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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2015-CP-42-1688

Dedra H. Kiser, ... Appellant,

v.

Spartanburg School District 7, ... Respondent.

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE IN REPLY

Appellant's counsel feels compelled to respond to Respondent's insinuation that the appeal in this case was potentially untimely because Respondent's counsel did not actually receive the Notice of Appeal until January 14, 2016. (Resp. Br., at 5). Appellant's counsel is not aware of any issue regarding the timeliness of this appeal. Appellant's counsel has never received any envelope marked "returned to sender" or other notice that any correspondence with Respondent's counsel was not delivered "due to an insufficient address." (Resp. Br., at 5, n.4). Appellant's counsel timely served the Notice of Appeal on December 23, 2015, within 30 days of Appellant's receipt of the Circuit Court's order on December 2, 2015, as attested in the Proof of Service, in accordance with Rule 203(b), SCACR. The Notice of Appeal, along with the Proof of Service and the order appealed from, was properly filed with the South Carolina Court of Appeals and with the Spartanburg County Court of Common Pleas in accordance with Rule 203(d), SCACR. Respondent's counsel was copied on all correspondence regarding this appeal, and no envelopes were ever returned to Appellant's counsel for improper or insufficient address. Under the South Carolina Appellate Court Rules, "Service by mail is complete upon mailing." Rule 262(b), SCACR. Whether or not there was some delay in the actual delivery of the Notice of Appeal to Respondent's counsel does not affect the timeliness of the appeal.

STATEMENT OF FACTS IN REPLY

The students in Ms. Kiser's vehicle were never "abandoned on the roadside" by Ms. Kiser, as repeatedly described by Respondent. (Resp. Br., at 2, 5, 6, 20). This is a grossly unfair characterization of the factual record. Once the highway patrol officer took control of the scene by ordering Ms. Kiser to exit the vehicle, she had absolutely no control over the subsequent course of

events, in which she found herself hand-cuffed in the front seat of the patrol car, without being allowed to communicate with the students about what was happening. (R. p. 229, ll. 15-21).

Ms. Kiser also never stated that the events that led to her arrest on the afternoon in question were "trivial and inconsequential," as implied by Respondent. (Resp. Br., at 6). In fact, she testified that she deeply regretted never having had an opportunity to apologize to the girls and their families for the horrible ordeal they were put through in this unfortunate situation. (R. p. 234, l. 17 to p. 235, l. 2).

Next, the two stops Ms. Kiser made as they were first leaving Spartanburg were not "unauthorized detours" as characterized by Respondent. (Resp. Br., at 10). Principal Stevens testified that there was nothing wrong with Ms. Kiser's stopping by one of the student's homes to pick up a CD player so the girls could listen to their music on the way to Charleston, or then running back to her own home to pick up an e-cigarette charger that she had forgotten to pack. (R. p. 190, ll. 7-19).

There is also no evidence in the record that Ms. Kiser was "ill-prepared" to drive the girls on the trip in question. (Resp. Br., at 9). Although Ms. Kiser testified that she was "a little tired," she was not disoriented or impaired in any way that would have impacted her abilities to drive safely. (R. p. 221. ll. 18-23). She also testified that her getting four hours of sleep the night before the trip was "pretty typical for a mother of three." (R. p. 244, ll. 17-21).

Furthermore, Ms. Kiser never stated that her driving performance on the day in question was caused by some physiological condition like "an uncontrollable tic or reflex," as unfairly described by Respondent. (Resp. Br., at 14). Ms. Kiser stated that her normal driving style is aggressive and fast and that she drove no differently on the day in question than she always drives, even when her

own children are in the car with her. (R. p. 219, ll. 7-16). There is no evidence in the record that Ms. Kiser made a conscious decision to speed or otherwise to place the safety or well-being of the students in jeopardy. Importantly, no student was ever actually injured at any time during the trip, no collision occurred, and the District's vehicle sustained no property damage.

Finally, the record before the School Board and the Circuit Court did not include anything about the disposition of the criminal charges that had been brought against Ms. Kiser. Appellant's counsel mentioned her subsequent plea of nolo contendere to a lesser charge of reckless driving only to update the court about the ultimate disposition of that case, which occurred after the appeal hearing before the Circuit Court. Appellant's plea of convenience to avoid an expensive jury trial on the DUI and child endangerment charges, is not any type of admission that would provide a post hoc justification of the school district's premature decision to terminate her teaching contract. Ms. Kiser was not actually charged with speeding or reckless driving in connection with this incident.

ARGUMENTS IN REPLY

1. "EVIDENT UNFITNESS FOR TEACHING"

Appellant acknowledges that the "substantial evidence" standard applies to appeals under the South Carolina Teacher Employment and Dismissal Act. Kizer v. Dorchester Co. Voc. Educ. Bd. of Trustees, 287 S.C. 545, 548, 340 S.E.2d 144, 146 (1986). The only relevant question here is whether the record from the school board hearing contains substantial evidence that Ms. Kiser has "manifest[ed] an evident unfitness for teaching." S.C. Code Ann. § 59-25-430 (emphasis added).

Appellant concedes that there is substantial evidence in the record of the following facts: (1) that Appellant was exceeding the speed limit at some points during the trip in question; (2) that she was having obvious difficulty controlling the loose steering of the District's 16-year old Suburban

and that she was not able to keep the vehicle between the lane markers at all times–a vehicle that she had never driven before and that was much larger than she was used to driving; (3) that she was mortified to have been ordered out of the vehicle by a an overly zealous highway patrol officer, administered field sobriety tests, and then hand-cuffed and placed into the trooper's patrol car, all in front of a car-load of student athletes; (4) that the students' parents were understandably shocked and outraged that their children were transported to the highway patrol headquarters more than 3 hours from their homes and that the children would not be released to the other cross-country coach, despite written permission slips from the parents allowing the coaches to supervise the children on the extracurricular trip and despite the pleas of the District's Superintendent on the phone to the trooper; and (5) that the Superintendent was placed in an incredibly difficult position of having to explain the predicament to the students' parents and respond to negative media coverage about Appellant's arrest on charges of DUI. What Respondent fails to address is that none of these facts or circumstances impugns Appellant's "fitness for teaching." S.C. Code Ann. § 59-25-430 (emphasis added). In other words, the substantial evidence of Appellant's bad driving during the single, isolated incident as issue here does not correlate in any way to bad teaching. The SCTEDA's express protections for continuing contract teachers are concerned with their teaching ability and the fundamental character traits necessary to demonstrate their fitness to be public school teachers.

Respondent repeatedly characterizes Ms. Kiser's conduct as demonstrating a "lack of good judgment and failure to exercise reasonable care." (Resp. Br., at 4, 5, 7, 8, 23). Similarly, the School Board's decision focused on Ms. Kiser's "lack of good judgment and failure to exercise reasonable care." (R. p. 108, ¶ 6). Even the Circuit Court's order affirming the school board's decision provides, "There is substantial evidence in the record to support the School District's

determination that Kiser's lack of good judgment and reasonable care in endangering the safety of seven students adversely and materially affected her fitness as a teacher because she cannot be entrusted with the supervision and protection of students, which is a primary and essential function of her job responsibility as a teacher." (R. pp. 13-14) (emphasis added). With all due respect, the phrases "lack of good judgment" and "failure to exercise reasonable care" are expressions of negligence, not "evident unfitness for teaching." Furthermore, the Circuit Court's use of the phrase "adversely and materially affected" to modify Ms. Kiser's "fitness as a teacher" is materially different than the statute's phrase "evident unfitness for teaching." Importantly, neither the School Board, the Circuit Court, nor Respondent ever explain the logical leap that Ms. Kiser's bad driving skills or habits in the operation of a vehicle on the highway demonstrate that she "cannot be entrusted with the supervision and protection of School District students" in her role as a classroom teacher. (R. p. 12).

Driving is clearly not a required skill for a competent and professional high school math teacher, nor is it part of the normal and expected job duties of a high school math teacher. Poor driving performance simply does not reflect a disqualifying flaw in a fundamental character trait that is expected or required of all competent and professional educators. Section 59-25-430 identifies significant character deficits like dishonesty, gross immorality, drug or alcohol addiction, and criminality as examples that could support a finding of "evident unfitness for teaching." Although the fitness of an individual to be a public schoolteacher is clearly not limited to his or her effectiveness in the classroom, the behavior or conduct in question must have some bearing on the individual's actual abilities or capabilities to teach.

Section 59-25-430 also mentions "persistent neglect of duty" as another category that could

demonstrate "evident unfitness for teaching." The adjective "persistent" in the statute implies a repeated course of conduct that continues even after multiple attempts at corrective action or remediation of the teacher. Here, it is important to note that Appellant's termination arose out of a single, isolated incident of conduct. Although Respondent identifies numerous District policies that essentially relate to the District's general duty to protect the safety and well-being of students, there is simply no evidence that Ms. Kiser engaged in any previous misconduct that persisted through the time of her ill-fated Charleston trip.

Section 59-25-430 also includes, as an example of unfitness for teaching, "willful violation of rules and regulations of district board of trustees." S.C. Code Ann. § 59-25-430. Under well-established South Carolina law, the term "willful" requires "a showing of a consciousness of wrongdoing." State v. Garrard, 390 S.C. 146, 149, 700 S.E.2d 269, 271 (Ct. App. 2010). In State v. Sowell, 370 S.C. 330, 635 S.E.2d 81 (2006), the South Carolina Supreme Court stated, "A willful act is defined as one 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" Id. at 336, 635 S.E.2d at 83 (quoting Spartanburg Co. Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988). There is no evidence in the record that Ms. Kiser's driving during the cross-country team trip was done with the specific intent to violate the District's general safety policies or with the specific intent to place the girls in danger. On three occasions during an almost four-hour trip, the girls pointed out that Ms. Kiser was going unusually fast, and each time Ms. Kiser moderated her speed. (R. p. 475, ll. 15-22). The girls themselves all told the other coach that they did not think Ms. Kiser had done

anything bad enough to warrant being stopped by the highway patrolman. (R. p. 400, ll. 17-19).[1] Ms. Kiser's obvious difficulty in keeping the Suburban between the highway lane markers, which is what prompted the two motorists' telephone reports to the SC Highway Patrol, was also not done with a specific intent to engage in any wrongdoing. Respondent's statement that "By all accounts, the Suburban was mechanically sound and safe to drive" (Resp. Br., at 14), is simply not an accurate depiction of the record. Ms. Kiser clearly testified that she was having trouble keeping the vehicle between the lines, (R. p. 218, l. 22 to p. 219, l. 1), and Coach Freed testified that when he drove that same vehicle earlier that summer, he noticed that the steering was loose and that the vehicle tended to drift to the right. (R. p. 255, ll. 20-25).

Appellant readily concedes that the Superintendent validly could have terminated her coaching supplement based on the incident in question. Ms. Kiser was clearly performing her duties as an assistant cross-country coach, not as a math teacher, in driving the girls' team to Charleston. Respondent argues that because Ms. Kiser's teaching contract refers to possible extracurricular assignments, her job duties as a coach cannot be separated from her job duties as a teacher. (Resp. Br., at 8). Respondent is clearly overreading the contract's reference to extracurricular assignments. That provision only clarifies that any extracurricular assignments, such as a coaching supplement, are expressly terminable at will and are not protected by the SCTEDA, even for continuing contract teachers. (R. p. 295). If the District had terminated Ms. Kiser's coaching supplement as punishment for her erratic or negligent driving while transporting the girls' cross-country team to a meet, that would have been perfectly appropriate and would not have implicated any of her rights under

[1]Excerpts from Coach Freed's deposition testimony were submitted to the School Board at the beginning of the hearing, without objection by Respondent.

SCTEDA.

Appellant agrees with the general proposition that "a judgment on fitness to teach encompasses more than just classroom performance." (Resp. Br., at 16). Undoubtedly, a teacher's "fitness for teaching" depends on more than the effectiveness of her skills in delivering instruction or in managing a classroom. The flaw in the Circuit Court's analysis and in Respondent's arguments, however, is that the challenged conduct or behavior at issue in a teacher's dismissal for "evident unfitness for teaching" must have some connection to one's teaching ability or to an underlying level of integrity or character that all professional teachers should possess. Although the list in section 59-25-430 is undeniably illustrative and non-exhaustive, the phrase "evident unfitness for teaching" must be read fairly narrowly or else the statutory protections under SCTEDA for public school teachers would be meaningless.

The important point of Barrett v. Charleston County Sch. Dist., 348 S.C. 426, 559 S.E.2d 365 (Ct. App. 2002), is that the teacher's dishonesty in mishandling the fund-raising money was a character flaw that is not tolerable among the teaching profession. Whether the dishonest conduct actually occurred outside of the classroom was not material in that case.

Similarly, the teacher's conduct in Felder v. Charleston County Sch. Dist., 327 S.C. 21, 489 S.E.2d 191 (1997), had a direct connection to her duties in imparting knowledge to her students. The key holding from Felder is not that "insubordination" is not specifically listed in Section 59-25-430 as an example of "evident unfitness for teaching." Instead, the misconduct in the Felder case fits within the same broad categories as those listed in the statute, because the teacher encouraged her students to defy the principal's directions to attend class, clearly a teaching-related function.

The case of Hilliard v. Orangeburg Co. School Dist. No. Three, 300 S.C. 123, 386 S.E.2d 628

(Ct. App. 1989), did not establish a general rule that teachers can be terminated under S.C. Code Ann. § 59-25-430 for failing "to ensure the safety of students" even outside of the classroom. (Resp. Br., at 18). First of all, the teacher at issue in Hilliard was a welding teacher. Obviously, a welding teacher's job duties include supervising students in the work area of the welding shop, a key part of a welding teacher's classroom. Second, the Hilliard case involved the non-renewal of a teaching contract, not termination under Section 59-25-430 for "evident unfitness for teaching." 300 S.C. at 124, 386 S.E.2d at 629. The Hilliard opinion does not contain a single citation or reference to section 59-25-430 or even to any other provision of the SCTEDA. The challenge by the appellant in Hilliard appears to have been based on a general due process argument, not on any statutory protection within the SCTEDA. Third, the teacher in Hilliard was employed under a "probationary contract," which contained a list of seven special conditions, most of which related to safety concerns. Id. The statement in Respondent's brief that "It is not clear from the facts whether Hilliard was employed pursuant to a continuing contract," (Resp. Br., at 18, n. 11), is puzzling. Moreover, there is nothing in the Hilliard case to indicate that the welding teacher was even a professionally certified teacher through the State Department of Education. See S.C. Code Ann. § 56-26-30. The Hilliard case did not establish a general rule that "student safety is not a trivial concern," as asserted by Respondent here. (Resp. Br., at 20). The actual quote from Hilliard is that the welding teacher's continued practice of allowing students to be unsupervised in the work area of a welding shop was "a blatant safety violation that cannot be characterized as trivial." 300 S.C. at 126, 386 S.E.2d at 630. Significantly, the teacher in Hilliard was actually given three previous, written warnings during the same school year for safety-related incidents that appeared to violate specific provisions of his probationary contract. Id. at 125, 386 S.E.2d at 629. The Hilliard case is

simply not applicable to the facts presented by Ms. Kiser's case.

Respondent's citation to the recent unpublished decision of Shaw v. Moss, Op. No. 2016-UP-286, 2016 WL 3335784 (S.C. Ct. App. June 15, 2016), is also not particularly germane to any issues presented here. The Shaw case involved the termination of a principal who committed at least ten separate violations of the district's financial policies in handling cash and other school funds. The court of appeals in Shaw, in an unpublished, per curiam opinion, had no difficulty in upholding the principal's termination based on his willful violation of the school district's policies regarding the handling of finances. Id. at *3.

Ms. Kiser is a ten-year, veteran math teacher with an otherwise stellar employment history at Spartanburg High School. Her career as a public school teacher should not be destroyed by a series of unfortunate events that flowed from an unjustified arrest while driving a group of students to a cross-country meet. There is no substantial evidence in the record to support a finding that she has displayed an "evident unfitness for teaching" sufficient to justify her immediate termination under S.C. Code Ann. § 59-25-430.

2. TERMINATION PREMATURE WHILE CRIMINAL CHARGES PENDING

Respondent asserts that "Kiser did not make a motion for a stay or continuance or otherwise object to the School Board hearing going forward on March 18, 2015, on the grounds that the case was premature." (Resp. Br., at 22, n. 12). This statement is simply not true. Appellant's Pre-Hearing Brief to the School Board expressly provides as follows:

> A criminal charge alone against a teacher is not sufficient grounds for termination of that teacher under the SCTEDA. See Shell v. Richland Co. School Dist. One, 362 S.C. 408, 608 S.E.2d 428 (2005). If Ms. Kiser were convicted of the charges against her, she would clearly be subject to termination under the statute; however, a charge is not a conviction. One of the bedrock principles of the American

> justice system is the presumption of innocence, unless and until one is proven guilty of an alleged crime beyond a reasonable doubt. With all due respect, the Superintendent's recommendation of termination is pre-mature. He should have placed Ms. Kiser on paid suspension pending the outcome of the criminal charges.

(R. p. 289). The Pre-Hearing Brief goes on to quote the relevant portion of S.C. Code Ann. § 59-25-430:

> "[W]hen any teacher is charged with a violation of the law of this State or the United States which upon conviction may lead to, or be cited as reason for, dismissal, such teacher may be suspended pending resolution of the charges and receive his [or her] usual compensation during the suspension period, such compensation not to exceed the term of his [or her] teaching contract. If the teacher is convicted, including pleading guilty or nolo contendere to the charges, he [or she] may then be subject to dismissal proceedings. If no conviction results, his [or her] suspension shall be terminated."

(R. p. 289) (quoting S.C. Code Ann. § 59-25-430).

Whether or not the District expressly cited Ms. Kiser's pending criminal charges as the reason for her termination, her arrest and the resulting embarrassment to the District from the negative media coverage were clearly the primary considerations underlying her immediate termination. The Superintendent's self-serving testimony that the arrest and the pendency of the criminal charges were not the basis of his recommendation is not sufficient evidence to overcome common sense. Respondent's submission to the School Board of at least nine separate news articles about Ms. Kiser's arrest reveals the true impetus behind her termination.

Respondent's efforts to distinguish Shell v. Richland County Sch. Dist. One, 362 S.C. 408, 608 S.E.2d 428 (2005), are unavailing. Neither the School Board nor the Circuit Court gave any consideration to the Shell court's holding that the mere arrest of a school teacher on criminal charges and the attendant negative publicity are not enough to justify immediate termination under S.C. Code Ann. § 59-25-430. Shell, 362 S.C. at 410, 608 S.E.2d at 429.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Initial Brief of Appellant, this Court should reverse the Circuit Court's ruling affirming the School Board's decision to accept the Superintendent's recommendation of immediate termination of Ms. Kiser's employment.

August 31, 2016

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CERTIFICATE OF COUNSEL

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

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