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

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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, Earnestine Williams, Marilyn Raines and Dr. Kelly Pew in their individual capacities,

Of whom the School District of Pickens County and Gary Culler

are ....Respondents.

FINAL BRIEF OF APPELLANT MARIAM R. NOORAI

R. Mills Arial, Jr.
Law Office of R. Mills Arial, Jr.
11 North Irvine St. Suite 11
Greenville, SC 29601
(864) 232-9390

Attorney for Appellant Mariam R. Noorai

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court erroneously grant summary judgment in favor of the School District of Pickens County, and against Ms. Noorai, on the negligent misrepresentation cause of action, given that Ms. Noorai presented admissible summary judgment evidence in support of each element of this cause of action?

2. Did the Circuit Court erroneously grant summary judgment in favor of the School District of Pickens County, and against Ms. Noorai, on the breach of contract cause of action, given that Ms. Noorai presented admissible summary judgment evidence that Principal Culler and other employees breached the implied covenant of good faith and fair dealing, and the South Carolina statutory provisions, implied by law into her contract?

3. Did the Circuit Court erroneously grant summary judgment in favor of the School District of Pickens County, and against Ms. Noorai, on the breach of contract accompanied by fraudulent acts cause of action, given that Ms. Noorai presented admissible summary judgment evidence not only of a breach of her contract but of conduct by school district employees that amounted to dishonesty in fact and unfair dealing?

4. Did the Circuit Court erroneously grant summary judgment in favor of Principal Culler and against Ms. Noorai on the intentional infliction of emotional distress cause of action, given that Ms. Noorai presented admissible summary judgment evidence of all elements of this claim?

5. Did the Circuit Court, in violation of Rule 56, SCRCP, and Ms. Noorai's state and federal due process rights, commit reversible by terminating the summary judgment

before Ms. Noorai's attorney had the opportunity to make responsive arguments on her behalf?

STATEMENT OF THE CASE

On March 21, 2011, Plaintiff-Appellant Mariam N. Noorai filed a civil action for damages against the following Defendants: the School District of Pickens County ("SDPC"), the School District of Oconee County ("SDOC"), Gary Culler, Donald Boggs, Richard Hudak, Earnestine Williams, Marilyn Raines and Dr. Kelly Pew in the Court of Common Pleas for Oconee County, South Carolina. (Supp. R. p. 2). In this action, the Plaintiff alleged that she was injured by the tortious conduct and breach of contract by the Defendants. The Plaintiff sought to recover damages for these injuries.

The Defendants SDPC, Gary Culler, Donald Boggs, Richard Hudak, Marilyn Raines, and Dr. Kelly Pew filed an Answer on May 18, 2011, denying liability and raising various affirmative defenses. The Defendants SDOC and Earnestine Williams, filed an Answer on April 28, 2011, denying liability and raising various affirmative defenses.

On June 11, 2012, the Plaintiff filed a Second Amended Complaint in the action. (R. p. 9). The Defendants SDPC , Gary Culler, Donald Boggs, Richard Hudak, Marilyn Raines, and Dr. Kelly Pew filed an Answer on June 29, 2012, denying liability and raising various affirmative defenses. (R. p. 30). The Defendants SDOC and Earnestine Williams filed an Answer on June 22, 2012, denying liability and raising various affirmative defenses.

On February 11, 2014, the SDPC, Gary Culler, Donald Boggs, Richard Hudak, Marilyn Raines and Dr. Kelly Pew moved for summary judgment on all claims. On

February 11, 2014 Defendants SDOC and Earnestine Williams also moved for summary judgment on all claims. The matter came before the Honorable J. Cordell Maddox, Jr., Circuit Court Judge, on April 17, 2014 for a hearing. The Circuit Court, however, ended the hearing after hearing argument on only the first two causes of action. By Order filed May 13, 2014, the Court granted summary judgment in favor of all Defendants and against the Plaintiff on all claims. (R. p. 70).

On June 11, 2014, the Plaintiff filed and served a Notice of Appeal.

STATEMENT OF FACTS

In August of 2007, the SDPC hired Mariam R. Noorai to work as an eighth grade English/Language Arts teacher at R.C. Edwards Middle School in Pickens County, South Carolina, for the 2007 to 2008 school year. (Supp. R. p. 40, lines 1-7). The SDPC also tasked her with teaching the yearbook class and with producing the school's yearbook. (R. p. 13, para. 10; Supp. R. p. 41, lines 13-24). Pursuant to her contract with the SDPC, Mr. Noorai received a salary of approximately $40,000 for performing these duties. (R. p. 206 p. 24, lines 5-8). At this time, the SDPC employed Dr. Chuck Pressley as the Edwards principal. (Supp. R. p. 40, lines 5-7).

Ms. Noorai began teaching English and writing to the eighth grade students and also taught the yearbook class. She performed her employment duties in an exemplary and highly professional manner. In February of 2008, however, a student at Edwards sexually assaulted Ms. Noorai. She reported the incident to Dr. Pressley. Under Dr. Pressley's leadership, the school pressed charges against the student and law enforcement arrested him. The student was placed on homebound instruction and Ms. Noorai was relieved from having to teach him again. (R. p. 2, para. 4).

Despite this highly disturbing incident, Ms. Noorai continued to perform her employment duties in an exemplary and highly professional manner. She received high ADEPT teaching standards scores and the yearbook published under her supervision was widely viewed as a success. (R. p. 13 at 11). At the end of the 2007 to 2008 school year, the SDPC offered Ms. Noorai a second employment contract entitled Contract for Employment for the 2008-2009 school year. (R. p. 191). The agreement provided that it was an "Annual First Year" contract as defined by S.C. Code Ann. § 59-26-40; that Ms. Noorai would render teaching services for 190 days for the 2008-2009 school year; and that the SDPC would pay for these services during the "life of this contract. . . ."

She signed the contract. The new contract provided for a salary "right above" $40,000. (Supp. R. p. 45, lines 13-17; Supp. R. p. 59, lines 12-13).

After Ms. Noorai signed this contract, the SDPC announced that the Defendant Gary Culler had been assigned to be the principal at Edwards. Ms. Noorai did not know Mr. Culler before this appointment. (Supp. R. p. 45, line 24-p.46, line 1). The SDPC also changed Ms. Noorai's teaching duties. As she explained in her deposition:

> We were now on an A/B schedule, so it was no longer a semester long course I taught half team six in the fall and team five in the spring. It was then a class where I had to teach an A/B switching schedule. And also the District had required that I was not to teach a writing class. I was to enrich and enhance all English language arts standards for eighth grade and English I.

(Supp. R. p. 46, lines 8-15). Because Ms. Noorai was also required to teach the yearbook class, the new teaching duties placed greater stress on her and required her to give up a daily planning period in order to teach all the classes. (Supp. R. p. 48, lines 1-5). In fact, Ms. Noorai "had the heaviest workload of any core teacher in the school." (Supp. R. p. 49, lines 10-16).

During the 2008 to 2009 school year, the SDPC also employed: Donald Boggs and Mary Bridges as the Edwards assistant principals; Marilyn Raines as the head of the Edwards English Department; and Richard Hudek as an Edwards industrial arts teacher. In addition, the SDPC employed Dr. Kelly Pew as the Assistant Superintendent of Human Resources for the SDPC. (R. p. 12, paras. 4-6, 8-9).

As the 2008 to 2009 school year progressed, Principal Culler began to harass, intimidate, and bully Ms. Noorai in violation of her contract. Principal Culler made Ms. Noorai feel "uncomfortable from the beginning" of their relationship. (R. p. 207 at 36, line 8). Ms. Noorai noticed that Principal Culler looked at her in a "leering" fashion. He also had a strange habit of "cornering" her in a room or a hall when he talked to her, so as to block the exit. In addition, Mr. Culler was "very argumentative" with and "aggressive" toward Ms. Noorai. (R. p. 207 at 36, lines 13-23; Supp. R. p. 55, line 24-p. 56, line 2). Ms. Noorai found Mr. Culler's conduct toward her to be "intimidating" and, eventually, she became "scared" of him. (Supp. R. p. 56, lines 5-12). She decided that the best plan was to avoid him as much as possible. (Supp. R. p. 56, lines 21-23).

As the 2008 school year progressed, Principal Culler's harassment, intimidation, and bullying of Ms. Noorai escalated. The first incident of this behavior arose from a student plagiarizing incident in November of 2008. Following her discovery of plagiarism by the student, Ms. Noorai reported the student to Mr. Boggs for discipline. (Supp. R. p. 60, lines 4-23). Mr. Boggs, however, simply gave the student a "zero" for the assignment and took no further disciplinary action. (Supp. R. p. 63, lines 21-25). Believing that further discipline was warranted, according to discipline policy as written in the R. C. Edwards Middle School Handbook for the 2008-2009 school year, Ms.

Noorai reported the situation to Principal Culler. Although Principal Culler agreed that further discipline was warranted, (Supp. R. p. 67, line 16-p. 68, line 2), he never imposed any further discipline on the student. Instead, Principal Culler told Ms. Noorai that Mr. Boggs was unhappy that Ms. Noorai had complained to Principal Culler. (Supp. R. p. 68, lines 15-21). In this regard, Principal Culler confronted Ms. Noorai and, "in loud, intimating and angry terms denounced the Plaintiff for consulting with Culler after Boggs had 'handled' the student's discipline." (R. p. 13, para. 14).

Despite her conflicts with Principal Culler, Ms. Noorai in December of 2008 signed a letter of intent with the SDPC that indicated that she intended to stay at Edwards. (Supp. R. p. 70, lines 3-4, 12-19). Ms. Noorai nonetheless felt overwhelmed by having to teach 10 classes plus the yearbook class. She considered leaving the Pickens County School District for the Oconee County School District because of her workload. (Supp. R. p. 72, line 24, p. 73, lines 17-23).

As the year progressed, the new and heavier workload imposed on Ms. Noorai began to impact her ability to perform her teaching duties at the highest level. Ms. Noorai expressed concerns about her heavy workload to Marilyn Raines and Principal Culler. (Supp. R. p. 49, lines 11-12). Ms. Raines advised Ms. Noorai to resign from teaching the yearbook class. (Supp. R. p. 49, lines 24-25). Principal Culler also initially seemed sympathetic to Ms. Noorai's work load problems and, in December of 2008, told her he would not force her to be the yearbook adviser for the 2008-2009 school year. (Supp. R. p. 51, lines 16-25, p. 52, lines 1-8). Ms. Noorai took Mr. Culler at his word and thanked him. (Supp. R. p. 52, lines 6-11).

Ms. Noorai nonetheless decided to explore her options and, in January of 2009, applied for a position in the Oconee County School District. (Supp. R. p. 76, lines 1-2). She interviewed with the Oconee County School District on February 10, 2009. (Supp. R. p. 90, lines 4-7).

During the spring semester of 2009, three incidents occurred that underscored Ms. Noorai's concerns that Principal Culler was engaged in a pattern of harassment, intimidation, or bullying toward her and was also allowing others at the school to treat her in the same fashion. On January 27, 2009, during a class change, a male student at Edwards confronted Ms. Noorai in a locker area where the students kept their books. There were stairs "going out on either side" of the stairwell. (Supp. R. p. 91, lines 18-22). This was an area where there had been "past scuffles" and teachers knew "you had to be very vigilant." (Supp. R. p. 92, lines 4-6). The area was "right below Mr. Culler's office" and near the area where Mr. Boggs usually stationed himself during class changes. (Supp. R. p. 128, lines 7-8).

The male student was larger, wider, and taller than Ms. Noorai. (Supp. R. p. 93, lines 5-6). He "began singing a very inappropriate sexually explicit song in which he inserted my name." He kept repeating the lyric "I'm ready to go right now" with her name in the lyrics. (Supp. R. p. 93, lines 11-21).

Ms. Noorai in a loud voice told the student "this is not appropriate. You need to stop." (Supp. R. p. 93, lines 24-25). She expected Mr. Boggs, or some other teacher, to hear her loud voice and rescue her, but "nobody did." (Supp. R. p. 94, line 20). As Ms. Noorai explained in her deposition, however, the student:

> [J]ust kept on, and I was pinned because I was at the stairwell, and I could have fallen down the stairwell. The railing that's between going down and

> going up was at my back. And he came and wrapped himself around me as he's singing these lyrics about being obsessed with me and wanting to have sex right then. And he pinned himself, and I was only slightly able to turn so that it wasn't full frontal contact between his organs, I guess, and mine. . . . And it was very uncomfortable because that was extremely inappropriate. And I was scared about falling down the steps, and there was nothing I could do to stop it.

(Supp. R. p. 94, lines 2-16). Finally, the student "let go, had a smile on his face, and he just walked away." (Supp. R. p. 95, lines 21-22).

Ms. Noorai immediately filed a complaint in Mr. Boggs' office. She filled out a "referral" form describing the incident and explaining that the student had "pinned" then "hugged her" while singing the lyrics. (Supp. R. p. 97, lines 4-24). Although Ms. Noorai did not characterize the incident as a physical or sexual assault in her referral, she considered the incident to be both a physical and sexual assault. (Supp. R. p. 98, lines 18-24).

She missed school the next day. Ms. Noorai did not report the assault to the police because she assumed the school district would do so. (Supp. R. p. 104, lines 2-11).

The student subsequently assaulted another student. Although the student was briefly suspended for this assault, Mr. Culler and Mr. Boggs incredibly allowed the student - after the suspension ended - to return to Ms. Noorai's class without any additional discipline whatsoever. (Supp. R. p. 122, lines 12-17). Having to face in class every day the very person who had sexually assaulted her without being disciplined, Ms. Noorai not surprisingly began to develop symptoms of post-traumatic stress disorder. As she explained in her affidavit:

> At the time that I was sexually assaulted for the second time on January 27, 2009 I followed procedure, reporting it immediately to Mr. Boggs (vice-principal in charge of discipline) in writing as I was supposed to. However, he did nothing about it. Mr. Culler was the new principal. The

> student was not referred to DJJ, to the solicitor, to the sheriff nor to the family court. The student was even allowed to participate back in my class after he was suspended for an assault on another student. The student was never disciplined for his assault on me. This assault was more violent in nature, and, as a result, I started having symptoms of PTSD.

(R. p. 2, para. 5).

The second and third disturbing incidents occurred in April of 2009. Ms. Noorai's health began to decline. Her gall bladder basically stopped functioning. On April 2, 2009, doctors operated on Ms. Noorai for gall bladder problems. (R. p. 3, para. 8). Following this surgery, Ms. Noorai did not return to her teaching duties until April 15, 2009. On her first day back, Principal Culler called her into his office and told her he "had changed his mind" - he would require her to continue teaching the yearbook class for the 2009-2010 year. (Supp. R. p. 165, lines 12-21). He also told her that she "would have a bigger workload because it was a larger class." (Supp. R. p. 149, lines 9-10). He ignored her fragile physical and emotional condition and put more pressure on her. (R. p. 3, para. 8).

On April 23, 2009, Ms. Noorai, in accordance with school policy, kept a student beyond the end of the class period so he would be able to complete an exam. She gave the student a pass to explain his late arrival to his second period shop class with Mr. Hudak. (R. pp. 208-209 at 123, lines 19-25, 124, lines 13-18). On this day, Ms. Noorai was in a very weak and very pale condition as a result of her recent surgery. She still had "a tube sticking out of me." (R. p. 210 at 126, lines 17-18).

Mr. Hudak returned the student to Ms. Noorai with a note that the student would not be accepted to his class. The note also directed Ms. Noorai to send the student the next day. (Supp. R. p. 142, lines 1-4). At the end of the second period, Mr. Hudak, a "big, puffy, muscular, large man," (R. p. 210 at 126, line 14), "stormed into the hallway

outside Plaintiff's classroom doorway, verbally berating and belittling her in front of students. Verbally angered and with the intent to harass and intimidate Plaintiff, Hudak then stormed from the classroom…." (R. p. 17, para. 29). As Ms. Noorai recalled the incident in her deposition:

> And I went down there and he started verbally berating me and screaming at me for being unprofessional for keeping a student. And he just went off and was screaming and shouting as my students were walking into my classroom. . . . He was screaming and shouting. It didn't matter what I said, he didn't hear me. He was gesticulating with his finger. I mean, it was a horrible, screaming, shouting thing. He was so angry that when he stood to leave, because it was getting ready for the late bell to ring . . . , he then stood back, slammed into one of my eighth grade students who was trying to enter my classroom. The girl hit the door and slammed her head, and I had to send another student to get ice for injury that Mr. Hudak caused and completely ignored.

(R. p. 211 at 127, lines 13-25, 128, lines 1-7). Ms. Noorai was quite frightened and "in fear of "Mr. Hudak during this incident. (R. p. 216 at 140, lines 1-5).

The Hudak incident was reported to Mr. Culler. Mr. Culler took no meaningful disciplinary action against Mr. Hudak but simply told Ms. Noorai to avoid him. (R. p. 18, para. 33). Mr. Hudak began sending intimidating emails to Ms. Noorai. (R. pp. 2-3, para. 6). In particular, Mr. Hudak on May 1, 2009, sent Ms. Noorai "a horrible, aggressive, nasty e-mail" that accused her of being unprofessional and further claiming that Principal Culler agreed she had been unprofessional. The email stated:

> You seem to have lost sight that what you did was wrong. Keeping a student out of your class without that permission from that teacher is inconsiderate and unprofessional. . . . And then compounding the offense by putting a student in the middle of conflicting directions is worse.

(Supp. R. p. 153, lines 11-14, p. 154, lines 6-8).

The email upset Ms. Noorai so badly she "almost fainted." (R. p. 213 at 133, lines 17-22). She complained to Principal Culler who told her to stop having contact with

Mr. Hudak. Specifically, he told her "there will be no more contact and no apologies on either side." (R. p. 215 at 139, lines 11-12).

By the end of the school year, Ms. Noorai "had endured so much that ... [she] felt forced to resign and seek employment elsewhere." (R. p. 3, para. 7).

She "suffered both emotional and physical health problems as result of ...[her] treatment at the school as well from ...[her] excessive work load which included being in charge of the yearbook." (R. p. 3, para. 7).

By contract dated May 15, 2009, the SDPC offered Ms. Noorai a "continuing contract" for the 2009 and 2010 school year. The contract required her to indicate her acceptance of the agreement by signing and returning the original to the SDPC superintendent. "(R. p. 217 at 146, lines 15-24).

Ms. Noorai decided that she could not continue her 2008 to 2009 workload for another year. She decided that she had to be relieved of the yearbook duties in order to continue. She told Principal Culler that "if I was going to be required or forced to do yearbook, that I would be unable to sign my contract." (R. p. 220 at 151, lines 18-19). Ms. Noorai also was uncertain as to whether she wanted to return to Edwards for another school year because the environment at Edwards "was no longer a safe environment for me or my students. "(R. p. 221 at 152, lines 12-13).

On May 22, 2009, Mr. Culler summoned Ms. Noorai to his office to discuss whether she would sign the SDPC contract. Despite her misgivings about renewing her contract, Ms. Noorai was still open to signing the contract. As the meeting progressed, however, Principal Culler treated her in a "belittling manner." He called her a "little writing teacher." (R. p. 222 at 153, lines 7-12). He told her to sign the contract but

promised her that if she found another job in a month, he would "let her out" of the contract. The meeting ended on this note. (R. pp. 222-223 at 153, line 23-25, 154, lines 1-2).

By Memorial Day, Ms. Noorai had made her decision that she would *not* sign the contract. (R. p. 223 at 154, lines 6-9). She informed Assistant Principal Mary Bridges of her decision and that she had rejected Principal Culler's suggestion that she sign the contract and then break it if she got a new job. (Supp. R. p. 171, lines 19-25, p. 172, lines 1-3). Although Ms. Noorai did not have another job, she had scheduled a June 1, 2009 interview for a job opening at West Oak Middle School in Oconee County. (Supp. R. p. 172, lines 9-17).

Following her interview for the West Oak job, Ms. Noorai returned to Edwards later that day. When she went to check her mail, Principal Culler confronted her and told her "that he wanted me to write a letter of resignation so that he could interview" for her soon to be vacant position. (R. p. 225 at 159, lines 9-10).

On Thursday, June 4, 2009, Ms. Noorai met with Mary Bridges. Bridges told her "that Mr. Culler wanted her to tell me that if I did not write my .... [letter] [sic] of resignation that day, my certificate would be pulled and I would never teach again in the state of South Carolina." (R. pp. 227-228 at 161, lines 23-25, p. 162, line 1; R. p. 20, para. 43). Ms. Bridges also told her that "Gary doesn't think you're not going to write it, but he wants you to know what the consequences are and it's very serious." (R. p. 228 at 162, lines 21-23). Principal Culler also told her he would pull her certificate:

> Q. Did Mr. Culler tell you directly that he would pull your certificate?
>
> A. Yes.

> Q. Okay.
>
> A. He told me it was automatic. That he would pull it.
>
> Q. So he said if you didn't sign your contract-
>
> A. If I did not write the letter of resignation, my certificate to teach in South Carolina would be pulled automatically.
>
> Q. Okay. But he didn't say that he would pull it, he said it would automatically be pulled, correct?
>
> A. He said that, you know, he would have-because it's his say so it would be pulled. It did imply that it came from him.
>
> ...
>
> Q. So he said that he would pull your certificate if you didn't draft the letter of resignation?
>
> A. Yes, ma'am.

(Supp. R. p. 194, lines 21-25, p. 195, lines 1-11, 18-21). Ms. Noorai believed that Principal Culler had the authority to pull her teaching certificate "because Mary Bridges had said that he could. When I mentioned that to Marilyn Raines, she didn't say. So I trusted what they said. " (Supp. R. p. 197, lines 2-6).

Fearful of having her teaching license pulled and worn down by the abusive conduct of Mr. Culler, Ms. Noorai went to Assistant Principal Bridges' office and began preparing a letter of resignation. Mr. Culler entered the office while she was working on the letter and began "berating" Ms. Noorai. Ms. Noorai noticed that Principal Culler actually seemed to take pleasure in berating her. Even worse, she notice that after a while he appeared to be having an erection:

> So then sometime later the door opened and Mr. Culler came in there, and he was very angry. And he was screaming, and he was going off. He came and he closed the door. He's standing with a bright red face. He was

> so angry. He was screaming. He had excitement. He had pleasure on his face because he seemed to take pleasure of the fact that I was completely scared, that I was completely crying, that it was – I was just in a state. It was horrible. . . . Then his face kind of changed a little bit, and it appeared that he was having an erection and he came forward to get in the seat that was in front of me and he sat down and his tone kind of changed. And he kept going off, "I thought I had explained it to you the first time. I needed you to write this letter."

(R. pp. 233-234 at 167, lines 20-25, 168, lines 6-11). Principal Culler kept screaming at Ms. Noorai and refused to leave the office despite her requests. Finally, she told him "I'll give in." (R. p. 234 at 168, lines 16-20). Culler finally left the office and Ms. Noorai completed the letter of resignation. Ms. Noorai was extremely upset by this point and started crying after he left the office. (R. p. 235 at 169, lines 1-6; R. pp. 20-21, paras. 45 & 46; *see also* Supp. R. p. 192, lines 22-25 ("Q. Now would you say that you were harmed in some sort of way by having to draft this letter of resignation? A. Yes, emotionally.")).

In late June of 2009, Ms. Noorai reported Mr. Culler's abusive behavior to Dr. Pew, the SDPC Assistant Superintendent of Human Resources. (R. p. 238 at 184, lines 5-10). Dr. Pew instructed Principal Culler to write a letter of recommendation for Ms. Noorai but otherwise brushed off her complaints. In a letter subsequently written to Ms. Noorai, Dr. Pew even claimed that Ms. Noorai had misunderstood what Principal Culler had meant by telling her he would "pull" her teaching certificate. She subsequently sent Ms. Noorai an email advising her that since "I was no longer employed; therefore, there was no grievance and that this was the end of it." (Supp. R. p. 209, lines 1-7).

In July of 2009, Ms. Noorai received a letter from Dr. Pew. In this letter Dr. Pew addressed her complaint that the Edwards officials had failed to report the sexual assault by the student. Dr. Pew told Ms. Noorai that she was mistaken. Dr. Pew claimed that

"law enforcement had been contacted and the situation had been handled and addressed." (Supp. R. p. 106, lines 3-6). Ms. Noorai thereafter went to the sheriff's department to get a copy of the report. (Supp. R. p. 89, lines 3-6). She was informed that no report from Edwards concerning the incident could be found:

> A. There was no such report. And at that time the resource –school resource officer Teddi Pallis was working at the desk, I guess the front desk.
>
> Q. Okay.
>
> A. And so the sheriff's department pulled her to come and say "Teddi, we can't find this report." And so she had an absolute look of shock. She said she had not heard about what had happened to me and that she had already had a file and she used her hand to gesture quite a thick file on this student and this would have been information that she should have been given at the school from the administrators.

(Supp. R. p. 107, lines 1-12).

Ms. Noorai left Edwards in the summer of 2009. With her exemplary teaching credentials and a written letter of reference from Principal Culler, she expected to have no problems getting the job at West Oak in Oconee County.

Indeed, Earnestine Williams of the School District of Oconee County told her she was the "the top candidate for the eighth grade position" and that her references were "quite good." (Supp. R. p. 228, lines 8-9; R. p. 245 at 218, line 22). Viewing the evidence and inferences in the light most favorable to the Plaintiff, however, Principal Culler contacted West Oak officials and orally made false and defamatory representations about Ms. Noorai that resulted in her not getting this job. Ms. Noorai subsequently learned that Principal Culler "had cost [her] the job" when she met with Ms. Williams. (Supp. R. p. 199, lines 11-12). Ms. Williams told her that "based on what Mr. Culler had said was the

reason I did not get the job." (Supp. R. p. 213, lines 2-3). As Ms. Noorai explained in her deposition:

> A. What I was told by Earnestine Williams in Oconee was that based on what Mr. Culler told West Oak and what Jami Verderosa, the new principal came and told her, was I went from being the top candidate for the eighth grade position to not being selected for that position. As Ms. Verdosa had told me on the phone, "After checking your references, we were unable to give you a job at this time." And she also told me that she couldn't remember exactly what was said by Mr. Culler that related to her by Ms. Verdosa, but it was something about what kind of teacher I was, whether budding or how I manage the classroom, she reassured me multiple times that Mr. Culler did not make reference to me being sexually assaulted by a student, but she kept reiterating that based on what Mr. Culler said cost me the job.

(Supp. R. p. 228, lines 5-21). Ms. Williams candidly told Ms. Noorai that "but for the reference Mr. Culler gave to Ms. Verderosa, I would have been the leading candidate for the Oconee position." (R. p. 4, para. 11).

Rebuffed at West Oak, Ms. Noorai subsequently interviewed with two female administrators at Lakeside Middle School in Anderson 5. These administrators told her "untrue things about myself and my teaching." (Supp. R. p. 218, lines 7-8). Specifically, they told Ms. Noorai that they understood that "I always had problems....like my induction year. I had all these problems in my induction year, which were not true." (Supp. R. p. 218, lines 16-19). They also told her that they understood "that I had never been a core subject teacher, that I was only like a related arts teacher, which was not true. And they also tried to imply that I wasn't offered a contract." (Supp. R. p. 218, lines 22-25). Viewing the evidence and inferences in the light most favorable to the Plaintiff, the foregoing false information was provided to them by Principal Culler.

During an interview at Lakeview Middle School, the principal told Ms. Noorai that "she had been told that if something little, just some little something happens, that

I'm just going to walk out and leave my job and not come back." (Supp. R. p. 225, lines 23-25, p. 226, lines 1-3). A principal in Anderson 5 called one of Ms. Noorai's references "and told her that my file in Anderson 5 was full of red flags." (Supp. R. p. 219, lines 20-24). Even worse, the principal told the reference that "these red flags were going to prevent her from interviewing me for a position." (Supp. R. p. 220, lines 12-14). Viewing the evidence and inferences in the light most favorable to the Plaintiff, the foregoing false information was provided to the principal by Principal Culler.

The principal at Hillcrest told Ms. Noorai in an interview that Dr. Medford had told him that "there were issues coming from my former employer." (Supp. R. p. 221, lines 3-4). According to this official, he believed that that an issue with a student had led to another student being attacked and "it ended up embarrassing the principal so, therefore he forced me to write a letter of resignation. The Hillcrest principal also had the understanding that I was not offered a contract." (Supp. R. p. 221, lines 15-16). Viewing the evidence and inferences in the light most favorable to the Plaintiff, the foregoing false information was provided to the principal by Principal Culler.

Another principal told her that reference letter written by Mr. Culler "was a very negative reference letter. That it implies to a principal that there were problems." Supp. R. p. 221, lines 23-25, 205, lines 1-2).

Ms. Noorai also interviewed at the Greenville Middle School. An official there told her that what her former employer had told him about Ms. Noorai would be the deciding factor in whether he would offer me a job. (Supp. R. p. 223, lines 9-14). He did not offer her a job and Ms. Noorai therefore believes Principal Culler told him negative things about her. (Supp. R. p. 224, lines 12-16).

The employment "freeze out" traceable to Principal Culler and the SDPC has continued to this day. Despite her exemplary teaching credentials, Ms. Noorai has been unable to find other employment in her field. As she explained in her affidavit:

> I have been systematically denied employment first in Oconee County and then in Anderson County and then Greenville County and later in the lower parts of the state. I have been denied employment because of comments made to my potential employers about my teaching and my employment at RC Edwards, both by Mr. Culler and the SDPC. Some of those negative comments were made even before the interview process began, while others occurred after I had been interviewed, having been designated as having the highest level of qualifications and being given a tour of the facilities. For example, in Oconee County, I learned that I was being denied employment, according to Ms. Verderosa, principal of West-Oak Middle School in the SDOC, "after checking [your] references". However, when I checked my references, I found that none of them had actually been contacted at all. The only plausible conclusion that can be drawn from my failure to obtain employment under such circumstances is that Mr. Culler and or the SDPC provided negative information about my employment at RC Edwards to Ms. Verderosa.

(R. p. 4, para. 10).

As of the date of the filing of the Complaint, March of 2011, "Plaintiff has been continually denied employment opportunities with both SDOC and SDOC and the record created by Culler is now keeping her from any meaningful position in her educational field." (R. p. 21, para. 51).

ARGUMENT

Rule 56, SCRCP, provides that summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the

nonmoving party." Wachovia Bank v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 39 (2013), quoting Quail Hill, LLC v. County of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). "In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). An appellate court reviewing a grant of summary judgment applies the same standard used by the trial court. Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 244, 711 S.E.2d 908, 910 (2011).

The Appellant respectfully submits that, applying the foregoing standards, the Circuit Court erred in granting summary judgment on the following claims:

(1) the negligent misrepresentation claim asserted against the SDPC in Count Two;

(2) the breach of contract and breach of contract accompanied by fraudulent acts claims asserted against the SDPC in Count Three;

(3) the intentional infliction of emotional distress claims asserted against Principal Culler in Count Eight;

As will be seen, material questions of fact exist as to the Plaintiff's right to recover on the foregoing claims, and there is no ground for entering judgment in favor of the Respondents as a matter of law.

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE SDPC ON THE NEGLIGENT MISREPRESENTATION CLAIM

Count Two of the SAC asserts a negligent misrepresentation claim against the SDPC arising from the false representations by its employees that Ms. Noorai was required to write a resignation letter and that Principal Culler would pull her teaching

certificate if she failed to do so. To recover for negligent misrepresentation, a plaintiff must prove six elements:

> To establish liability for negligent misrepresentation, the plaintiff must show by a preponderance of the evidence: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Turner v. Milliman, 392 S.C. 116, 123, 708 S.E.2d 766 (2011). At the summary judgment stage, a plaintiff need produce only a scintilla of evidence on each element. *Id.*

Viewing the evidence and the inferences therefrom in the light most favorable to the Plaintiff, the record contains evidence of all six elements. Specifically, the record contains evidence that Principal Culler and Assistant Principal Mary Bridges, in the course of their employment for the SDPC, represented to the Plaintiff:

(1) that she was required to sign a letter of resignation "that day" because she chose not to renew her contract; and

(2) that Principal Culler would automatically "pull" her teaching certificate if she failed to do so. (*See* Supp. R. p. 178, lines 18-21 ("Q. So . . . [Principal Culler] said that he would pull your certificate if you didn't draft the letter of resignation? A. Yes, ma'am[.]")); R. p. 227 at 161, lines 23-25, 162, line 1) (Assistant Principal Bridges told Ms. Noorai "that Mr. Culler wanted her to tell me that if I did not write my ....[letter] [sic] of resignation that day, my certificate would be pulled and I would never teach again in the state of South Carolina").

The record further contains evidence that both representations are false. Ms. Noorai's contract for employment for the 2008 and 2009 school year contains no term requiring her to sign a letter of resignation. (R. p. 191). To the contrary, the contract clearly states that it is an Annual First Year contract as defined by S.C. Code Ann. § 59-26-40. This statute likewise does not require a teacher to write a resignation letter under any circumstances. The contract provides for a fixed 190 day term for the 2008-2009 school year. At the end of this term, the contract expires automatically. There is no further employment, unless the school district offers, and the teacher accepts, another annual contract, or a continuing contract.

Further neither the SCDC, Principal Culler, nor Assistant Principal Bridges had authority to *automatically* revoke Ms. Noorai's teaching certificate if she failed to sign the letter of resignation. S.C. Code Ann. § 59-25-159 provides that a teacher's certificate may be revoked, or suspended, only for "just cause." S.C. Code Ann. § 59-25-160 defines 12 categories of conduct that qualify as "just cause" for certificate suspension or revocation. Refusing to sign a resignation letter is not listed as "just cause" for termination, or suspension. Further, even when just cause for termination or suspension exists, a teaching certificate cannot be *automatically* revoked as Principal Culler represented. S.C. Code Ann. § 59-25-170 provides that a teaching certificate may not be revoked or suspended unless written notice has been given to the teacher and a hearing has been held.

The evidence presented to the Circuit Court is consistent with this law. Ms. Noorai testified that, after she signed the letter of resignation in reliance on the foregoing representations, she called the South Carolina Education Association "and they told me

that that was not the case. That no one would have their license pulled for not writing a letter of resignation." (Supp. R. p. 216, line 24-25, p. 200, lines 1-2). Dr. Pew in her letter to Ms. Noorai effectively conceded that no automatic certificate revocation could occur and speculated that Ms. Noorai had "misunderstood" Principal Culler:

> I believe Mr. Culler was attempting to explain that you could lose your certificate if you did not resign and took other employment without obtaining a release from your contract. There apparently were misunderstandings on the part of all involved, including the assistant principal involved in some of the discussions.

(July 8, 2009 Letter from Dr. Kelly Pew to Ms. Noorai).

The record further contains evidence that the SCDC, Principal Culler, and Assistant Principal Bridges owed Ms. Noorai a duty to exercise reasonable care to communicate truthful information to her. The South Carolina Supreme Court has adopted Restatement (Second) of Torts § 552 as the standard of liability for negligent misrepresentation. Ml-Lee Acquisitiion v. Deloitte Touche, 327 S.C. 238, 238 n.3, 489 S.E.2d 470, 470 n.3 (1997) ("[w]e adopt the § 552 standard of liability for the reasons set forth in the Court of Appeals' decision"). Section 552 provides in pertinent part:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Ml-Lee Acquisition v. Deloitte Touche, 327 S.C. 238, 238 n.2, 489 S.E.2d 470, 470 n.2 (1997), quoting Restatement (Second) of Torts § 552(1). The facts are undisputed that Culler and Bridges made the foregoing false representations to Ms. Noorai in the course of their employment for the SDPC, and that they made the representations to guide Ms. Noorai as to what they represented to be the proper way to end her employment with the

SDPC . Culler, Bridges, and the SDPC accordingly owed Ms. Noorai a duty "to exercise reasonable care or competence" both to obtain and communicate truthful information to her.

Although a pecuniary interest is not required for negligent misrepresentations made in the course of employment, see Restatement (Second) of Torts § 552(1) (emphasis added) ("[o]ne who, in the course of his business, profession or employment, *or in any other transaction* in which he has a pecuniary interest…"), Culler, Bridges, and the SDPC also had a pecuniary interest in making the representations. (*See* Supp. R. p. 198, lines 18-19 (stating that by requiring her to resign, "the District wouldn't have to pay for two positions")). As Dr. Pew admitted in her deposition, the purpose of requiring resignation letters was to prevent duplicative hirings for the same position. She further explained that "in 2008, 2009 we were in such economic….we would never have wanted to over-hire." (R. p. 357 at 54, lines 3-4). The SDPC even conceded in their summary judgment brief that "the District did not want to be in a position where Plaintiff changed her mind about leaving." (R. p. 122 at 5, note 4). In addition, the resignation letter provided a basis for the SDPC to deny paying unemployment compensation to Ms. Noorai. (*See* Supp. R. p. 182, lines 4-6 ("[T]he letter of resignation has been used to try to stop the unemployment.")).

Ms. Noorai, at the time she signed the resignation letter, believed that Principal Culler had the authority to pull her teaching certificate. (Supp. R. p. 197, lines 2-6). Certainly, given that both the Principal and the Assistant Principal were in charge of hiring and firing at the school, and both told her the same thing, she had every reason to

believe that these school administrators were telling her the truth. She reasonably relied on the false representation and drafted and signed a resignation letter.

Ms. Noorai suffered significant economic loss as a result of the negligent misrepresentation. She went from being the top candidate at West Oak to not being offered the position. The officials at West Oak and the other schools to which Ms. Noorai applied used the "resignation letter" as grounds for denying Ms. Noorai's employment application. Viewing the evidence in the light most favorable to the Plaintiff, these officials all concluded that Ms. Noorai had never been offered a contract for the 2009-2010 school year because she was not a worthy candidate for reemployment. They concluded she had been forced to resign. The principal at Lakeview Middle School concluded that Ms. Noorai was the type of employee who would resign during the school year for trifling reasons. (Supp. R. p. 225, lines 23-25, p. 226, lines 1-3 ("[S]he had been told that if something little, just some little something happens, that I'm just going to walk out and leave my job and not come back.")).

The SDPC also subsequently used this letter to deny her unemployment benefits. The false and negligently made representations, therefore, were both the cause in fact and the proximate cause of her inability to obtain other employment, her loss of unemployment benefits, and the emotional distress she experienced as a result.

With the evidence supporting each element of the negligent misrepresentation claim thus properly identified, each of the various rulings of the Circuit Court in granting summary judgment for the SDPC on this count are obviously error. First, the Court ruled as a matter of law that the resignation letter requirement and the teaching revocation threat *were not false representations* but were true representations. In this regard, the

Circuit Court relied on defense witnesses who asserted "that the practice of the District was to require a written notice of resignation and that if a teacher did not provide such written notice and took another teaching job elsewhere, her teaching certificate could be subject to revocation." (R. p. 82 at 13). This ruling is clearly erroneous for two different reasons. This ruling obviously misconstrues *the content of the misrepresentations* made by Principal Culler and Assistant Principal Bridges. Culler did not say that Ms. Noorai's teaching certificate would be pulled *if she obtained another job* – he flatly told Ms. Noorai that he would "automatically" pull her teaching certificate if she refused to sign the letter of resignation that day:

> A. He told me it was automatic. That he would pull it.
>
> Q. So he said if you didn't sign your contract-
>
> A. If I did not write the letter of resignation, my certificate to teach in South Carolina would be pulled automatically.
>
> Q. Okay. But he didn't say that he would pull it, he said it would automatically be pulled, correct?
>
> A. He said that, you know, he would have-because it's his say so it would be pulled. It did imply that it came from him.
>
> . . .
>
> Q. So he said that he would pull your certificate if you didn't draft the letter of resignation?
>
> A. Yes, ma'am.

(Supp. R. p. 194, lines 21-25, p. 195, lines 1-11, 18-21).

In addition, the ruling is erroneous because, as previously discussed, South Carolina law did not allow for an automatic revocation, or suspension, of Ms. Noorai's teaching certificate and because her contract did not require her to sign a letter of

resignation. Further, even accepting that Ms. Noorai "misunderstood" what Culler and Bridges told her about the revocation of her teaching certificate, the jury could still find an actionable misrepresentation here because the jury could find that Culler and Bridges failed to exercise reasonable care to explain the consequences of refusing to sign the resignation letter. Hence, the summary judgment by the Circuit Court cannot be upheld on grounds that there is *no evidence in the record of false representations* made by the SDPC employees.

Second, the Circuit Court granted summary judgment on grounds that, right or wrong, both Culler and Bridges actually believed 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 teaching position." (R. p. 83 at 14). The Circuit Court reasoned that "[e]ven if they were mistaken in their belief, their representation was on a matter of law and is not actionable." (R. p. 83 at 14). But once again, the Circuit Court misperceived the content of the false representation made - Culler and Bridges told Ms. Noorai her teaching certificate would be pulled automatically solely because she refused to write and sign a resignation letter that day. Neither witness submitted sworn evidence that he or she believed *this* representation to be true. Further, there is zero evidence in the record that the representation was on a matter of law. To the contrary, Dr. Pew conceded in her deposition testimony that the resignation letter requirement was simply a *practice* of the SDPC to avoid over hiring. (R. p. 357 at 54, lines 3-4). Given that the SDPC used the resignation letter to deny Ms. Noorai unemployment benefits, there is a serious question as to the legality of this practice. In any event the "practice" is certainly a breach of

contract. As previously noted, Ms. Noorai's 2008-2009 contract with the SDPC says nothing about her having to write a "resignation letter" to terminate the agreement. To the contrary, the contract by its express terms is for a 190 day period and expires at the end of the period.

The Circuit Court alternatively ruled that, if Culler and Bridges were merely mistaken, this mistake would not by itself be actionable because they had a duty only "to take reasonable care which Mr. Culler and Mrs. Bridges did." (R. p. 83 at 14). This part of the ruling is not only erroneous but reflects an abdication of the judge's duties to fairly try the case. The statement that Culler and Bridges had a duty only "to take reasonable care which Mr. Culler and Mrs. Bridges did" is copied verbatim from the SDPC Memorandum at 26 ("the Defendants' duty of care to Plaintiff was not to be right, but simply to take reasonable care, which Mr. Culler and Ms. Bridges did") (R. p. 143). The assertion amounts to a ruling that Culler and Bridges were not negligent as a matter of law. Under South Carolina law, however, as long as there is some evidence of a breach of duty, whether a party failed to exercise reasonable care is always a question for the jury. Westchester Fire IMs. Co. v. Bollin, 186 S.C. 45, 90 S.E. 327 (1916) ("[n]egligence is a question for the jury"); Miller v. City of Camden, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct.App. 1994), aff'd as modified, 329 S.C. 310, 494 S.E.2d 813 (1997) (stating negligence is mixed question of law and fact with existence and scope of duty being questions of law and breach of duty being a question for the jury). Here, in addition to Ms. Noorai's testimony that the administrators made erroneous representations about matters on which they should have been experts, even Dr. Pew admitted in her letter that

there were "misunderstandings" by both Bridges and Culler. There accordingly is at least a scintilla of evidence that they were negligent.

Third, the Circuit Court erroneously dismissed Count Two on grounds that the "Pickens District had no pecuniary interest in misrepresenting its need for a written notice of resignation." (R. p. 83 at 14). As discussed above, there was admissible summary judgment evidence that the very purpose of the resignation letter requirement was to protect the economic interests of the SDPC by preventing duplicative hirings. In addition as previously noted, the "no pecuniary interest" ruling fails as a matter of law – under Restatement (Second) of Torts § 552(1) as adopted in Ml-Lee Acquisition v. Deloitte Touche, 327 S.C. 238, Note 2 489 S.E.2d 470 (1997), a pecuniary interest is not required if the defendant makes the false representation in the course of his employment.

Fourth, although the false representations were made to Ms. Noorai by both the principal and assistant principal of Edwards, the Circuit Court also ruled that Ms. Noorai could not justifiably rely on the representations. (R. p. 83 at 14). In this regard, the Circuit Court ruled as a matter of law that Ms. Noorai "allowed several days to elapse after being told of the requirement before she actually wrote the letter of resignation on June 4, 2009, during which she had the opportunity to investigate the truth of the Pickens Districts representations to her." (R. p. 84 at 15). Apparently, the Circuit Court believed that Ms. Noorai should have hired a lawyer at this point to review her contract and research the law. As a point of fact as documented in her 2012 deposition by SCPC attorney, Ms. Noorai only learns about the threat to pull her certificate on the afternoon of June 4th, never having days to investigate. South Carolina appellate courts, however,

have repeatedly emphasized that justifiable reliance is almost always a question for the jury:

> The general rule is that questions concerning reliance and its reasonableness are factual questions for the jury. In Starkey v. Bell, 281 S.C. 308, 315 S.E.2d 153 (Ct. App. 1984), the Court stated that issues of reliance and its reasonableness going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the trier of facts.

Unlimited Servs., Inc. v. Macklen Enters., Inc., 303 S.C. 384, 401 S.E.2d 153 (1991). The ruling is also directly contradictory to Circuit Court's ruling that, even if Culler and Bridges were mistaken, they exercised reasonable care. Surely, if Ms. Noorai was required as a matter of law to investigate their false representations for truthfulness, Culler and Bridges could not make the representations in the exercise of reasonable care without making the same investigation.

Finally, the Circuit Court erroneously ruled that Ms. Noorai "cannot establish that she suffered a pecuniary loss as a proximate result of her reliance on the District's representation." (R. p. 84 at 15). In this regard, the Circuit Court noted that Ms. Noorai had decided to reject the contract the SDPC offered her for the 2009-2010 school year. Viewing the evidence in the light most favorable to the Plaintiff, however, the Circuit Court overlooked that the letter of resignation played a causal role in the decision of at least four of the other schools to refuse to offer the superbly qualified Ms. Noorai a job. In addition, the Circuit Court overlooked the evidence that the SDPC used the resignation letter to deny Ms. Noorai unemployment benefits:

> A. I also know by writing he letter of resignation,....it appeared as if I was breaking my contract, that I was not fulfilling the terms of what I signed. And I also know that in terms of unemployment, that was what was used by the District to deny my unemployment that the state gave me based on the harassment that I suffered....

(Supp. R. p. 197, lines 24-25, p. 198, lines 1-5). Finally, the Circuit Court ignored the severe emotional distress that Ms. Noorai suffered in conjunction with the foregoing economic losses.

The summary judgment entered in favor of the SDPC and against Ms. Noorai on Count Two must be reversed and the case remanded for trial.

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE SDPC ON THE BREACH OF CONTRACT CLAIM

A. Viewing the evidence and inferences in the light most favorable to Ms. Noorai, the jury could find that the SDPC breached the 2008 to 2009 School Year Annual Contract with Ms. Noorai

Count Three alleges both a breach of contract by the SDPC, and a breach of contract accompanied by fraudulent acts. With respect to the breach of contract claim, the Plaintiff contends that the conduct of the SDPC employees during the 2008-2009 school year breached the implied covenant of good faith and fair dealing, and other implied terms, that were contained in the SDPC's 2008 to 2009 School Year Annual Contract with Ms. Noorai.

"Every contract entered into in this State embodies in its terms all applicable laws of the State just as completely as if the contract expressly so stipulated." Parker v. Byrd, 309 S.C. 189, 193, 420 S.E.2d 850 (1992) *quoting* Inabinet v. Royal Exchange Assur. of London, 165 S.C. 33, 36, 162 S.E. 599, 600 (1932). S.C. Code Ann. §§ 59-24-60 and 59-63-335 imposes a mandatory duty on school administrators to report criminal conduct to law enforcement authorities and S.C. Code Ann. § 59-63-330 imposes a mandatory duty on school administrators to report school related crimes to the State Department of Education. Both obligations accordingly are implied into Ms. Noorai's contract as a

matter of law. Viewing the evidence in the light most favorable to Ms. Noorai, the jury could easily find that the SDPC breached the contract by failing to report the sexual assault to the authorities.[1]

In addition to the statutes that are implied in Ms. Noorai's contract, "[t]here exists in every contract an implied covenant of good faith and fair dealing." Parker v. Byrd, 309 S.C. 189, 193-94, 420 S.E.2d 850, 853 (1992) quoting Tharpe v. G.E. Moore Co., 254 S.C. 196, 201, 174 S.E.2d 397, 399 (1970). The jury could easily find that the bullying, intimidation, and harassment of Ms. Noorai by Principal Culler and Mr. Hudak breached the implied covenant of good faith and fair dealing. The provisions of the Safe School Climate Act are also implied into Ms. Noorai's contract. This Act prohibits the harassment, intimidation, and bullying of students:

> (A) A person may not engage in:
>
> (1) harassment, intimidation, or bullying; or
>
> (2) reprisal, retaliation, or false accusation against a victim, witness, or one with reliable information about an act of harassment, intimidation, or bullying.

S.C. Code Ann. § 59-63-130. The Act further requires "each local school district to adopt a policy prohibiting harassment, intimidation, or bullying at school." S.C. Code Ann. § 59-63-140(A). The jury could easily find that this statute also provides a standard of good faith and fair dealing applicable to the treatment *of teachers.* The harassment, intimidation, and bullying of Ms. Noorai by the SDPC employees Culler, Hudak, Boggs, and Bridges thus would be a breach of contract by the SDPC.

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[1] Although Dr. Pew claimed that the incident had in fact been reported, Ms. Noorai's contrary testimony based on her visit to law enforcement shows that material questions of fact exist on this point.

In granting summary judgment for the SDPC on this claim, the Circuit Court properly noted that the Plaintiff contended that the SDPC employees had engaged in "dishonesty in fact and unfair dealing with Plaintiff as to actions and remedies under the contract." (R. p. 86 at 17). The Circuit Court, ignoring the established law of the this state, nonetheless erroneously ruled that the only obligation owed by the SDPC to the Plaintiff was "to employ her as a teacher for the school year 2008-2009 and to compensate her in accordance with the adopted salary schedule." (R. p. 87 at 18). This construction of the contract by the Circuit Court is obviously reversible error. The statutory law of this state and the duty to act in good faith and to deal fairly with an employee are implied into the contract. Indeed, this Court has recognized that a term will be implied into a contract whenever necessary to effectuate the intention of the parties:

> [N]either law nor equity requires every term or condition to be set forth in a contract. Where an implied term is necessary to effectuate the intention of the parties, the law will supply it. The unexpressed provision may be inferred from the language of the contract itself, or by looking to the external facts and circumstances surrounding the bargain, or by proving a general custom and usage of including certain terms as part of similar contracts.

Maccaro v. Andrick Dev. Corp., 280 S.C. 96, 100, 311 S.E.2d 91, 94 (Ct. App. 1997). Viewing the evidence in the light most favorable to Ms. Noorai, the jury could easily find that the SDPC breached the implied statutory obligations and the implied covenant of good faith and fair dealing as a result of the acts and omissions set forth above. The summary judgment entered in favor of the SDPC and against Ms. Noorai on the breach of contract claim therefore must be reversed.

B. The evidence also establishes a breach of contract accompanied by fraudulent acts

Under South Carolina law:

> To establish a claim for breach of contract accompanied by a fraudulent act, a party must show: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach.

Conner v. City of Forest Acres, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). For purposes of this cause of action, a "fraudulent act" is broadly defined as "any act characterized by dishonesty in fact or unfair dealing." *Id.* at 466, 560 S.E.2d at 612. "Fraud, in this sense, 'assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.'" *Id. quoting* Sullivan v. Calhoun, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921).

Breach of contract accompanied by a fraudulent act requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making, and such proof may or may not involve false representations. Ball v. Canadian Am. Exp. Co., 314 S.C. 272, 276, 442 S.E.2d 620, 623 (Ct. App. 1994). "Fraudulent intent is normally proved by circumstances surrounding the breach." Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 54, 336 S.E.2d 502, 503-04 (Ct. App. 1985). "The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character." *Id.* at 54, 336 S.E.2d at 504.

Viewing the evidence and the inferences in the light most favorable to Ms. Noorai, the jury could also find that the SDPC through its employees acted with fraudulent intent in the course of breaching Ms. Noorai's contract. Certainly, the false

representation that Ms. Noorai was required to sign the resignation letter or her teaching certificate would be automatically revoked was blatant dishonesty by Culler and Bridges as well as unfair dealing.

In granting summary judgment on this claim, the Circuit Court found there was no evidence of any *fraudulent* act by the SDPC. This ruling, however, is erroneous because it ignores the dishonest misrepresentation that Ms. Noorai was required to sign the resignation letter or her teaching certificate would be automatically revoked. The jury could infer from the evidence that both Culler and Bridges knew their misrepresentation about the resignation letter and teaching certificate were untrue and that they were intentionally acting to mislead Ms. Noorai.

Somewhat inexplicably, the Circuit Court also ruled that the fraudulent act was the same act Ms. Noorai contended amounted to the breach of her contract. As discussed in Part IIA, however, the SDPC breached the contract through the many acts and omissions discussed above. Hence, the evidence shows both a breach of contract *and separate fraudulent acts* by the SDPC employees. The Circuit Court finally found no evidence of an intent to deceive the Plaintiff. But the jury could easily infer such an intent from Culler's and Bridges' insistence that she sign the resignation letter "that day" or her teaching certificate would be automatically pulled.

The summary judgment entered in favor of the SDPC and against Ms. Noorai on the breach of contract accompanied by fraudulent act claim therefore must be reversed.

III. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PRINCIPAL CULLER

Count Eight asserts a claim against Principal Culler for the intentional infliction of emotional distress. Under South Carolina law, a plaintiff must prove the following elements to recover for the intentional infliction of emotional distress:

> (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 plaintiffs emotional distress; and
>
> (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it.

Hansson v. Scalise Builders of S.C., 374 S.C. 352, 356, 650 S.E.2d 68 (2007), quoting Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981).

In granting summary judgment for Principal Culler on this count, the Circuit Court found as a matter of law that the conduct of Principal Culler could not be regarded as "so extreme or outrageous as to be beyond all possible bounds of decency and regarded as atrocious and utterly intolerable in a civilized community." (R. p. 102 at 33). Viewing the evidence and inferences in the light most favorable to Ms. Noorai, this ruling is erroneous. As the testimony recounted in the Statement of Facts shows, Principal Culler repeatedly harassed, intimidated, and bullied Ms. Noorai during the 2008 to 2009 school year. He "leered" at her, he cornered her in school rooms when he berated her, and was unduly argumentative and aggressive with her. When she returned from gall bladder surgery with a tube sticking out of her and in a weak condition, he chose this time to tell her he had changed his mind about relieving her from yearbook duties. Principal

Culler also refused to discipline teacher Hudak for his own harassment, intimidation, and bullying of Ms. Noorai following the student plagiarizing incident.

In finding that Principal Culler's conduct did not reach the "beyond human decency" standard, the Circuit Court also ignored the two incidents that raised Culler's conduct far beyond that of the normal abusive and abrasive boss. First, the Circuit Court ignored that Culler not only did not report the student who sexually assaulted the Plaintiff to law enforcement, or the State Board of Education, *but sent him back to Ms. Noorai's class after a short 5 day suspension.* She accordingly had to face the student who sexually assaulted her in class every day. Second, the Circuit Court ignored that, when Principal Culler berated her about the resignation letter in the close confines of the office, he displayed a visible erection. Principal Culler clearly took great pleasure in bullying Ms. Noorai and this pleasure even manifested itself in a sexual component. Finally, the jury could find that Culler made false statements about Ms. Noorai to other school administrators that cost her the West Oak job and other employment. The jury could easily find that this conduct, in conjunction with the other abusive conduct of this man, so extreme or outrageous as to be beyond all possible bounds of decency and regarded as atrocious and utterly intolerable in a civilized community."

The Circuit Court alternatively erroneously ruled that Ms. Noorai's clams of outrageous conduct "are also included as the basis for other causes of action. Her remedy is in the other causes of action, not in the tort of outrage." (R. p. 102 at 33). This ruling is erroneous because S.C. Code Ann. § 15-78-60(17) provides that a government entity is not liable for "employee conduct ... which constitutes intent to harm...." The SDPC as a matter of law could not be held liable for Principal Culler's intentional conduct designed

to humiliate, abuse, and cause Ms. Noorai to suffer emotional distress. Moreover, a plaintiff cannot recover damages for the negligent infliction of emotional distress if no physical injury is caused; hence, Ms. Noorai cannot recover her emotional distress damages on her negligence claims in the absence of physical injury. Finally, the Circuit Court found that the emotional distress suffered by the Plaintiff was not sufficiently severe to be actionable. Viewing the evidence in the light most favorable to the Plaintiff, however, the jury could find that the severe symptoms of post traumatic stress disorder to which the Plaintiff testified in her affidavit and deposition are so severe that no reasonable man could expect to endure it.

The summary judgment entered in favor of the Defendant Culler and against the Plaintiff on Count Eight accordingly must be reversed.

IV. THE JUDGMENT BELOW SHOULD BE REVERSED AND REMANDED FOR A PROPER SUMMARY JUDGMENT HEARING

If the Court is not inclined to reverse the summary judgment entered in favor of the Defendants the SDPC and Culler and remand for trial, the Court should at the very least reverse the judgment and remand for a full and proper summary judgment hearing. Any other result would violate the Plaintiff's state and federal due process rights.

On April 7, 2014, the Circuit Court held a hearing on the summary judgment motions filed by the Defendants. Ms. Noorai was not present at this hearing. By this date, the Plaintiff was represented by new counsel. But new counsel had not had time to prepare a brief in opposition to the summary judgment motion. Hence oral argument by counsel at the hearing was the only avenue remaining by which legal arguments could be made in opposition to the voluminous summary judgment brief and submissions made by the Defendants.

After the Defendants made their arguments on Count One, the Plaintiff's attorney asked the Court to deny the motions for summary judgment. The Plaintiff's attorney further asserted that "there is....a scintilla of evidence that would suggest these causes of action to go forward." (R. p. 59 at 12, lines 2-7). Counsel thereafter made arguments in opposition to the defense arguments on Counts One and Two.

At the conclusion of the response arguments made on Count Two, however, the Circuit Court terminated the hearing and advised counsel for both parties that he would take the matter under advisement. He noted that he had been provided depositions, the affidavits, the defense memorandum, and the file. (R. p. 67 at 20, lines 23-25). The Circuit Court thereafter asked counsel if anyone objected to the Court reading these materials and then ruling:

> Do you all have any objection to me just reading this, I mean what you have written, Any objection to me taking it under advisement, reading everything and rule?

(R. p. 68 at 21, lines 1-4). Neither attorney objected to this procedure. The Circuit Court thereafter issued its Order based strictly on the submissions made in these materials. (R. pp. 70-105).

The Plaintiff respectfully submits that the Court's termination of the hearing under these circumstances constitutes plain, reversible error. Rule 56 *requires* the Court to hold a hearing on a summary judgment motion. (Rule 56, SCRCP)("[t]he motion shall be served at least 10 days before the time fixed for the hearing"). There is no provision in Rule 56 that allows for a partial hearing such as occurred in this case. Because no summary judgment opposition brief had been filed, no legal arguments had been made on the Plaintiff's behalf, except for those arguments made on Counts One and Two before

the Court terminated the hearing. *The record thus contains no legal arguments whatsoever on Counts Three - Eight.* Moreover, no evidence was submitted on the Plaintiff's behalf except for her affidavit, even though the record contains substantial evidence that raises questions of fact on many key factual issues. Even worse, the Circuit Court - with only the defense brief to read - had no choice but to accept the Defendants' frequent mis- characterization of the Plaintiff's claims and the Defendants' mis-characterization of the evidence bearing on those claims. Not surprisingly, the defense summary judgment brief became the Circuit Court's Order. (R. pp. 70-105).

Under South Carolina appellate procedure practice, the general rule is that "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." If the Court strictly applies this rule to the appeal, this means all of the arguments made in the Initial Brief of Appellant on Counts Three -Eight are not preserved for appellate review because they were not raised to the Circuit Court.

Under these circumstances, the Plaintiff has been denied her state and féderal due process rights. As the South Carolina Supreme Court has explained, the touchstone of due process is the opportunity to be heard:

> The United States Supreme Court has said the fundamental touchstone of due process is the opportunity to be heard. Goss v. Lopez, 419 U.S. 565, 579, 95 S.Ct. 729, 739, 42 L.Ed.2d 725 (1975). The Supreme Court further stated that the type of hearing required to be provided will depend upon the nature of the case. Id. at 579, 95 S.Ct. at 738.

Stinney v. Sumter School District, 391 S.C. 547, 707 S.E.2d 397 (2011).

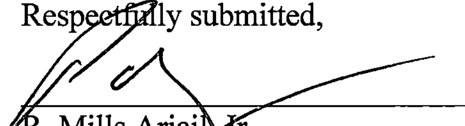
The Plaintiff has not yet received a fair opportunity to be heard. The Court accordingly should reverse the summary judgment entered in favor of the Defendants the

SPDC and Culler, and should remand for a proper and complete summary judgment hearing.

CONCLUSION

For the reasons stated, the summary judgment entered in favor of the Defendants the SDPC and Gary Culler, and against Ms. Noorai, should be reversed on the specified claims and the case remanded for trial. In the alternative, the summary judgment entered in favor of the Defendants the SDPC and Gary Culler, and against Ms. Noorai, should be reversed and the case remanded for a proper summary judgment hearing.

Respectfully submitted,



R. Mills Ariail, Jr.
Law Office of R. Mills Ariail, Jr.
11 North Irvine St. Suite 11
Greenville, SC 29601
(864) 232-9390

Attorney for Appellant Mariam R. Noorai

August 25, 2015
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

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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 2014-001282

Mariam R. Noorai..Appellant,

v.

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

Of whom the School District of Pickens County and Gary Culler

are ....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant Mariam R. Noorai complies with Rule 211(b), SCACR.

August 25, 2015

R. Mills Ariail, Jr.
Law Office of R. Mills Ariail, Jr.
11 North Irvine St. Suite 11
Greenville, SC 29601
(864) 232-9390

Attorney for Appellant Mariam R. Noorai

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PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief by depositing a copy of it in the United States Mail, postage prepaid, on August 25, 2015, to all counsel of record listed below.

August 25, 2015

Stacy Davis

Laura Callaway Hart
Duff, White and Turner, LLC
Post Office Box 1486
Columbia, SC 29202

David T. Duff
Duff, White and Turner, LLC
Post Office Box 1486
Columbia, SC 29202

Thomas Kennedy Barlow
Childs & Halligan, PA
Post Office Box 11367
Columbia, SC 29211