

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge

Case No. 2015-CP-07-1343

Appellate Case No. 2016-000955

John Alden Bauer, III,

Appellant,

v.

Beaufort County School District

Respondent

**MOTION FOR LEAVE TO FILE A SUR-REPLY
TO RESPONDENT'S REPLY TO APPELLANT'S RETURN TO
RESPONDENT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO
STRIKE APPELLANT'S DESIGNATION OF MATTER AND INITIAL BRIEF, TO
REQUIRE AN AMENDED BRIEF THAT COMPLIES WITH THE RULES, AND
FOR AN EXTENSION OF TIME TO FILE RESPONDENT'S DESIGNATION OF
MATTER AND INITIAL BRIEF**

This motion is necessary to require a substantive response from Respondent, which he has so far refused to submit. The issues are numerous and the complexities can best be argued in writing without consuming an inordinate amount of time of the court during oral arguments.

Respondent has failed to respond in substance to the claims of imposed delays, false evidence, withheld evidence, perjurious testimony, and violations of Due Process. May one not receive a serious answer to such misbehavior?

Note: Counsel for Respondent, David T. Duff, has worn many relevant hats before and during this case and spoke 108 times during the School Board Hearing as Advice Counsel to the Board. Instead of referring to him multiple times by various titles, it will be clearer to just call him Mr. Duff.

Incontrovertible Facts:

1. Mr. Duff was the losing attorney for the Respondent in the Court of Appeals of South Carolina. Sharon BROWN, Appellant, v. William B. JAMES, Superintendent for Cherokee County School District, Respondent. **The issues in *Brown* are critical to this case.** (Also see *Fields-Lary v. Charleston County*, recently decided by this court; Also *Middleton, inter alia*, regarding delays)
2. Appellant requested a hearing to be held within 15 days (as mandated by the Teacher Employment and Dismissal Act 59-25-470) and it was delayed 10 months. Appellant repeated the request for a hearing at the fourth month of delay and was ignored. Why? Respondent has failed to answer this claim.

3. Mr. Duff would not allow attorney George McMaster's correspondence to him to be admitted regarding the delay. Why? McMaster denied to Mr. Duff in an email of ever requesting a delay. Can Respondent justify his not admitting that evidence, as he indicated would be the case in his response to Mr. McMaster?
4. Mr. Duff and Mr. Davis knew that Childs and Halligan, informed Appellant, that a hearing would be scheduled in September 2014. It was not. Why? Does Respondent have an answer? Why such lengthy delays?
5. In her certified letter to Appellant dated Tuesday, July 22, 2014 Dr. Shirley Fawley of Childs and Halligan stated:

"Please note that under the Act, only the teacher may waive the statutory deadline."

The Appellant NEVER waived the statutory deadline and Appellant requested true copies of any agreements or evidence of an agreed delay, whatsoever, while Appellant was acting pro se and/or while Appellant was represented by Counsel.

No Response.

Lauren Martel's requests were made on:

July 7, 2014

July 8, 2014

July 12, 2014

August 2, 2014

September 21 2014

December 5, 2014

Appellant never received a response.

Mr. Duff and Mr. Davis knew this and refused to act because they knew that the school district had violated the law. Perhaps since Mr. Duff has a negative history with this issue he did not wish to lose on this issue again.

6. Mr. Duff and Mr. Davis refused to respond to Appellant's requests for evidence (before the hearing!) that would have exonerated Appellant. Why? Can Respondent answer that?
7. Mr. Duff and Mr. Davis knew that Appellant had requested remote online access...restricted to work emails, a three minute operation according to Alice Walton, who had cut off access. This was during the discovery period and while Appellant was still employed by the district. Appellant was denied this access to exculpatory evidence. Why?
8. Mr Duff and Mr. Davis knew that Appellant's requested exculpatory emails were being reviewed by the opposing counsel of Childs and Halligan and that a fraction of those reviewed items were provided 1 year and 1 month after the initial request. Why? What right did Childs and Halligan have to decide to withhold up to 90% of exculpatory emails? In his August 22, 2014, letter, Mr. Vernie L. Williams of Childs and Halligan stated that: *In light of the volume of emails we were provided, we believe many of them are outside the scope of what you requested. It appears there are hundreds of pages of emails for each month. We are continuing to review*

approximately several Thousand Pages to determine the ones that are responsive to your needs.”

The scope of what Appellant requested was to have all emails. There was no need for review or to exclude emails from Principal McAden that would embarrass her, such as the pencil sharpener controversy, calling Appellant “Jason”, an apology for not knowing that Appellant was using his truck to haul school furniture, etc.

The examples in the email below to Childs and Halligan were to identify missing emails.

The last sentence again makes it clear that Appellant wished computer access to all stored emails.

Will Respondent explain how it is proper to withhold exculpatory evidence?



Alden Bauer <aldenbauer706@gmail.com>

SLED, FOIA, etc.

1 message

Alden Bauer <aldenbauer706@gmail.com>

Wed, Jul 23, 2014 at 11:25 AM

To: sfawley@childs-halligan.net, John Bauer <jbauer2@sc.rr.com>

Dr. Fawley,

1. I need the email that Mrs. McAden sent to Mrs. Mullen on about December which stated that Mrs. Bishop did not need a SLED check.

2. Mr. Clendaniel claims in his February 5 "Describe the problem" that he sent an email to me at 1:36 PM and another at 2:10 PM. Can you get those for me?

3. I have never heard anything from my FOIA request re: emails. Was the form incorrect? Or was something else wrong? May I have a response?

I need them for my evidence file.

Note: I can receive those emails on my home computer if they will unblock it. So far they have refused (Ms. Walton, I believe)

 **My FOIA Request.docx**
14K

<https://mail.google.com/mail/u/0/?ui=2&ik=c3a05574d0&view=pt&q=in:sent%20has:atta...> 3/27/2015

Childs and Halligan even denied emails existed that later were found.

On September 17, 2014, Childs and Halligan emailed that they did not have the Clendaniel email of February 5, 2014. (See email above) And on September 19, they wrote:

“Fourth, our firm did not have a ‘February 5, 2014’ Outlook invitation from the Assistant Principal Donald Clendaniel to you. Otherwise, the document would have been sent to you in August 2014.” Letter from Childs and Halligan September 19, 2014.

9. Mr. Duff and Mr. Davis knew that Childs and Halligan denied the existence of that “February 5, 2014” important email only to have to admit later that it existed...and that only because the denied email was referenced by one of their own witnesses. Where are the other emails? Why were they not provided before the hearing as requested, or even now? What are they hiding?

Appellant knows what they are hiding, but how can Appellant prove this when he is denied discovery by the opposing counsel? According to the district and opposing counsel there are thousands of emails that were not provided to the Appellant.

(Walton transcripts, Vernie Williams letter, above)

Will Respondent explain how it is proper to withhold exculpatory evidence?

10. Mr. Duff gave advice to the Board (Jury) and Chairman (Judge) as “Advice Counsel” before and during the school board hearing. At times Duff made rulings directly--speaking 108 times. His advice/rulings blocked relevant evidence and Mr. Duff even

offered false *de facto* testimony (non-sworn) favoring the District. The Board was making a decision on Appellant's career based on the bias of their Advice Counsel.

11. Before deliberations it appeared that Appellant had the votes of four (4) Board members—BUT-- Mr. Duff was physically in attendance at the school board deliberations. Mr. Drew Davis, General Counsel to the District--but not licensed at the time, was also in attendance, according to the Board Hearing Transcript.

According to case law, just the appearance of these attorneys can have an influence on the outcome of the vote of board members who are, as the National School Boards Association states "*should strive to be an "unbiased jury" should a due process hearing become necessary.*" (also violation of Gonzales v. McEuen, 435 F. Supp. 460 (C.D. Cal. 1977) U.S. District Court for the Central District of California - 435 F. Supp. 460 (C.D. Cal. 1977) March 2, 1977.

Can Mr. Duff explain how a third party is allowed into jury deliberations for a school board but not into a federal jury for cases that are far more complicated?

12. Childs and Halligan, the law firm representing the Beaufort County School District against the Appellant was once Childs and Duff, an appearance of impropriety.

13. Childs and Halligan, was fired by the School Board (How does the "*jury*" fire the "*prosecuting*" law firm?). Mr. Duff was hired by the School Board (Jury) to represent the district (Prosecutors). How does the jury hire the law firm that was advising them to now represent the former prosecution? And all without consent?

14. Lauren Martel (Appellant's former counsel) accused Duff of Ethics violations.
15. As Duff incessantly claims, he only *advised* the rulings but did not make the rulings (not true). Somehow Duff *advised* 100 % of District's objections favorably, but 0% of Appellant's objections were sustained, an unlikely statistic at a fair hearing.
A substantive response to that would be interesting.
16. Objections by Childs and Halligan numbered 226 times during only ONE cross examination. At times the hearing was seeming chaos with attorneys alternately challenging every good issue for Appellant. In one exchange appellant averaged 2.3 words before being interrupted.
17. Appellant's Petition and Motions for Reinstatement and for Scheduling a Hearing received no response, and when Mr. Duff was made aware of this he chose not to react. Why? Will Respondent answer that?
18. Appellant's FOIA request for exculpatory emails received no response— a *misdemeanor*, and when Mr. Duff was made aware of this he chose not to react.
Why? Will Respondent address that federal and state violation by the district?
19. When attorneys, and those in power, make grievous errors that injure others are they not required to take remedial action according to the Rules of Professional Conduct?
Will Respondent justify that?
20. Appellant's Petition to request *de novo* (October 21, 2014) the hearing requirements of SC Code 59-25-470 was ignored and when Mr. Duff became aware of this he chose not to act. Why? Will Respondent answer that?

21. A Personnel Ratification Report was published, a violation of law, and admitted in testimony to be illegal by the District. The report was illegally published for 5 months revealing that Appellant had been terminated (without a hearing, a violation of TEDA 460).
22. The December 10, 1013 (sic) falsified letter was knowingly admitted into evidence, and objected to, without the requested, and easily accomplished authentication. In the Court of Common Pleas, Mr. Duff argued that the clearly spurious letter (District's exhibit, and at that moment HIS exhibit) had now suddenly become irrelevant. Judge Dukes ignored the issue and expressed his misunderstanding. "I guess I'm confused." Perhaps respondent can explain how one of his exhibits which is false is no longer relevant.
23. Opposing counsel was repeatedly informed (before the hearing!!!) that the attendance grade book (District's Exhibit #2) was false and that Principal McAden had confiscated the Appellant's true attendance grade book on Tuesday February 11, 2014, and that the book was in her possession. Mr. Duff and Mr Davis were aware of this and ignored it. Why? Probably because this evidence was damaging to the district and would indicate perjury by principal McAden. Respondent's substantive answer should be interesting.
24. Amazingly Principal McAden inadvertently sent the actual attendance grade book that she had confiscated, and hidden, to Appellant's father on July 2, 2015, (2 months after the hearing). The package was intended for the Appellant and was to contain Appellant's personal belongings. It *did* contain a few hats, kids drawings etc., but also

included 13 un-redacted student confidential forms (FERPA violation) some of which the principal falsely accused Appellant of leaving unsecured in his office on the day he was placed on leave. There were also 12 Beaufort County School District owned computer accessories (returned without so much as a thank you) and, unbelievably, a set of Beaufort County School District Office master keys! These keys were immediately returned to Mr. Duff, again without so much as a "thank you." Was the grade book mentioned in the final written order? No. Why? Because one cannot exhibit withheld evidence. The damage was done and Respondent refused to act on the violation of FERPA. Will Respondent explain his casual attitude for federal law?

25. Judges may consider critical relevant evidence not previously admitted, especially if it had been withheld by the District. Will respondent address this issue?

Fed. R. Civ. P. 56(c)(4) "*but (the court) can consider other materials in the record in its discretion.*"

Rule 12(b) "*The amendment to the fourth sentence of Rule 12(b) clarifies the litigant's right to assert at trial any defenses as well as any claims he could have raised in a permissive pleading. ...*"

And, "*The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.*" Singleton v. Wulff, 428 U.S. 106 (1976) No. 74-1393

26. A Motion for Summary Judgment was scheduled to be heard by Judge Carmen Mullen, Mr. Duff wrote to Judge Marvin H. Dukes, III, to request that Dukes hear the Motion instead of Judge Mullen. Judge Dukes complied with the request. Mr. Duff

did not send a copy of this request to Judge Carmen Mullen. (Is that ethical?) Will Respondent answer that?

27. Mr. Duff was made aware by Appellant before the school board hearing that the claim that a psychiatric evaluation was not timely was a false claim. Duff then was dismissive of an affidavit, revealing Duff's error, written by Dr. Laura Rosenbaum-Bloom and Duff accused Appellant of trying to introduce new evidence. Once again Duff cares about technicalities and not about remediation for his damaging errors. Will Respondent answer that?

28. RE: Technicalities. The District did not comply with the 30 day requirement to submit the hearing transcript (TEDA 480) and Mr. Duff needed 120 days and a Court Order Calendar to finally provide the document. Will Respondent answer for that?

29. Authentication of contested documents: Before the School Board Hearing Appellant informed Mr. Duff that several District exhibits were false and asked that they be authenticated--even to the extent that Appellant would pay for forensic analysis, if necessary. Mr. Duff ignored all requests. Will respondent explain why false exhibits were allowed by him.

30. Mr. Duff gave advice to the Appellant during the School Board Hearing without opposing counsel present.

31. Appellant has, heretofore, been reluctant to reveal that Mr. Duff engaged in a substantive conversation about this case with Appellant's father, Dr. John Bauer, in a parking lot in Columbia, S.C. on July 15, 2015. They discussed the propriety of Mr. Duff's representing the district (at that time the superintendent) and both sides,

Professor Bauer and Mr. Duff, expressed a willingness to make a reasonable settlement. Mr. Duff stated that the superintendent should not be the Respondent. Dr. Bauer then stated that the superintendent should be named if he had committed perjurious testimony. Mr. Duff replied, "Well, that's true."

Will Mr. Duff explain how this exchange that he initiated was ethical?

32. Mr. Duff allowed a Motion in Limine to proceed 23 hours before the scheduled hearing was to begin, limiting nearly all of the exhibits that appellant had planned to use. (The Motion was not even captioned correctly)

"A written motion ... shall be served not later than ten days before the time specified for the hearing..." (Rule 6(d) Exhibit 8)

The concept of timely disclosure is reinforced (in criminal procedures) Rule 110(a)(2)

"...all motions...must be filed not less than ten (10) days before trial." Rule 110(a)(2)

33. Mr. Duff and Mr. Davis knew that Appellants' former attorney George McMaster sent a Litigation Hold Letter to the law firm of Childs and Halligan in May 2014. They knew that Childs and Halligan wrote that all electronic evidence would be preserved. This evidence would have exonerated Appellant but, in fact, the evidence was not preserved. Will Respondent address that issue?

34. Mr. Duff and Mr. Davis twice offered Appellant a chance to settle, in March 2016.
- a. All references to termination removed from Appellant's file
 - b. The District's records will say Appellant resigned from his position.

c. The Superintendent will not seek revocation of Appellant's license

This indicates to Appellant that Mr. Duff and Mr. Davis do not believe the accusations are true.

Appellant cannot imagine that the School District or School Board or anyone associated with this case, and who truly believed that Appellant was negligent with students would encourage other school districts to hire Appellant.

Dr. Jeffrey C. Moss, Superintendent of the Beaufort County School District who recommended Appellant's termination, using false evidence and violating policy, must appear before the South Carolina Ethics Commission on August 17, 2016, for similar accusations.

Moss history available on line.

- 1 Cursing citizens at a public meeting.
- 2 Using obscene gesture at a public meeting in front of minors.
- 3 Having students write letters to state representatives opposing budget cuts.
- 4 Obliging Beaufort County Schools (North Carolina), where Moss served as Superintendent from 2004 to 2009, with debt and overcapacity that threatened the solvency of the district. (see articles and editorials)
- 5 Threatening a food vendor for sending a critical email.

- 6 In the candidate file for Superintendent of the Beaufort County School District Moss wrote *“The Governor of North Carolina has tentatively offered me the position of Education Policy Adviser, which is the equivalent of state superintendent, but he cannot match my salary.”*
- 7 Denying alternative schooling to a sophomore who was suspended for fighting at school.
- 8 Moss knowingly used his position as superintendent to sign a consulting contract between his wife and the district and thereby violated the state nepotism law, S.C. Ethics Act, by creating this highly paid position for his wife.
- 10 Moss did not allow a senior to finish at her high school after a mix-up with her father’s lunch bag. (The father had an apple and a paring knife)

Will Mr. Duff explain why the superintendent has credibility when the superintendent avers that there was never any controversy...and then contradicts other testimony that he gave?

Mr. Bill Evans, Chairman of the Beaufort County School Board, Judicial Officer who presided at Appellant’s Hearing.

- Evans was accused of withholding information misleading the school board, as well as misleading the SC Ethics Commission.

- After much controversy Evans resigned October 6, 2015, five (5) months after Appellant's hearing.

Will Respondent explain how Mr. Evans could act as judicial officer, with no legal background, after the Board voted 9-0 to use only trained judicial officers?

Specifics from Respondent's Response

Page 1 Line 5 Duff: *"...Appellant's Designation of Matter impermissibly includes materials not in evidence at any of the proceedings below and his brief cites those materials."*

Appellant's Reply:

All of the issues contained in the Designation of Matter referenced in the Initial Brief will cite page numbers from the Record on Appeal.

Page 2 Line 7 Duff: *"...Appellant's submissions should refer to any such exhibits as they were enumerated in the school board's hearing transcripts so that Respondent and this Court can be assured of their propriety in this appeal."*

Appellants Reply:

Much of the Record is not numbered--such as references to law, witness testimony, withheld evidence, and evidence withheld until after the hearing. Mr. Duff knew long

before the hearing that the District's version of Appellant's attendance grade book was fraudulent and that the December 10, 1013 (sic) letter was fraudulent. (Petitioner Exhibit #2, Petitioner Exhibit #17) Appellant asked Mr. Duff for authentication of the letter and was repeatedly ignored. A simple creation date screen shot would have been welcomed. The true attendance grade book was withheld and in the possession of Principal Jill McAden until she accidentally sent it to Appellant's father, after the conclusion of the hearing. Yet Duff knowingly allowed false evidence to be presented and now refuses to acknowledge the genuine evidence that was revealed after the school board hearing. Will Respondent explain why he should not take remedial action?

Page 2 2nd Paragraph

"In his return Appellant does not attempt to defend the propriety of the exhibits he signs or the unreserved arguments he makes."

Appellants Reply

One need not defend that which needs no defense.

Page 3 last sentence

"...it is undisputed that they contain matters not presented in the proceedings below"

Appellant's Reply

If it is undisputed, then why is Appellant disputing it?

Public outrage, and the media coverage of the unlawful and scandalous behavior by the Superintendent, members of the Beaufort County School Board, and the School District attest to the need for skepticism for the results of their proceedings.

Respondent should be required to respond with substance for the irregularities that occurred, related to the district.

Appellant would not risk this action, complicated by vastly expensive district imposed delays, if he did not have physical, tangible, and undeniable evidence of the truth.

Challenge:

If the opposing counsel will provide incontrovertible proof that the Appellant requested a waiver to the statutory deadline and that the Appellant agreed to delay the hearing for 10 months, Appellant will agree to drop the appeal and save the taxpayers money.

Prediction:

Counsel will never address substance, such as illegally imposed delays, laws broken by the district, false evidence, withheld evidence, and the fact that the principal and assistant principals testified that Appellant was "excellent" and that they were willing to work with him again.

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Respectfully Submitted,

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John Alden Bauer III

John Alden Bauer, III

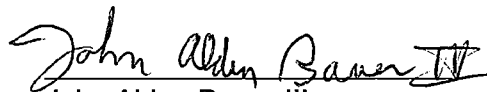
August 1, 2016

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SC Court of Appeals

CERTIFICATE OF SERVICE VIA US MAIL

The undersigned, John Alden Bauer III, pro se, certifies that he has served the following counsel of record with the foregoing MOTION FOR LEAVE TO FILE A SUR-REPLY by making a copy of same, postage prepaid, and return address clearly indicated to the following on the first day of August, 2016.

David Duff, Esq
Duff, White and Turner
3700 Forest Drive
Suite 404
Columbia, SC 29204



John Alden Bauer III
5 Gumtree Road E-11
Hilton Head Island, SC 29926
aldenbauer706@gmail.com
(843) 384-1506

John Alden Bauer III
5 Gumtree Road Unit E-11
Hilton Head Island, SC 29926
843-384-1506
Email: aldenbauer706@gmail.com

August 1, 2016

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AUG 01 2016

SC Court of Appeals

VIA HAND-DELIVERY

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

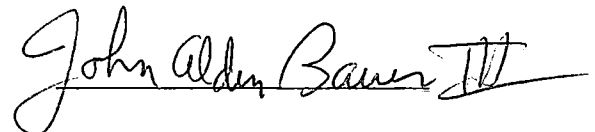
Re: **John Alden Bauer, III v. Beaufort County School District**
C.A. No. 2015-CP-07-1343
Appellate Case No. 2016-000955

Dear Ms. Kitchings:

Enclosed for filing is the original and six copies of Appellant's MOTION FOR LEAVE TO FILE A SUR-REPLY.

Thank you,

Sincerely,



John Alden Bauer III

Enclosures

C: *Via Us Mail and Email:*

David Duff

David Lyon

Drew Davis