

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

SC Court of Appeals

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

AMENDED INITIAL REPLY BRIEF

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Constitutional Issue

South Carolina Constitution Section 22, (1970 (56) 2684; 1971 (57) 315) Pages 3, 12

Other laws, Cases, and Rules

Brown v. James, 697 S.E. 2d 604, 389 S.C. 41 (2010). Page 8

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. Pages 4, 5

Karppi v. Greenville Terrazzo Co., 489 S.E.2d 679 (S.C. Ct. App. 1997) Page 9

South Carolina Appellate Court Rule 208(b)(1)(C) Page 9

South Carolina Rules of Professional Conduct: Rule 1.12, pages 5, 8

South Carolina Teacher Employment and Dismissal Act ("TEDA") Act 59-25-430 through 59-25-480. Pages 3, 6

Singleton v. Wulff, 428 U.S. 106 (1976) No. 74-1393. Page 10

Succinct Reply Summary:

(Details to follow in "Reply")

"TEDA" refers to The South Carolina Teacher Employment and Dismissal Act Title 59, Chapter 25

1) The District violated TEDA 460 and many examples of case law by terminating Appellant prior to a hearing. 2) The District violated TEDA 440 and many examples of case law by not allowing any opportunity for improvement. 3) The District violated TEDA 460 and other policies and laws by not issuing formal charges. 4) The District violated TEDA 470 and many examples of case law by delaying the hearing 10 months. 5) The District violated TEDA 470 and many examples of case law by introducing un-charged accusations, and presenting evidence not "*discovered*". 6) The District violated TEDA 470 by allowing accusations that were not in "*substantiation of the charges.*" 7) The District violated the SC Constitution Section 22 by combining prosecution with jury. 8) The District violated law by allowing attorneys for the district to attend jury deliberations. 9) The District violated law by *knowingly* allowing false evidence to be admitted. 10) The District violated law by withholding exculpatory evidence.

Reply:

In the more than two dozen discursive pages by Respondent his point seems to be that Appellant may well be innocent of any wrong-doing but Appellant *refused* (not true) to testify, therefore, Appellant is stuck with a death penalty to his career. Never mind that Chairman William Evans promised that Appellant's exhibits would be considered, but Respondent's counsel did not allow it.

The Appellant's notebook exhibits were shredded following the hearing including Appellant's only personal copy.

Respondent's counsel attended the Board's "jury" deliberations, and the Board and District, i. e. Jury and Prosecution were "*One in the same*" (foregoing quotation from Respondent's Counsel as stated in the Court of Common Pleas Hearing, 14th Judicial District, August 19, 2016, Page 27 lines 6-7). 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.

Respondent's counsel argued that knowingly false or withheld evidence (Spoliation) was not relevant to the case (page 2, "*Official Termination Documents*"). Appellant was more than surprised that the Honorable Marvin H. Dukes, III, knowingly allowed false documents to be preserved for appeal, while disallowing true documents that had been withheld by the district.

Therefore, Appellant asked for a hearing with the South Carolina Department of Education in order that the whole truth may finally be allowed to be considered and acted upon.

There are important concomitant issues skirted by Respondent that add clarification to this Reply. These issues are commingled with direct responses to Respondent.

Respondent's counsel ignores that the district's violation of six (6) sections of Title 59 should have had a bearing on the outcome of the Beaufort County School Board's decision to terminate Appellant. Five (5) of the violations (part of the Record) occurred

before the hearing and one (1) violation occurred after the hearing. (Repeatedly documented in filed documents, and to be considered by discretion as cited below)

Respondent's counsel who attended the deliberations of the jury, as Advice Counsel to the Board, overruled Chairman Bill Evans on admission of Appellant's exhibits on the grounds that Appellant had not testified, although the sworn witnesses confirmed the exhibits. (Counsel's attendance at jury deliberations is confirmed by the law firm of Childs and Halligan and by Mr. David Duff in separate affidavits, one signed by Dr. Shirley Fawley and Mr. Vernie L. Williams.) 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.

Appellant moved the disqualification of Respondent's counsel at the Court of Common Pleas on the following grounds. "*Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.*" Rule 1.12 South Carolina Rules of Professional Conduct. The Honorable Marvin H. Dukes, III erred by denying that counsel had participated substantially (counsel spoke 108 times and made rulings).

Concomitant issue: How can this court condone the attendance of attorneys for the district to attend jury deliberations? Is that not enough for reversal? Gonzales v. McEuen.

How is it that the Board of Education can hear false testimony that all those involved, except the board, know to be false?

Though objected to repeatedly, such as page 282, line 16, of the Board Hearing, therefore “preserved”, how is it that no written charges were ever issued in this case, a violation of TEDA 59-25-460? *“No teacher shall be dismissed unless written notice specifying the cause of dismissal is first given the teacher by the District Board of Trustees and an opportunity for a hearing has been afforded the teacher.”*

How is it that an Advice Counsel who claimed to be unbiased can actually testify for the district at a board hearing? (Page 247, line 8 of Board Hearing) (Counsel stated that the district had not withheld emails--Fact: 11,000 emails, (their numbers) containing exculpatory evidence, are still withheld).

How is it that the District Administration, and the Board can collaborate?
(McKee v. Peoria Unified School District, Superior Court of Arizona, LC2011-000006-001 DT, September 6, 2013. *“1. The Board was not an impartial tribunal. (a)The Board and the District are the same entity.*

Also as asserted by Mr. David Duff, below, now representing the district: “... *Board or the District which legally are one in the same.*” Duff at times has represented both Board and District, plus the Superintendent. (Duff’s assertion, above, was in a Hearing, 14th Judicial District, August 19, 2016, page 27 lines 6-7)

How can an Advice Counsel to the board knowingly allow false evidence to be presented? (Board Hearing page 185, line 8. Other examples cited in filed documents)

How can Advice Counsel rule that relevant case laws from other states are inadmissible in a board hearing? (Board hearing page 522, lines 20-24. Duff's comments are on page 521)

How can an Advice Counsel to the board knowingly allow the superintendent to testify falsely during the board hearing? As cited in multiple documents the superintendent swore that he would produce certain emails that did not exist, then swore that he had produced them. (Board Hearing page 543, lines 19-24, inter alia)

How can an Advice Counsel to the board allow true exculpatory evidence to be withheld (Spoliation) and then claim that the evidence was not preserved for appeal? Is that not a punishable offense? (Board Hearing page 185, line 8) Other examples are detailed in filed documents. See page 2, paragraph 2, line 1 of Respondent's Initial Brief.

How can counsel unilaterally decide to change judges in the Court of Common Pleas by only informing his chosen judge and ignoring the judge assigned to the case?

How is it that accusations, not asserted during discovery, can be presented at trial? (Board Hearing page 128, lines 4-8)

How is it that Advice Counsel to the Board can add fictitious "*facts*" to the Board Order that were not presented? Counsel even wrote that the exhibits in Appellant's notebooks were *unnumbered*, page 5 of Board Order. Not only were all 300 exhibits numbered, but there was an Alphabetical Cross-referenced Directory included in the notebook. (Numerous examples filed)

How is it that the Order of the Court of Common Pleas, as written by Respondent, contain the same factual errors as in the Board Order? (Numerous examples filed)

How is it that Respondent's attorney was allowed to interpret the law for the Court of Common Pleas? Should the judge not consult as per Canon 3(7)(b).

How is it that the district could violate six (6) sections of the Teacher Employment and Dismissal Act, i.e., 59-25-430, 440, 450, 460, 470, and 480 and still prevail in court? All of these violations are detailed in filed documents. "*The observance of the procedural requirements of the Employment and Dismissal Act is mandatory and not a matter of discretion.*" Brown v. James, 697 S.E. 2d 604, 389 S.C. 41 (2010).

Why did the Advice Counsel to the Board insist that Appellant testify at the hearing but then made certain that Appellant could not do so after attorneys for the district objected, and counsel never suggested a way for appellant to testify? (page 522, line 7, and thereafter) Concomitant point for clarification. Prior to the hearing Advice Counsel advised Appellant that he might not be allowed to testify, since he had not put himself on the witness list. This information should be considered to be *preserved* as vital information necessary to determinations by the Board.

NOTE: It was apparent that the hearing was a blatant "Kangaroo" and that the only opportunity for justice would be from an appeal.

Although Duff's participation in the Court of Common Pleas appeared to violate Rule 1.12 of The Rules of professional Conduct, the Court of Common Pleas allowed him to proceed. Rule 1.12 "*Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally*

and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.”

In addition the General Counsel for the district, Drew Davis, participated substantially in this case for depositions and in advising the district. Davis was not licensed to practice law in South Carolina.

What is the basis for Respondent’s objections to Appellant’s Statement of the Case? As mentioned (on his page 2), did Respondent believe that under South Carolina Appellate Court Rule 208(b)(1)(C) that only court procedures are to be included, and was he objecting on those grounds? But Respondent went far afield in his own statement including contested issues, surely not appropriate as to Rule 208.

It is odd that Respondent (Respondent’s page 2) objects to including the official Termination Papers of July 1, 2014, citing Rule 210(c) “...*matter not presented to the tribunal below...*” Those documents are among the many documents illegally withheld (Spoliation) by the district until after the Board Hearing, ending May 2, 2015. Karppi v. Greenville Terrazzo Co., 489 S.E.2d 679 (S.C. Ct. App. 1997, inter alia).

Withholding documents should not favor the lawbreaker, i.e. Respondent.

It is clear, as stated many times in Appellant’s filed documents, that the court has discretion (below) to consider relevant evidence that was illegally withheld by the district. In fact, willfully withholding relevant evidence is the crime of Spoliation and is enough to reverse this case. (*Karppi, et al*) “*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.

If the court accepts *Singleton*, Respondent's principal argument is negated.

Respondent objects to #2 in Appellant's Statement of the Case, that reads, "*February 5, 2014. Principal McAden was ordered to preserve evidence..*" The district's own witness testified to the fact, that she was required as to "*preserving anything electronic*" Board Hearing page 209 line 24, and when asked, Ms. McAden answered, "*..everything was to be preserved..*"

Board Hearing page 210 line 2. (Respondent page 2, Number 5 of Appellant's statement reads, "*May 21, 2014. George McMaster wrote Litigation Hold Letter to Preserve Evidence, as final act as pro bono consultant (McMaster was closing his law practice)*" This letter is District Exhibit 28. Again, Respondent objects to his own exhibit.

Even by the most narrow interpretation of Rule 208, certainly #26 is relevant. "*March 16, 2016. Proposed Order submitted by Counsel for Respondent.*" Was this part of the procedure? Yes. Does Respondent contest the entry? No, he merely objects to it. (Respondent page 2)

How can Respondent on page 2 object to #8 which simply cites case law as part of the Board Hearing, page 438, line 15?

Repeating the lie in the Initial Brief that "*Bauer negligently left a 'special needs' ('special needs' was changed from 'handicapped') student unattended off campus*", page 3, does not make it true. Yes, the Board believed that lie because their side said it was true, but without ANY evidence, and the exculpatory evidence that was available was not

allowed, nor retained, by the district. Promised camera footage would have cleared Appellant.

It does not take talent, only honesty, to know that the pool is on campus and that the child was attended by employees at the pool, and that Appellant returned to the school with the same class (23 students) that he left with. So where did the 24th child come from? There was no investigation and the child was not interviewed. No one knows how he got there or where he hid. But the lie continues. It is easier to blame a teacher rather than the truth that an administrative policy was changed to allow tardy students to enter safety-intensive classes.

Concomitant information that clarifies: The outrageous behavior of the Beaufort County School District is now famous in Beaufort County, and WSAV TV station reported that, "... *more than 60 rules Moss changed (in two years) without oversight from the 11 member school board. Board member Michael Rivers is concerned.*"

It was reported in August that the superintendent pleaded down to two ethics violations and paid a fine. The lack of a professional core in the district is that during this whole case the General Counsel for the district was not licensed to practice law in South Carolina.

In the early stages of Appellant's case, procedure and technical compliance was perceived not to matter. The District violated six (6) sections of the Teacher Employment and Dismissal Act. How can that be tolerated?

It is outrageous that Respondent's Counsel, as Advice Counsel to the Board (Jury), allowed the District to withhold exculpatory evidence (spoliation), and then asked

this court to consider the evidence as not preserved “...*matter not presented to the tribunal below...*”. Should this court not make a referral for punishment? (Board Hearing page 185, line 8)

There are times when principle and rectitude matter. Great good could come out of this if the court would decide that the South Carolina Constitution Section 22 actually matters and that prosecution and jury acting together to hide misdeeds cannot continue.

The fitting result of this appeal would be restoring, at least temporarily, Appellant to his position while an independent inquiry examines the School Board and the handling of this case.

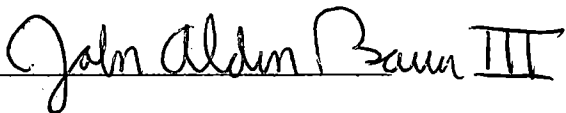
Conclusion

There is compelling evidence, *preserved* by any standard, that the District and Board colluded in this case to the detriment of a teacher, whom administrators had praised, and who testified that they would welcome back.

Rule 502.1, Judges oath. “*I pledge to seek justice, and justice alone;*”

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Respectfully Submitted,



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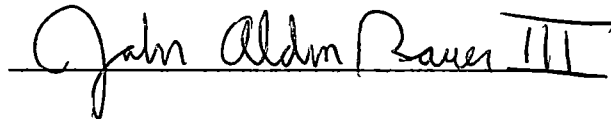
OCT 27 2016

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 AMENDED INITIAL REPLY BRIEF by mailing a copy of same via US Mail, postage prepaid, and return address clearly indicated to the following on the 27th day of October, 2016.

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