Under the business arrangement, Benedict would write premium checks to the order of SAS,

[2] HBCU is an acronym for "Historically Black Colleges and Universities."

[3] In the SAC, Plaintiff omits the word "nearly" before the $150,000 figure from the text of the ad, but the ad clearly contains the word "nearly." An electronic copy of the ad will be made available for the Court.

send them to Plaintiff to distribute to SAS, and SAS would submit a commission to Appellant after receiving full payment. (R. pp. 266-267 ¶¶ 8, 13-14.)

The SAS Complaint states that at some point in time, Appellant began cashing Benedict College's checks directly to his own accounts and then cutting smaller checks to SAS. (R. p. 268 ¶ 25-26; *see also* R. p. 43 ¶¶ 49, 51.) In other words, he was taking Benedict College's money—which was meant for SAS—and using it for his own purposes. All told, SAS alleged that Appellant had failed to remit $144,677.75 in premiums paid by Benedict College to SAS. (R. p. 270 ¶ 37, *see also* R. p. 44 ¶ 56.) SAS also alleged that Appellant told it that the reason the premiums had not been paid was because Benedict College was having "severe cash problems," despite the fact Benedict College submitted all owed premiums to him. R. p. 269 ¶ 28; *see also* R. p. 43 ¶¶ 47, 52.)

In response to the SAS Complaint, Appellant executed (1) a Promissory Note and (2) an Agreement and Confession of Judgment, both of which are included in the Record of Appeal as exhibits to Respondents' Motion to Dismiss. In the Promissory Note and Agreement and Confession of Judgment, Appellant admitted that he owed SAS $144,677.75, agreed to pay it back, and authorized the entry of judgment in favor of SAS. (*See* R. pp. 307-308 ¶ 1.1, 2.1; R. pp. 313-314 ¶ 2-3, 5; *see also* R. p. 44 ¶¶ 59-60.) Further, in neither the Promissory Note nor the Agreement and Confession of Judgment did Appellant dispute the facts alleged in the SAS Complaint.

In sum, according to the public record and the SAC, it is demonstrably true that: (1) Appellant was sued in the amount of nearly $150,000 for stealing money from Benedict College, an HBCU; (2) the lawsuit alleged that Appellant lied to cover up the fact that he had stolen the money; and (3) the lawsuit was successful in that it resulted in a confession of judgment for the entire amount alleged in the Complaint.

III. Procedural History

Appellant filed the original Complaint on January 29, 2021 and an Amended Complaint on February 2, 2021 in the Charleston County Court of Common Pleas. The SAC was filed on August 12, 2021. Respondents filed motions to dismiss the Amended Complaint and SAC Complaint, and memorandums of law in support thereto. (*See* the Coalition and Board Members' Motions to Dismiss, filed on March 22, 2021 and August 27, 2021 (P. p. 63, R. p. 253), and memorandum of law in support, filed on December 10, 2021 (R. p. 431); Steward's Motions to Dismiss, filed on March 24, 2021 and August 27, 2021 (R. p. 124, R. p. 316), and motion to dismiss or in the alternative for summary judgment, filed on December 6, 2021 (R. p. 362); TFA's Motions to Dismiss, filed on April 9, 2021 and October 7, 2021 (R. p. 193, R. p. 329); and Waters' Motion to Dismiss, filed on March 25, 2021. (R.p. 184.)) The Honorable R. Ferrell Cothran, Jr. heard oral argument on the motions to dismiss December 16, 2021. (R. p. 469.) On April 5, 2022, Judge Cothran issued a Form 4 Order granting the motions to dismiss as to Respondents the Coalition and Leeza Steward. (R. p. 6.) On April 26, 2022, Judge Cothran issued a second Form 4 Order granting the motions to dismiss as to all Respondents, including the Coalition and Leeza Steward again. (R. p. 9.) Appellant filed a Notice of Appeal on May 12, 2022 in the state court. (R. p. 504.) Appellant's Notice of Appeal was received by this Court on May 17, 2022. (*Id.*) Between June 7 and 9, 2022, Respondents the Coalition and Leeza Steward filed Motions to Dismiss the Appeal as being untimely. (Motions to Dismiss, June 7-9, 2022.) On July 22, 2022, this Court denied the Motions to Dismiss the Appeal, and stated "Nothing prevents the parties from arguing the issue of timeliness of service of the notice of appeal in their briefs." (Order, July 22, 2022.)

STANDARD OF REVIEW
(Timeliness of Appeal)

The South Carolina Appellate Court Rules lay out the instructions for what may be appealed, who may appeal, and the timing of an appeal, among many other rules. (SCACR 201, 208.) An appeal may be taken from a final judgment, appealable order, or decision. (*Id*. at (a)). Further, an appellant shall serve a notice of appeal on all respondents within thirty (30) days after written notice of the final order or judgment. (SCACR 203(b)(1).) Rule 260, SCACR, provides "[w]henever it appears that an appellant… has failed to comply with the requirements of these Rules, the clerk **shall** issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." (emphasis added.)

ARGUMENT
(Timeliness of Appeal)

I. Appellant's Appeal as to Respondents Leeza Steward and the Coalition and its Board Members was Untimely

Appellant's Notice of Appeal was received by this Court on May 17, 2022. (R. p. 504.) In the Notice of Appeal, Appellant states that the final order was received "via the SC Courts E-Filing system on April 26, 2022." (*Id*.) However, Plaintiff failed to inform this Court that he received the final order as to Respondents the Coalition and Leeza Steward via the e-filing system of the state court on April 5, 2022. (R. p. 6.) As the Coalition and the Board Members filed their Motion to Dismiss collectively and were represented by the same attorneys, it is reasonable to conclude that the Form 4 Order issued on April 5, 2022, dismissed the SAC Complaint as to all of them and gave notice to Appellant of the same as of that date. Thus, as to Respondents the Coalition, the Board Members, and Leeza Steward, Appellant's Notice of Appeal was required to be filed no later than May 5, 2022. Appellant did not file his Notice of Appeal in the state court until May

12, 2022, and it was not received by this Court until May 17, 2022. Therefore, pursuant to SCACR 203(b)(1), Appellant's Notice of Appeal was untimely.

In instances such as this, the Supreme Court has made clear that "[w]henever it appears that an appellant has failed to comply with the requirements of the SCACR, an order of dismissal ***shall be issued***." *Wise v. South Carolina Dept. of Corrections*, 372 S.C. 173, 174 642 S.E.2d 551, 551 (2007) (emphasis added). The Supreme Court has held, "The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v, South Carolina Dept. of Transp.*, 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004).

The trial court's entering of a second Form 4 Order, for the second time dismissing the SAC as to Respondents the Coalition, the Board Members and Leeza Steward, did not start the clock over for Appellant's time to file a Notice of Appeal as to those parties. Due to Appellant's disregard for the Rules and compliance with the required notice of appeal deadline, this appeal should be dismissed without any further consideration by this Court as to Respondents the Coalition, the Board Members, and Leeza Steward.

STANDARD OF REVIEW
(Affirmation of Circuit Court's Dismissal of the SAC)

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the [circuit] court." *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 631, 699 S.E.2d 699, 703 (Ct. App. 2010). In order to survive a motion to dismiss pursuant to SCRCP Rule 12(b)(6), the court should consider whether Appellant has "state[d] facts sufficient to constitute a cause of action," and unlike the more lenient standard under the federal rules, SCRCP preserves the Code pleading standard. *Paradis v. Charleston Cty. Sch.*

Dist., 424 S.C. 603, 613, 819 S.E. 2d 147, 153 (Ct. App. 2018). "When a plaintiff states nothing more than legal conclusions, a claim should fail." *Id*. (citing *Talbott v. Padgett*, 30 S.C. 167, 171, 8 S.E. 845, 847 (1889)). Stated simply, "Rule 12(b)(6) requires the plaintiff to allege facts." *Id*. at 614, 819 S.E. at 153.

Moreover, a trial court may properly consider documents that are referenced in the complaint without converting a motion to dismiss to a motion for summary judgment. *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) ("[A]llowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto [without converting a motion to dismiss to one for summary judgment] prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based."). "[R]eliance on [] court orders in the underlying [] action d[oes] not convert the motion to one for summary judgment." *Doe v. Bishop of Charleston*, 407 S.C. 128, 134 n.2, 754 S.E.2d 494, 497 n.2 (2014).

However, if the Court does find that the documents were not incorporated in the Second Amended Complaint, the Court must treat the motion as one for summary judgment. SCRCP Rule 12(b) provides in part that,

> [i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

SCRCP 56(c) states that the Court will grant summary judgment where "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Regardless, the trial court did not err in dismissing this action.

ARGUMENT
(Affirmation of Circuit Court's Dismissal of the SAC)

I. The Circuit Court's Dismissal Should be Affirmed as Appellant's Defamation Claim Fails as a Matter of Law.

Appellant's defamation claim fails as a matter of law because the allegations in the SAC, taken in consideration with the documents referenced therein, which are part of the public record, clearly establish that the allegedly defamatory statements are true or at least substantially true. Generally, the elements of a defamation claim are: "(1) a false and defamatory statement concerning another, (2) an unprivileged publication 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." *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 580, 556 S.E.2d 732, 737 (Ct. App. 2001). Therefore, the circuit court's decision to dismiss this action was not in error, and it should be affirmed by this Court.

A. The allegedly defamatory statements are true as a matter of law.

As for the first element, in some cases, a defamatory statement is presumed to be false and truth is an affirmative defense. *Fountain v. First Reliance Bank,* 398 S.C. 434, 443, 730 S.E.2d 305, 310 (2012); *accord Haulbrooks v. Overton*, 295 S.C. 380, 383, 368 S.E.2d 676, 678 (Ct. App. 1988). When, however, the alleged defamatory statement involves a public figure or public official, the Free Speech Clause of the First Amendment to the United States Constitution abrogates the common law presumption of falsity, and "the ***plaintiff*** must prove the statement was false." *Parker v. Evening Post Pub. Co.*, 317 S.C. 236, 243, 452 S.E.2d 640, 644 (Ct. App. 1994) (emphasis added) (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)). Further, the South Carolina Supreme Court has explained that, in evaluation of defamation claims in the context of a political election, "***free speech is particularly important***." *George v. Fabri*, 345 S.C.

440, 455, 548 S.E.2d 868, 876 (2001) (emphasis added). The Supreme Court touted "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720 (1964).

Here, Appellant is undoubtedly a public figure and a public official. Indeed, he admitted that he was a member of the Charleston County School Board running for re-election. (R. p. 40 ¶ 17.) Thus, he was a public figure and a public official when the allegedly defamatory statement was made. *See George*, 345 S.C. 440, 548 S.E.2d 868 (defamation claim by candidate for city council analyzed as a public official); *Anderson v. The Augusta Chronicle*, 364 S.C. 589, 619 S.E.2d 428 (2005) (analyzing defamation claim by a candidate for public office as a public figure). Accordingly, under *Parker*, Appellant bore the burden of showing that the statements in the political ad were false.

Appellant, did not, and cannot satisfy that burden. In sum and substance, the facts stated in the political ad were that Plaintiff (1) was successfully sued, (2) for stealing nearly $150,000, (3) from Benedict College, a HBCU, and (4) lying to cover it up. (R. p. 42 ¶ 38.) Based on the face of the Second Amended Complaint and documents referenced therein and available in the public record, each of these statements is true, or at the very least substantially true.

Appellant argues in his Initial Brief to this Court that the statements in the ad were not true because Benedict College was not involved in the SAS Lawsuit, but admits the SAS Lawsuit involved a dispute over commissions earned as a result of sales of health insurance to students enrolled in Benedict College. (Appellant's Initial Brief at p. 11.) In addition, while Appellant argues nothing outside of the allegations in the SAC itself can be considered by the Court

(Appellant's Initial Brief at pp. 6-7), Appellant explicitly cites to and relies on the SAS Lawsuit allegations in drafting the SAC and in making his further arguments in his Initial Brief. Further, Appellant takes great liberties by using terms such as "implies," "put in context," "cannot be plausibly construed," and "insinuation" throughout his Initial Brief in an attempt to show how the statements made in the ad could be construed as false, without actually showing they were false, as was his burden. Appellant's arguments ring hollow as a simple reading of the statements in the ad show they are true and/or substantially true.

First, Appellant was undoubtedly "successfully sued." Indeed, the SAS Lawsuit resulted in Appellant entering into a Promissory Note and Agreement and Confession of Judgment wherein he admitted that he was liable in the amount of $144,677.75, the exact amount alleged in the SAS Lawsuit. This fact is supported by the allegations in the Second Amended Complaint and confirmed in the public record. (R. p. 44 ¶ 59 ("Hollinshead [] confessed judgment…"); R. p. 313 ¶ 1.) Because the SAS Lawsuit resulted in a judgment in SAS's favor, the SAS Lawsuit was successful. Thus, on the face of the Second Amended Complaint, the statement that Appellant was "successfully sued" is true.

Second, the SAS Lawsuit alleged that Appellant had stolen $144,677.75, the Promissory Note was for that amount, and the Agreement and Confession of Judgment was for that amount. (R. p. 313 ¶ 1.) That amount of money is—as the political ad says—"nearly $150,000." The difference in $144,677.75 and $150,000 is a difference of only approximately 3.59%, thus making the statement that the amount in question was "nearly $150,000" true or at least substantially true. *See* 20 S.C. Jur. *Libel and Slander* § 34 (2021) ("Under the standard of substantial truth, '[i]t is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies . . . are immaterial provided that the defamatory charge is true in substance." (quoting Restatement

Second, Torts § 581A Comment f (1977))); *see also Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976) (interpreting South Carolina law and holding that minor inconsistencies in the alleged defamatory statements did not defeat the defense of substantial truth). Thus, Appellant's allegations, coupled with the public record referenced therein, plainly show that this statement, too, is true or substantially true.

Third, the SAS Lawsuit alleged that Appellant had stolen the money from Benedict College, an HBCU. As an initial matter, it is unquestionably true, and the Court can take judicial notice, that Benedict College is an HBCU. *See* https://www.benedict.edu/about-benedict/, last visited on March 22, 2021. Moreover, it is also true that the SAS Lawsuit alleged the Appellant had stolen Benedict College's money. (*See* R. p. 43 ¶ 51 ("[T]he [SAS] Lawsuit alleges Hollinshead [] breached a contract . . . by misappropriating insurance premium checks paid by Benedict."); *Id.* ¶ 43 ("Lawsuit alleges that Hollinshead stole and unlawfully converted . . . insurance premiums paid to Hollinshead for the benefit of SAS."); R. p. 270 ¶ 36 ("Hollinshead had over-billed Benedict for the health insurance premium for the Plan…").) "Conversion has been defined in our case law as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the exclusion of the owner's rights. . . Conversion may arise by some illegal use or misuse, or by illegal detention of another's chattel." *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975). Thus, the SAS Lawsuit alleges that he committed conversion, *i.e.* he stole from Benedict College and/or its students.

As noted, the SAS Complaint alleged that Appellant was appointed as the agent on the insurance policy at issue. (R. p. 266 ¶ 7.) In that role, his duties included receiving premium payments from Benedict College and transmitting those payments to SAS. (*Id.* ¶ 8.) SAS alleged

that Appellant received those payments from Benedict College but, rather than forward the money to SAS, Appellant stole that money and used it for his own purposes. (R. p. 270 ¶ 34; *see also* R. p. 43 ¶ 43.) In other words, Appellant improperly assumed control over funds belonging to Benedict College and its students, since he had no right to use the money or do anything more than submit it to SAS. In Appellant's Initial Brief, he attempts to argue that that the SAS Complaint does not allege Appellant stole from Benedict College, but ultimately, within his own argument, proves that the SAS Complaint explains that Appellant stole from Benedict: "[b]y ***stealing*** the premiums…for the benefit of SAS by ***Benedict***". (R. p. 42 ¶ 40; Appellant's Initial Brief p. 17.)(emphasis added.) Accordingly, the statement in the political ad that the SAS alleged that Appellant had stolen the money from Benedict College, an HBCU, is true, and Appellant cannot demonstrate otherwise.

In the Second Amended Complaint and in Appellant's Initial Brief, Appellant attempts to suggest that the political ad was false because SAS did not allege that Appellant stole the money ***from Benedict College,*** but, rather, that he stole the money from ***SAS***. As mentioned above, this argument, however, is demonstrably false. The money at issue was Benedict College's money, which Benedict College entrusted to Appellant for the purpose of forwarding to SAS. Thus, the money at issue belonged to Benedict College. Even though it was SAS—and not Benedict College—that sued Appellant, SAS alleged that Appellant had stolen the money ***from Benedict College***. Even more, the SAS Complaint alleges that Appellant "over-billed Benedict," *i.e.* took money from Benedict College above and beyond what was owed to SAS. (R. p. 270 ¶ 36.) There is no reasonable way to read the SAS Lawsuit such that it did not allege that Appellant stole from Benedict College and/or its students. Accordingly, the Second Amended Complaint coupled with the public record establishes that, as a matter of law, the statement in the political ad that the money

at issue in the SAS Lawsuit belonged to Benedict College is true. Appellant goes to great lengths to try and convince this Court that it cannot look to the SAS Lawsuit and that it is confined to the four concerns of the SAC only, but then goes on to cite, verbatim, exact language of the Complaint from the SAS Lawsuit in attempt to support his own position. Appellant's attempt to have his cake and eat it too is inexplicably inappropriate.

Fourth, the SAS Lawsuit alleged that Appellant lied about stealing the money. Specifically, SAS alleged that Appellant falsely told SAS that the reason the premiums had not been paid was because Benedict was having "severe cash problems." (R. p. 269 ¶ 28; *see also* R. p. 43 ¶¶ 47, 52.) Thus, the statement in the political ad that the SAS Lawsuit alleged that Appellant had lied to cover up his theft is true as a matter of law.

For these reasons, based solely on the Second Amended Complaint and the public record, the allegedly defamatory statements at issue here are true or substantially true as a matter of law. Thus, Appellant cannot satisfy his burden of establishing that they were false, and in fact has established the truth of all factual statements, and this is even evidenced by Appellant's Initial Brief. Despite stating that "clearly and unequivocally…the funds in issue belonged to [SAS]" Appellant admits that the premiums were paid by Benedict in his own Brief. (Appellant's Initial Brief p. 20.) Further, Appellant can cite no case law, statute, or authority otherwise in support of his position that the money was not Benedict College's funds within his Initial Brief. Accordingly, Appellant cannot state a claim for defamation, and the circuit court did not err in dismissing this case.

B. <u>The allegedly defamatory statements are protected under the doctrine of fair speech.</u>

Further, even if the statements at issue here were false (and they were not), Appellant also fails to state a claim upon which relief can be granted because the ad at issue here is protected

speech under the fair comment doctrine, *Oswalt v. State-Rec. Co.*, 250 S.C. 429, 435, 158 S.E.2d 204, 207 (1967), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and is subject to a qualified privilege, *see Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 SE.2d 305, 310 (2012) (statement is not defamatory if subject to qualified privilege). "When a citizen holds a public office he becomes subject to criticism; any citizen [] is privileged to criticize his acts, fitness and qualifications for the office he holds. . ." *Oswalt*, 250 S.C. at 435, 158 S.E.2d at 207. A privilege defense can properly be decided on a motion to dismiss, especially where the text / video / audio of the actual allegedly defamatory statements and the underlying public records are available for review, as they are here. *See Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546 (granting a motion to dismiss defamation claim based on the fair report privilege after review of the news reports and public records attached to the motions).

As demonstrated above, in this case, Appellant is a citizen holding public office and is therefore "subject to criticism." The Coalition Respondents, therefore, were "privileged to criticize [Appellant's] acts, fitness and qualification for the office he holds. . ." *See Oswalt*, 250 S.C. at 435, 158 S.E.2d at 207. Again, based on the allegations in the Second Amended Complaint, any criticism of Appellant's acts, fitness, and qualification for the office of Charleston County School District North Area, therefore, are privileged as a matter of law. As Appellant alleges, the speech at issue was a political ad in the heat of an election for public office. Further, Appellant again attempts to state that this Court may not consider evidence outside the Second Amended Complaint, when it suits him to do so, which is a clear misstatement of the law and cases, such as *Cobin*, which was dismissed pursuant to extrinsic evidence and on the basis of this same defense. Therefore, any statements by any citizen that criticize Appellant's acts, fitness, and qualification

for the office he holds are privileged. Wherefore, the circuit court's decision is not in error as to this claim.

C. Any remaining statements in the political ad were mere opinions and cannot form the basis of a defamation claim.

The remaining statement alleged to be defamatory ("[w]e can't have someone like that managing the tax dollars for our school"), is protected opinion speech under the First Amendment to the United States Constitution. "[A] statement of opinion relating to matters of public concern that does not contain a provably false connotation will receive full constitutional protection." *Garrard v. Chas. County School District*, 429 S.C. 170, 199-200, 838 S.E.2d 698, 713 (Ct. App. 2019) (internal citations omitted). Thus, "[i]f the defendant's words cannot be described as either true or false, they are not actionable. . ." *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1288 (4th Cir 1987).

Here, the statement is not provably true or false, but it is a matter of opinion.[4] Accordingly, it is not actionable and cannot form the basis for a defamation claim.

Plaintiff admits in his brief that all of the statements discussed above in this brief form the "crux of the libelous statements" (Appellant's Initial Brief pp. 10-11), but then claims that another statement "using our money to help himself," must be read in context with the statement "[w]e can't have someone like that managing the tax dollars for our schools," which somehow shows the

[4] This statement, in addition to being protected opinion speech under the First Amendment to the United States Constitution and Article 1 § 2 of the Constitution of the State of South Carolina, is also protected speech under the fair comment doctrine for all the reasons set forth in Section I. The statement is privileged fair comment and opinion of quintessential public concern involving a public candidate on the candidate's fitness for office. Otherwise, punishing citizens for political speech will have a chilling effect on our system of elections, on governmental accountability, on the vetting of candidates for public office and will open the floodgates to litigation over political speech.

statements are defamatory. (Appellant's Initial Brief p. 12.) Even when read in context, however, these statements are clearly opinion as they are not provably true or false.

For all of these reasons, Appellant's allegations, coupled with the public record referenced in those allegations, cannot form the basis of a defamation claim. If the Court determines that consideration of the documents attached to the Coalition Respondents' Motion to Dismiss (or those attached to motions filed by any of the Co-Defendants and / or documents herein), then the Court may also consider Appellant's defamation claim through the standard for summary judgment. *See* SCRCP 12(b). As demonstrated above, there is no genuine issue of material fact as to the truth of the allegedly defamatory statements (or that they are opinions), and Respondents are therefore entitled to judgment as a matter of law under SCRCP Rule 56. Therefore, the circuit court's ruling, which granted Respondents' Motions to Dismiss was not in error, and this Court should affirm that ruling.

II. The Circuit Court's Dismissal Should be Affirmed as Appellant's Civil Conspiracy Claim Fails as a Matter of Law.

Appellant cannot state a claim for civil conspiracy because the unlawful act upon which it relies, the political ad, was not unlawful or committed by unlawful means. The elements of a claim for civil conspiracy are: "(1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston County School District,* Case No. 2018-002025, __ S.E.2d __, 2021 WL 3668152, at *7 (S.C. Aug. 18, 2021). Further, while "[t]here are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, [] political expression is not one of them." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkely, Cal.*, 454 U.S. 290, 296, 102 S.Ct. 434, 437 (1981).

Here, the only action about which Appellant complains is the act of publishing the political ad. The ad, however, is not unlawful (as described above) and is in fact protected by the First Amendment to the United States Constitution and Article 1 § 2 of the Constitution of the State of South Carolina. As the Supreme Court stated in *Citizens Against Rent Control / Coalition for Fair Housing*, the political ad, which is undoubtedly political expression, is not an act that can become illegal by virtue of being performed with others. The political ad, therefore, cannot stand as the basis for a civil conspiracy claim and this cause of action also fails as a matter of law under both the Rule 12(b)(6) standard for a motion to dismiss and Rule 56 standard for summary judgment. Appellant, in fact, has not cited to a single basis of authority that is controlling to support his argument that civil conspiracy is a proper cause of action within his Second Amended Complaint. (Appellant's Initial Brief p. 24.) Appellant makes a meager attempt to support this cause of action by referencing an Illinois case, which still fails to illustrate how Appellant can maintain a cause of action for civil conspiracy when the political ad is not an act that can become illegal. (*Id.*) Appellant cannot distinguish his claims from *Citizens Against Rent Control* because these facts herein squarely align. Therefore, the circuit court did not err in dismissing Appellant's Second Amended Complaint.

III. The Circuit Court's Dismissal Should be Affirmed as Appellant's Outrage / Intentional Infliction of Emotional Distress Claim Fails as a Matter of Law.

The elements of a claim of outrage / intentional infliction of emotional distress are:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 401, 596 S.E.2d 42, 48 (S.C. 2004). The Supreme Court has held that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publication [] without showing in addition that the publication contains a false statement of ***fact*** which was made with "actual malice. . ." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56, 108 S.Ct. 876, 882 (1988) (emphasis added).

Appellant's claim for outrage / intentional infliction of emotional distress fails because Appellant failed to allege facts to support the elements of his claim. Instead, he merely recited the elements of the claim in a conclusory fashion. (R. pp. 48-49 ¶ 96.) Appellant does not even attempt a good faith argument in his Initial Brief regarding this cause of action. (Appellant's Initial Brief p. 24.) Instead, he simply states that the Second Amended Complaint presents "sufficient allegations" for a claim of outrage. (*Id*.) Not once, but twice, Appellant fails to lay out facts to support any claim of outrage / intentional infliction of emotional distress between the Second Amended Complaint and his Initial Brief. Moreover, as demonstrated above, Appellant cannot establish that the political ad contained any false statement of fact, and in fact establishes that the statements of fact were true as a matter of law. Accordingly, Appellant's claim for outrage / intentional infliction of emotional distress must also fail as a matter of law.[5] The circuit court's decision to dismiss the Second Amended Complaint is not in error.

CONCLUSION

Therefore, for all of the reasons stated herein and those presented at any oral argument, this Court should affirm the circuit court's decision to dismiss this action.

[5] In addition, the facts as alleged here clearly do not meet the high threshold to establish that anyone inflicted severe emotional distress, that any conduct was so extreme and outrageous (especially in the form of a political ad), or that the emotional distress allegedly suffered was so severe and pervasive that no reasonable person could be expected to endure it.

Respectfully Submitted,

Dated: July 17, 2023

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Jul 17 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No.: 2022-000674

Kevin Dion Hollinshead, Senior, ...Appellant,

v.

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

CERTIFICATION OF COUNSEL

The undersigned certifies that this Final Initial Brief complies with Rule 211(b), SCACR.

Dated: July 17, 2023

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