THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson Jr., Circuit Court Judge

Case No. 2016-001337

Leisel Paradis ..... Appellant

v.

Charleston County School District, James Island Charter High School, Robert Bohnstengel, and Stephanie Spann, in their individual capacities, ...Respondents

REPLY BRIEF OF APPELLANT

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ARGUMENT

Respondents filed a response brief to Appellant's initial brief, received by this Court on November 9, 2016. There the Respondent District and Respondent Charter School maintain that they are immune from Appellant's defamation claim, that the defamation claim is brought outside of the statute of limitations, and that it is insufficiently pled. (Respondents' Brief pp. 5-13). Similarly Respondents Bohnstengel and Spann, with respect to civil conspiracy (the sole claim alleged against them,) maintain that special damages are not sufficiently pled, and that they are entitled to intracorporate immunity. (Respondents' Brief pp. 13-17). Last, Respondents argue that an amendment to Appellant's complaint would be futile. (Respondents' Brief pp. 17-18). Appellant Paradis respectfully replies to show this Court:

1. That governing and persuasive precedent does not support the District and Charter's School's sovereign immunity argument,
2. That the lion's share of the Defamation alleged occurred within the actionable statute of limitations,
3. That the District and Charter School has mischaracterized Paradis; defamation claim as insufficiently pled,
4. That the Individual Respondent's seek impermissible inferential support with respect to their special damages argument,
5. That Paradis sufficiently alleged a personal motive to harm her on the part of the Individual Respondents, and
6. That an amendment, if necessary, would not be futile.

Paradis, therefore, asks this Court to remand this case, and allow it to proceed to discovery.

1. The sovereign immunity argument, made by the District and Charter school, has no governing or persuasive precedential support.

The only cases relied upon by the Respondent District and Respondent Charter School in support of their argument in favor of sovereign immunity are a 1960 per curium opinion of the

Fourth Circuit Court of Appeals, analyzing Virginia Law, and a 1974 decision by the District Court of South Carolina. (Respondents Brief p. 7); *citing, De Levay v. Richmond Cty. Sch. Bd.*, 284 F.2d 340, 340 (4th Cir. 1960); *and, Green v. Cauthen*, 379 F. Supp. 361, 374 (D.S.C. 1974). Both of these cases predate their states' tort claims act by over 10 years. Va. Code Ann. § 8.01-195.3 (West) (Originally Passed 1981); S.C. Code Ann. §§ 15-78-10 *et seq.* (1986). *De Levay* and *Green*, decided before South Carolina and Virginia abrogated their sovereign immunity, are not relevant to this Court's decision; rather this Court must look to the language of the South Carolina Tort Claims Act (SCTCA) and the case law interpreting that law.[1]

The Lower Court, as well as the Respondent District and Respondent Charter School, in addition to the case law distinguished above, solely relied upon § 15-78-20(b) as substantive support to find sovereign immunity. (Order Dismissing Case pp. 4-5). The District and Charter School continue to rely, in part, on S.C. Code Ann. § 15-78-20(b). (Respondents' Brief p. 6). Their reliance is misplaced, and is akin to using only the first page of a book to comprehensively describe its contents. Section 15-78-20(b) is not an exception to the SCTCA's waiver to immunity; rather, it simply describes what the SCTCA does. Section 15-78-20(b) provides: "The General Assembly in this chapter intends to grant the State . . . while acting within the scope of official duty, immunity from liability and suit for any tort **except as waived by this chapter**." (emphasis added). The SCTCA then broadly waives immunity at S.C. Code Ann. § 15-78-40: "The State . . . [is] liable for

[1] Even if *De Levay* and *Green*, were persuasive a School District and Charter School are not "arms of the state," and are not subject to eleventh amendment sovereign immunity under prevailing constitutional law. *Eason v. Clark Cty. Sch. Dist.*, 303 F.3d 1137, 1145 (9th Cir. 2002) ("The district court erroneously concluded that the Clark County School District is an arm of the state, entitled to Eleventh Amendment immunity.") *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81, 97 S. Ct. 568, 573, 50 L. Ed. 2d 471 (1977) ("On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.")

[its] torts in the same manner and to the same extent as a private individual under like circumstances, **subject to the . . . exemptions from liability and damages contained herein**." (emphasis added)[2]. Those exemptions are found within § 15-78-60; until now, the District and Charter School have not attempted to establish a § 15-78-60 exemption.

The Respondent District and Charter School have, for the first time here, argued pursuant to S.C. Code Ann. § 15-78-60(5) that they are entitled to discretionary immunity. (Respondent' Brief p. 8). That argument is not preserved for appeal, because it was not raised at the Court below. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") Even if the District and Charter School's new § 15-78-60 argument were ripe for determination, discretionary immunity, an affirmative defense, is not a suitable basis for Rule 12(b)(6), SCRCP dismissal. "The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." *Steinke v. S. Carolina Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999); *citing, Strange v. South Carolina Dep't of Highways and Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994). The Respondents cannot rely on an affirmative defense, within the standard at hand, to show that Paradis' defamation claim should be dismissed. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001) ("The [Trial Court's Order] will not be sustained if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.") Here Paradis has alleged that the defamatory insinuations flowing from her placement, re-placement, and

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[2] See also S.C. Code Ann. § 15-78-200 recognizing that governmental entities can be liable for tots committed in the scope of their official duty: "the 'South Carolina Tort Claims Act', is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty."

maintenance upon a SAFE-T evaluation, and her termination were pretextual and not based on the regular discretionary determinations of her supervisors. (*See*, Complaint ¶¶ 21, 23-32). Those allegations are entitled to fair deference, and the Respondent District and Respondent Charter School are not entitled to sovereign immunity.

2. Paradis' Defamation Claim is sufficiently attributable to conduct and statements within the statute of limitations.

This lawsuit was filed on September 22, 2015. Defamation has a two year statute of limitations. *Jones v City of Folly Beach*, 326 S.C. 360, 368 483 S.E.2d 770, 774 (Ct. App. 1997) (citing S.C. Code Ann. § 15-3-550) (Supp. 1995)). The Respondent District and Respondent Charter School attempt to narrow Paradis' Defamation claim to render a grossly prohibitive result. Respondents argue that Paradis' defamation claim is entirely sourced on her initial placement on a SAFE-T evaluation in August, 2013, and that therefore her defamation claim is barred, by one month, due to defamation's two year statute of limitations. (Respondents' brief pp. 9-11). To the contrary, Paradis' pleadings, with respect to defamation, are almost entirely based on conduct and speech within the actionable time period. Paradis, as relevant, alleges:

> 21. All of Plaintiff's peers and colleagues knew she was undergoing the evaluation process and witnessed the physical and emotional toll Plaintiff suffered as a result. Plaintiff's peers in the English department, who had experience working with her over a number of years, commented on the two-year evaluation process and speculated that Plaintiff was placed on it due to administration's belief that Plaintiff had classroom management issues, although Plaintiff was not the only teacher who reported discipline to administration.
>
> 22. After Plaintiff failed the evaluation for a second year, she was dismissed from her twenty-year career at JICHS. She exhausted her administrative remedies.
>
> ...
>
> 25. Plaintiff was slandered by oral and written statements as well as by actions of Defendant District and Defendant JICHS.

26. These statements and actions made against Plaintiff were made by agents and servants of Defendant District and Defendant JICHS acting in the course and scope of their employment under the circumstances alleged above.

27. These statements and actions are false.

28. These statements and actions, **including false accusations that Plaintiff could not effectively teach her students and manage her classroom**, injured Plaintiff, and have defamed Plaintiff in her trade, business, and profession. By virtue of placing **and holding Plaintiff on the evaluation process for two years – which was widely known at JICHS – Plaintiff's credibility as a teacher was diminished greatly.**

29. By the false statements and actions made against Plaintiff by agents and servants of Defendant District and Defendant JICHS acting in the course and scope of their employment, Defendant District and Defendant JICHS defamed Plaintiff, and the defamation was published to Plaintiff's colleagues, students, and possibly others, including parents who previously knew Plaintiff to be a good and hardworking English Teacher.

30. The false statements and actions were not privileged, as there was no duty to furnish the information to the recipients, and they circulated to persons other than Plaintiff and her superiors, injuring her professional reputation.

31. The statements and actions made by the agents and servants of Defendant District and Defendant JICHS acting within the course and scope of their employment, **together with the actions that Defendant District and Defendant JICHS took, including the actions that proximately caused Plaintiff's termination,** are defamatory per se.

(Complaint ¶¶ 21-22, 25-30) (emphasis added). With the exception of the word "placing" in paragraph 28 of the complaint each allegation of defamatory action and speech falls within the actionable statute of limitations. This Court is required to read all pled facts as true, and all inferences attributable therefrom, in Paradis' favor. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). Respondents' characterization of Paradis' defamation claim requests an opposite review standard.

Respondents, seeking further inferential support to which they are not entitled, also argue that Paradis' defamation damages are not abatable or cannot be attributed to conduct and speech before and then after the commencement of the statute of limitations. (Respondents' Brief pp. 10-11). A reasonable reading of Paradis' damages indicates that they entirely arise from occurrences within the statute of limitations. Paradis, on her defamation claim, seeks recompense for: the loss of her job, loss of income, loss of earning capacity, and future income and benefits associated therewith; as well as, embarrassment, humiliation, damage to her reputation, emotional distress, pain and suffering, and loss of sleep and self-confidence. (Complaint ¶ 32). These subsets of damages, particularly the economic damages, are each reasonably understood to be flowing from the period of time that is actionable in this case.[3]

3. Paradis sufficiently pleads defamation.

The sole defamation element attacked by the Respondent District and Respondent Charter School is third party publication. (Respondents' Brief pp. 11-13). Respondents attempt to analogize this case to *Pagano v. Martin*, a 1968 Fourth Circuit per curium opinion. (Respondents' Brief pp. 11-12); (*citing, Pagano*, 397 F.2d 620 (1968). *Pagono*, where the sole publication alleged was within a performance evaluation not shared with unprivileged third parties, is different from this case. *Id.* Plaintiff has sufficiently pled third party publication:

> 29. By the false statements and actions made against Plaintiff by agents and servants of Defendant District and Defendant JICHS acting in the course and scope of their employment, Defendant District and Defendant JICHS defamed Plaintiff, **and the defamation was published to Plaintiff's colleagues, students, and possibly others, including parents who previously knew Plaintiff to be a good and hardworking English Teacher.**

[3] The Respondent District and Respondent Charter Schools' statue of limitations argument, if accepted, would engender a policy stance whereby plaintiffs should immediately initiate litigation where an occurrence might later on give rise to defamatory speech or conduct. That is a litigious proposition.

> 30. **The false statements and actions were not privileged, as there was no duty to furnish the information to the recipients, and they circulated to persons other than Plaintiff and her superiors, injuring her professional reputation.**

(Complaint ¶¶ 29-30) (emphasis added). Paradis has pled unprivileged third party publication. "In South Carolina, an employee's statement to another employee is a 'publication' when the privilege of the employees' common interest is abused." *McBride v. School District of Greenville County.* 389 S.C. 546, 562, 698 S.E.2d 845, 853 (Ct. App. 2010). The Respondents' argument that the sole publication at issue lies within the language of Paradis' SAFE-T evaluations requires an improper inference in its favor, and is not supported by the pleadings. Paradis is entitled to have both her pled facts, and the reasonable inferences flowing therefrom, viewed in her favor on a motion to dismiss. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) ("A 12(b)(6) motion should not be granted if 'facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.') (Internal citation omitted)[4]. Paradis, within this framework, has pled third party publication and defamation, in general, sufficiently.

4. Paradis sufficiently pleads special damages.

Special damages are required, in the civil conspiracy context, to prevent a double recovery. *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000); *See Also, Anthony v. Ward*, 336 Fed. Appx. 311, 318, (C.A.4 S.C. (2009)) (interpreting South Carolina civil conspiracy law: "The case law makes clear that the concern is with the plaintiff receiving a double recovery".) "Special damages are those elements of damages that are the natural, but not the necessary or usual,

[4] Respondents, relying on *Deberry v. McCain*, assert that the Court is not to consider inferences drawn from well-pled allegations. (Respondents' Brief pp. 5, 13); *citing, DeBerry v. McCain,* 275 S.C. 569, 574, 274 S.E.2d 293, 296 (1981). *DeBerry* was a decision on a demurrer prior to the modern May 1, 1986 enactment of Rule 12, SCRCP (amended again on July 1, 1995). Respondents' use of *DeBerry* both within this argument (p. 13) and within their statement of the standard of review (p. 1) is mistaken. Furthermore, even if it were applicable, *DeBerry* allows the Court to view inferences in the non-movant's favor; 'It is for the court to determine what inferences, if any, can be justifiably drawn from the pleading." *DeBerry,* 274 S.E.2d at 296.

consequence of the defendant's conduct." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 116, 682 S.E.2d 871, 875 (Ct. App. 2009). This Court has held that special damages are not sufficiently alleged where the damages for one claim are the same as the damages sought for a civil conspiracy claim. *Hackworth*, 682 S.E.2d at 875–76 ("Greywood has repeated verbatim the same damages in its civil conspiracy claim as are alleged in its claim for breach of contract accompanied by a fraudulent act . . . Accordingly, we believe under the case law cited above, Greywood failed to properly plead its civil conspiracy cause of action, and therefore, the trial court did not error in dismissing the claim.") Such is not the case here. Paradis pleads the following damages on her defamation claim:

> 32. That such statements and actions were false, known to be false, and given with reckless disregard for the truth, were maliciously made, and have proximately caused Plaintiff's severe and continuing damages including the loss of her job, loss of income, loss of earning capacity, and future income and benefits associated therewith. Further, Plaintiff has sustained embarrassment, humiliation, damage to her reputation, emotional distress, and pain and suffering, which will continue into the foreseeable future. As a result of these actions, Plaintiff lost a considerable amount of sleep and her self-confidence.

(Complaint ¶ 32). Paradis pleads the following damages on her civil conspiracy claim:

> 36. Such actions taken by the Defendants and others amount to an unlawful civil conspiracy and approximately cause special damages to the Plaintiff for being blacklisted and ostracized from the profession of education.
>
> 37. Plaintiff is further entitled to an award of punitive damages from the Individual Defendants for their intentional, malicious, and evil actions.

Paradis' special damages are the natural, but not typical, result of the Individual Respondents' conduct, and those damages are not the same, in word or in substance, as her defamation damages. As such, Paradis has sufficiently pled special damages, and the Individual Respondents' (Bohnstengel and Spann) argument to the contrary is not based on governing law. Furthermore, special damages, in this case, are facially inferred from the fact that the only damages sought against the Individual Respondents are for civil conspiracy. *See, Allegro, Inc. v. Scully*, 418 S.C. 24, 791 S.E.2d

140, 147 (fn 6) (2016), reh'g denied (Oct. 26, 2016); (Pleicones dissenting) ("Even if the Court were to preserve the Todd rule, the sole claim asserted against petitioner Corbin was civil conspiracy, and thus as to him the "special damages" rule created by Todd does not apply.)[5].

5. Paradis sufficiently pleads a personal motive to harm her on the part of the Individual Respondents.

The Individual Respondents attempt to mischaracterize Paradis' civil conspiracy claim as solely relating "to conduct that occurred while [the Individual Respondents] were acting within the course and scope of their employment. . . ." (Respondents' Brief p. 17). This is a premature fact finding, reliant upon an improper inference in the Individual Respondents' favor. The pleadings indicate a personal motive to harm Paradis, by the Individual Respondents, which would not fall within their ordinary scope of employment. Specifically Paradis, as relevant, pled:

> 9. Plaintiff reported the same to Spann and Bohnstengel. After the incident, Plaintiff discussed the event with Bohnstengel in more detail and informed him that she desired to file a report with the local police department because of the aggressive and violent nature of the assault. Bohnstengel became angry with Plaintiff, strongly encouraged her not to make the report because it would "lower the JICHS report card" related to disciplinary reports, place the school on a list of violent schools in the state, and further told Plaintiff that her report would be useless because she could not call students as witnesses due to their ages.
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> ...
>
> 34. The Individual Defendants Bohnstengel and Spann met, conspired, schemed and planned with others to rebuke Plaintiff and to cause her special damages in an evil and personal agenda **motivated from a personal dislike of Plaintiff and her valid complaints of discipline issues,** which was offensive to the Defendants, who had previously experienced issues with discipline and its negative effect upon JICHS and the District for reporting purposes.

[5] It merits note that our Court is presently skeptical of the applicability of special damages to the tort of civil conspiracy. *See, Allegro, Inc.*, 791 S.E.2d 140, 145 (fn 3) (majority) & 146-147 (Beatty Concurrence), (Pleicones' Dissent).

(Complaint ¶¶ 9, 34), (emphasis added). Retaliating against an employee for filing a valid disciplinary report cannot be reasonably inferred to be within the scope and course of the Individual Respondents' conduct. Therefore the Individual Respondents are not entitled to intracorporate immunity. Civil conspiracies between the employees of a principal and an agent are recognized in South Carolina where the employees and agents act outside of the scope of their employment. *See, Pridgen v. Ward*, 391 S.C. 238, 246, 705 S.E.2d 58, 63 (Ct. App. 2010); *see also, Crittenden v. Thompson-Walker Co., Inc.*, 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986); (*holding*, "On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment").

6. An amendment, if necessary, would not be futile.

"When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. *Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 881 (2006). The Respondents argue that allowing Paradis to amend her complaint would be futile. (Respondents' Brief p. 18). This is ironic given that the Respondents additionally sought the alternative relief of a more definite statement, and that the majority of their arguments target minor asserted pleading deficiencies. Particularly, aside from their sovereign immunity and statute of limitations arguments, the Respondents argue that third party publication, special damages, and conduct outside the course and scope of employment are not pled with enough detail. Paradis vehemently disagrees with this argument as set forth above and within her opening brief. However assuming, *arguendo*, that the Respondents are right, and Paradis' pleadings are deficient, those deficiencies are the sort that could easily be corrected with an amendment to add minor details.

CONCLUSION

Appellant respectfully replies to the Respondents' brief as set forth above and asks this Honorable Court to Reverse the holding of the Circuit Court, and Remand this case for discovery.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

I hereby certify, as counsel of record in the above-captioned case, that the Initial Reply Brief submitted herewith contains no matter which is irrelevant to the appeal as required by Rule 208.

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