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SC Court of Appeals

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

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FINAL BRIEF OF APPELLANT

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B. THAT THE CLAIM WAS NOT BROUGHT WITHIN THE STATUTE OF LIMITATIONS? AND
C. THAT THE DEFAMATION CLAIM WAS NOT SUFFICIENTLY PLED?

II. DID THE CIRCUIT COURT ERR DISMISSING APPELLANT'S CIVIL CONSPIRACY CLAIM FOR FAILURE TO PLEAD SPECIAL DAMAGES, AND ON THE BASIS THAT THE ALLEGED CONSPIRATORS WERE IMMUNE FROM SUIT?

III. SHOULD THE CIRCUIT COURT HAVE GRANTED LEAVE TO AMEND?

STATEMENT OF THE CASE

Appellant, Leisel Paradis, filed this action alleging (1) defamation against Respondents Charleston County School District ("District") and James Island Charter High School ("Charter School"); and (2) civil conspiracy against Respondents Robert Bohnstengel and Stephanie Spann on September 17, 2015. (R. pp. 14-24). The civil conspiracy claim is pled against Bohnstengel and Spann in their individual capacities. (R. p. 19). Respondents filed a Rule 12(b)(6), SCRCP Motion to Dismiss and alternative Motion for a More Definite Statement on November 30, 2015. That Motion was fully briefed. (*See*, R. pp. 72-84). Thereafter, the Respondent Charter School and Respondent Spann filed an Amended Motion to Dismiss on March 18, 2016, and the Respondent District and Respondent Bohnstengel filed an Amended Motion to Dismiss on March 21, 2016.

Oral arguments were held on March 30, 2016, before the Honorable J.C. Nicholson, Jr. in Charleston County. Respondents, upon request, submitted a proposed order to the Court on April 13, 2016 granting the Rule 12(b)(6) Motion to Dismiss. (R. pp. 101-112). That Order was signed on April 15, 2016 by Judge Nicholson.[1] (R. pp. 3-15). Paradis filed a Motion for Reconsideration which was fully briefed. (R. pp. 113-126). That motion was denied May 19, 2016. (R. pp. 1-2). Paradis timely filed her notice of Appeal. Paradis appeals the dismissal of her case.

PLEADINGS

The Respondent Charter School and Respondent District employed Paradis as an English teacher for nearly twenty years. (R. pp. 17-18 ¶¶ 1, 7). Respondent Bohnstengel was the principal at the Respondent Charter School and Respondent Spann was an Assistant Principal at the Respondent Charter School during the 2012-2013 school year. (R. p. 18 ¶ 4-5). Paradis successfully met her Goals Based Evaluation ("GBE") for 2012-2013, and had successful performance evaluations prior thereto. (R. p. 18 ¶ 7).

[1] Respondent's Motion for More Definite Statement was not ruled upon.

Paradis was verbally assaulted by a student, who had an established disciplinary record, during the 2012-2013 school year. (R. p. 18 ¶ 8). Paradis immediately reported the assault to Spann and Bohnstengel, and informed them that she felt it was necessary to file a police report as the assault was violent in nature. (R. p. 18 ¶ 9). Respondent Bohnstengel vehemently discouraged Appellant from filing the report; because, the report might negatively impact the Respondent Charter School's South Carolina Department of Education (SCDOE) report card. (R. p. 18 ¶ 9).

Paradis received her successful 2012-2013 GBE following her disagreement with Respondent Bohnstengel regarding the police report. However, shortly thereafter, Respondents Bohnstengel and Spann placed Paradis on a formal, rigorous evaluation plan for struggling teachers known as a SAFE-T plan for the 2013-2014 school year. (R. p. 19 ¶ 12). The SAFE-T plan had disciplinary implications, and could result in Appellant's termination. (*Id.*). Respondent Bohnstengel cited a prior meeting with Paradis as his basis for placing her on the SAFE-T. (*Id.*). That meeting never occurred. (R. p. 19 ¶ 13). The SAFE-T plan required Paradis be subjected to periodic evaluations by three individuals, and complete other rigorous assignments throughout the 2013-2014 school year. (R. p. 19 ¶ 12). Consistent with his opposition to Paradis filing a necessary police report, Paradis learned later that Respondent Bohnstengel recommended to Respondent Spann that Paradis be placed on a SAFE-T plan due to disciplinary referrals she made. (R. p. 19 fn. 1).

Paradis, pursuant to the SAFE-T plan, was to be evaluated throughout the 2013-2014 school year by three individuals: Respondents Bohnstengel, Respondent Spann, and another employee Kevin Eakes; none of Appellant's evaluators had experience in her field. (R. p. 19 ¶ 14). Bohnstengel was terminated prior to the completion of Appellant's 2013-2014 SAFE-T evaluation, and another evaluator was appointed in his stead (who also had no experience teaching English). (R. p. 20 ¶¶ 15-16). The three evaluators observed Appellant less than 5% of her total teaching time during the 2013-2014 school year; nevertheless, Paradis received a failing score at the end of the year. (R. p. 20

¶ 17). Paradis was forced to undergo the SAFE-T plan for a second year (the 2014-2015 school year) to avert termination. (*Id.*). Additionally, she was required to accept a full-time position; whereas, she was previously part-time. (*Id.*).

Paradis' 2014-2015 SAFE-T evaluators included Respondent Spann (R. p. 20 ¶ 18). Paradis contacted a fellow employee, of the Respondent District, regarding Spann's continuation as an evaluator, and was informed that typically the evaluators are wholly replaced. (*Id.*). Paradis was worried that Respondent Spann would not be objective; because Spann failed her the prior year, and was involved in Paradis' placement on the SAFE-T plan in the first place. (R. pp. 19-20 ¶ 18; *see also*, ¶ 12; *and*, fn. 1). Respondent Spann changed the plan's evaluation requirements multiple times throughout the 2014-2015 school year leaving Paradis perpetually confused about what she had to do in order to succeed. (R. p. 20-21 ¶ 19). Paradis regularly sought clarification on her assignments and requirements due to the same. (*Id.*). Appellant's appointed mentor, Charity Scruggs, met with Appellant almost daily, and noticed that Appellant was suffering from severe work related stress caused by the requirements of the SAFE-T program. (*Id.*). At the same time, Scruggs noted that Appellant was working hard to meet her plan's shifting requirements by employing various teaching strategies, asking for assistance, and utilizing suggestions offered to her. (R. pp. 20-21 ¶ 19-20). Respondent Spann, and her fellow evaluators, gave Appellant failing grade for her 2014-2015 SAFE-T evaluation. (R. p. 21 ¶ 20). Appellant was bizarrely scored higher at the beginning of the 2014-2015 school year in comparison to later in the year when she was implementing the strategies recommended to her. (*Id.*).

Appellant's peers and colleagues were made aware that she was twice placed on the SAFE-T evaluation. (R. p. 21 ¶ 21). Many of Paradis' peers within the English department commented to others that she was on the SAFE-T program; because administration perceived that she had issues

managing her classroom. (R. p. ¶ 21). Paradis was terminated on the stated basis that she failed the 2014-2015 SAFE-T evaluation. (R. p. 21 ¶ 22).

STANDARD OF REVIEW

This is an appeal of an order granting Rule 12(b)(6), SCRCP Motions to Dismiss. "[T]he appellate court [on Rule 12(b)(6)] applies the same standard of review implemented by the trial court." *Ashley River Properties I, LLC v. Ashley River Properties II, LLC*, 374 S.C. 271, 279, 648 S.E.2d 295, 298 (Ct. App. 2007) (citing *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001)).

"The trial court's ruling on a Rule 12(b)(6) motion must be bottomed and premised solely upon the allegations set forth by the plaintiff." *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001); *citing, Holy Loch Distribs. v. Hitchcock,* 332 S.C. 247, 503 S.E.2d 787 (Ct.App.1998), *rev'd on other grounds,* 340 S.C. 20, 531 S.E.2d 282 (2000); *Berry v. McLeod,* 328 S.C. 435, 492 S.E.2d 794 (Ct.App.1997). "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." *Williams*, 553 S.E.2d at 499; *citing, Brown v. Leverette,* 291 S.C. 364, 353 S.E.2d 697 (1987); *McCormick v. England,* 328 S.C. 627, 494 S.E.2d 431 (Ct.App.1997). "The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief." *Williams*, 553 S.E.2d at 499-500; *citing, Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987); *Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct.App.1999).

ARGUMENT

The Circuit Court held that Paradis' defamation claim against the Respondent School District and Respondent Charter School was: (1) barred by the South Carolina Tort Claims Act Appellant's; (2) filed outside of the statute of limitations; and (3) insufficiently pled. (R. pp. 5-9). The Circuit Court dismissed Paradis' civil conspiracy claim on the grounds of special damages and

intracorporate immunity. (R. pp. 9-13). The Lower Court additionally disregarded Paradis' request to amend her complaint contemporaneous with her opposition to the underlying motion. Paradis' claims are sufficiently pled, Respondents are not entitled to dismissal, and, assuming Respondents were entitled to dismissal, Paradis should have been given to leave to amend her Complaint.

I. PARADIS' DEFAMATION CLAIM IS SUFFICIENTLY ALLEGED, AND THE RESPONDENTS ARE NOT ENTITLED TO DISMISSAL AS A MATTER OF LAW.

Defamation requires: (1) a false and defamatory statement; (2) published, without privilege, to a third party; (3) fault on the part of the publisher; and (4) actionability of the statement. *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 474, 710 S.E.2d 67, 74 (2011). A defamatory statement tends to impeach the honesty, integrity or reputation of a person. *See Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (1987); *Smith v Bradstreet Co.* 63 S.C. 525, 41 S.E. 763 (1902). Extrinsic circumstances can render a statement defamatory when it would not ordinarily be interpreted as such. *Costas v Florence Printing Co.,* 237 S.C. 655, 118 S.E.2d 696 (1961); *see also Mains v. K-Mart Corp.*, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988). "The defamatory meaning of a message or statement may be obvious on the face of the statement, in which case the statement is defamatory *per se*." *Holtzscheiter v. Thomson Newspapers*, 332 S.C. 502, 508-509, 506 S.E.2d 497, 501 (1998). Imputing one's credibility in their profession is *per se* defamatory. *Woodward v. South Carolina Farm Buereau Ins. Co.*, 277 S.C. 29, 282 S.E.2d 599 (1981). Malice and damages are presumed in a case of *per se* defamation. *See, Manley v. Manley*, 291 S.C. 325; 353 S.E.2d 312 (Ct. App. 1987); *McBride v. Sch. Distr. of Greenville County*, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010). South Carolina, in addition to by word and insinuation, recognizes defamation by action. *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980) ("It is established that a defamatory insinuation may be made by actions or conduct as well as by word.") (*citing*, 50 Am.Jur.2d Libel and Slander, Section 26).

The circuit Court erred in determining: (1) that the Respondents were immune from suit for defamation, (2) that Paradis' claim is time barred, and (3) that Paradis' claim is not sufficiently pled.

A. The Respondent District and Charter School are not immune from Suit.

The South Carolina Tort Claims Act (SCTCA) waives the state and its political subdivisions' tort immunity. S.C. Code Ann. § 15-78-10 *et. seq.* The SCTCA provides: "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained [in the SCTCA.]" S.C. Code Ann. § 15-78-40. The SCTCA is the exclusive remedy for any tort committed by an employee of a governmental entity while acting within the course and scope of his or her official duty. S.C. Code Ann. § 15-78-200. A claim based on the conduct of government employees, acting within their scope of employment, should be alleged against the government employer. S.C. Code Ann. § 15-78-70(c) ("a person . . . shall name as a party defendant only the agency of political subdivision for which the employee was acting and is not required to name the employee individually.").

The Circuit Court held that because Schools and School Districts are required to evaluate instructors they are therefore immune from suit based on any defamation initially sourced on a teacher evaluation regardless of the propriety of the evaluation or the manner in which it was published to others. (R. pp. 6-7); (*citing*, S.C. Code Ann. § 15-78-20(b), *and* S.C. Code Ann. § 59-26-40). "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 Respondent District and Charter School argued, and the Circuit Court agreed, that the intersection SCTCA Section 15-78-20(b) and S.C. Code Ann. § 59-26-40, regarding teacher

evaluations, immunized the Respondents from suit. Section 15-78-20(b) of the SCTCA maintains immunity for official duty conduct except as waived by SCTCA. S.C. Code Ann. § 59-26-40 requires school districts to evaluate teachers. The Respondents, and Lower Court by affirmation, did not cite to or establish a specific exception to the SCTCA's waiver of immunity applicable here, are not supported by governing precedent, and have mischaracterized Paradis' defamation claim.

The portion of the SCTCA relied on by the Circuit Court, Section 15-78-20(b), is subject to the SCTCA's general waiver of immunity: "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 specifically recognizes that government entities can be liable for conduct arising out of an official duty. S.C. Code Ann. § 15-78-200. (The SCTCA "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**.") (emphasis added). The SCTCA generally provides: "The State . . . [is] liable for [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." S.C. Code Ann. § 15-78-40. The Respondents, to establish an SCTCA exemption, must site to a specific exemption from liability. *See*, S.C. Code Ann. § 15-78-60; *See also*, *Steinke*, 520 S.E.2d at 152 (Government has burden of establishing an exception to liability.) The Respondents, and the Circuit Court, have not done so. Thus, S.C. Code Ann. § 15-78-20(b), alone, does give rise to immunity.

Section 15-78-20(b), and the SCTCA, has never been applied in the manner requested by the Respondents. Rather, Government entities have been required to establish an immunity exception to the SCTCA typically arising under Section 15-78-60. *See Steinke*, 520 S.E.2d 142. The Respondents' argument and the Circuit Court's order is based on inapplicable, non-governing authority. (R. pp. 6-7); *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). The first case relied upon by the Lower Court, *De Levay*, is a two page 1960 4th Circuit Decision interpreting Virginia Law and based on sovereign immunity. *De Levay*, 284 F.2d 340. *De Levay* preceded Virginia's State Tort Claims Act by 21 years. Va. Code Ann. § 8.01-195.3 (West) (Originally Passed 1981). *De Levay* a pre-tort claims act sovereign immunity case is wholly irrelevant to this matter. The second authority relied on by the Respondents and Circuit Court is a 1974 South Carolina District Court Case, *Green v. Cauthen*, preceding the SCTCA by 15 years. *Green*, a 42 U.S.C. § 1983 case against government officials, was decided prior to the passage of the South Carolina Tort Claims Act, and is similarly inapplicable to the present case. *Green*, 379 F. Supp. 361. The pre-tort claims act cases relied upon by the Respondents and Circuit Court do not support a finding of official immunity.

Even if the SCTCA or the authority relied upon by the Respondents did support immunity, The Lower Court reversibly misstated Paradis' defamation claim as solely arising out of her placement on the SAFE-T evaluation. Rather, Paradis' defamation claim concerns not only her placement on the SAFE-T evaluation, but also the alleged pretextual manner in which her SAFE-T evaluation was conducted, her termination thereupon, and that the grounds for her termination and placement to on the SAFE-T evaluation were made widely known to her peers. (R. pp. 21-23 ¶¶ 21, 23-32). The Lower Court unjustifiably narrowed Paradis' defamation claim as arising solely out of her placement on the SAFE-T evaluation.

B. Appellant's Defamation Claim was filed within the Statute of Limitations.

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)). South Carolina recognizes defamation by word and action. *Tyler*, 272 S.E.2d at 634. Paradis filed her defamation claim on September 17, 2015; thus any defamatory statements or actions occurring on or after September 17, 2013 are actionable.

The Circuit Court improperly narrowed Paradis' defamation claim as solely arising out of her initial placement on the SAFE-T evaluation at the beginning of the 2013-2014 school year. As pled, Paradis' defamation claim involves the words and conduct associated with her being maintained on the SAFE-T plan throughout the 2013-2014 school year, her continuation on that plan for 2014-2015, her termination, and publications to non-privileged co-workers incidental to the same; all of which would be actionable within the statute of limitations. (R. pp. 21-23 ¶¶ 21, 23-32). The post September 17, 2013 defamatory actions and conduct described above are actionable in accord with the continuous accrual doctrine. *See, State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 77, 777 S.E.2d 176, 199 (2015), *reh'g granted* (July 8, 2015), *cert. denied sub nom. Ortho-McNeil-Janssen Pharm., Inc. v. S. Carolina ex rel. Wilson*, 136 S. Ct. 824, 193 L. Ed. 2d 766 (U.S.S.C. 2016) ("Janssen assumes, wrongly so, that its ability to successfully invoke the statute of limitations to bar the labeling claim prior to January 24, 2004, ends the labeling claim altogether."); *see also, Estate of Livingston v. Livingston*, 404 S.C. 137, 147, 744 S.E.2d 203, 209 (Ct. App. 2013) ("The supreme court has held that when a nuisance is continuing and the injury is abatable, the statute of limitations does not run merely from the time of the original intrusion on the property and cannot be a complete bar."); *and, Cutchin v. S.C. Dep't of Highways & Pub. Transp.*, 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (stating if the injury is permanent, the plaintiff has a single cause of action that cannot be split; however, if the cause of the injury is abatable, each injury gives rise to a new cause of action). Thus, defamatory statements and conduct occurring on or after September 17, 2013, are actionable in this case; and the statute of limitations is not a complete bar to Paradis' defamation claim.

C. Defamation is Sufficiently Pled.

The Circuit Court additionally granted dismissal on the grounds that Paradis did not sufficiently plead her defamation claim. The Circuit Court relied on a *per curium* decision interpreting Virginia law, *Pagano v. Martin*, in support of its conclusion that Paradis had failed to plead third party

publication. (R. pp. 8-9); (*citing, Pagano*, 397 F.2d 620 (1968)). *Pagano* concerned an allegation of libel solely related to a performance evaluation. This case, somewhat similarly, is partially related to Paradis placement on two full-year formal performance evaluations; however, Paradis has sufficiently pled that her placement on the SAFE-T evaluation, termination and grounds for the same were published to unprivileged co-workers. (R. p. 21 ¶21). This case, with respect to publication, is more akin to the Court of Appeals recent decision in *McBride v. School District of Greenville County.* 389 S.C. 546, 562, 698 S.E.2d 845, 853 (Ct. App. 2010). *McBride* concerned a publication by a high school principal to appellant/plaintiff's (a teacher) co-worker that appellant/plaintiff stole school property. *Id.* This Court reasoned, in *McBride*, that "in South Carolina, an employee's statement to another employee is a 'publication' when the privilege of the employees' common interest is abused." *Id.* Likewise, here, statements and actionable insinuations that Paradis was incompetent at her job to co-workers can be considered unprivileged. Paradis' Complaint sufficiently pleads third party publication of the defamatory insinuation that she was unfit in her profession by the Respondent District and Respondent Charter School, through the Respondent Charter School's administration. (R. pp. 21-23 ¶¶ 21, 23-32). The same constitutes actionable defamation, and the Circuit Court's decision to the contrary is reversible.[2]

II. PARADIS SUFFICIENTLY PLED SPECIAL DAMAGES, AND THE RESPONDENTS ARE NOT IMMUNE FROM SUIT.

Civil conspiracy requires: (1) A combination of two or more persons, (2) for the purpose of injuring the plaintiff, which (3) causes the Plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E. 2d 91, 95 (Ct. App. 1989). A plaintiff needs to show "additional acts in furtherance of the conspiracy" to establish the first two elements. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) The third element, special damages, intends to prevent a

[2] Assuming arguendo, that Paradis' allegations of defamation were insufficient she should have been given leave to amend to correct any pleading deficiencies as discussed in § 3, *infra.*

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".)

The Circuit Court dismissed Appellant's claim for civil conspiracy against Respondents Bohnstengel and Spann (Collectively "Individual Respondents") for want of special damages and on the grounds of intracorporate immunity. Paradis sufficiently alleged special damages, and the Individual Respondents are not immune from suit.

A. Special Damages are Sufficiently Alleged

"Special damages must be alleged in the complaint to avoid surprise to the other party." *Allegro, Inc. v. Scully*, No. 2014-002055, 2016 WL 4474336, at *4 (S.C. Aug. 24, 2016); *citing, Sheek v. Lee*, 289 S.C. 327, 329, 345 S.E.2d 496, 497 (1986). The primary consideration with respect to special damages, prevention of a double recovery, requires that damages for a conspiracy be distinct from those sought on a plaintiff's other claims. *See, Allegro, Inc.*, 2016 WL 4474336, at 6 (Pleicones, *dissenting*) ("In *Todd*, the Court created a new rule of pleading for civil conspiracy claims, holding that the plaintiff in a civil conspiracy action must allege damages different from those alleged in any other of her tort causes of action.") Paradis alleged that she suffered the economic loss of her income and reputational harm as a result of her defamation claim. (R. p. 23 ¶ 32). Paradis alleged that she was blacklisted, ostracized and incurred the costs and fees of prosecuting this action as the result of her civil conspiracy claim. (R. p. 24 ¶ 36, and prayer for relief).

Paradis' civil conspiracy damages are distinct in substance and form from her defamation damages. *See, Grady v. Spartanburg Sch. Dist. Seven et. al.*, No. 7:13-CV-02020-GRA, 2014 WL 1159406, at *14 (D.S.C. Mar. 21, 2014) ("Plaintiff has alleged that these emotional damages came from being ostracized from her peers, distinct from the emotional damages of losing her job"); *Austin v.*

Torrington Co., 810 F.2d 416, 421 (4th Cir. 1987)("Rather, to effectuate a recovery under a blacklisting theory, the plaintiff must prove that there was a blacklist, a combination of employers who exchanged the information contained on the blacklist, and a willful or malicious use of that blacklist by one or more of the members of the combination, with resultant injury to the plaintiff.") (interpreting South Carolina Law); *and, Benedict Coll. v. Nat'l Credit Sys., Inc.*, 400 S.C. 538, 548-49, 735 S.E.2d 518, 523 (Ct. App. 2012) ("The civil conspiracy claim then explicitly incorporates that assertion and limits the special damages it seeks to 'the costs and attorney's fees associated with the defense of [the College]'s allegations.' . . . NCS does not assert amorphous or unlimited grounds for special damages. The language provides sufficient specificity . . . [as to the] alleged special damages are being sought."). The Circuit Court held that Paradis' "alleged damages of being blacklisted and ostracized are simply a re-wording of the 'injury to her professional reputation.'" This reasoning constitutes a reversible inference in favor of the moving party. *See, Williams*, 553 S.E.2d at 499. Paradis sufficiently pled damages distinct from her defamation damages, and she satisfies the special damages prong of the civil conspiracy analysis.

Moreover, civil conspiracy is the only claim upon which Paradis seeks damages from Individual Respondents; thus, even if Paradis' damages were duplicative, the special damages rule is not applicable here. *See, Allegro, Inc.*, fn. 6. Chief Justice Pleicones, dissenting in the Court's August 24, 2016 decision in *Allegro*, reasoned "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* [*v. S.C. Farm Bureau Mut. Ins. Co.*,] does not apply." Notably Chief Justice Pleicones dissent in *Allegro* (joined in concurrence by Justice Beatty) concerned whether or not special damages should even be an element in the civil conspiracy analysis; the *Allegro* majority did not reject Pleicones' position on this point, but observed that *Allegro*, a 12 year old case, was not

the appropriate vehicle to reverse *Todd. Id.* at Fn. 3. This Court need not address the propriety of the special damages element, as Paradis properly and sufficiently pled special damages.

B. The Individual Respondents are not immune from Suit.

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, Anthony*, 336 Fed. Appx 311. (unpublished); *citing, McMillan v. Occonee Memorial Hospital, inc.*, 367 S.C. 559, 565, 626 S.E.2d 884, 886 (2006). Although, the acts of an entity's employees and agents are usually considered the acts of an entity; where those acts fall outside of the scope of employment or agency, the employees and agents may be liable for civil conspiracy. *Anthony,* 336 Fed. Appx 311; *See also, 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").

This Court, in *Pridgen* – regarding intracorporate immunity and employee scope, found that "the evidence in the record creat[ed] more than one reasonable inference as to whether the [individual defendants] acted outside the scope of their employment" and "the jury could infer from the evidence presented that the [individual defendants'] actions were personally, not professionally, motivated, and were wholly disconnected from the business of their employer. *Pridgen*, 391 S.C. at 245, 705 S.E.2d at 62-63. Paradis alleged that the individual respondents were personally motivated to cause her harm. (R. pp. 18, 23 ¶¶ 9, 34-35). Paradis alleged that the individual respondents placed her on the SAFE-T evaluation on the basis of personal, not professional, motivations. (R. p. 23 ¶ 35). Such conduct is not reasonably inferred to be within the scope of the Individual Respondents' employment nor is it within the furtherance of the Respondent Charter School and Districts' mission. *See, Williams*, 553 S.E.2d at 499 (inferences to be construed in favor of non-movant); and,

Crittenden, 341 S.E.2d at 387 (master-servant analysis). Appellant has sufficiently alleged that the Individual Respondents acted personally, outside of the course and scope of their employment, to harm her; thus, the Individual Respondents are not entitled to intra-corporate immunity.[3]

Paradis has pled that the Individual Respondents acted with a personal motivation to harm her, and that she suffered special damages as a result of the same. The Circuit Court's holding to the contrary is reversible.

III. APPELLANT, ASSUMING ARGUENDO HER PLEADINGS ARE DEFICIENT, IS ENTITLED TO LEAVE TO AMEND.

Appellant requested, that should the Court find her pleadings deficient, she be given leave to amend. (R. p. 112-13); (R. pp. 46-47, 22:20-23:17). "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 law is well settled "that leave to amend a pleading should be denied *only when* the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) (Regarding Fed. R. Civ. P. 15). The South Carolina Rules of Civil Procedure should "be construed to secure the **just**, speedy, and inexpensive determination of every action." Rule 1, SCRCP (emphasis added). Should this Court find that Paradis' pleadings are deficient on either of her claims, justice is served by remanding this matter with leave to amend; and setting the statute of

[3] Moreover, placing Paradis on a formal SAFE-T evaluation based on the same year's performance where she succeeded on her informal goals based evaluation may circumvent the statutes and regulations underlying teacher evaluation. *See*, S.C. Code Ann. § 59-26-30; S.C. Code Ann. § 59-26-40(j); S.C. Code of Regs. 43-205.1; and South Carolina State Board of Education Expanded ADEPT Guidelines, Office of Teacher Evaluation, Division of Educator Effectiveness (2015) ("ADEPT Guidelines"). Pursuant to the Guidelines governing evaluations, Teachers are placed on a formal evaluation or SAFE-T evaluation plan when they fail to meet the requirements of their informal Goals Based evaluation. (ADEPT Guidelines p. 27). Thus, Paradis was placed on a SAFE-T Evaluation contravening the regulations and guidelines underlying teacher evaluations. Therefore, not only did Paradis sufficiently allege that the Individual Respondents acted factually outside the course and scope of their employment; the individual respondents likewise acted outside of the lawful course and scope of their employment. *See, Id.*; *See also*, (R. pp. 18-19 ¶¶ 7, 12, 13, fn. 1).

limitations on any amended claim in accord with the original statute of limitations when this Complaint was filed.

CONCLUSION

Appellant Liesel Paradis respectfully asks this Honorable Court to Reverse the holding of the Circuit Court and Remand this case for the reasons discussed above.

Respectfully Submitted,

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January 3, 2017

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

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SC Court of Appeals

Appellate 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

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CERTIFICATE OF COUNSEL

I hereby certify, as counsel of record in the above-captioned case, that the Final Brief and Reply Brief submitted herewith contains no matter which is irrelevant to the appeal as required by Rule 211.

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