

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

RECEIVED

FEB 06 2015

SC Court of Appeals

Case No. 2011-CP-37-279
Appellate Case 2014-001282

Mariam R. Noorai,

Appellant,

v.

School District of Pickens County,
School District of Oconee County,
and Gary Culler, Donald Boggs, Richard
Hudak, Ernestine Williams, Marilyn
Raines, and Dr. Kelly Pew, in their
individual capacities,

Respondents.

**INITIAL BRIEF OF RESPONDENTS
SCHOOL DISTRICT OF PICKENS COUNTY,
GARY CULLER, DONALD BOGGS,
RICHARD HUDAK, MARILYN RAINES
AND DR. KELLY PEW**

David T. Duff
Laura Callaway Hart
DUFF, WHITE & TURNER, LLC
3700 Forest Drive
Post Office Box 1486
Columbia, South Carolina 29202

Attorneys for Respondents
School District of Pickens County,
Gary Culler, Donald Boggs, Richard
Hudak, Marilyn Raines, and Dr.
Kelly Pew

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE2

STATEMENT OF FACTS5

ARGUMENT..... 12

 I. Standard of Review 12

 II. The Circuit Court Properly Granted Summary Judgment to these Respondents..... 14

 A. The Pickens District is entitled to summary judgment because the Appellant failed to establish the essential elements of negligent misrepresentation by the District..... 14

 1. Appellant cannot establish that she suffered a pecuniary loss as a proximate result of her reliance on the Pickens District’s representation..... 15

 2. The Pickens District exercised reasonable care and made no false representation to Appellant regarding its request for a written notice of resignation. 17

 3. The School District of Pickens County had no pecuniary interest in misrepresenting its need for a written notice of resignation from Appellant 20

 4. Appellant cannot establish that she justifiably relied on the Pickens District’s representations to her. 22

 B. Respondent School District of Pickens County is entitled to summary judgment because Appellant failed to establish that the District either breached its contract with her, with or without fraudulent intent, or that it committed a separate fraudulent act in connection with the alleged breach 24

 C. The Fourth Cause of Action does not include a claim for breach of contract separate from the claim for breach of contract accompanied by a fraudulent act, and Appellant is barred from

raising new arguments about her contract that were not presented to the trial court.....	29
D. Culler is entitled to summary judgment because Appellant did not and cannot establish that he intentionally inflicted severe emotional distress on her.	30
1. Appellant produced no evidence that Culler intentionally or recklessly inflicted severe emotional distress on her.....	32
2. Appellant produced no evidence of conduct by Culler that was so extreme and outrageous that it exceeded all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community	34
3. Appellant produced no evidence that she suffered from severe emotional distress such that no reasonable person could be expected to endure it.....	41
E. The circuit court correctly granted summary judgment to the Respondents after hearing arguments from counsel and reviewing written submissions by the parties.....	45
CONCLUSION	47

TABLE OF AUTHORITIES

CASES

<i>AJG Holdings LLC v. Dunn</i> , 392 S.C. 160, 708 S.E.2d 218 (Ct.App. 2011).....	42
<i>AMA Mgt. Corp. v. Strasburger</i> , 309 S.C. 213, 420 S.E.2d 868 (Ct.App. 1992).....	15, 20
<i>Baughman v. American Tel. & Tel. Co.</i> , 306 S.C. 101, , 410 S.E.2d 537 (1991)	13, 22
<i>Butts v. AVX Corp.</i> , 292 S.C. 256, 355 S.E.2d 876 (Ct.App. 1987).....	35
<i>Byerly v. Connor</i> , 307 S. C. 441, 415 S.E.2d 796 (1992).....	13
<i>Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation</i> , 337 S.C. 476, 523 S.E.2d 795 (Ct.App.1999).....	13, 22
<i>Carolina Chloride, Inc. v. Richland Cnty</i> , 394 S.C. 154, 714 S.E.2d 869 (2011)	15, 20
<i>Conner v. City of Forest Acres</i> , 348 S.C. 454; 560 S.E.2d 606 (2002).....	25
<i>Corder v. Champion Rd. Mach. Int'l Corp.</i> , 283 S.C. 520, 324 S.E.2d 79 (Ct.App. 1984).....	35
<i>Dawkins v. Fields</i> , 354 S.C. 58, 580 S.E.2d 433 (2002)	14
<i>David v. McLeod Reg'l Med. Ctr.</i> , 367 S.C. 242, 626 S.E.2d 1 (2006).....	12, 13
<i>Doe v. Erskine Coll.</i> , No. 8:04-23001RBH, 2006 WL 1473853 (D.S.C. May 25, 2006) (unpublished opinion)	41
<i>D.R. Horton, Inc. v. Wescott Land Co., LLC</i> , 398 S.C. 528, 730 S.E.2d 340 (Ct.App. 2012), <i>aff'd as modified on other grounds</i> , 410 S.C. 319, 764 S.E.2d 701 (2014).....	25, 27
<i>Fleming v. Rose</i> , 338 S.C. 524, 526 S.E.2d 732 (Ct.App. 2000), <i>rev'd on other grounds</i> , 350 S.C. 488, 567 S.E.2d 857 (2002).....	35
<i>Folkens v. Hunt</i> , 290 S.C. 194, 348 S.E.2d 8309 (Ct.App. 1986).....	35
<i>Ford v. Hudson</i> , 276 S.C. 157, 276 S.E.2d 776 (1981).....	37
<i>Gattison v. S.C. State Coll.</i> , 318 S.C. 148, 456 S.E.2d 414 (Ct.App. 1995)	35, 36
<i>Harris Teeter, Inc. v. Moore & Van Allen, PLLC</i> , 390 S.C. 275, 701 S.E.2d 742 (2010).....	12-13

TABLE OF AUTHORITIES (CON'T)

Hansson v. Scalise Builders of S.C., 374 S.C. 352, 650 S.E.2d 68 (2007)..... 32, 34, 41, 42, 44

Hoard ex rel. Hoard v. Roper Hosp., Inc. 387 S.C. 539, 694 S.E.2d 1 (2010)..... 14

Holtzscheiter v. Thomson, 306 S.C. 297, 411 S.E.2d 665 (1991) 35

Hudson v. Zenith Engraving Co., 273 S.C. 536, 259 S.E.2d 812 (1979)..... 37

Koontz v. Thomas, 333 S.C. 702, 511 S.E.2d 407 (Ct.App.1999)..... 15

Ludwick v. This Minute of Carolina, Inc., 283 S.C. 149, 321 S.E.2d 618 (Ct.App. 1984)..... 42

McSwain v. Shei, 304 S.C. 25, 402, S.E.2d 890 (1991) 35

Melton v. Medtronic, Inc., 389 S.C. 641, 698 S.E.2d 886 (2010) 37

Minter v. GOCT, Inc. 322 S.C. 525, 473 S.E.2d 67 (Ct.App. 1996)..... 28

Quail Hill, LLC v. Cnty of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010)..... 15, 20, 23

Roberts v. Dunbar Funeral Home, 288 S.C. 48, 339 S.E.2d 517 (Ct.App. 1986) 36

Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 408, 581 S.E.2d 161 (2003) 15, 20

Shipman v. Glenn, 314 S.C. 327, 443 S.E.2d 921 (Ct.App. 1994)..... 36, 42

Smith v. Canal Ins. Co., 275 S.C. 256, 269 S.E.2d 348 (1980)..... 25

Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995)..... 29

Strickland v. Madden, 323 S.C. 63, 448 S.E.2d 581 (Ct.App. 1994)..... 36

Todd v. S.C. Farm Bureau Mut. Ins. Co., 283 S.C. 155, 321 S.E.2d 602 (Ct.App.1984), *rev'd on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985) 32, 35

Thomas v. Waters, 315 S.C. 534, 445 S.E.2d 659 (Ct. App. 1994)..... 13

Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766 (2011) 15

Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 1998) 16, 29

Wright v. Sparrow, 298 S.C. 469, 381 S.E.2d 504 (Ct.App. 1989)..... 35

TABLE OF AUTHORITIES (CON'T)

STATUTES

S.C. Code Ann. § 59-26-4020

OTHER AUTHORITIES

S.C. Reg. 43-206.....20

STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court properly grant summary judgment to the School District of Pickens County on Appellant's cause of action for negligent misrepresentation when any pecuniary loss to Appellant resulted from her own action in declining to continue to be employed by the District and when she failed to produce competent evidence that the District made false statements for its own pecuniary benefit or that she justifiably relied on such statements?
2. Did the circuit court properly grant summary judgment to the School District of Pickens County on Appellant's cause of action for breach of contract accompanied by a fraudulent act when Appellant failed to produce competent evidence that the District breached its contract, that the District's breach was dishonest or made with the intent to deceive Appellant, or that the District perpetrated an independent fraudulent act in connection with its alleged breach of contract?
3. Does the Fourth Cause of Action include a separate claim against the School District of Pickens County for simple breach of contract in addition to its stated claim of breach of contract accompanied by a fraudulent act, and, if so, may Appellant make new arguments about her contract at this stage?
4. Did the circuit court properly grant summary judgment to the Respondent Culler on Appellant's cause of action for intentional infliction of emotional distress when Appellant failed to produce competent evidence that Culler's conduct was extreme or outrageous or that he intentionally or recklessly inflicted severe emotional distress on Appellant?
5. May Appellant appeal the termination of the hearing on Respondents' motions for summary judgment when she consented to the circuit court forgoing additional oral argument in favor of reviewing and considering the written submissions of the parties and when the circuit court afforded her an opportunity to be heard?

STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of summary judgment on May 13, 2014 to the Respondents, the School District of Pickens County ("the Pickens District"), the School District of Oconee County ("the Oconee District"), and their employees who had been named as defendants in the case. The Appellant, Mariam R. Noorai, a former teacher and employee of the Pickens District and a job applicant to the Oconee District, asserted multiple causes of action, including various tort claims and breach of contract accompanied by a fraudulent act, against the Respondents.

Appellant filed suit against the Respondents on March 22, 2011, and subsequently amended her Complaint twice. She filed her Second Amended Complaint on June 11, 2012, complaining that the Pickens District was negligent and grossly negligent in the manner in which it allegedly failed to protect her and in which it handled her notice that a student should be disciplined for what she asserted was a sexual assault (First Cause of Action); that the Pickens District negligently misrepresented to her the conditions of her resignation from employment (Second Cause of Action); that the Oconee District was negligent and grossly negligent because it failed to hire her (Third Cause of Action); that the Pickens District and the principal of her school, Respondent Gary Culler, were liable for breach of contract accompanied by a fraudulent act in connection with her teaching contract (Fourth Cause of Action); that the Pickens District, the Oconee District, and Culler defamed her (Fifth Cause of Action); that Respondent Richard Hudak, a teacher employed by the Pickens District, assaulted her (Sixth Cause of Action); that Respondents Dr. Kelly Pew, Donald Boggs, and Marilyn Raines, all employees of the Pickens District, and Respondent Ernestine Williams, an employee of the Oconee

District, conspired to remove her from employment and damage her in her profession (Seventh Cause of Action); and that Culler intentionally inflicted severe emotional distress on her (Eighth Cause of Action). Appellant sought actual damages from Pickens District and the Oconee District; she sought actual and punitive damages from the remaining Respondents.

The Pickens District and its employees Culler, Boggs, Hudak, Raines, and Pew filed an Answer to the Second Amended Complaint on June 29, 2012, denying liability and asserting various affirmative defenses. The Oconee District and its employee Williams filed an Answer to the Second Amended Complaint on June 22, 2012, also denying liability and asserting various affirmative defenses.

The Pickens District and its employees Culler, Boggs, Hudak, Raines, and Pew filed a motion for summary judgment on January 29, 2013, which was scheduled to be heard on February 19, 2013. That hearing was continued as the request of Appellant's then-attorney. Order dated February 15, 2013. Appellant's then-attorney sought and was granted permission to be relieved as her counsel, and dispositive motions were postponed to allow sufficient time to retain new counsel. Order Relieving Counsel, dated June 6, 2013. These Respondents filed an amended motion for summary judgment on August 13, 2013. The hearing on this amended motion was scheduled for October 24, 2013, but was continued to allow Appellant's new counsel additional time to review and prepare. Order dated October 7, 2013. Another hearing on the Respondents' amended motion for summary judgment was scheduled for December 9, 2013, but was continued at the request of Appellant's counsel because Appellant was unavailable. Order dated

December 5, 2013. The motions for summary judgment for all parties were heard on April 7, 2014, more than one year after the initial motions were filed.

At the hearing on April 7, 2014, the presiding judge, after hearing oral arguments on some of Appellant's claims and, after soliciting but receiving no objections from counsel to forgoing further oral argument in favor of his review of the written submissions by all parties, took the matter under advisement. The circuit court subsequently issued an order dated May 13, 2014, finding that Appellant had failed to establish the existence of genuine issues of material fact and that the Respondents were entitled to summary judgment on all causes of action.

Appellant filed a notice of appeal on June 11, 2014. In her brief to this court, she argues that the circuit court erred in dismissing her claims against the Pickens District for negligent misrepresentation (Second Cause of Action) and breach of contract accompanied by a fraudulent act (Fourth Cause of Action) and her claim against Culler for intentional infliction of emotional distress claim (Eighth Cause of Action). Further, Appellant argues that, in addition to the breach of contract accompanied by fraudulent act, she also alleged and produced sufficient evidence of a simple breach of contract against the Pickens District in the Fourth Cause of Action to survive summary judgment.

Appellant does not argue that the circuit court erred in granting summary judgment to the other Respondents on the remaining causes of action. Thus, the grant of summary judgment in favor of the Respondents on the First Cause of Action (negligence against the Pickens District), the Third Cause of Action (negligence against the Oconee District), the Fourth Cause of Action against Culler (breach of contract accompanied by a fraudulent act), the Fifth Cause of Action (defamation against the Pickens District, the

Oconee District, and Culler), the Sixth Cause of Action (assault against Hudak), and the Seventh Cause of Action (civil conspiracy against Boggs, Raines, Pew, and Williams) were abandoned and are not at issue in this appeal.

STATEMENT OF FACTS

Preliminary Note: The Pickens District and Culler object to the following matter to which Appellant cites in the Statement of Facts section of her Initial/Final Brief as it was not presented to the circuit court and cannot, therefore, be included in the Record on Appeal: Deposition of Mariam R. Noorai at pages 23, 28, 29, 31, 32, 34, 35, 38, 39, 42, 44, 46, 50, 51, 53, 55, 56, 59, 73, 75, 76, 77, 78, 80, 81, 87, 89, 90, 105, 111, 125, 136, 137, 148, 149, 155, 176, 177, 178, 180, 192, 201, 202, 203, 204, 205, 207, 208, 209, and 211.

The Pickens District and Culler also object to the use of the allegations asserted in Appellant's Second Amended Complaint ("the Complaint") as competent evidentiary support in her Statement of Facts.

In addition, in her Complaint, in three days of deposition, and in her affidavit, Appellant disagreed with and complained of several management actions and student disciplinary decisions at the school where she was employed. Many of these incidents formed the basis for several causes of action that were dismissed, but that she does not raise as issues in this appeal. The alleged facts relating to the following causes of action, which were dismissed and are not at issue in Appellant's appeal, are not relevant to the arguments in this appeal:

- That the Pickens District was negligent in not properly disciplining a student and not reporting to law enforcement what she now refers to as a "sexual assault" on her by the student;

- That the principal of her school, Gary Culler, breached her teaching contract and was dishonest and unfair in his representations concerning her actions and remedies under the contract, thus incurring individual liability for breach of contract accompanied by fraudulent act;
- That the Oconee District was negligent in relying upon what Appellant contends were false statements by Culler about her employment and, therefore, failing to hire her;
- That the Pickens District, the Oconee District, and Culler defamed her by communicating false information about her employment at the Pickens District;
- That another teacher at her school, Richard Hudak, assaulted her during a disagreement about whether Appellant could prevent a student from attending Hudak's class by holding the student in her class for longer than its scheduled time; and
- That Pickens District employees Pew, Boggs and Raines and Oconee District employee Williams conspired to damage her in her profession and render her unemployable.

The Pickens District and Culler confine their Statement of Facts to those circumstances that are relevant to the following causes of action which Appellant argues were improperly dismissed by the trial court:

- That after Appellant had decided and announced that she would not return to teach at her school the following year, the Pickens District negligently misrepresented to her that she was required to submit a written letter of resignation;
- That the Pickens District breached Appellant's teaching contract and was dishonest and unfair in its representations concerning her actions and remedies under the contract, thus incurring liability for breach of contract accompanied by fraudulent act; and
- That Culler is liable for intentional infliction of emotional distress because he allegedly harassed her during and after the school year 2008-2009.

Statement of Relevant Record Facts: Appellant was employed by the Pickens District as an English/Language Arts teacher at Edwards Middle School during the school year 2008-2009. Att. 3 to Respondent Pickens District's Memorandum of Law in Support

of Summary Judgment. The Respondent Culler served as the principal of the school during the 2008-2009 school year. Appellant expressed dissatisfaction to other District personnel about his administration of the school. She voiced disagreement with the manner in which Culler handled some incidents of student conduct and discipline, Second Amended Complaint (“Complaint”) ¶¶ 13-14, 16 and 21; Pew Dep. p. 42, lines 7-15; she complained about not being informed of and thus not being able to attend the awarding of an honor received by her students, Complaint ¶ 19; Culler Dep. p. 34, lines 6-17; and she complained that Culler winked at her and made her feel uncomfortable, Pew Dep. p. 41, lines 10-18. She complained directly to Culler about a disagreement she had with a fellow teacher, Richard Hudak, Culler Dep. p. 65, line 23-p. 66, line 19, and was disappointed that Culler did not support her position, Complaint ¶¶ 33-35; Noorai Dep. p. 139, lines 2-12.

During her two years of employment by the Pickens District and as a part of her job, Appellant taught language arts and yearbook classes and also served as the school yearbook advisor. Noorai Dep. p. 24, lines 13-20. While Appellant was employed by the Pickens District, her teaching evaluations were positive. Pew Dep. p. 29, lines 1-6. The Pickens District offered her a contract to teach for the 2009-2010 school year, but Appellant declined to accept it. Noorai Dep. p. 146, line 11-p. 147, line 10; p. 151 line 23-p. 152 line 3; and Ex. 13. Although each of her employment contracts and offers stated that school administration “may assign reasonable extra-curricular activities to teachers,” Noorai Dep. Ex. 13, Appellant objected to continuing to serve as the yearbook advisor in addition to her English teaching duties in 2009-2010. Culler Dep. p. 89, lines 11-13.

On the recommendation of Culler, the Pickens District offered “a continuing teaching contract” to Appellant for the 2009-2010 school year, a year ahead of schedule. Noorai Dep. Ex. 13; Pew Dep. p. 35 line 12-p. 36, line 16. A continuing contract represents a promotion and a higher level of job projection compared to an annual contract, which is the contract Appellant held during the 2008-2009 school year. *See generally* S.C. Code Ann. § 59-26-40. At the time Appellant was offered a continuing contract for 2009-2010, teachers with continuing contracts generally needed to have taught for more than two years and successfully completed the evaluation process known as ADEPT. Thus, the Pickens District treated Appellant more favorably than the law required by offering her a continuing contract when it did.

The offer of a continuing teaching contract to Appellant was made on May 15, 2009, when the Pickens District offered written employment contracts to all teachers for the following school year. All teachers desiring employment in 2009-2010 were instructed to sign and return the contracts to their school principals no later than May 25, 2009. Noorai Dep. p. 146, line 11-p. 147, line 8. The contract form contains this deadline on its face. Noorai Dep. Ex. 13. When Culler did not receive a signed contract from Appellant, he and Mary Bridges, an assistant principal, met with Appellant to discuss whether she intended to sign her contract and return to teach at the school the following year. Culler Dep. p. 88, lines 22-25; Bridges Aff. ¶ 7. Culler was aware that Appellant at the time was seeking a teaching position in another school district because, as he understood it, she did not want to continue to teach the yearbook class and serve as the yearbook adviser. Culler Dep. p. 91, lines 3-15. At the time, Culler was unable to promise Appellant that she would be relieved of this duty because he did not know whether any

other teachers qualified to teach yearbook would be hired for the 2009-2010 school year, Culler Dep. p. 63, line 18-p. 64, line 13; budget constraints facing the Pickens District due to the recession in 2009 limited the District's options. In light of the fact that Appellant had not yet secured other employment, Culler encouraged her to sign the proffered employment contract instead of risking potential unemployment for the following school year. Culler Dep. p. 89, lines 2-15; Bridges Aff. ¶ 7. Despite Culler's urging, Appellant did not sign the contract.

Because Appellant, like all teachers, was employed only year-to-year, her failure to sign the proffered contract for the 2009-2010 school year was equivalent to a resignation from her continued employment. However, because the Pickens District did not wish to fill the potential vacancy created by Appellant's departure until she confirmed her decision not to return to the school, it requested that she submit a written notice or letter of resignation, a standard procedure in the Pickens District. Pew Dep. p. 51, line 10-p. 54, line 4. Both Culler and Mary Bridges told Appellant that if she were not planning to return to teach at the school, she needed to submit a written notice of resignation so that they could begin the process of finding a replacement for her. Noorai Dep. p. 159, lines 8-12; Bridges Aff. ¶ 8.

By June 4, 2009, Appellant's last day at the school, she had not submitted her written notice of resignation. Bridges requested that she do so, in order to "tie up a loose end." Bridges Aff. ¶ 8. Because the equipment in Appellant's classroom had already been packed up for removal, Bridges allowed Appellant to use the computer in Bridges' office to type the resignation letter, which Appellant described as an upsetting process. Noorai Dep. p. 162, line 20-p. 163, line 16. While she was working on this task, Culler came into

the room. Culler testified that he entered the room because he “heard she was upset and I did not want an employee of mine in there upset.” Culler Dep. p. 96, line 25-97, line 3. Appellant, however, said that Culler was angry, although she did not explain the reason for his anger, and that he had an erection while he spoke with her about the need for a written resignation notice. Noorai Dep. p. 167, line 20-p. 168, line 15. Appellant eventually completed and submitted a letter in which she stated that she was resigning because she did not want to be the yearbook adviser for a third school year. She stated further that she was leaving “for this reason alone.” Noorai Dep. Ex. 14.

Appellant applied for teaching positions in other school districts, including the Oconee District, both before and after she left her employment in the Pickens District, but was unsuccessful in obtaining another position. One of the persons who interviewed her observed, “This was in 2010. Districts were laying off teachers and firing teachers, and I couldn’t imagine why a teacher would choose to leave a position, especially if she was a continuing contract teacher.” Brock Dep. p. 35, lines 2-5.

After the school year and her employment ended, Appellant reported concerns about the circumstances surrounding her resignation to Pew, then Assistant Superintendent of Human Resources for the Pickens District. On June 30, 2009, Pew met with Appellant to hear her concerns, which was the first time Pew was made aware of them, although they included incidents that Appellant alleged occurred more than a year earlier. Pew Dep. p. 40, lines 12-18; p. 48, lines 17-24; p. 74, lines 7-17. Appellant provided Pew with a 25-page statement laying out a litany of complaints against Culler, all of which were different from the reason Appellant gave for her resignation in the letter she had submitted three weeks earlier. Noorai Dep. Ex. 15. Included among her

complaints to Pew was an allegation that Culler disregarded her welfare and broke state law and school policy by not reporting what she characterized as a “sexual assault” on her by a student in a crowded school stairwell during change of classes on January 27, 2009. Noorai Dep. Ex. 15 at pp 3-4.¹ In fact, Culler was not aware of the incident or of Appellant’s complaints about it until after the school year ended when Pew brought it to his attention. Culler Dep. 34, line 18-p. 35, line 2. Culler was neither consulted nor involved in the investigation or student discipline resulting from the January 27, 2009 incident; Donald Boggs, the assistant principal of the school, and Teddi Palis, the School Resource Officer who is employed by the Pickens County Sheriff’s Department, handled that matter. Culler Dep. p. 35, lines 1-18; Palis Aff. ¶¶ 3-5.

Upon learning of Appellant’s complaints, Pew investigated her allegations, including speaking with Culler, who was also unaware of many of Appellant’s listed complaints, particularly those about him. Pew Dep. p. 40, line 18-p. 41, line 5; p. 41, lines 16-18 (Culler was “very shocked and concerned when he heard that complaint”) and p. 42, lines 9-10. Pew concluded that while there may have been misunderstandings, no improper conduct by Culler had occurred and notified Appellant of this determination. Pew Dep. Ex. 6. Subsequently, on October 13, 2009, Culler provided a letter of recommendation for Appellant. Culler Dep. Ex. 5.

On or about March 18, 2010, Appellant filed complaints of misconduct against Culler and Donald Boggs, an assistant principal at the school, with the South Carolina

¹ Appellant also brought this complaint to the State Department of Education, Noorai Dep. Ex. 19, and the Pickens County Sheriff’s Department, Noorai Dep. Ex. 11. Culler was not disciplined by the State Department of Education or charged by the Sheriff’s Department with any wrongdoing. Att. 2 to Respondents’ Memorandum of Law in Support of Summary Judgment; Noorai Dep. Ex 11.

State Department of Education (“the SDE”). Noorai Dep. Ex. 19. The SDE investigated Appellant’s complaints and closed the cases on or about July 28, 2010, without taking any action. *See* Att. 2, Respondent Pickens District’s Memorandum of Law in Support of Summary Judgment. Subsequently, based solely on the complaints she had herself filed and which the SDE had closed with no finding of misconduct, Appellant included statements on her employment applications to other school districts in 2011 claiming that Culler’s educator certificate was under review by the State Department of Education because of misconduct, *see, e.g.*, Noorai Dep. Ex. 23 at p. 4. On January 5, 2011, Culler wrote Appellant, requesting that she stop falsely representing to other school districts that his certificate was under review for misconduct. Culler Dep. Ex. 18. Appellant alleged that she found Culler’s letter threatening and particularly objected to the use of a “King of Hearts” postage stamp containing the word “LOVE” on the envelope in which it had been delivered to her. Complaint ¶ 92. Appellant said she believed Culler or someone at his direction deliberately used the postage stamp to upset her. “His choice of postage stamp was very upsetting to me . . . and very unprofessional.” Noorai Dep. p. 223, line 24-p. 224, line 1. Appellant filed this lawsuit approximately two months later.

ARGUMENT

I. Standard of Review

In considering whether an order of summary judgment by a trial court was appropriate, an appellate court applies the same standard of review as the trial court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). An order of summary judgment under Rule 56, SCRPC, is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Harris*

Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 701 S.E.2d 742 (2010) “Summary judgment is proper when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ.” *Byerly v. Connor*, 307 S. C. 441, 445, 415 S.E.2d 796, 799 (1992). “In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the nonmoving party.” *David*, 367 S.C. at 247, 626 S.E.2d at 3.

A party opposing a motion for summary judgment may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue of material fact to be considered by a jury. *Thomas v. Waters*, 315 S.C. 534, 445 S.E.2d 659 (Ct. App. 1994). If the party opposing summary judgment “fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial,” *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct.App.1999), the opposing party fails to establish the existence of a genuine issue of material fact “since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.” *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991). Inadmissible testimony, including hearsay, suppositions, speculation, and bald allegations, are insufficient to create a genuine issue of fact. *Id.*; *see also David*, 367 S.C. at 250, 626 S.E.2d at 5 (“summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner”). Thus, in opposing the Pickens District’s Motion for Summary Judgment, Appellant could not rest on the mere allegations of her Complaint or her suspicions, but

was required to set forth or point to specific admissible facts showing that there is a genuine issue of material fact to be considered by a jury. *Hoard ex rel. Hoard v. Roper Hosp., Inc.* 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010); *Dawkins v. Fields*, 354 S.C. 58, 70-71, 580 S.E.2d 433, 439 (2002).

II. The Circuit Court Properly Granted Summary Judgment to these Respondents.

Appellant's case is built primarily on suspicion and speculation rather than admissible evidence. She failed to produce admissible facts showing the existence of a genuine issue of material fact requiring the consideration by a jury, and the trial court properly granted summary judgment to the Respondents.

A. The Pickens District is entitled to summary judgment because Appellant failed to establish the essential elements of negligent misrepresentation by the District.

In her cause of action for negligent misrepresentation, Appellant claims that the Pickens District, through Culler as principal of Edwards Middle School and Pew as Assistant Superintendent for Human Resources, falsely represented that she was required to submit a letter of resignation. Complaint ¶ 57. She also claims that Culler, through Assistant Principal Mary Bridges, falsely told her that her license to teach would be "pulled" or cancelled if she did not submit a resignation letter. Complaint ¶ 43. She asserts that she reasonably relied on this representation and submitted the resignation letter, which caused her pecuniary loss because she lost her employment. Complaint ¶¶ 62-63.

To establish a claim of negligent misrepresentation by the Pickens District, Appellant must prove: (1) a false representation made by the Pickens District to the Appellant; (2) a pecuniary interest by the Pickens District in making the statement; (3) a

duty of care owed by the Pickens District to see that truthful information was communicated to the Appellant; (4) the Pickens District breached the duty by failing to exercise due care; (5) Appellant justifiably relied on the representation; and (6) Appellant suffered a pecuniary loss as a proximate result of her reliance on the District's representation. *Turner v. Milliman*, 392 S.C. 116, 123, 708 S.E.2d 766, 769 (2011); *Quail Hill, LLC v. Cnty of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010). The duty of care owed is "not a duty to take every possible care, still less is it a duty to be right; it is the familiar duty to exercise that care a reasonable man would take in the circumstances." *AMA Mgt. Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct.App. 1992). In addition, for a representation to be actionable, it "must relate to a present or pre-existing fact and be false when made." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 408, 581 S.E.2d 161, 167 (2003), quoting *Koontz v. Thomas*, 333 S.C. 702, 713, 511 S.E.2d 407, 413 (Ct.App.1999). "There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." *Quail Hill, LLC*, 387 S.C. at 240, 692 S.E.2d at 508, quoting *AMA Mgt. Corp. v. Strasburger*, 309 S.C. at 223, 420 S.E.2d at 874; *see also Carolina Chloride, Inc. v. Richland Cnty*, 394 S.C. 154, 714 S.E.2d 869 (2011). Appellant does not produce evidence to support the necessary elements of negligent misrepresentation.

1. Appellant cannot establish that she suffered a pecuniary loss as a proximate result of her reliance on the Pickens District's representation.

Perhaps the strongest argument against Appellant's right to recover against the Pickens District on a negligent misrepresentation claim is that Appellant was not

damaged through her submission of a written notice of resignation. Accordingly, although the element of resulting pecuniary loss appears at the end of the list of elements constituting negligent misrepresentation, the Pickens District discusses it before addressing the remaining elements.

The pecuniary loss Appellant claims as a result of the alleged misrepresentation that she was required to submit a written notice of resignation is that she is no longer employed. Complaint ¶ 63. However, Appellant herself decided not to return to teach at Edwards Middle School and rejected the contract of employment the Pickens District offered her for the school year 2009-2010. Her loss of employment was not due to the Pickens District's insistence on compliance with a procedural requirement of a written notice of resignation, which is the alleged misrepresentation, but to her earlier decision not to accept the proffered employment contract. The letter of resignation was of no consequence to her lack of employment; Appellant did not lose her job and was not prevented from obtaining further employment because of the resignation letter, regardless of whether the Pickens District falsely stated its resignation requirements to her.

Appellant argues that her written notice of resignation from the Pickens District served as grounds for other school districts not to hire her and to prevent her from receiving unemployment benefits. First, this argument and the testimony Appellant cites as support for this claim were not presented to the trial court and cannot not, therefore, be included in the Record or considered by the appellate court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); Rule 210(c), SCACR. Second, the testimony is speculative and hearsay and, for those reasons, is incompetent evidence and, therefore, insufficient to defeat summary judgment.

Appellant cannot establish that her lack of employment in 2009-2010 and later was due to and proximately caused by a misrepresentation by the Pickens District. Her lack of employment was instead due to her own decision and actions. Even if the Pickens District misrepresented the manner in which teachers must notify it of their resignations, Appellant was not damaged because her decision not to return to her position was independent and separate from the alleged misrepresentation.

2. The Pickens District exercised reasonable care and made no false representation to Appellant regarding its request for a written notice of resignation.

Although the practice of requiring a written resignation notice was not included in Appellant's one-page employment contract, Att. 3, Pickens District's Memorandum of Law in Support of Summary Judgment, or in statute, several witnesses provided testimony that the practice of the Pickens District was to require a written notice of resignation. Appellant produced no evidence contradicting that testimony. There is, therefore, no triable issue of fact on this issue. When viewed in the light most favorable to Appellant, the evidence and all reasonable inferences that may be drawn from it establish that the Pickens District exercised reasonable care and that the alleged misrepresentation of which Appellant complains was in fact not false, but true.

Pew, who as Assistant Superintendent for Human Relations was responsible for overseeing the employment of teachers by the Pickens District, testified that the Pickens District's practice was to ask for and collect written resignation letters or notices from those teachers who do not sign contracts of employment for the following year and who intend to resign. As she explained,

[O]ur contracts clearly say they have ten days to sign their contract. However, our practice is, that if a person intends to resign, we ask that

they write a resignation letter. We do that to benefit the employee, because we give more than 1,200 contracts in a year. We want to make sure that we don't get an unsigned contract or we don't get a contract returned to us because somebody laid it down, it got put somewhere, and we take the name to the board to terminate them and that was not their intention. And that resignation letter ensures that we understand that their intention is to resign.

...

We ask that they say that they do intend to resign, and we ask that it's attached to the contract. That way, we take it to the board and we can post the position.

Pew Dep. p. 51, line 13-p. 52, line 5.

Culler testified consistently with Pew: it was the Pickens District's procedure to request a written resignation letter from any teacher who did not choose to accept and sign a proffered contract. Culler Dep. p. 92, lines 19-22. Mary Bridges, the assistant principal, agreed that the Pickens District's practice was to require a written notice of resignation from a teacher before declaring the teaching position vacant and filling it with a new hire. She viewed the procedure and described it to Appellant as simply "needing to 'tie up a loose end.'" Bridges Aff. ¶ 8. Appellant herself confirmed the gist of this testimony by Pew, Culler and Bridges: she said that Culler told her directly that "he wanted me to write a letter of resignation so that he could interview. And until I wrote this letter of resignation, he could not interview anybody for my position" Noorai Dep. p. 159, lines 8-12; *see also* Noorai Dep. p. 160, lines 4-9.

Pew also testified that the Pickens District had never had a teacher in that situation refuse to provide a resignation letter. Pew Dep. p. 52, lines 6-16. Culler similarly had never known a departing teacher not to turn in a resignation letter when

requested. Culler Dep. p. 96, lines 5-6. The Pickens District had never encountered this situation with any other teacher; it was uncharted territory.

Appellant cannot establish that the Pickens District, through Culler, Bridges, or Pew, made a false representation when they told her that it required non-returning teachers like her to provide written resignation letters. It was, in fact, the Pickens District's practice and procedure to require written statements of resignation from teachers so that it would not mistakenly proceed to fill positions that teachers did not intend to relinquish. Thus, not only was this representation not false, but it was made in an effort to protect teachers, including Appellant, from having the Pickens District mistakenly replace them with new hires. As Pew explained, "For us, it is a situation where we are ensuring that the employee truly intends to resign, that somehow the contract did not get lost in the shuffle. And with as many employees as we have, that is just a very clear way for us to understand their intentions." Pew Dep. p. 52, lines 16-21.

Appellant also cannot establish that the Pickens District misrepresented to her that she could have her teaching certificate revoked by the State Department of Education if she refused to provide a written resignation notice and subsequently left the Pickens District for another position. Culler and Bridges apparently believed that to be the case. Bridges stated that she was concerned that if Appellant refused to provide formal written notice of resignation and subsequently obtained another teaching position elsewhere, she could be at risk of having her teaching certificate revoked by the State Department of Education. Bridges Aff. ¶ 8. Culler had a similar concern. Culler Dep. p. 94, line 4-p. 95, line 4. Indeed, if a teacher does not resign but takes employment with another district without obtaining a release from her contract, she can be deemed to have abandoned her

teaching position, which is, in fact, cause for the State Department of Education to revoke the teacher's certificate. *See* S.C. Reg. 43-206.

Even if Bridges and Culler were mistaken in their belief that Appellant's teaching certificate could be at risk if she failed to submit a resignation letter at the end of the contract period, their representation was a statement about a future event and, therefore, was not actionable. *Sauner*, 354 S.C. at 408, 581 S.E.2d at 167 (2003). In addition, their representation regarding whether Appellant could or would lose her teaching certificate was on a matter of law, which is also not actionable. *See Carolina Chloride, Inc.*, 394 S.C. at 166-68, 714 S.E.2d at 875-76 (county is not liable for a mistaken representation regarding a matter of law); *Quail Hill, LLC*, 387 S.C. at 240, 692 S.E.2d at 508 (misrepresentations as to matters of law are not actionable).

Moreover, a mistaken representation is not, by itself, actionable. The Pickens District's duty of care to Appellant was not to be right, but simply to take reasonable care. There is no evidence that either Culler or Bridges acted unreasonably in their efforts to protect Appellant from the consequences of her actions. *AMA Mgt. Corp.*, 309 S.C. at 223, 420 S.E.2d at 874.

Because Appellant cannot establish genuine issues of material fact as to the falsity of the representations made by the Pickens District or the breach by the Pickens District of a duty of care to Appellant, the Pickens District is entitled to judgment as a matter of law on the Second Cause of Action.

3. The School District of Pickens County had no pecuniary interest in misrepresenting its need for a written notice of resignation from Appellant.

Appellant alleges that the Pickens District had a pecuniary interest in falsely telling her that it needed a written resignation letter from her. However, the only reasonable inference from the evidence is that the requirement of a written notice of resignation did not serve the pecuniary interest of the Pickens District, but instead was intended to protect Appellant's teaching position in case of a misunderstanding and she did not intend to resign. As Pew testified,

We do that to benefit the employee, because we give more than 1,200 contracts in a year. We want to make sure that we don't get an unsigned contract or we don't get a contract returned to us because somebody laid it down, it got put somewhere, and we take the name to the board to terminate them and that was not their intention. And that resignation letter ensures that we understand that their intention is to resign.

Pew Dep. 51:14-24.

Appellant argues that the Pickens District had a pecuniary interest in requiring a written resignation notice because such a written confirmation would protect the Pickens District from over-hiring if it hired a replacement for a teacher who subsequently changed her mind and chose to remain in her position.² In fact, however, a teacher who does not sign her contract by the due date has no legal right to remain in her position because the offer of employment to her expired on the date specified for the return of the signed contract. The Pickens District may, through a sense of loyalty to its employees, choose to accommodate such a teacher by again employing her for the following school year, but it has no legal obligation to do so. Indeed, if the Pickens District has already

² Appellant's departure from the Pickens District occurred during the economic recession that began in 2008-2009, a time when school districts' budgets were being cut and districts were reducing their staffing and taking other steps to decrease their expenses. Because of these budgetary constraints, the Pickens District was particularly wary of being in a position where Appellant, or any other teacher, changed her mind about leaving after they had hired a replacement for her. "[I]n 2008, 2009 we were in such economic – we would never have wanted to over-hire." Pew Dep. p. 54, lines 3-4.

hired a replacement, its budget may not allow it to also employ the teacher who belatedly expresses a wish to return. The written confirmation of resignation is a pro forma writing intended to protect those teachers who sign contracts, but misplace them or forget to return them. Requiring written notices of resignation protects against such mistakes and misunderstandings. As with written acceptances of contracts, written notices or letters of resignation provide the Pickens District with clear statements of intentions from all those to whom it has offered contracts of employment and prevent it from hiring new teachers to fill positions that teachers actually intend to retain.

Appellant also speculates that the Pickens District had a pecuniary interest in requiring a written resignation letter because the letter allowed the Pickens District to avoid paying unemployment compensation to Appellant. Appellant's support for this claim is her own hearsay and speculation, *see* Appellant's Brief at 25, which was not presented to trial court for consideration. It is, therefore, neither competent as evidence to defeat summary judgment, nor included in the Record on Appeal.

Because Appellant failed to establish that the Pickens District had a pecuniary interest in making the alleged misrepresentation, there is a failure of proof of this essential element of her cause of action for negligent misrepresentation. *See Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991); *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct.App. 1999). There is, thus, no issue of material fact to be decided by a jury on this issue, and summary judgment for the Pickens District on Appellant's Second Cause of Action should be affirmed.

4. Appellant cannot establish that she justifiably relied on the Pickens District's representations to her.

Aside from the fact that the representation by the Pickens District – that it required a written notice of resignation – was not false, Appellant cannot establish that she justifiably relied on the Pickens District’s statements to her. A plaintiff who has the means to ascertain the truth of a matter does not act reasonably when she relies solely on a defendant’s representations to her and cannot, therefore, prove that she justifiably relied on those representations. *See Quail Hill*, 387 S.C. at 241, 692 S.E.2d at 509 (real estate buyer could not show justifiable reliance on county’s representations of the property’s zoning classification when buyer could have reviewed the zoning map itself).

Appellant had a contractual relationship with the Pickens District and a concomitant duty to inform herself about the conditions and requirements of her employment, as well as the Pickens District’s requirements and procedures for ending that employment. Culler expressly discussed with Appellant the Pickens District’s procedure of requiring a written resignation letter during a meeting on June 1, 2009, Noorai Dep. p. 160, lines 4-15, yet by the last day Appellant worked at the school on June 4, she still had not submitted the letter. She resisted supplying a written notice of resignation, suspecting that the Pickens District was misinforming her about its need for such notice. In fact, she testified that she “did not think it sounded correct,” Noorai Dep. p. 159, lines 15-16, and said that she drafted the letter “under duress,” Noorai Dep. p. 156, lines 7-9. Under these circumstances, she should and could have investigated this issue further, but she did not.

In addition, Appellant did not raise the issue with Pew until she met with Pew on June 30, 2009, after Appellant had already submitted her resignation letter. In submitting

her written resignation on June 4, she could not have relied on anything Pew told her, as she alleges, because those communications did not occur until after the fact.

Appellant cannot establish that she was justified in relying solely on the Pickens District's statements to her before she submitted her resignation letter, and she could not have acted in reliance on Pew's statements to her after the fact. Justifiable reliance on the Pickens Districts' alleged misrepresentation is an essential element of Appellant's Second Cause of Action, and her failure to create a genuine issue of fact on this element entitles the Pickens District to summary judgment.

The trial court's decision to order summary judgment in favor of the Pickens District on this claim should be affirmed because Appellant did not and cannot establish falsity for the pecuniary interest of the Pickens District or her own justifiable reliance on and pecuniary loss as a result of a false representation.

B. Respondent School District of Pickens County is entitled to summary judgment because Appellant failed to establish that the District either breached its contract with her, with or without fraudulent intent, or that it committed a separate fraudulent act in connection with the alleged.

Appellant's claim of breach of contract accompanied by a fraudulent act in the Fourth Cause of Action is apparently based on the contract between Appellant and the Pickens District, pursuant to which she was employed as a teacher during the school year 2008-2009.³ Appellant claims that the Pickens District breached "Plaintiff's contract," presumably her 2008-2009 employment contract, by not protecting her employment, not acting on her complaints, and failing to "properly inform" her of the requirements to

³ The 2008-2009 contract was the only contract Plaintiff had at the time of the alleged wrongdoing. She had no contract with the District for the school year 2009-2010 because she rejected the offer from the District of continued employment.

terminate her contract.⁴ She alleges that the fraudulent acts by the Pickens District consisted of “dishonesty in fact and unfair dealing with Plaintiff as to actions and remedies available to her under the contract.” Complaint ¶ 71. She does not allege how she was damaged by these alleged failures. She also does not allege a breach of contract based on “constructive discharge.”

To recover on her claim of breach of contract accompanied by a fraudulent act, Plaintiff must prove: (1) a breach of contract; (2) the breach was accomplished with a fraudulent intent; and (3) the breach was accompanied by an independent fraudulent act. *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 555, 730 S.E.2d 340, 354 (Ct.App. 2012), *aff'd as modified on other grounds*, 410 S.C. 319, 764 S.E.2d 701 (2014); *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66; 560 S.E.2d 606, 612 (2002). Both a fraudulent intent to breach the contract and a separate fraudulent act are required; the absence of either requires dismissal of the claim. *See D.R. Horton, Inc.*, 398 S.C. at 556, 730 S.E.2d at 355.

The existence of a contract and breach of that contract are foundational elements of this cause of action. “There is no cause of action distinct from breach of contract for breach of contract accompanied by a fraudulent act.” *Smith v. Canal Ins. Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980). Proof of the additional elements (i.e., a fraudulent intent to breach plus an accompanying fraudulent act) does not transform the cause of action into something other than a breach of contract action; such proof merely entitles a plaintiff to recover punitive damages on his breach of contract action. *Id.*

⁴ Appellant asserted, but abandoned, her claim in the Fourth Cause of Action that Culler was individually liable for the same breach of contract accompanied by a fraudulent act.

Appellant claims that the Pickens District had contractual obligations to protect her from harm, intervene on her behalf “where its contract warranted such action,” inform her of requirements for terminating her employment, and act upon her grievances. Complaint ¶ 69. A review of the contract shows that it imposed no such obligations on the Pickens District. *See* Att. 3 to Respondents’ Memorandum of Law in Support of Summary Judgment. For the reasons enumerated below, the Pickens District owed no such contractual duties to Appellant and did not breach its contract with her.

First, the contract was a straightforward employment contract with no extraordinary provisions. The only contractual obligations owed by the Pickens District to Appellant were to employ her as a teacher for the school year 2008-2009 and to compensate her in accordance with the adopted salary schedule. Appellant does not claim that the Pickens District breached those terms.

Second, the contract contained no terms transforming the duty of care under the law of torts into a contractual obligation. The Pickens District had no contractual duty to protect Appellant from harm, to intervene in her disagreements with other employees, or to protect her in any other way from normal workplace issues.

Third, the contract contained no extraordinary provision requiring the Plaintiff District to inform Appellant of its procedures for resigning from her employment.

In fact, the Pickens District did not terminate Appellant’s employment; her contract of employment expired of its own accord at the end of the contract period. Appellant’s complaint that she was fraudulently told to write a resignation letter refers to the procedure adopted by the Pickens District for the protection of departing teachers like Plaintiff, as discussed *supra* at pp 17-19. The fact that the Pickens District obtained a

resignation letter from her did not change or breach the terms of Appellant's employment with the Pickens District and did not result in any pecuniary loss to Appellant. The simple fact is that the Pickens District employed Appellant as a teacher until the end of the contractual period; it owed no additional contractual duties to her and did not breach its contract with her.

Aside from the fact that the Pickens District did not breach its contract, Appellant makes no attempt to allege or prove that the District fraudulently intended to breach its contract or that its alleged breach was accompanied by a separate fraudulent act. First, the Pickens District did not misrepresent the terms of Appellant's employment or the means by which it ended, as is fully discussed *supra* at pp 17-19. Appellant speculates, but provides no evidence to prove that the Pickens District acted dishonestly or unfairly regarding her in connection with the end of her employment contract. As the South Carolina Court of Appeals noted in the *D.R. Horton* case when it found no evidence of dishonesty or unfair dealings in the contractual transaction, "more is required than mere speculation to withstand [the defendant's] motion for summary judgment." *D.R. Horton, Inc.*, 398 S.C. at 556, 730 S.E.2d at 355.

Second, the "fraudulent acts" Appellant alleges accompanied the breach are not independent acts occurring prior to, contemporaneous with, or subsequent to the breach, but rather the same acts she contends amounted to the breach. They are, therefore, insufficient proof of a fraudulent act accompanying the alleged breach. In the *D.R. Horton* case, in which the developers of real estate asserted that a purchaser of the property committed breach of contract accompanied by a fraudulent act when it refused to close the sale, the Court of Appeals observed:

[The developers] maintain [the purchaser's] shifting reasons for refusing to close on [the property], reversing positions as to whether conditions precedent had been satisfied, its strained and self-serving construction of the parties' contract, and [the purchaser's] written threat to tie up the property if [the purchaser] did not get its way support this cause of action. Even if we were to assume these qualify as evidence of [the purchaser's] fraudulent intent in breaching the contract, they are not evidence of an independent fraudulent act which accompanied the breach. *See Minter v. GOCT, Inc.* 322 S.C. 525, 530, 473 S.E.2d 67, 70-71 (Ct.App. 1996) (holding evidence corporation opened quick oil-change facility without offering real estate developer contractual right of first refusal despite being put on notice by developer that such conduct would be regarded as breach, while possibly evidence of corporation's fraudulent intent in breaching the contract, was not evidence of an independent fraudulent act which accompanied the breach).

Id. at 556, 730 S.E.2d at 355-56.

The fact that the Appellant was dissatisfied with the handling of her various complaints and grievances at the end of her employment with the Pickens District does not make the Pickens District's handling of those complaints and grievances fraudulent; nor were they connected to the ending of her employment contract, except in a temporal sense. The Pickens District explained the various situations to the Appellant exactly as the Pickens District believed the situations to be and handled her complaints accordingly, albeit not to Appellant's satisfaction. There is no evidence that the Pickens District acted dishonestly or fraudulently, and, thus, there can be no finding of either a fraudulent intent or a separate fraudulent act.

In order to avoid summary judgment on this claim, Appellant must produce evidence that the Pickens District breached its contract with Appellant, that its breach of the contract was dishonest and done with the intent to deceive Appellant, and that it perpetrated an independent fraudulent act against Appellant in connection with its breach of the contract. The Appellant has no evidence to prove any of these elements, and,

accordingly, the order granting summary judgment to the Pickens District on the Fourth Cause of Action for breach of contract accompanied by a fraudulent act should be affirmed.

C. The Fourth Cause of Action does not include a claim for breach of contract separate from the claim for breach of contract accompanied by a fraudulent act, and Appellant is barred from raising new arguments about her contract that were not presented to the trial court.

For the first time any where in these proceedings, Appellant argues in her brief that she asserted a separate claim of breach of contract within the Fourth Cause of Action, which she entitled “Breach of Contract Accompanied by Fraudulent Act.” Complaint ¶¶ 68-72. Appellant offers new arguments that by allegedly failing to comply with crime reporting statutes and the Safe School Climate Act, the Pickens District breached “implied statutory obligations” in her teaching contract. She further argues that by allegedly failing to act in good faith and fair dealing, the Pickens District breached a covenant of good faith and fair dealing implied in her teaching contract. Appellant’s novel arguments cannot be considered by this court because they were not raised to or considered and ruled upon by the trial court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995).

Moreover, Appellant did not assert a simple breach of contract action; in her Fourth Cause of Action she asserted an action for breach of contract accompanied by fraudulent act, which the trial court dismissed, in part because it found the Pickens District did not breach its contract with Appellant. *See* Order at p. 18. Appellant’s newly asserted “breach of contract” action is one that is not separate and apart from her cause of action for breach of contract accompanied by fraudulent action. To the contrary, the only

breach of contract alleged within her Complaint is subsumed within the action for breach of contract with fraudulent act.

Appellant is prohibited from raising these new and novel arguments at this stage of her case to salvage what she can from her claim that the Pickens District is liable for breach of contract accompanied by fraudulent act. She did not present these arguments to the trial court, and the trial court did not consider or rule upon them. Therefore, they cannot be considered by this court.

D. Culler is entitled to summary judgment because Appellant did not and cannot establish that he intentionally inflicted severe emotional distress on her.

Appellant alleges that during the entire time she was employed as a teacher at Edwards Middle School and continuing for more than another year after she left that employment, until January 2011, Culler, as principal of the school, “carried out a ruthless and intentional campaign to severely inflict emotional distress upon the Plaintiff through threats, harassment, gestures, movements, stalking, intimidating and preying upon Plaintiff’s sensibilities, weaknesses and personality. . . .” Complaint ¶ 90. Appellant described a scenario in which Culler acted inappropriately in virtually every instance in which she was in his presence because he wanted her “to leave the school [and] to severely damage and harm her emotionally, physically and otherwise.” *Id.*

In her Complaint, Appellant specifically complains of two incidents: (1) being required to write a resignation letter on the last day of school, which is also the basis of other claims against the Defendants; and (2) receiving a letter in January 2011 from Culler which she viewed as threatening because it suggested she was defaming him and because it bore a “King of Heart” stamp saying “LOVE.” Complaint ¶¶ 91-92. Based on

these allegations, the trial court granted summary judgment to Culler on the intentional infliction of emotional distress cause of action, finding Appellant failed to produce evidence that these incidents constituted intentional infliction of emotional distress.

In her brief to this court, Appellant also refers to other instances which she now argues constituted outrage: that Culler “leered” at her and was “unduly argumentative and aggressive with her”; that Culler “chose” a time when Appellant returned to school after surgery “with a tube sticking out of her and in a weakened condition” to tell her she would have to continue serving as the yearbook advisor; that Culler refused to discipline Hudak, another teacher, after Hudak confronted Appellant for holding a student in her class past the end of the class period, causing the student to miss much of Hudak’s class; that Culler did not properly handle the student discipline and reporting of the alleged “sexual assault” of her by a student; and that Culler made false statements about Appellant that caused her not to be employed in other school districts. Brief of Appellant pp 35-36.

The tort of intentional infliction of emotional distress, or outrage, requires proof by Appellant of the following elements:

- (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” so as to exceed “all possible bounds of decency” and must be regarded as “atrocious, and utterly intolerable in a civilized community;”
- (3) the actions of the defendant caused plaintiff’s emotional distress; and
- (4) the emotional distress suffered by the plaintiff was “severe” and such that “no reasonable man could expect to endure it.”

Hansson v. Scalise Builders of S.C., 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007). In South Carolina, the courts apply a heightened burden of proof to the second and fourth elements, noting “the widespread reluctance of courts to permit the tort of outrage to become a panacea for wounded feelings rather than reprehensible conduct.” *Id.* at 356-57, 650 S.E.2d at 71, quoting *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 171, 321 S.E.2d 602, 611 (Ct.App.1984), *rev'd on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985). South Carolina courts have proven reluctant to find either such oppressive and atrocious conduct or the level of extreme emotional distress that would warrant a recovery for the tort of outrage.

Appellant asserts that Culler behaved in an egregious and atrocious manner toward her throughout her employment and after it concluded. However, she did not produce evidence sufficient to establish the first, second, or fourth elements of the tort of intentional infliction of emotional distress.

1. Appellant produced no evidence that Culler intentionally or recklessly inflicted severe emotional distress on her.

Appellant produced no evidence that Culler “intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct.” She described two instances of allegedly egregious conduct on the part of Culler in her Complaint; she added other instances in her brief to this court that were not presented or addressed below.

The first instance of allegedly egregious conduct Appellant complained of in her Complaint occurred when Culler “continually berated and preyed upon her, demanding a letter of resignation and threatening her with the loss of her teaching credentials” if she did not write such a letter. However, according to Culler and Bridges, who witnessed

these interactions, Culler's intention was to obtain written confirmation from Appellant that she truly intended to leave the school before he began interviewing for a replacement for her. Culler was also trying to protect her from what he believed might be possible action by the State Department of Education for abandoning her position if she stopped working without notice. The only competent evidence supports the conclusion that Culler did not intend to cause Appellant any distress.

Appellant also alleges that on her last day at the school, Culler "arranged to make [Appellant] come back into the school building, go into a room, which was supposed to be locked, to write her letter of resignation and knowing that the room was unlocked, he burst in on [Appellant] and to further inflict emotional distress on her demanding that she sign the letter immediately, which she was forced to do." Complaint ¶ 91. The only evidence of Culler's intention and state of mind at this point, however, is from Culler himself who said he went back into the room where Appellant was writing her resignation letter "because I heard she was upset and I did not want an employee of mine in there upset." Culler Dep. p. 96, line 25-p. 97, line 3. Culler asked Appellant if writing the letter was upsetting her, to which she replied that she wanted to be left alone, so he left the room. Culler Dep. p. 97, lines 4-14.

In the second instance of allegedly egregious conduct described in the Complaint, Appellant claims that a letter written by Culler requesting that she stop falsely indicating on her applications for employment in other school districts that Culler's educator certificate was being reviewed by the State Department of Education because of

misconduct,⁵ was outrageous and atrocious. Culler's letter was short, mild, and to the point. *See* Noorai Dep. Ex. 18. Appellant claims that Culler's intent to cause her emotional distress is somehow evidenced by the use of a stamp containing the word "LOVE" on the envelope in which the letter was mailed. Complaint ¶ 92. At the same time, however, she speculated that Culler had someone else address the letter "in order to disguise . . . to ensure that I would open it, he also knew full well which stamp would have been used to cause me the most distress." *Id.* at 224:24-225:3. In fact, Appellant does not know who addressed the letter or who chose the stamp. Her speculation about Culler's intent, derived from the appearance of the envelope, cannot be credited.

Appellant failed to produce competent, admissible evidence on the element of intent. Her speculation does not create a genuine issue of material fact that Culler "intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct," *Hansson*, 374 S.C. at 356, 650 S.E.2d 70.

2. Appellant produced no evidence of conduct by Culler that was so extreme and outrageous that it exceeded all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community.

South Carolina courts, following the guidelines of the Restatement, have deliberately required a heightened burden of proof on the element of outrageous conduct and limited recovery to those extraordinary cases where the defendant's conduct is

⁵ Appellant wrote this statement on several of her employment applications in 2011, *see, e.g.*, Noorai Dep. Ex. 23 at p. 4, based on a complaint she herself had filed in 2010 with the State Department of Education, *see* Noorai Dep. Ex. 19. In fact, the State Department of Education had investigated Plaintiff's complaint and closed the case in 2010 without taking any action. *See* Att. 2 to Pickens District's Memorandum of Law in Support of Summary Judgment.

extreme and utterly intolerable in a civilized society. This cause of action is not intended to redress rude or harassing behavior or to compensate for hurt feelings. Whether a defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery is a question for the court as a matter of law. *McSwain v. Shei*, 304 S.C. 25, 402 S.E.2d 890 (1991); *Fleming v. Rose*, 338 S.C. 524, 537, 526 S.E.2d 732, 739 (Ct.App. 2000), *rev'd on other grounds*, 350 S.C. 488, 567 S.E.2d 857 (2002).

In *Gattison v. S.C. State Coll.*, 318 S.C. 148, 456 S.E.2d 414 (Ct.App. 1995), the Court of Appeals catalogued a number of cases and circumstances in which the plaintiffs failed to allege or prove sufficiently outrageous conduct to support liability, including, but not limited to, the following:

- Retaliatory discharge from employment, *Corder v. Champion Rd. Mach. Int'l Corp.*, 283 S.C. 520, 324 S.E.2d 79 (Ct.App. 1984);
- Investigation by independent contractor for employer in which the investigator lied to employees and asked them to take an illegal voice stress analysis test, *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 171, 321 S.E.2d 602, 611 (Ct.App.1984);
- Verbally and abusively accusing plaintiff that he owed hundreds of thousands of dollars in taxes and that he filed fraudulent tax returns, *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 8309 (Ct.App. 1986);
- Conduct by employer in which he continually denied employee's medical excuses and willfully engaged him in verbal arguments about his absences, despite knowing of plaintiff's inability to talk due to vocal chord surgery, *Butts v. AVX Corp.*, 292 S.C. 256, 355 S.E.2d 876 (Ct.App. 1987);
- Conduct by employer, who was allegedly plotting to build a case to fire plaintiff, in which employer increased plaintiff's job responsibilities but removed her authority, and also changed the way she should perform her job and then accused her of not following instructions, *Wright v. Sparrow*, 298 S.C. 469, 381 S.E.2d 504 (Ct.App. 1989);
- Reference by newspaper to plaintiff's murdered daughter as a drifter and high school drop-out who had no family support, *Holtzscheiter v. Thomson*, 306 S.C. 297, 411 S.E.2d 665 (1991);

- Supervisor ridiculing speech impediment of plaintiff, who had cerebral palsy, and threatening to fire him, *Shipman v. Glenn*, 314 S.C. 327, 443 S.E.2d 921 (Ct.App. 1994); and
- Doctor incorrectly informing patient's daughter that patient had died, *Strickland v. Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct.App. 1994).

After this extensive review of precedent, the Court of Appeals in *Gattison* determined that the plaintiff's allegations – that his independence as an internal auditor was improperly limited; that he lost support, staff, and funding for his office; that his complaints of irregularities and violations were ignored by his supervisors and by the Board of Trustees; that his supervisors failed to provide information to him, misplaced his travel vouchers, taunted him and told him he was going to be fired; that he was humiliated at meetings; and that his work environment became hostile – also did not rise to the level of conduct required for outrage. “While the facts *Gattison* alleges may demonstrate unprofessional, inappropriate behavior, they fall short of conduct that exceeds all possible bounds of decency and is atrocious and utterly intolerable in a civilized society.” *Gattison*, 318 S.C. at 157, 456 S.E.2d at 419. *See also Roberts v. Dunbar Funeral Home*, 288 S.C. 48, 51-52, 339 S.E.2d 517, 519 (Ct.App. 1986) (even where a defendant, knowing that the plaintiff is fragile and emotional, acts with extreme insensitivity and with “a hard and inflexible business posture” toward the plaintiff, he does not commit the tort of outrage).

The case law in South Carolina that has developed since the *Gattison* case is replete with other examples of circumstances where defendants may have acted with tortious or even criminal intent, with malice, or even with “a degree of aggravation which would entitle the plaintiff to punitive damages for another tort,” Restatement (Second) of

Torts § 46 cmt. d (1977), applied in *Ford v. Hudson*, 276 S.C. 157, 276 S.E.2d 776 (1981) and *Hudson v. Zenith Engraving Co.*, 273 S.C. 536, 259 S.E.2d 812 (1979), but which did not rise to the level of intentional infliction of emotional distress. *See, e.g., Melton v. Medtronic, Inc.*, 389 S.C. 641, 698 S.E.2d 886 (2010) (shortly before patient's scheduled surgery and after patient questioned cardiologist's care and recommendations, cardiologist acted insensitively in telling patient "to get another doctor . . . and don't even come back to my group," but did not commit tort of intentional infliction of emotional distress).

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt.

Restatement (Second) of Torts § 46 cmt. d (1965).

Appellant's descriptions of Culler's conduct do not suggest behavior that "exceeds all possible bounds of decency and is atrocious and utterly intolerable in a civilized society." Those descriptions include the following:

- Culler "made [her] uncomfortable from the very beginning" because he was argumentative and aggressive toward her, Noorai Dep. p. 36, lines 8-17;
- After Culler allegedly winked at Appellant in the office, she responded to a question from Bridges about whether Appellant had spoken with him by saying, "I looked at her and with tears in my eyes, I told her, 'All he did was wink at me.'" Noorai Dep. p. 150, lines 16-18; p.150, line 23-p. 151, line 1;
- When Appellant spoke to Culler in the parking lot about not signing her contract at the end of the school year, he spoke to her in "an abrasive tone" that caused her to catch her breath. Noorai Dep. p. 151, lines 14-19;
- "A principal who constantly told me what he was going to force me to do [referring to serving as the yearbook sponsor] was not professional or appropriate

. . . . I felt like I was being singled out for being stupid or incompetent or not doing what was being asked of me.” Noorai Dep. p. 152, line 24-p. 153, line 6;

- Culler referred to her as “the little writing teacher” and addressed her in “a belittling manner,” which she felt was not appropriate. Noorai Dep. p. 153, lines 10-13;
- After a meeting in which Culler tried to coax her into signing her contract for the next year by telling her if she signed the contract and found another job, they would let her out of the contract, she “left crying my eyes out the whole way home. . . . I was balling my eyes out. It was the most horrible, most painful thing. But there was no way I could stay there.” Noorai Dep. p. 153, line 14-p. 154, line 7; and
- The letter from Culler requesting that Appellant stop stating that his educator certificate was under review “because of misconduct” caused Appellant to feel threatened and unsafe and “his choice of postage stamp was very upsetting to me . . . and very unprofessional.” Noorai Dep. p. 223, line 24-p. 224, line 4.

In describing the scene on June 4, 2009, when Culler and Bridges insisted that Appellant finally submit a written notice of resignation so that they could begin interviewing for a replacement for her position, Appellant describes a scenario which is unrecognizable to either of them. She depicts a scene in which Culler harassed her, screamed at her, took pleasure (or so she surmised) in frightening her, and even appeared to have had an erection while talking with her in Bridges’ office where Appellant was finally writing her resignation letter. Notably and tellingly, Appellant did not tell anyone at the time that Culler had an erection in her presence; nor did she include that detail in a 25-page detailed statement she provided to Pew a few weeks later. *See* Noorai Dep. Ex.15. Bridges also stated that Appellant made no complaint to her at that time, or any other, of any kind of hostility or sexual harassment by Culler. Bridges Aff. ¶ 9.

To the contrary, Culler testified that he opened the door to Bridges’ office to check on Appellant because he had been told that Appellant was upset and he “did not want an employee of mine in there upset.” Culler Dep. p. 96, line 25-p. 97, line 3. He

also testified that he asked her if writing the letter was making her upset, to which she said she just wanted to be left alone, and he left the room. Culler Dep. p. 9, lines 4-14.

Bridges' testimony supports that of Mr. Culler. She was aware that Appellant was upset about having to write the resignation letter, which Bridges did not understand since Appellant had already decided not to accept the offer of employment for the next school year. Bridges Aff. ¶ 8. Bridges confirmed that Culler asked her to check on Appellant because she seemed upset, and that Appellant told her that writing the letter made her upset. According to Bridges, Appellant said nothing to her "about feeling uncomfortable around Mr. Culler and made no complaints to me about Mr. Culler's behavior, or any alleged hostility or sexual harassment by him on that day or at any other time." *Id.* at ¶ 9. Bridges also stated that Culler acted in a polite and solicitous manner when he earlier encouraged Appellant to sign her contract to protect against being unemployed, *id.* at ¶ 7. Bridges was not aware that Appellant was upset by this conversation, *id.*, despite Appellant's claim that she "left crying her eyes out." Noorai Dep. p. 154, lines 2-3.

Appellant's additional arguments in her brief to this court that Culler intentionally or recklessly acted in an outrageous manner toward her are likewise ineffectual. As an initial matter, none of these additional incidents argued in Appellant's brief were presented to the trial court as grounds for the claim of intentional infliction of emotional distress. They cannot, therefore, be considered by this court in connection with this claim. In addition, such alleged conduct, if true, is not so extreme or outrageous as to be beyond all possible bounds of decency and regarded as atrocious and utterly intolerable in a civilized community.

For example, Appellant's claim that Culler "chose" a time when Appellant returned to school after undergoing surgery toward the end of the school year "with a tube sticking out of her and in a weakened condition" to tell her she would have to continue serving as the yearbook advisor, Appellant's Brief at p. 35, does not describe extreme and outrageous behavior. This is particularly true given Culler's obligation to ensure that his school, in a time of budgetary crisis, was properly staffed for the following year.

Appellant's additional claim that Culler acted outrageously when he did not discipline another teacher, Hudak, for confronting Appellant in a disagreement over whether Appellant should have kept a student in her class, making the student late to Hudak's class, *id.* at p. 36, is likewise insufficient to establish the tort of outrage. Further, these same facts underlie Appellant's cause of action against Hudak himself for assault, which the trial court dismissed on summary judgment and which Appellant does not appeal.

Appellant's additional claim that Culler did not properly handle the student discipline and reporting of the alleged "sexual assault" of her by a student, *id.*, ignores the undisputed fact that this incident was handled by school personnel other than Culler; Culler was neither involved nor consulted in the handling of this incident. Culler Dep. p. 35, lines 1-18; Palis Aff. ¶¶ 3-5. Moreover, the trial court granted summary judgment to the Pickens District on Appellant's First Cause of Action based on these same factual allegations. Appellant does not appeal the dismissal of that claim and is, therefore, bound by the trial court's findings that its employees violated no duty to Appellant in its handling of the incident.

Finally, “the tort of outrage was not intended to replace existing causes of action but was intended as a remedy for tortious conduct ‘where no remedy previously existed.’ F. Patrick Hubbard and Robert L. Felix, *The South Carolina Law of Torts* 438 (3rd Ed. 2004).” *Doe v. Erskine Coll.*, No. 8:04-23001RBH, 2006 WL 1473853, at *14 (D.S.C. May 25, 2006) (unpublished opinion). Most of the acts Appellant claims are outrageous conduct form the factual basis for other causes of action that she asserted or could have asserted. Her remedy is in other causes of action, not in the tort of outrage.

An analysis of Appellant’s evidence in the light most favorable to her, and considering the legal precedent for this tort in South Carolina, demonstrates that Appellant has not established that Culler’s actions were so extreme or outrageous as to be beyond all possible bounds of decency and regarded as atrocious and utterly intolerable in a civilized community.

3. Appellant produced no evidence that she suffered from severe emotional distress such that no reasonable person could be expected to endure it.

In addition to failing to establish extreme and outrageous conduct by Culler, Appellant also provides no evidence that the emotional distress she suffered was so severe and extreme that no reasonable person could be expected to endure it.

Emotional distress . . . includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.

Hansson, 374 S.C. at 359 fn 3, quoting Restatement (Second) of Torts § 46 cmt. j. As with the element of outrageous conduct, South Carolina courts apply a heightened burden

of proof to the element of severe emotional distress. *Hansson*, 374 S.C. at 356, 650 S.E.2d at 71. Moreover, “[t]he distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge.” Restatement (Second) of Torts § 46 cmt. j.

Thus, evidence that property owners experienced high blood pressure and digestive problems and that they became “emotionally ill” and lost weight as a result of a dispute and lawsuit over the use of their property is insufficient to establish severe emotional distress. See *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 169-70, 708 S.E.2d 218, 223-24 (Ct.App. 2011). Similarly, evidence that an employer’s ridicule of his employee who had cerebral palsy and his threats to fire her caused the employee “to become emotionally upset, distressed, and worried, caused her to be physically ill to the point that she had to leave work early that day, caused her to live in constant fear of [her employer] and what he might do to injure her or harm her career, and adversely affected her personal life and her ability to function in her job,” fell “far short” of the kind of severe emotional distress required in a cause of action for intentional infliction of emotional distress. *Shipman v. Glenn*, 314 S.C. 327, 328, 443 S.E.2d 921, 922-23 (Ct.App. 1994). See also *Hansson*, 374 S.C. at 359-60, 650 S.E.2d at 72 (evidence that plaintiff suffered sleeplessness and grinding of his teeth at night was insufficient to establish severe emotional distress); *Ludwick v. This Minute of Carolina, Inc.*, 283 S.C. 149, 154, 321 S.E.2d 618, 621 (Ct.App. 1984) (humiliation and embarrassment at being fired is not sufficient proof of emotional distress so severe that no reasonable person could be expected to endure it).

Appellant's distress neither reached the level of severity contemplated in the case law, nor was it reasonable or proportionate to Culler's allegedly objectionable behavior. She testified that she felt "uncomfortable," Noorai Dep. p.36, line 8; she had "tears in my eyes," *id.* at p.150, line 25-p. 151, line 1; she had to "catch her breath," *id.* at p. 151, line 14; she felt she was "being singled out," *id.* at p. 153, lines 4-5; she felt Culler belittled her, which was "not appropriate," *id.* at p. 153, lines 11-13; she left a meeting with Culler and Bridges "crying my eyes out the whole way home. . . . I was balling my eyes out. It was the most horrible, most painful thing." *Id.* at p. 153, line 14-p. 154, line 6.

Appellant provided perhaps the most complete summary of her distress in recalling the last day of school, June 4, 2009, when the other teachers asked that she join them in the end of year celebration for the teachers who, like Appellant, were leaving the school:

And I broke into tears at that instant because I had realized what that threat [about possibly losing her teaching certificate] meant. And I said, "No, I cannot." And I turned and I walked out of the school and got into my vehicle to cry my eyes out because what was happening and the unfairness of it and how everything was escalating and had gotten to this point and how unsafe and unprofessional a place that school environment was and that I could no longer stay there. And I cried and I cried.

Id. p. 164, lines 9-18.

Appellant's response was, in the first place, not reasonable or proportionate to Culler's allegedly offensive behavior, particularly since her submission of the resignation letter should have eliminated her fear of losing her teaching certificate. If she were a person with a "peculiar susceptibility to such distress," she certainly did not establish that Culler knew that and took advantage it by allegedly harassing her for the requested resignation letter. *See* Restatement (Second) of Torts § 46 cmt. j.

Indeed, Appellant's emotional distress, although she described it vividly, was not any more severe than any other person's distress at experiencing what is perceived as unfair treatment on a job. Further, Appellant's current claim that she suffers from post-traumatic stress syndrome, depression, or anxiety is without competent evidentiary support. She has produced no expert opinion to support a diagnosis of any emotional or mental condition, which requires special knowledge, skill, experience or training that Appellant, as a high school English teacher, does not possess. Appellant's lay opinion as to her mental condition and diagnosis is not competent to support this claim. Rule 701, S.C. Rules of Evidence.

The evidence, viewed in the light most favorable to Appellant, does not support a conclusion that the distress derived from the circumstances was so severe that a reasonable person could not be expected to endure it. A reasonable person would not have been justified in reacting, and they do not react, in such a highly emotional manner to the kind of run-of-the-mill, on the job conflicts described by Appellant. The vagaries of day-to-day interactions among staff and students in a public school can certainly create "fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea," but only where such emotions are severe does liability for intentional infliction of emotional distress attach. *See Hansson*, 374 S.C. at 359, fn 3, quoting Restatement (Second) of Torts § 46 cmt. j. Appellant's distress was driven by her own imagination rather than Culler's actions, and can only be viewed as exaggerated. Appellant's evidence of her distress does not, therefore, establish that it was so severe that no reasonable person could be expected to endure it.

Appellant fails to produce evidence to satisfy the heightened burden of proving intentional infliction of emotional distress by Culler. The decision by the trial court to dismiss the Seventh Cause of Action against Culler should be affirmed.

E. The circuit court correctly granted summary judgment to the Respondents after hearing arguments from counsel and reviewing written submissions by the parties.

Appellant argues that the order of the trial court should be reversed and the case remanded for another hearing because the presiding judge did not hear oral arguments on every cause of action. Appellant asserts that she had no opportunity to prepare a brief in opposition to the Respondents' motions for summary judgment, and the trial judge's action in terminating the hearing and ruling on the written submissions of the parties deprived her of her right to be heard, in violation of her constitutional due process rights. Appellant's argument should be rejected.

First, at the April 7, 2014 hearing, the presiding judge, after hearing oral arguments on some of Appellant's claims, solicited but received no objections from counsel to forgoing further oral argument in favor of his review of the written submissions by all parties. Transcript of hearing at p. 20, line 17-p. 21, line 23. Having consented to this procedure, Appellant cannot now argue that the trial judge erred in following it.

Second, Appellant submitted a sworn affidavit to the trial court for consideration. *See* Aff. of Appellant dated December 6, 2013. This affidavit contained eight pages outlining Appellant's claims and factual allegations. Her counsel represented to the court that this affidavit "explains her position." Transcript of hearing at 21:10-11. The trial court confirmed that he "fully considered" her affidavit. Order filed May 13, 2014.

Finally, Appellant's argument that she lacked sufficient time to prepare a written response to the summary judgment motions is incorrect. These Respondents initially filed a motion for summary judgment on January 29, 2013, more than a year before the April 7, 2014 hearing. A hearing on their initial motion was scheduled for February 19, 2013, but was continued to allow additional discovery sought by Appellant's then-attorney. *See* Order dated February 15, 2013. Subsequently, by order filed June 6, 2013, the circuit court granted that attorney's request to be relieved as counsel, and, in acknowledgement of Respondents' concern that the case would be unduly delayed by the withdrawal of Appellant's counsel, gave Appellant 60 days within which to obtain new counsel. *See* Order dated June 6, 2013. Following the expiration of that time, these Respondents filed an amended motion for summary judgment on August 13, 2013. *See* Respondents' Amended Motion for Summary Judgment dated August 13, 2013. A hearing on the amended motion was scheduled for October 24, 2013, but was continued on the request of Appellant's new counsel to allow time for him to familiarize himself with the case. *See* Order dated October 7, 2013. Another hearing was scheduled for December 9, 2013, but it was also continued at the request of Appellant's counsel because Appellant was not available on that date. *See* Order dated December 5, 2013. Appellant, thus, had more than a year after the filing of the initial summary judgment motions, six months after the filing of the amended summary judgment motion, and at least four months after her new counsel appeared on her behalf to prepare for the hearing on April 7, 2014.

Appellant had a full and fair opportunity to be heard and, moreover, consented to the trial court's procedure. She provides this court with no legally justifiable reason to

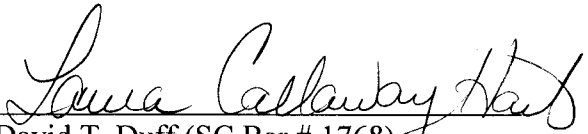
remand the case for another hearing on the Respondents' motions for summary judgment. These Respondents request that this court affirm the findings and order of the trial court.

CONCLUSION

The Respondents, Pickens District and Gary Culler, respectfully submit that the evidence and any inferences to be drawn from it, viewed in the light most favorable to Appellant, do not establish that they can be liable to Appellant on any of the causes of action asserted by Appellant against them. They request that the Court of Appeals affirm the grant of summary judgment on the grounds stated by the circuit court.

Respectfully Submitted:

DUFF, WHITE & TURNER, L.L.C.

By: 

David T. Duff (SC Bar # 1768)
Laura Callaway Hart (SC Bar #2766)
P.O. Box 1486
Columbia, SC 29202
Telephone: (803) 790-0603
Facsimile: (803) 790-0605

Attorneys for Respondents School District
of Pickens County, Gary Culler, Donald
Boggs, Richard Hudak, Marilyn Raines, and
Dr. Kelly Pew

February 6, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

FEB 06 2015

SC Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2011-CP-37-279
Appellate Case No. 2014-001282

Mariam R. Noorai,

Appellant,

v.

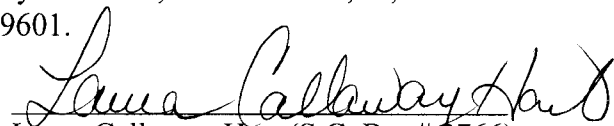
School District of Pickens County,
School District of Oconee County,
and Gary Culler, Donald Boggs, Richard
Hudak, Ernestine Williams, Marilyn
Raines, and Dr. Kelly Pew, in their
individual capacities,

Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents School District of Pickens County, Gary Culler, Donald Boggs, Richard Hudak, Marilyn Raines and Dr. Kelly Pew on Mariam R. Noorai by depositing a copy of it in the United States Mail, postage prepaid, on February 6, 2015, addressed to her attorney of record, R. Mills Ariail, Jr., 11 North Irvine Street, Suite 11, Greenville, South Carolina 29601.

February 6, 2015



Laura Callaway Hart (S.C. Bar #2766)
DUFF, WHITE & TURNER, LLC
P. O. Box 1486
Columbia, South Carolina 29202
(803) 790-0603

Attorney for Respondents School District of
Pickens County, Gary Culler, Donald Boggs,
Richard Hudak, Marilyn Raines and Dr. Kelly
Pew

(CONTINUED ON NEXT PAGE)

Other Counsel of Record:

R. Mills Ariail, Jr., Esq.
Law Office of R. Mills Ariail, Jr.
11 North Irvine Street, Suite 11
Greenville, South Carolina 29601
(864) 232-9390
Attorney for Appellant

Thomas K. Barlow, Esq.
Childs & Halligan, P.A.
P. O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035
Attorney for Respondents School District of
Oconee County and Earnestine Williams

DUFF, WHITE & TURNER, L.L.C.

ATTORNEYS AND COUNSELORS AT LAW

DAVID T. DUFF*†
ANDREA E. WHITE
MEREDITH L. SEIBERT
LINDSAY ANNE THOMPSON*
JOSEPH P. BIAS
WILLIAM C. FREEMAN

POST OFFICE BOX 1486
COLUMBIA, SOUTH CAROLINA 29202

3700 FOREST DRIVE, SUITE 404
COLUMBIA, SOUTH CAROLINA 29204
WWW.DWTLAWFIRM.COM

TELEPHONE
803 / 790-0603

FACSIMILE
803 / 790-0605

OF COUNSEL
M. JANE TURNER
LAURA CALLAWAY HART

sender's email address
lhart@dwtlawfirm.com

* CERTIFIED SPECIALIST IN EMPLOYMENT AND LABOR LAW
† CERTIFIED CIVIL ARBITRATOR AND MEDIATOR
* ALSO ADMITTED IN TENNESSEE

February 6, 2015

RECEIVED

FEB 06 2015

SC Court of Appeals

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Mariam R. Noorai v. School District of Pickens County, et al.
C.A. No. 2011-CP-37-279
Appellate Case No. 2014-001282

Dear Ms. Kitchings:

Enclosed for filing is the Initial Brief of Respondents School District of Pickens County, Gary Culler, Donald Boggs, Richard Hudak, Marilyn Raines and Dr. Kelly Pew ("Respondents") and Proof of Service, along with Respondents' Designation of Matter to Be Included in The Record on Appeal and Certificate of Counsel in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,



Laura Callaway Hart (S.C. Bar # 2766)

DUFF, WHITE & TURNER, LLC

P. O. Box 1486

Columbia, South Carolina 29202

(803) 790-0603

Attorney for Respondents School District of Pickens
County, Gary Culler, Donald Boggs, Richard Hudak,
Marilyn Raines and Dr. Kelly Pew

Enclosures

The Honorable Jenny Abbott Kitchings

February 6, 2015

Page 2

c: Via U.S. Mail
R. Mills Ariail, Jr., Esq.
Law Office of R. Mills Ariail, Jr.
11 North Irvine Street, Suite 11
Greenville, South Carolina 29601
(864) 232-9390
Attorney for Appellant

Via U.S. Mail
Thomas K. Barlow, Esq.
Childs & Halligan, P.A.
P. O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035
Attorney for Respondents School District of
Oconee County and Earnestine Williams