THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

The Honorable Paul M. Burch
Circuit Court Judge

Case No. 2013-CP-17-220
Appellate Case No. 2015-000163

Antonia Graves.....Appellant,

v.

Dillon County Board of Education, Dillon County School District Four, Richard Schafer, James McRae, Ray Rogers, Arthur McMillan, Amanda Hayes, and Claretha Whitfield.....Respondents

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INITIAL BRIEF OF RESPONDENTS DILLON COUNTY BOARD OF EDUCATION, DILLON COUNTY SCHOOL DISTRICT FOUR, RICHARD SCHAFER, JAMES MCRAE, RAY ROGERS, ARTHUR MCMILLAN, AMANDA HAYES, AND CLARETHA WHITFIELD

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2. Did the trial court correctly determine that Appellant failed to produce sufficient competent evidence that the Respondents wrongfully interfered with her contractual relations to require submission of her Second Cause of Action to a jury?

3. Did the trial court correctly determine that Appellant failed to produce sufficient competent evidence that the individual Respondents engaged in a civil conspiracy to require submission of her Fourth Cause of Action to a jury?

STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of summary judgment to the Dillon County Board of Education ("the Board"), the Dillon County School District Four ("the District"), Richard Schafer, James C. McRae, Ray Rogers, Arthur McMillan, Amanda Hayes, and Claretha Whitfield (collectively "the Respondents"). Appellant, Antonia Graves, asserted multiple causes of action, including various tort claims and interference with contractual relations, against the Respondents.

Appellant initially filed suit against the Respondents and a co-defendant, CareSouth Carolina, Inc. ("CareSouth"), on June 7, 2013. She subsequently amended her Complaint to correct the names of certain defendants and to correct scrivener errors; her First Amended Complaint ("the Complaint") was filed on July 9, 2013. The Complaint alleged that the Respondents and CareSouth defamed Appellant (First Cause of Action); that the Respondent Board and the Respondent District interfered with her contractual relations (Second Cause of Action) and invaded her privacy (Third Cause of Action); and that the individual Respondents Schafer, McRae, Rogers, McMillan, Hayes, and Whitfield and the co-defendant CareSouth conspired together to harm Appellant, causing her damage (Fourth Cause of Action). The Respondents filed an Answer to the Second Amended Complaint on August 12, 2013, denying liability and asserting various affirmative defenses. CareSouth also timely filed an Answer; Appellant subsequently settled her claims against CareSouth and dismissed it from the case.

The Respondents filed a motion for summary judgment on July 31, 2014. The motion was heard by the circuit court, the Honorable Paul M. Burch presiding, on September 3, 2014. Appellant submitted an affidavit from Linda Pinkney a few days

prior to the hearing, and the presiding judge granted leave to the Respondents to take the deposition of Pinkney after the hearing. The parties subsequently submitted supplemental memoranda of law addressing Pinkney's testimony. The circuit court issued an order, dated December 31, 2014 and filed on January 6, 2015, 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 served a notice of appeal on January 26, 2015.

In her brief to this court, Appellant argues that the circuit court erred in dismissing her claims against the Respondents for defamation, interference with contractual relations, and civil conspiracy. Appellant does not argue that the circuit court erred in granting summary judgment to the Respondents Board and District on the invasion of privacy cause of action.

STATEMENT OF FACTS

Appellant's case is based on multiple incidents occurring over several years while she was a member of the Respondent Dillon County Board of Education. During the time Appellant served on the Board, the individual Respondents were either members of the Board or employees of the District,[1] over which the Board has rule-making authority and fiscal authority for local revenues. Although these several incidents were unrelated, Appellant claims that the Respondents instigated or were involved in them as part of a campaign to discredit and silence her because she raised issues about racial

[1] During all pertinent times, Respondent Schafer was a member and the Chair of the Board, and Respondent McRae was a member of the Board. During all pertinent times, the other Respondents were employees of the District: Respondent Rogers as the District Superintendent; Respondent McMillan as the Assistant Superintendent of the District for Finance; Respondent Hayes as the Director of Programs for Exceptional Children which is responsible for special education services; and Respondent Whitfield as a secretary. Complaint ¶¶ 5-10; Hayes Aff. ¶ 1.

discrimination and "fiscal irresponsibility" by the District and the Board. She claims that the Respondents caused her to lose her position on the Board, to be terminated from her employment with CareSouth, and to suffer other harm. The incidents on which Appellant focuses are separately described below.

Appellant was a member of the Board from 2005 until September 2012. Complaint ¶ 16; Graves Dep. (11/11/13) p. 92, lines 18-20; p. 108, lines 8-11. The Dillon County Legislative Delegation recommends persons to the Governor for appointment, and the Governor, acting either on such recommendations or on her own, appoints the members. As political appointees, members serve terms of three years and may continue to serve beyond their three-year terms, until the Governor appoints their successors. Act No. 1, 1953 S.C. Acts 1 (Dillon County Board of Education); Act No. 336 § 1, 1963 S.C. Acts 561 (same); *see also* S.C. Code § 59-15-10 (all county boards of education). Plaintiff's term on the Board expired in 2008. Graves Dep. (11/11/13) p. 112, lines 8-10 and Ex. 4. In September, 2012, Governor Nikki Haley, on the recommendation of the Dillon County Legislative Delegation, appointed Robert Absom, a black male, to replace Appellant on the Board. Graves Dep. (11/11/13) p. 115, line 11-p. 116, line 3; p. 121, lines 14-15. Because she served until she was replaced in 2012, Appellant served more than the three-year term to which she had been appointed.

During her tenure on the Board, Appellant became President of the local chapter of the NAACP where she says she was "progressive" and "sought to redress racial inequality throughout the community including with the Dillon County school system." Complaint ¶¶ 23-24. Respondent Whitfield, who was employed as a secretary by the District, was also active in the NAACP local chapter. Respondent Whitfield and

Appellant disagreed on how the NAACP chapter should be led and managed. *See, e.g.*, Whitfield Dep. p. 31, line 16-p. 32, line 9; p. 34, line 24-p. 36, line 11; p. 39, line 20-p. 41, line 13; Graves Dep. (11/11/13) p. 194, lines 3-24.

Appellant alleged that unidentified employees and agents of Respondents Board and District tampered with the lock on Appellant's office door, illegally wire-tapped her home telephone, hacked into her email accounts, broke into her home and office, and intercepted or interfered with United States mail addressed to or from Appellant. Complaint ¶¶ 48-51; Graves Dep. (11/11/13) p. 212, line 10-p. 218, line 21; p. 219, line 17- p. 224, line 7; and p. 227, line 3-p. 232, line 3. Her evidence that the Respondents engaged in such wrongful activity consisted of her beliefs that they were motivated to do so and involved in some unspecified way; in short, she "wouldn't put it past them." Graves Dep. (11/11/13) p. 146, lines 2-7; p. 251, line 25-p. 252, line 20; p. 254, line 25-p. 255, line 11; Graves Dep. (12/16/13) p. 83, lines 2-10; Graves Dep. (1/16/14) p. 126, line 23-p. 127, line 6; p. 128, lines 2-11.

Appellant held a license as a social worker and was employed beginning in 2002 by CareSouth as a clinical counselor at its Lake View, South Carolina clinic. Graves Dep. (11/11/13) p. 39, lines 7-20; Kershner Aff. ¶ 2; Watford Aff. ¶ 2. During the course of her employment, Appellant failed to maintain proper and necessary documentation on the patients assigned to her, a failure which her supervisor, Elizabeth Kershner, determined to be a "gross violation of state and federal regulations." Kershner Aff. ¶¶ 5-6. In addition, CareSouth discovered that the cell phone it had issued to Appellant had been used for unauthorized telephone calls, text messages, and transmissions of pictures over a period of several months, resulting in unauthorized charges in an amount exceeding

$1500 to CareSouth. *Id.* at ¶ 9; Watford Aff. ¶ 3. As a consequence of Appellant's failure to maintain performance standards, expectations, and competencies, Kershner terminated Appellant's employment with CareSouth on June 10, 2011. Kershner Aff. at ¶ 10.

CareSouth provided dental services to needy students in the former Dillon County School District One in Lake View, South Carolina beginning in March 2011. Shifflet Aff. ¶ 2. At that time, another entity, the Sisters of Charity Foundation, was similarly providing dental services to students in the adjoining (former) Dillon County School District Two. When Dillon One merged with Dillon Two in August 2011 to form the Respondent Dillon County School District Four, the Sisters of Charity advised that it could not provide services to the children in the newly formed, larger school district that then included the Lake View area. Rogers Dep. p. 36, lines 6-11. CareSouth agreed to expand the services it was then providing in the Lake View schools to all the students in the newly formed Respondent District. Shifflet Aff. ¶ 4; Rogers Dep. p. 38, line 22-p. 39, line 10. Appellant claims that CareSouth terminated her from employment in order to obtain a contract to provide indigent dental services to students in the Lake View area. Complaint ¶¶ 62-63; Graves Dep. (1/16/14) p. 132, line 3- p.134, line 8. However, none of the officials with CareSouth or with the District or the Board mentioned Appellant during the discussions about these dental services to students. Shifflet Aff. ¶ 5; Boynes Aff. ¶2; Rogers Dep. p. 38, line 21-p. 40, line 6.

While Appellant was employed by CareSouth, the National Health Service Corps ("NHSC") provided funding to her to pay her educational loans because she was providing clinical services as a health professional at CareSouth, an NHSC-approved site. After CareSouth terminated Appellant in 2011, she was out of compliance with her

NHSC contract and no longer entitled to funding from NHSC for her student loans. Graves Dep. (11/11/13) p. 278, line 14-p. 279, line 23 and Exhibits 7 and 8. As a consequence, she is now obligated to repay her student loans. She claims the amount she still owes, plus interest, as damages caused by the Respondents.

After CareSouth terminated Appellant from her employment, Appellant filed for and received unemployment compensation. She also opened a private counseling business known as Let's Make a Difference. Graves Dep. (1/1614) p. 140, lines 10-14. After she opened her business and after she began seeing patients, she continued to receive unemployment compensation benefits for several months, and the South Carolina Department of Employment and Workforce determined that, as a consequence, it had overpaid benefits to Appellant. Appellant agreed to repay to the Commission the overpayment of benefits she had received. As of the time of her deposition, over a year later, she had not repaid the overpayments. *Id.* at p. 103, line 19-p.104, line 25; p. 108, lines 1-18; p. 113, line 21- p. 114, line 24. Appellant claims that Respondent Whitfield, in referring to the fact that Appellant received unemployment benefits to which she was not entitled after she opened her business, defamed her by saying that she was "defrauding the unemployment." Graves Dep. (1/16/14) p. 101, lines 14-21; *see also* Whitfield Dep. p. 45, line 17-p. 46, line 7.

At some time prior to May 9, 2012, Appellant provided counseling services to a student enrolled in the District. According to the student's mother, Linda Pinkney, after a few meetings between Appellant and the student, Pinkney Aff. ¶ 7, Appellant handed Pinkney a paper printed from the internet describing the signs and symptoms of Asperger's Disorder, and suggested that she talk with Respondent Amanda Hayes about

help for "this problem." Pinkney Dep. p. 18, line 20-p. 19, line 22. Respondent Hayes, as the District's Director of Programs for Exceptional Children, is responsible for the provision of special education services to eligible students in accordance with the mandates and provisions of the federal Individuals with Disabilities Education Act ("IDEA"). Hayes Aff. ¶ 1. On May 9, 2012, Pinkney met with Hayes and told her that Appellant said the student had "Asperger's Syndrome."[2] Hayes Aff. ¶ 3. Because the diagnosis of Asperger's Disorder and the separate evaluation of whether a student with Asperger's Disorder is eligible under federal law for special education services are complex, technical issues, Hayes inquired into Appellant's qualifications to do either the diagnosis or the required special education evaluation. In fact, as Hayes discovered, Appellant was not qualified to perform either the diagnosis or the evaluation for special education services. Hayes Aff. ¶¶ 4 and 5; Graves Dep. (1/16/14) 85, lines 7-15 (Appellant admitted she is not licensed to diagnose Asperger's Disorder). When Pinkney questioned Hayes about medications for the student, Hayes suggested that Pinkney speak with her physician or the local Mental Health Center about that since Hayes was not qualified to address that issue. Hayes Aff. ¶ 3. Based on Pinkney's report to Appellant of her meeting with Hayes, Appellant contends that Hayes defamed her by telling Pinkney (1) that Appellant was not licensed, (2) that Pinkney should not take her daughter back to see Appellant for counseling, (3) that Appellant was not qualified to provide clinical counseling, (4) that Appellant did not know what she was talking about, and (5) that Pinkney should take her daughter to the Mental Health Center rather than to Appellant. Graves Dep. (1/16/14) p. 82, lines 5-19.

[2]The correct term is Asperger's Disorder.

Appellant also contends that this meeting between Hayes and Pinkney led to a separate defamatory statement by Respondent Rogers that she was not licensed. *Id.* at p. 99, lines 10-25. Appellant herself reported and complained about Hayes's comments to Shafer, the Chairman of the Board. Shafer notified Rogers, the Superintendent of the District and Hayes's supervisor, of Appellant's alleged complaints about Hayes. Rogers questioned Hayes about the incident, but there is no evidence that he or Shafer communicated with anyone else about the matter or made any statements regarding Appellant's licensure or professional competence. Rogers Dep. p. 62, lines 8-p. 64, line 11; Hayes Dep. p. 48, line 12-p. 49, line 24.

Appellant also alleges that Respondent Whitfield, who is employed as a secretary by the District and served with Appellant as an officer of the local NAACP chapter, allegedly said Appellant was unlicensed and incompetent, Graves Dep. (1/16/14) p. 93, lines 2-7, and a "troublemaker," *id.* p. 122, lines 6-9. She further contends that Respondent McRae, who was also a member of the Board, said Appellant was a "troublemaker" and "crazy," *id.* p. 123, lines 8-10; and that Respondent Schafer, the Chairman of the Board, said Appellant was a "troublemaker," *id.* p. 123, line 24-p. 124, line 11. She included Respondent McMillan, an employee of the District, in the list of people who allegedly defamed her, but she did not identify any allegedly defamatory statements he made. She contends that the District and the Board are liable for statements allegedly made by the individual Respondents. Complaint ¶ 54.

Finally, Appellant contends that the individual Respondents conspired with the co-defendant CareSouth to harass and demean her and to harm her career, purportedly to shield themselves from her criticism of them. Complaint ¶¶ 74-75.

These alleged actions by the Respondents, according to Appellant, caused her to suffer a loss of reputation, to be "terminated" from the Board, to lose her employment with the co-defendant CareSouth, to lose income from her private counseling business, and to lose the benefit of the repayment of her educational loan. Complaint ¶¶ 59, 66, and 77.

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, SCRCP, 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, 279, 701 S.E.2d 742, 743 (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 her 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. 524, 526, 445 S.E.2d 659, 661 (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 Emp't 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. Am. 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 Respondents' 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 (2003).

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 consideration by a jury, and the trial court properly granted summary judgment to the Respondents.

A. The Circuit Court Correctly Found that Respondents Are Entitled to Summary Judgment on the First Cause of Action Because She Cannot

Establish the Essential Elements of a Defamation Action Against Any of the Respondents.

Appellant claims that the District, the Board, and the individual Respondents all defamed her. When pressed for specifics about the defamation, Appellant identified the following alleged statements:

- Respondent Hayes, the Director of the District's Office of Exceptional Children, allegedly told Linda Pinkney, the mother of a student seeking special education services, that Appellant was unlicensed and incompetent to diagnose and provide counseling services to the student; that Pinkney should not take her daughter back to see Appellant for counseling, but should take her to the local Mental Health Center instead; and that Appellant did not know what she was talking about. Graves Dep. (1/16/14) p. 82, lines 5-19;
- Respondent Rogers allegedly said Appellant was unlicensed as a counselor, *id.* p. 99, lines 22-25;
- Respondent McRae allegedly said Appellant was a "troublemaker" and "crazy," *id.* p. 123, lines 8-10;
- Respondent Schafer allegedly said Appellant was a "troublemaker," *id.* p. 123, line 24-p. 124, line 11;
- Respondent Whitfield allegedly said Appellant was unlicensed and incompetent, Graves Dep. (1/16/14) p. 93, lines 2-7, a "troublemaker," *id.* p. 122, lines 6-9, and had committed unemployment fraud, *id.* p. 101, lines 14-21;
- Respondent McMillan allegedly defamed her, Complaint ¶ 54 (Appellant "has been falsely accused by the individual defendants . . ."), although Appellant did not describe the defamation.

The elements of a defamation claim are: "(1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication," *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 518, 506 S.E.2d 497, 506 (1998) (Toal, C.J., concurring). "It is the trial court's function to determine initially whether a statement is susceptible of having a defamatory meaning." *White v. Wilkerson*, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997).

A public figure or public official plaintiff[3] must meet the fault standard articulated in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964): clear and convincing evidence that the defendant, in publishing a false and defamatory statement about the plaintiff, acted with actual malice. To prove such constitutional actual malice, the plaintiff must prove that the defendant knew the statement was false or recklessly disregarded whether the statement was false or not. *Murray v. Holnan*, 344 S.C. 129, 143-44, 542 S.E.2d 743, 750-51 (Ct. App. 2001). In order to recover on her claims of defamation, therefore, Appellant must produce "sufficient evidence to conclude either that the defendant made the statements with a 'high degree of awareness of . . . probable falsity,' or that the defendant 'in fact entertained serious doubts as to the truth of his publication.'" *George v. Fabri*, 345 S.C. 440, 456, 548 S.E.2d 868, 876 (2001).

Under the affirmative defense of qualified privilege, "one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is

[3] The trial court correctly found that Appellant was both a public official and a public figure, and Appellant has not challenged this finding on appeal. Therefore, it is the law of the case. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (stating "an unappealed ruling, right or wrong, is the law of the case").

published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Swinton Creek Nursery v. Edisto Farm Credit, ACA,* 334 S.C. 469, 514 S.E.2d 126, 134 (S.C.1999). "A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable." *Constant v. Spartanburg Steel Prods., Inc.,* 316 S.C. 86, 447 S.E.2d 194, 196 (S.C.1994). Although an abuse of privilege is ordinarily a jury issue, where there are no facts supporting an abuse of privilege or no controversy as to the facts, the court can decide whether the privilege has been abused or exceeded. *Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012).

The trial court correctly found that each of Appellant's claims of defamation suffered from one or more deficiencies, including that some of the alleged statements were supported only by speculation, some were privileged, some were true or substantially true, and some were neither defamatory nor actionable for other reasons. In addition, the trial court correctly held that Appellant failed to meet the *New York Times* standard of fault applicable to public figures and public officials because she did not offer clear and convincing proof of actual malice. Further, Appellant offered no evidence of any false and defamatory statement by McMillan and provided no evidentiary support for her claim that the District and the Board could be found liable for the alleged statements of their employees or members. Finally, Appellant abandoned several particular claims of defamation in this appeal.

1. **Appellant's claim that Respondent Hayes said Appellant was not licensed or was incompetent in her profession does not raise a jury**

question because it is not supported by the evidence and, the alleged statement, even if proven, is privileged as a matter of law.

Appellant's allegation that Respondents Hayes said she was not licensed or competent as a counselor arises from the meeting Hayes had with Linda Pinkney, the mother of a student seeking special education services from the District. Prior to this meeting, Appellant had provided counseling to Pinkney's daughter on several occasions and thought the child had Asperger's Disorder. At Appellant's suggestion, Pinkney met with Hayes to discuss whether her daughter was entitled to special education services. Pinkney reported to Hayes that Appellant had said the child had Asperger's Disorder. Hayes Aff. ¶ 3. According to Appellant, Pinkney said that Hayes inquired about Appellant's licensure and told Pinkney that Plaintiff was not licensed to diagnose Asperger's Disorder. Pinckney Dep. p. 27, lines 17-22. When Pinkney asked Hayes about medications for her daughter, Hayes suggested that Pinkney speak with her doctor or the Mental Health Center about medications, because Hayes was not qualified to address that issue. Hayes Aff. ¶ 3.

A proper diagnosis of Asperger's Disorder and a separate evaluation of the educational effects of Asperger's Disorder by qualified professionals are required in the special education evaluation process. It was, therefore, necessary that Hayes determine whether Appellant was qualified to make that diagnosis and to consult with the District, or whether the District needed to seek a diagnosis and educational evaluation from other professionals. Hayes Aff. ¶¶ 3-5. In fact, Appellant is not qualified or licensed to diagnose Asperger's Disorder, as Appellant herself admits, Graves Dep. (1/16/14) p. 85, lines 7-15, and as she told Pinkney. Pinkney Dep. p. 19, line 8-p. 20, line 2; p. 43, line 25-p. 44, line 8. Nevertheless, Appellant argues that Hayes's questioning Pinkney about

Appellant's licensure to diagnose Asperger's Disorder constituted actionable defamation about Appellant's professional qualifications and licensure to provide counseling. Appellant's Brief at Section I.A. This is both nonsensical and inconsistent with the evidence presented to the trial court.

In support of her argument to the trial court, Appellant submitted an affidavit that she drafted and had Pinkney sign, *see* Pinkney Dep. p. 33, lines 15-23; p. 36, line 11-p. 37, line 1; p. 37, line 16-p. 38, line 10, stating that Hayes told Pinkney that Appellant "was not qualified to be a counselor because she was not licensed," Pinkney Aff. ¶ 9, and that Pinkney "should not take her daughter back to [Appellant] ever again," *id.* at ¶ 12. When questioned directly about these assertions during a subsequent deposition, however, Pinkney qualified her previous assertions and ultimately admitted that they were not true. Instead, Pinkney testified that she merely "felt" that Hayes's questions about Appellant's licensure meant that Hayes was saying Appellant was not qualified as a counselor and that Pinckney should not take her daughter to see Appellant again. Pinkney Dep. p. 40, line 14-p. 41, line 11; p. 49, lines 13-19. In fact, Pinkney admitted that Hayes never said that Appellant did not hold a license to provide counseling, *id.* p. 41, lines 12-15; that Hayes never said anything to her about Appellant's counseling sessions with her daughter, *id.* at p. 28, lines 14-22; and that Hayes never told her not to take her daughter back to see Appellant, *id.* at p. 28, lines 20-22; p. 32, lines 14-21. Appellant's claim that Hayes made these assertions rests solely on Appellant's characterization in the affidavit of Pinkney's subjective—and inaccurate—interpretation of what Hayes said. Pinkney's interpretation and Appellant's arguments are in stark contrast to what Pinkney admits Hayes actually said.

Hayes questioned Pinkney about Appellant's licensure to diagnose Asperger's Disorder. Hayes did not question Pinkney about Appellant's licensure or qualifications to counsel Pinkney's daughter, nor did Hayes say anything about whether Appellant should be counseling Pinkney's daughter. Pinkney's testimony does not create a triable question of fact regarding Appellant's claim that Hayes made defamatory statements about Appellant's licensure or qualifications as a counselor.

Moreover, Hayes's discussion with Pinkney revolved around the process of diagnosing and evaluating Pinkney's daughter for special education services and was privileged as a matter of law. Hayes explained the necessary and complicated steps required by state and federal law, including the requirements that a diagnosis of Asperger's Disorder be made by a licensed and qualified professional and that a separate educational evaluation be made by "an appropriately certified or highly qualified teacher, a certified school psychologist, a licensed psychoeducational specialist, or a licensed psychologist with training in autism." Hayes Aff. ¶ 5. When Pinkney stated that Appellant felt her daughter had Asperger's Disorder, Hayes then appropriately questioned Pinkney about what she knew about Appellant's qualifications to make such a diagnosis. Pinkney and Hayes were the only parties to this discussion, and both had a corresponding interest in it: to determine whether Pinkney's daughter was eligible for special education services. Their discussion was limited to that warranted by the occasion, and there is no evidence that Hayes acted in bad faith in exchanging this information with Pinkney. Therefore, Hayes's statements to Pinkney were qualifiedly privileged, and she did not abuse the privilege. *See Austin v. Torrington Co.*, 810 F.2d

416 (4th Cir. 1987); *Fountain v. First Reliance Bank*, 398 S.C. 434, 730 S.E.2d 305 (2012).

Appellant's argument that Hayes abused the privilege by spending more time during the meeting discussing Appellant rather than Pinkney's child has no merit. "Abuse of a qualified privilege" is a legal term to denote when a statement goes beyond the scope of what is reasonable given the duties and interests involved or when a statement was made in reckless disregard of the victim's rights. *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310. The relative amount of time spent in discussion on a particular topic is not pertinent to this consideration.

The existence of a privilege is a matter of law for the court, *Murray v. Holnam, Inc.*, 344 S.C. 129, 140, 542 S.E.2d 743, 749 (Ct. App. 2001), as is whether there are any facts demonstrating abuse of the privilege, *Fountain*, 398 S.C. at 446, 730 S.E.2d at 311. The trial court correctly found that Hayes's statements were privileged and there were no facts suggesting abuse of the privilege. The court correctly determined that Hayes is entitled to judgment as a matter of law on this additional ground on Appellant's claim of defamation.

2. Appellant's claim that Respondent Rogers said Appellant was not licensed as a counselor was abandoned on appeal and, further, does not raise a jury question because it is not supported by the evidence and the alleged statement, even if proven, was privileged.

a. Appellant abandoned her claim that Rogers defamed her.

Appellant testified in her deposition that Respondent Rogers said she was not licensed as a counselor. Graves Dep. (1/16/14) p. 99, lines 22-25. However, Appellant appears to have abandoned this argument on appeal, focusing instead only on alleged statements by Respondent Hayes about her licensure, discussed in Section I.A.1., *supra.*

Thus, this court should not consider the issue of whether Rogers defamed Appellant by saying Appellant was not licensed. *See* Rule 208(b), SCACR (appellant must set forth an issue in a statement and argument in order to preserve it for appellate review); *Woodson v. DLI Props., LLC*, 406 S.C. 517, 529 n.11, 753 S.E.2d 428, 434 n.11 (2014) (citing *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993)).

b. The evidence does not support Appellant's claim that Rogers made the statement Appellant attributed to him regarding Appellant's licensure, and such a statement, even if proven, would be privileged.

Even if Appellant had not abandoned her claim that Rogers defamed her by saying she was unlicensed, Rogers is entitled to judgment as a matter of law on this point because Appellant is unable to explain her allegation in any detail whatsoever and cannot identify to whom the alleged defamation was published. Graves Dep. (1/16/14) p. 99, line 22-p. 100, line 4. The only evidence in the record suggesting that Rogers was involved in any discussion regarding Appellant's licensure comes from the testimony of Rogers and Hayes describing Rogers's investigation of Hayes's meeting with Pinkney. Appellant complained to Respondent Schafer, Chair of the Board, about Hayes's alleged statements to Pinkney, thus publishing the alleged defamatory statements herself. Schafer then asked Rogers, who as Superintendent of the District was Hayes's supervisor, to investigate Appellant's complaints about Hayes's alleged statements. Rogers questioned Hayes about her meeting with and statements to Pinkney and, from that discussion, correctly understood that Hayes needed more information than Pinkney and Appellant had provided in order to determine whether Pinkney's child was eligible for special education services. Rogers Dep. p. 62, line 8-p. 63, line 23; Hayes Dep. p. 48, line 12-p. 49, line 24.

There is no competent evidence in the record that Rogers made any statements whatsoever about Appellant's licensure, *see* Rogers Dep. p. 64, lines 20-24.

Moreover, all statements by and between Rogers and Hayes about this incident are privileged because their discussion remained within the confines of those with a corresponding interest in the information, was limited to what was warranted by the occasion, and was conducted in good faith. Absent a showing that the privilege was abused, which Appellant does not attempt to make, Rogers cannot be liable for this alleged defamation. *See Fountain v First Reliance Bank*, 398 S.C. 434, 730 S.E.2d 305 (2012). Indeed, Rogers and Hayes deny speaking about this matter with anyone else, and the only reason Rogers was even aware of it was because Schafer learned about it from Appellant herself and asked Rogers to investigate. The evidence thus establishes that it was Appellant, not Rogers or Hayes, who published the alleged defamation.

3. Appellant's claim that Respondent Whitfield said Appellant was not licensed or was incompetent in her profession was abandoned on appeal and, further, does not raise a jury question because it is not supported by the evidence and the alleged statement, even if proven, is not actionable as defamation.

a. Appellant abandoned her claim that Whitfield defamed her by allegedly saying she was not licensed and incompetent.

Appellant testified in her deposition that Respondent Whitfield said she was unlicensed and incompetent. Graves Dep. (11/11/13) p. 192, line 23-p. 193, line 13; p. 194, lines 10-21. Although she argued in her brief to this court that Whitfield defamed her, she appears to have abandoned any argument that the defamation consisted of statements regarding her professional qualifications and competency, focusing instead only on a statement by Whitfield that Appellant was "defrauding the unemployment." *See* Section I.B. of Appellant's Brief. Thus, this court should not consider the issue of

whether Whitfield defamed Appellant by saying Appellant was not licensed and incompetent because she abandoned that issue. *See* Rule 208(b), SCACR (appellant must set forth an issue in a statement and argument in order to preserve it for appellate review); *Woodson v. DLI Props., LLC*, 406 S.C. 517, 529 n.11, 753 S.E.2d 428, 434 n.11 (2014) (citing *Biales v. Young,* 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993).

b. The evidence does not support Appellant's claim that Whitfield made the statement Appellant attributed to her regarding Appellant's licensure and competence, and such a statement, even if proven, would not be actionable as defamation.

Even if Appellant had not abandoned her claim that Whitfield defamed her by saying she was unlicensed and incompetent, Whitfield is entitled to judgment as a matter of law on this point. Appellant's allegation that Respondent Whitfield said she was unlicensed and incompetent arises out of the ongoing disagreements the two had over the work and leadership of the local chapter of the NAACP in which both women held offices. However, Whitfield testified that she did not know how Appellant was employed and did not make such statements. Whitfield Dep. p. 45, lines 3-11.

Moreover, Appellant displayed a great deal of animus toward Whitfield because of their disagreements inside the local NAACP and, in that context, accused Whitfield of attacking her personally. *See, e.g.,* Graves Dep. (1/16/14) p. 93, lines 2-7 and lines 16-22. Indeed, the vast majority of the accusatory questions directed by Appellant's counsel to Whitfield at her deposition had to do with these disagreements, which are irrelevant to the issues in this case. *See* Whitfield Dep. p. 26, line 12-p. 44, line 14. The South Carolina Supreme Court has long followed the principle that "the intent and meaning of an alleged defamatory statement must be gathered not only from the words singled out as

libelous, but from the context . . ." *Jones v. Garner*, 250 S.C. 479, 485, 158 S.E.2d 909, 912 (1968), quoting 33 Am. Jur., Libel and Slander, § 87. Thus, even if Whitfield accused Appellant of incompetence, the fact that such statements allegedly occurred in the context of heated meetings of the local NAACP demonstrates that they were exaggerations not aimed at harming Appellant's business, but at scoring political points. As the United States Supreme Court recognizes, "rhetorical hyperbole" or "a vigorous epithet used by those who considered [an opponent's] position extremely unreasonable" is not defamatory. *Greenbelt Coop. Publ'g Assn., Inc. v. Bresler*, 398 U.S. 6, 13-14, (1970) (real estate developer accused by some as engaging in "blackmail" in negotiations with the city was not defamed) (quoted with approval in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990)). Constitutional protection for such statements "provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20.

In addition, even if Whitfield did say Appellant was incompetent in her profession, such a comment would have been a subjective opinion subject to varying interpretations and, thus, not defamatory. Only statements of fact that can be proven as false are actionable as defamation. As one commentator succinctly summarized the law: "Defamation is actionable only if false; opinions cannot be false; opinions are not actionable." Sack on Defamation: Libel, Slander, and Related Problems § 4.2.4.1 at pp. 4-15–4-16, quoted in 99 Am. Jur. Proof of Facts 3d 393 (Originally published in 2008).

Finally, Appellant, a public figure and official, did not establish that Whitfield, if she made such remarks, had a "high degree of awareness of [their] probable falsity" or

"entertained serious doubts as to [their] truth." *See George*, 345 S.C. at 456, 548 S.E.2d at 876. The record before the trial court contained no subjective evidence of Whitfield's knowledge or beliefs regarding Appellant's licensure and professional competence. Appellant, therefore, failed to satisfy the necessary element of fault in her defamation claim against Whitfield.

4. Appellant's allegation that Respondent Whitfield accused her of committing unemployment fraud does not raise a jury question because such a statement is a subjective opinion rather than a statement of fact and because it is substantially true.

Appellant claims that Respondent Whitfield defamed her by accusing her of committing unemployment fraud. Graves Dep. (1/16/14) p. 101, lines 14-21. Whitfield cannot be liable for her statement regarding Appellant's receipt of unemployment compensation because it was an opinion rather than a statement of fact and, even if not literally true or precisely accurate, it was substantially true.

Whitfield admits that when she learned Appellant had opened a counseling business after she was fired from her job with CareSouth, she told Tim Faulk, another member of the Board, that she thought Appellant was "defrauding the Unemployment" because she was receiving unemployment compensation while she was also operating a business. Whitfield Dep. p. 45, line 17-p. 46, line 2. Appellant admits that she received unemployment benefits after opening her private business and seeing patients and further admitted that she had not fully repaid those benefits to which she was not entitled. Graves Dep. (1/16/14) p. 103, line 11-p. 104, line 3; p. 104, lines 14-16; p. 108, lines 14-18; p. 113, lines 21-24; p. 114, lines 16-24; p. 140, lines 10-18.

When Whitfield's statement is considered in the context of her conversation with Faulk, as it must be, *see White v. Wilkerson*, 328 S.C. 179, 184, 493 S.E.2d 345, 347

(1997), it cannot be construed as anything other than her justifiable lay opinion that Appellant, while she was serving as a member of the Board, collected unemployment benefits when she was not entitled to them. This belief was supported by the facts, as Appellant's own testimony demonstrated. Graves Dep. (1/16/14) p. 140, lines 10-14 (opened her business in November 2011 and saw first patients in April 2012); p. 108, lines 14-18 (continued to receive unemployment checks between April and September 2012); p. 113, line 21-p. 114, line 24 (has not yet repaid the overpayment and is not currently making payments). Whitfield merely expressed her belief based on disclosed facts that were true: that Appellant continued to receive unemployment benefits after she opened her business. Whitfield's statement of her belief was not a statement of fact that is demonstrably false; it was Whitfield's opinion and, therefore, not defamatory.

In addition, a statement is not defamatory if it is substantially true. *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976); *Haulbrooks v. Overton*, 295 S.C. 380, 383-84, 368 S.E.2d 676, 678 (Ct. App. 1988). The defense of truth is viable even if the defendant's statement is not literally true or precisely accurate:

> [M]any charges are made in terms that are accepted by their recipients in a popular rather than a technical sense. . . . Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance. It is not necessary to establish the literal truth of the precise statement made.

Restatement (Second) of Torts § 581A, comment f (1977), cited in *Myles v. Main-Waters Enters., LLC*, 2011 WL 11733602 at *3 (S.C. Ct. App., March 22, 2011) (unpublished opinion) (plaintiff said he tried to break up a fight by grabbing and throwing another person out of a car; defendants' statements that plaintiff was engaging in a fight were, therefore, substantially true).

In an analogous case, *Blanchett v. Wal-Mart Stores, Inc.*, former employees of the Wal-Mart store in Greenwood, South Carolina, who had been eating food from the snack bar without paying for the food, claimed that Wal-Mart defamed them by telling their co-workers and customers that they had been "fired for stealing." 14 F.3d 593, 1994 WL 6255, at *2 (4th Cir. Jan. 12, 1994) (unpublished table opinion). The former employees preferred to call their actions "sampling" or "grazing" rather than "stealing." The Fourth Circuit Court of Appeals, applying South Carolina law, affirmed summary judgment in favor of Wal-Mart because Wal-Mart's use of the term "stealing" was simply common parlance for what the plaintiffs admitted doing. Although the statement was not technically accurate because the plaintiffs were not arrested for theft, it was substantially true and, therefore, not defamatory. The Fourth Circuit summarized the case in the following manner: "The appellants brought this suit alleging that Wal-Mart defamed them by, in essence, saying 'to-*may*-toe.' Wal-Mart defended on the ground that it instead said, if anything, 'to-*mah*-toe.' We affirm the district court's decision to call the whole thing off." *Id.* at *3.

Here, Appellant admits that she collected unemployment benefits to which she was not entitled, yet complains that Whitfield said she was "defrauding the Unemployment" because she collected unemployment benefits to which she was not entitled. The difference in terminology is negligible. Like the statement in *Blanchett*, Whitfield's statement, accompanied by a statement of the underlying facts (i.e., that Appellant collected unemployment benefits to which she was not entitled after she opened her business), was substantially true.

Moreover, Whitfield's use of the term, "defrauding the Unemployment," is quite obviously a reference to the popular sense of the term, rather than a statement that Appellant had been charged or convicted of any kind of criminal fraud. No reasonable person could believe from this inartful statement by Whitfield, a secretary with no legal training, that Appellant had been charged or convicted of any kind of criminal fraud. Indeed, Appellant admits that the only person known to have heard Whitfield's remark, Tim Faulk, told her he did not believe she was "committing unemployment fraud." Graves Dep. (11/11/13) p. 234, lines 16-17. In an analogous case, *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970), the Supreme Court held that the use of the word "blackmail" in connection with a real estate developer's negotiating position was not defamation because the underlying facts were disclosed and no reader could have understood that the use of the term actually charged the developer with a criminal offense. Instead, the Court recognized that the term was used as "rhetorical hyperbole" or "a vigorous epithet." Noting that the record, like the record in the instant case, contained no evidence that anyone thought the plaintiff had been charged with a crime, the Court reversed a jury verdict for the plaintiff. *See also Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974) (use of the word "traitor" to describe union workers who did not honor a strike did not constitute a defamatory statement of fact because it was used in a "loose, figurative sense" and could not have been understood to charge the workers with committing the criminal offense of treason).

The evidence viewed in the light most favorable to Appellant does not establish that Whitfield falsely charged Appellant with the commission or conviction of a crime. Whitfield merely said that she thought because Appellant was collecting unemployment

benefits while simultaneously operating a business, Appellant was "defrauding the Unemployment." This statement could not reasonably be construed as falsely stating that Appellant had actually been charged with a crime, and the only known hearer, Faulk, did not believe Appellant had been charged or convicted of a crime. Moreover, the statement was substantially true because Appellant had collected unemployment benefits to which she was not entitled. Finally, Appellant offered no subjective evidence of fault in the form of actual malice on the part of Whitfield. Appellant's claim of defamation against Whitfield is not supported by the evidence and should be dismissed as a matter of law.

5. Appellant's claim that Respondents Whitfield and Schafer defamed her by saying Appellant was a "troublemaker" and "crazy" was abandoned on appeal and, further, that claim and the additional claim that Respondent McRae defamed her in the same manner do not raise jury questions because they are not supported by the evidence and the alleged statements, even if proven, are subjective opinions and, thus, not actionable as defamation.

a. Appellant abandoned her claims that Whitfield and Schafer defamed her by saying she was a "troublemaker" and "crazy."

Appellant testified in her deposition that Respondents Whitfield, McRae, and Schafer said she was a "troublemaker" and/or "crazy." Graves Dep. (1/16/14) p. 122, lines 6-9; p. 123, lines 8-10; p. 123, line 24-p. 124, line 11. Although she argued in her brief to this court that McRae defamed her in this way, she appears to have abandoned any argument that Whitfield and Schafer did so. *See* Section I.C. of Appellant's Brief. Thus, this court should not consider the issue of whether Whitfield or Schafer defamed Appellant by saying Appellant was a "troublemaker" or "crazy." *See* Rule 208(b), SCACR (appellant must set forth an issue in a statement and argument in order to preserve it for appellate review); *Woodson v. DLI Props., LLC*, 406 S.C. 517, 529 n.11,

753 S.E.2d 428, 434 f.11 (2014) (citing *Biales v. Young,* 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993)).

b. Appellant's claims that McRae, Whitfield, and Schafer defamed her by calling her a "troublemaker" and "crazy" are not supported by the evidence and, even if proven, are subjective opinions and not actionable as defamation.

Even if Appellant had not abandoned her claim that Whitfield and Schafer defamed her by saying she was a "troublemaker" and "crazy," they are entitled to judgment as a matter of law on this point, as is McRae.

First, with respect to McRae, Appellant's allegation is remarkably weak and does not raise a genuine issue of material fact that McRae made such statements. She testified that Danielle Goodin told her about rumors "circulating in the community" to the effect that McRae, in a gathering of a vaguely identified group, said that Appellant was a "troublemaker" and "crazy." Graves Dep. (1/16/14) p. 122, line 15-p. 123, line 21. Appellant is unable to identify exactly what was said, who heard the alleged statements, or when or where the defamation occurred. Appellant's ultimate source that the alleged defamatory statements were made is talk "circulating in the community" about which Goodin told her. Appellant relies on rumors and inadmissible hearsay, not to prove the truth of McRae's alleged statements about her, but to prove the truth of Goodin's statement and of the rumors "circulating in the community" that McRae actually made such statements.

Appellant has the burden of proving that McRae and others made defamatory statements about her. It is true, as Appellant contends, that the alleged defamatory statements themselves are not offered for the truth of the matter asserted. However, Appellant's proof that McRae made the statements is incompetent because it is based on

several layers of inadmissible hearsay. *See* Rule 805, SCRE (hearsay within hearsay is not admissible unless each part of the chain of statements falls within an exception to the hearsay rule); *Wilson v. Childs*, 315 S.C. 431, 439, 434 S.E.2d 286, 291 (Ct. App. 1993) (same).

According to Appellant, Goodin did not hear McRae make the statements, but reported to Appellant only that she had heard rumors "circulating in the community" that McRae made the statements. Appellant offers no documentary or testimonial evidence adduced from the person or persons who heard what McRae said as to what they heard. Thus, Appellant's testimony about what Goodin told her (Goodin heard talk that McRae said X), Goodin's statement to Appellant about what she heard (talk "circulating in the community" that McRae said X), and the rumors Goodin said she heard (McRae said X)—are all inadmissible hearsay. *See Hernandez v. Citibank, N.A.*, 141 F.Supp.2d 241, 244 (D.P.R. 2001) (plaintiff's testimony that "C" told plaintiff that an unidentified person told "C" that person "A" made a defamatory statement about plaintiff is inadmissible hearsay); *see also Vazquez v. Lopez-Rosario*, 134 F.3d. 28, 34 (1st Cir. 1998) ("hallway gossip" in which the source of information is not identified is inadmissible hearsay). Appellant's proof, based as it is on rumor, innuendo, and multiple layers of unidentifiable unverifiable hearsay is clearly inadmissible and insufficient to create a genuine issue of material fact. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991).

In addition, the alleged statements by McRae, Whitfield, and Schafer that Appellant was a "troublemaker" and "crazy" would, even if made, constitute personal opinion and name-calling by persons whom Appellant has publicly accused of

wrongdoing, rather than defamatory statements of fact. Epithets and figurative or hyperbolic language such as "troublemaker" and "crazy" are not "sufficiently factual to be susceptible of being proved true or false" and do not constitute defamation upon which an action may be based. *Lieberman v. Fieger*, 338 F.3d 1076 (9th Cir. 2003) (lawyer's use of the terms "crazy people," "Looney Tunes," "nuts," and "mentally unbalanced" in reference to an expert witness was non-defamatory as a matter of law).

Subjectively labeling a person as "crazy" or "a troublemaker" is hyperbolic, ambiguous, and non-verifiable name-calling that cannot form the basis for a claim of defamation. Such comments express subjective opinions that are not provably false assertions of fact and, therefore, are not actionable as defamatory. In cases where the parties are engaged in a public dispute, in particular, courts consider the context of the dispute to be a key element in determining that insults and name-calling are opinion and not actionable as defamation. For example, in a case in which a professor referred to his colleague as a "lousy anthropologist" and "anti-Semitic" and further described him as "pursuing a half-assed fantasy," "pursuing a bizarre obsession," "paranoid," "delusional," "beset by devils," "crazy," and "having little grasp on reality," the court found that the objectionable words were personal opinion and not defamatory, reasoning as follows:

> Defendant's assessments or interpretations of Plaintiff's mental state are not actionable because they are reasonably considered expressions of opinion. In some contexts, such statements about another's mental state could qualify as statements of fact. *See* 1 Robert D. Sack, *Sack on Defamation,* § 4.3.1. For example, a statement made by a psychiatrist or other mental health professional might require a different analysis. The statements here, when taken in their context as statements by one anthropologist about a rival anthropologist, are not reasonably interpreted as factual.

Fikes v. Furst, 133 N.M. 146, 156, 61 P.3d 855, 865 (Ct. App. 2003), *rev'd in part on other grounds*, 134 N.M. 602, 81 P.3d 545 (2003); *see also Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1293-94 (9th Cir. 2014) (considered in the context of a website containing hyperbolic language, blog posts accusing plaintiffs of "illegal activity," "corruption," "fraud," "deceit on the government," "money laundering," "defamation," "harassment," tax crimes," and "fraud against the government" were opinion because "not sufficiently factual to be proved true or false" and, therefore, not defamatory). As Justice Brennan has observed, "the kind of language used and the context in which it is used may signal readers that an author is not purporting to state or imply actual, known facts." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 25 (Brennan, A.J., concurring).

In addition to being simple opinions, the terms "troublemaker" and "crazy" also fall within the category of rhetorical hyperbole or a vigorous epithet applied in the public area to a public official, which is not defamatory. *See Greenbelt Coop. Publ'g Assn., Inc. v. Bresler*, 398 U.S. 6, 13-14 (1970) ("blackmail"); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990) (plaintiff lied under oath); *Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974) ("traitor"). The terms "troublemaker" and "crazy" supposedly applied to Appellant may be insults, but are certainly lesser degrees of insults than the terms in the United States Supreme Court cases listed above. Despite their insulting character, however, all of these terms are non-defamatory in the contexts in which they were made.

Appellant's claim that McRae, Whitfield, or Schafer defamed her by calling her "crazy" or a "troublemaker" is without merit. Such terms are strictly personal opinions or "non-fact-subjective conclusions" that are subject to varying interpretations and not

provably false. Any reasonable person would recognize the subjective character of such terms. They are not, therefore, defamatory as a matter of law.

6. Appellant's allegations that Respondents McMillan, District, and Board defamed her do not raise jury questions because she offers no evidence to support them.

a. Appellant abandoned her claim that Respondent McMillan defamed her and, in any event, never provided any evidence to support that claim.

Appellant initially claimed that all Respondents, including presumably Respondent McMillan, defamed her, *see* Complaint ¶ 55, but provided no testimony or other evidence to support that claim. She has never dismissed that claim, however, and in her arguments to the trial court, did not differentiate between McMillan and other Respondents. In her brief to this court, however, she appears to have abandoned any argument that McMillan defamed her. *See* Section I of Appellant's Brief. Thus, this court should not consider the issue of whether McMillan defamed Appellant. *See* Rule 208(b), SCACR (appellant must set forth an issue in a statement and argument in order to preserve it for appellate review); *Woodson v. DLI Props., LLC*, 406 S.C. 517, 529 n.11, 753 S.E.2d 428, 434 n.11 (2014) (citing *Biales v. Young,* 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993)).

Even if Appellant had not abandoned her defamation claim against McMillan, he is entitled to summary judgment on this issue because Appellant offered no evidentiary support for such a claim.

b. Appellant offered no evidence upon which the District or the Board could be held liable for the alleged statements of the individual Respondents.

Appellant argues that the District and Board are vicariously liable for the alleged defamatory statements of the individual Respondents. In order to establish vicarious liability on the part of the District and Board, Appellant must prove that the individual Respondents, in publishing defamation about her, were acting within the scope of their employment or apparent authority. Aside from the fact that Respondent Schafer and McRae were members of the Board and the fact that Respondents Rogers, McMillan, Hayes, and Whitfield were employed by the District, however, Appellant made no effort to establish vicarious liability of the District or the Board for each alleged statement. Appellant provided no evidence that the Board authorized its members—Schafer and McRae—to make defamatory statements about Appellant, or that the District authorized its employees—Rogers, McMillan, Hayes, and Whitfield—to make defamatory statements about Appellant. In addition, the Board cannot be liable for statements of those Respondents who were not employed or authorized to act by the Board, and the District cannot be liable for statements of those Respondents who were not employed or authorized to act by the District. The burden is on Appellant to prove facts supporting her contention that the District and the Board are legally responsible for the allegedly defamatory statements, and she has not done so. The District and the Board are, therefore, entitled to judgment as a matter of law on the First Cause of Action for defamation.

B. The Circuit Court Correctly Found that the Respondents Board and District Are Entitled to Summary Judgment on the Second Cause of Action Because She Cannot Establish the Essential Elements of Tortious Interference With Contractual Relations.

Appellant claims in her Second Cause of Action that the Board and the District interfered with her employment contract with CareSouth by inducing CareSouth to fire her and that it interfered with her private business by discouraging the public from

engaging Appellant's business for counseling services. Complaint ¶¶ 61-62. Tortious interference with contractual relations requires proof of the following elements: "1) the existence of a contract; 2) knowledge of the contract; 3) intentional procurement of its breach; 4) the absence of justification; and 5) resulting damages" *Eldeco, Inc. v. Charleston Cnty. Sch. Dist.*, 372 S.C. 470, 480, 642 S.E.2d 726, 731 (2007). Appellant cannot establish that the Respondents interfered with her employment contract with CareSouth. Appellant also cannot establish that she had a contract with her own counseling business with which the Respondents could interfere.

In support of her claim of tortious interference with her employment contract with CareSouth, Appellant offered the testimony of Alice Grice, who, incidentally also had litigation pending against the District and its employees. Grice alleged that CareSouth terminated Appellant as a *quid pro quo* for obtaining a contract with the District to provide dental services to students in the Lake View schools. Graves Dep. (1/16/14) p. 132, line 3-p.134, line 13; Grice Dep. p. 21, line 10-p. 22, line 4; p. 24, line 19-p. 25, line 16. Grice's testimony is based on nothing more than supposition and speculation, which is insufficient to create a genuine issue of fact. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991). Grice testified that "In my opinion, [Appellant] was drawing too much attention to things that they were doing," Grice Dep. p. 24, lines 19-20, and "I suspect that they wanted her just to be quiet." *Id.* p. 25, lines 6-7. As for the supposed advantage to CareSouth from this alleged deal, Grice admitted that she did not know whether CareSouth would profit from providing these dental services. *Id.* at p. 26, lines 14-24. Appellant's evidence that the District and the Board struck a deal with CareSouth for dental services in return for CareSouth terminating Appellant's

employment is based on nothing more than Grice's opinion and suspicion about the supposed *quid pro quo* agreement. The trial court correctly determined that Grice's testimony was insufficient to create a genuine issue of material fact because it was incompetent, based as it was on speculation and supposition, not because the trial court did not find it credible as Appellant argues in her brief.

The only competent evidence in the record establishes that Appellant was fired from her employment at CareSouth because of her "gross violation of state and federal regulations," her "failure to maintain required performance standards, expectations, and competencies" and her misuse of her company cell phone. Kershner Aff. ¶¶ 6, 9, and 10. Her supervisor, Elizabeth Kershner, made the decision to fire her, without consulting anyone inside or outside of CareSouth about that decision. *Id.* at ¶ 10. She also testified that had she known additional information about Appellant's wrongful access and use of other employees' email accounts at the time, she would have fired Appellant for that reason alone. *Id.* at ¶ 11. Kershner knew none of the Respondents and never communicated with any of them. *Id.* at ¶ 10. In addition, none of the officials with CareSouth or with the District or the Board involved in the discussions leading to the provision of dental services to students in either Lake View or Dillon ever mentioned Appellant. Shifflet Aff. ¶ 5; Boynes Aff. ¶ 2; Rogers Dep. p. 38, line 21-p. 40, line 6. Appellant's lost employment had nothing to do with the provision of dental services to any students in Dillon County and everything to do with her own failure to perform her job appropriately.

Appellant has abandoned her claim that the District and Board tortiously interfered with her private consulting business by encouraging persons not to use it

because she failed to argue the issue in her brief. Even if she had not abandoned this claim, her evidence does not support a cause of action for tortious interference with contract relating to her private consulting business. The cause of action requires proof of the existence of a contract. Appellant owned her business; she did not have a contract with it. Appellant failed to prove the existence of this first essential element of this cause of action. The trial court correctly found that Appellant could not establish, as a matter of law, that the District and Board negligently or intentionally interfered with any contract to which she was a party.

C. Appellant Abandoned Her Third Cause of Action for Invasion of Privacy.

Appellant does not argue that the circuit court erred in granting summary judgment to the Respondents on the Third Cause of Action for invasion of privacy. Thus, Appellant abandoned any issue that the grant of summary judgment in favor of the Respondents in the Second Cause of Action was in error. *See* Rule 208(b), SCACR (appellant must set forth an issue in a statement and argument in order to preserve it for appellate review); *Woodson v. DLI Props., LLC*, 406 S.C. 517, 529 n.11, 753 S.E.2d 428, 434 n.11 (2014) (citing *Biales v. Young,* 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993)).

D. The Circuit Court Correctly Found that the Respondents Schafer, McRae, Rogers, McMillan, Hayes, and Whitfield Are Entitled to Summary Judgment on the Fourth Cause of Action Because Appellant Cannot Establish the Essential Elements of a Civil Conspiracy Among the Respondents.

Appellant contends in her Fourth Cause of Action that all the individual Respondents and her former employer, CareSouth, met and conspired together to "harass, demean, threaten and otherwise harm [her] in her career and wellbeing," which she alleges caused her "separate special damages." Complaint ¶ 74. The damages she claims

resulted from this conspiracy consisted of ostracism, blacklisting, lost employment with the Board and with CareSouth, loss of reputation, embarrassment, humiliation, and mental suffering. Complaint ¶ 77. She contends in her brief to this court that she produced sufficient evidence of concerted action and special damages to warrant the submission of her claim of civil conspiracy to a jury.

To recover on her claim of civil conspiracy, Appellant must plead and prove that the Respondents combined with each other and/or with CareSouth for the purpose of injuring her and that such combined action caused her special damage. *See Kuznik v. Bees Ferry Assoc.*, 342 S.C. 579, 610, 538 S.E.2d 15, 31 (2000); *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981), *rev'd on other grounds*, 283 S.C. 155, 321 S.E.2d 602 (1984), *quashed in part on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985). A plaintiff must plead and prove acts in furtherance of the conspiracy that are in addition to and separate from those alleged in support of her other causes of action. *Id.* If "the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong." *Kuznik*, 342 S.C. at 610-11, 538 S.E.2d at 31 (quoting *Todd*, 276 S.C. at 293, 278 S.E.2d at 611). In addition, special damages, which also must be specified in the complaint and proven by the claimant, "are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct. . . . Special damages . . . are not implied at law because they do not necessarily result from the wrong." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 116-17, 682 S.E.2d 871, 875 (Ct. App. 2009).

Special damages sought in a civil conspiracy claim must be different from the damages sought in the plaintiff's other causes of action. *Id.*

The trial court correctly found that Appellant "failed to provide any proof of a combination of persons who agreed and pursued a common plan to injure her; any additional, independent acts in furtherance of the conspiracy; or any special damages that are separate and independent of the damages that underlie her other causes of action." Order at p. 19. Appellant argues in her brief to this court that she provided such proof, but did not support that argument with any references to the specific proof she claims she provided. In fact, she provided no competent evidence to either the trial court or this court to support any of the elements of this cause of action.

The only support Appellant offered the trial court that the Respondents had intent, a plan, and acted to combine with CareSouth to harm her professionally consisted of her suspicions and beliefs that the Respondents bore her ill will. She admitted that she has no evidence that any of the individual Respondents spoke about her with Elizabeth Kershner, Appellant's supervisor at CareSouth who terminated her for cause, or any other decision makers at CareSouth. *See, e.g.,* Graves Dep. (11/11/13) p. 170, lines 15-25 (Schafer); p. 172, lines 22-25 (McRae); p. 188, lines 8-14 (McMillan); p. 192, lines 9-22 (Hayes); p. 194, lines 3-8 (Whitfield). Appellant was only able to say that another person relayed some vague, non-specific information to her that the Respondents conspired to have her fired from her job. According to Appellant, "She didn't give me any specifics as far as this person said this particular thing, but she stated that she was able to come to the conclusion that they were after my job. And shortly after that I was indeed terminated." Graves Dep. (11/11/13) p. 179, lines 8-12.

Appellant correctly states in her brief that civil conspiracy, being "by its nature, covert and clandestine and usually not susceptible of proof by direct evidence," *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998), may be proved by either direct or circumstantial evidence. However, mere speculation, which is all Appellant offered, is insufficient. She failed to produce any competent evidence—whether direct or circumstantial—that the Respondents "positively or tacitly" agreed to pursue a common plan to injure her.

Appellant also failed to produce evidence of any acts in furtherance of the conspiracy that are in addition to or separate from those on which she relies in her other causes of action. Instead, she merely re-alleged and relied on the acts complained of in connection with her First, Second, and Third Causes of Action. When questioned about the alleged involvement by each individual Respondent in a conspiracy with CareSouth to terminate her from her job or otherwise harm her, Appellant repeatedly responded in these or similar words: "I base my belief [of a conspiracy] on the circumstances surrounding everything that had went on with me concerning the defendants, that the defendants were involved in destroying my name, my character and defaming me in the community. And part of that led to my termination." Graves Dep. (11/11/13) p. 191, line 21-p. 192, line 8; *see also id.* at p. 169, lines 12-21 (after Schafer asked where she worked, her office was broken into and she was terminated); p. 187, line 12-p. 188, line 7 (the conspiracy was to interfere with her employment and defame her); p. 195, lines 9-13 (referring to the "conspiracy of defaming my name"). Assuming, *arguendo*, that Appellant proved the Respondents broke into her home and office, or defamed her, or worked with CareSouth to have her terminated, those are the same alleged facts she relies

on for her other claims. Appellant's civil conspiracy claim "does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy," *Todd*, 276 S.C. at 293, 278 S.E.2d at 611, which is insufficient as a matter of law.

Finally, Appellant neither alleged nor proved any special damages resulting from the alleged civil conspiracy, or indeed any damages at all that are separate and apart from the damages she sought in her other causes of action. She seeks damages in her civil conspiracy claim for professional harm, harm to her reputation, emotional injuries, and loss of her employment at CareSouth, and loss of her "employment" on the Board, Complaint ¶ 77. She claims the same damages in her First Cause of Action for defamation, Complaint ¶ 59, and her Second Cause of Action for interference with contractual relations, Complaint ¶ 66. These are not special damages attributable solely to the alleged civil conspiracy claim. The damages Appellant alleged and attempted to prove are not separate and distinct from the damages she sought in her other claims. "If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed." *Hackworth*, 385 S.C. at 117, 682 S.E.2d at 875; *see also Vaught v. Waites*, 300 S.C. 201, 209, 287 S.E.2d 91, 95 (Ct. App. 1989). Appellant's statements in her brief to this court that her damages are separate and distinct do not make it so; she failed both to allege and to prove any special damages and does not, therefore, satisfy this essential element of her civil conspiracy claim.

Appellant neither alleged nor offered any proof of the essential elements of a civil conspiracy among the Respondents and CareSouth that caused her special damages. The Respondents are entitled to judgment as a matter of law on this claim.

CONCLUSION

The Respondents respectfully submit that the trial court correctly determined that Appellant failed to establish a genuine issue of material fact warranting submission of this case to a jury. The Respondents request that this court affirm the decision of the trial court that they are entitled to summary judgment.

October 9, 2015

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

The Honorable Paul M. Burch
Circuit Court Judge

Case No. 2013-CP-17-220
Appellate Case No. 2015-000163

Antonia Graves.....Appellant,

v.

Dillon County Board of Education, Dillon County School District Four, Richard Schafer, James McRae, Ray Rogers, Arthur McMillan, Amanda Hayes, and Claretha Whitfield.....Respondents

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PROOF OF SERVICE

I certify that I have served Respondents' Initial Brief on Appellant Antonia Graves, by depositing a copy in the United States Mail, postage prepaid, on October 9, 2015, addressed to P.O. Box 2104, Dillon, South Carolina 29536.

October 9, 2015

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October 9, 2015

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Antonia Graves v. Dillon County Board of Education, Dillon County School District Four, Richard Schafer, James McRae, Ray Rogers, Arthur McMillan, Amanda Hayes, and Claretha Whitfield
Appellate Case No. 2015-000163

Dear Ms. Kitchings:

I am enclosing for filing the Initial Brief and Proof of Service of Respondents Dillon County Board of Education, Dillon County School District Four, Richard Schafer, James McRae, Ray Rogers, Arthur McMillan, Amanda Hayes, and Claretha Whitfield ("Respondents") in the above-referenced appeal.

Also enclosed please find 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

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