

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM PICKENS COUNTY

Court of Common Pleas

Alford S. Lee, Circuit Court Judge

Case No. 2014-CP- 39- 0259

Appellant Case No. 2015-001361

RECEIVED

JUN 13 2017

SC Court of Appeals

Mark Ostendorff,.....Appellant,

v.

School District of Pickens County,.....Respondent.

RECORD ON APPEAL

Mark Ostendorff
135 Cedar Creek Circle
Central, SC 29630
(864) 640-3340
Appellant, pro se

Thomas K. Barlow, Esquire
Halligan, Mahoney & Williams
PO Box 11367
Columbia, SC 29211
(803)254-4035

INDEX

Order granting Defendants' Motion for Summary Judgment.....	1 THRU 5
Judge's email to Defendants' attorney.....	6
Appellant's emails in response to Judge's email to Defendants' attorney.....	7 THRU 9
Complaint.....	10 THRU 24
Answer.....	25 THRU 32
Transcript.....	33 THRU 54
Defendants' Motion for Summary Judgment.....	55 + 56
Plaintiff's Opposition for Summary Judgment.....	57 THRU 64
All material on Record on Appeal from related appeal of Improperly Named Defendants.....	Appellate Case no. 2014-001737
Certificate of Counsel.....	65

①

STATE OF SOUTH CAROLINA ²⁰¹⁵ MAY 29 AM 10 12 JUDGMENT IN A CIVIL CASE

COUNTY OF PICKENS
IN THE COURT OF COMMON PLEAS

CLERK OF COURT CASE NO: 2014CP3900259
PICKENS COUNTY
SOUTH CAROLINA

Mark D Ostendorff vs. School District of Pickens County

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Pickens, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Mark D Ostendorff 135 Cedar Creek Circle Central, SC 29630

Thomas Kennedy Barlow PO Box 11367 Columbia, SC 29211
Mary Allison Caudell P.O. 11367 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S) _____

ATTORNEY(S) FOR THE DEFENDANT(S)

[Handwritten signature]

Harold P Welborn, Jr. - Clerk of Court

MB

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS

Mark D. Ostendorff,)
)
Plaintiff,)

C.A. No. 2014-CP-39-00259

vs.)

**PROPOSED ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

School District of Pickens County,)
)
Defendant.)

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

2015 MAY 29 AM 10 12

I. INTRODUCTION

This matter comes before the Court on the motion of Defendant Pickens County School District ("District") for an order granting summary judgment in this action filed by a former District employee, *pro se* Plaintiff, Mark Ostendorff. Specifically, Plaintiff asserts the following causes of action: fraud, "intentional fraud," civil conspiracy, "false testimony under sworn oath," "subordination [*sic*] of false testimony under sworn oath," negligence, gross negligence, "reckless (willful) negligence," "retaliatory discharge," "unequal treatment," and wrongful discharge against the Defendant.

The District has moved for summary judgment on the grounds that (1) Plaintiff's claims are time-barred, and (2) Plaintiff cannot create a genuine issue of material fact on any of his claims. The Court has carefully considered the pleadings and materials submitted, the oral arguments presented at the hearing held on April 1, 2015, and the relevant authorities governing this action. For the reasons set forth below, the Court grants the District's motion for summary judgment.

II. STATEMENT OF UNDISPUTED FACTS

Plaintiff was employed by the District from June 2008 until March 2011 as a Building

2

Handwritten initials/signature

Project Manager. Plaintiff was an at-will employee with the District. Plaintiff's employment was terminated on March 1, 2011. Plaintiff filed the Complaint in this case on February 28, 2014.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Under Rule 56, SCRCPP, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCPP; *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 534 S.E.2d 275 (2000). On a summary judgment motion, the Court must view the facts in the light most favorable to the non-moving party. *Id.* at 311, 534 S.E.2d at 277. Nonetheless, a party cannot defeat a motion for summary judgment by creating an inference which is not reasonable or an issue of fact that is not genuine. *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). Moreover, where a plaintiff fails to establish an element essential to his case, there can be no genuine issue as to any material fact, since a failure to establish even one essential element of a party's case renders the cause of action insufficient as a matter of law. *S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986).

IV. LEGAL ANALYSIS

A. Plaintiff's Claims Are Time-Barred.

Under S.C. Code Ann. § 15-78-110, the applicable statute of limitations for any tort claim against a governmental entity, like the District, is two years. The South Carolina Tort Claims Act requires liberal construction in favor of limiting governmental liability. See S.C. Code Ann. § 15-78-20(f). Any of Plaintiff's claims would have arisen out of Defendant's actions on or around his termination on March 1, 2011. Therefore, the alleged acts forming the basis for Plaintiff's claims all occurred more than two years prior to Plaintiff's filing of the instant action on February 28, 2014, almost three years after the termination of his employment.

Plaintiff's argument that the statute of limitations does not begin to run until the

#2-28
12

ultimate amount of damages is determined is incorrect. A statute of limitations begins to run from the time when the injured party knew or should have known that he had a cause of action. *Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 799 (Ct. App. 1997). The injured party must exercise reasonable diligence when determining if he has a claim for his injury, meaning that a person of common knowledge and experience would know if he might have a cause of action. *Id.* For most causes of action, “[t]he courts of South Carolina have adopted the ‘discovery rule’ in determining when a cause of action accrues.” *Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 215, 332 S.E.2d 555, 559 (1985) (citations omitted). “Under the discovery rule, the statute does not begin to run from the date the negligent act or breach of contract occurred; rather, the statute runs from the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence.” *Id.* The statute of limitations will begin to run regardless of whether or not the injured party knows the extent of his injury. *Republic Contracting Corp. v. South Carolina Dept. of Highways and Public Transportation*, 332 S.C. 197, 207, 503 S.E.2d 761, 767 (Ct.App. 1998). South Carolina courts “interpret[] the ‘exercise of reasonable diligence’ to mean that the injured party must act with some reasonable promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist.” *Graham v. Welch, Roberts and Amburn, LLP*, 404 S.C. 235, 239, 743 S.E.2d 862 (2013) (emphasis in original; quoting *Dean v. Ruscon Corp.*, 321 S.C. 320, 363-64, 468 S.E.2d 645, 647 (1996)).

As stated previously, Plaintiff’s claims against the District arose from his termination on March 1, 2011. In fact, Plaintiff concedes that all of Defendant’s actions occurred before March 2011, or at the latest May 2011, in his “demand letter,” that he sent to the Defendant on February 11, 2014:

If I have to file the lawsuit, I will file it on February 25, 2014. I will not let any statute of limitations become an

#3
ASK

4

issue. Even though I made claims for settlement and also SDPC appeal after March 1, 2011, and the last loss of unemployment insurance was in May 2011, it is only prudent to file by February 25th.

Accordingly, any claims against the District are untimely. Consequently, the District is entitled to summary judgment.

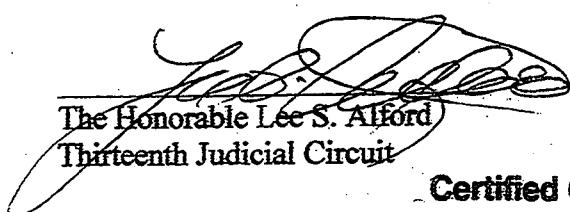
B. Plaintiff Failed To State A Cause Of Action For Breach Of Contract

Plaintiff attempted to assert a breach of a five (5) year oral contract argument during the April 1, 2015 hearing. Based on the Court's review of the Complaint, Plaintiff did not allege a breach of contract claim and has alleged only tort claims. As such, he cannot now pursue such an action before this Court.

V. CONCLUSION

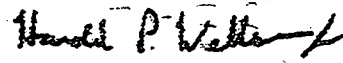
THEREFORE, for the reasons stated above, Defendant Pickens County School District's motion for summary judgment is granted in its entirety and Plaintiff's claims dismissed with prejudice.

AND IT IS SO ORDERED.


The Honorable Lee S. Alford
Thirteenth Judicial Circuit

May 26, 2015
Pickens, South Carolina

Certified Copy


Heidi P. Walker
Clerk of Court
Pickens County, SC
Dated May 2015
MB

2015 MAY 29 AM 10 12

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

#4
MB

5

2

Search Search Mail Search Web



Compose

Delete Move More Collapse All

Inbox (9999+)

Drafts (30)

Sent

Spam (649)

Trash

Smart Views

Folders

Recent

Sponsored



Take control of your credit with Equifax Complete Premier.

Mark D. Ostendorff v. School District of Pickens C People

Thomas K. Barlow Judge Alford: Attached please fi Mar 27

Alford, Lee S. Apr 15

To Thomas K. Barlow
CC markostendorff@yahoo.com

Mr. Barlow: I am sending as a reply to your brief in this matter for convenience with a copy being sent to Mr. Ostendorff at the same time. The defendant is clearly entitled to a dismissal of the tort claims against the defendant because of the 2 year statute of limitations in the S.C. Tort Claims Act. At the hearing, however, he stated that he had a contract for 5 years and alleges fraud I am assuming relating to the inducement to leave his former employment and come to S.C. to work on a project for the Defendant. I believe that cause of action has a 3 year statute of limitations and would still be timely. You mentioned that a 5 year contract would have to be in writing but part performance on his part could take it out of the statute. Let me hear from you and Mr. Ostendorff, if he wishes on the contract causes of action if he alleges a breach of contract. I do not have the complaint here. Lee Alford

Show message history

--- CONFIDENTIALITY NOTICE --- This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

Reply, Reply All or Forward | More

Mark Ostendorff Apr 16

To Alford, Lee S., Thomas K. Barlow

Dear Judge Alford,

Attached is my response to your email from yesterday. I find it easier to use Word. I copied Thomas Barlow

Thank you,
Mark Ostendorff

Show message history

SDPC- Response to...docx View Download

Reply, Reply All or Forward | More

Thomas K. Barlow Judge Alford: I am out of the of Apr 16

Alford, Lee S. That will be acceptable. Lee Alford Apr 17 at 9:24 AM

Click to reply all

6

April 16, 2015

Dear Judge Alford,

Thank you for yesterday's email.

I still feel that my Complaint falls within the statute of limitations of three years, as my monetary demands fit the definition of "claim" in Section 15-78-30.

First, my monetary demand made during my conference with Henry Hunt on March 17, 2011 and also my letter to Henry Hunt on April 5, 2011. That would put action required by March 2, 2014.

Secondly, my actual damages did not cease until around June 2013. Mitigation of my damages could not be ascertained until then due to my finding other work and the unemployment insurance benefits I received. I made a final monetary demand on February 11, 2014. In that situation action would be required by around June 2016.

My Complaint in the first paragraph "Ostendorff seeks damages for lost income ...and lost retirement...".

The second page at the top lists the amounts of lost wages and lost retirement, along with lost unemployment benefits.

#s 11, 12, 30, 33, 34, addressed the issue of contract through June 2013.

The next to last page, under Damages, states "...damages under breach...."

Flanagan, in South Carolina Civil Procedure, states "The purpose of a pleading is fair notice to the opponent and the court." Ostendorff provided numerous notices of breach in his correspondence and in his Complaint.

Very truly yours,

Mark Ostendorff

3

April 23, 2015

Re: Mark Ostendorff v. School District, et al

Dear Judge Alford:

I would like to also comment on the issue of part performance as conduct taking the agreement outside the statute of frauds:

In Settlemyer v. McCluney, 359 S.C. 317, 596 S.E. 2d 514 (S.C. App. 2004), "To compel specific performance of an oral contract where part performance is alleged to remove the contract from the statute of frauds, a court of equity must find: 1) clear evidence of an oral contract; 2) the agreement had been partially executed; and 3) and the party who requested performance had completed or was willing to complete his part of the oral agreement. Gibson v. Hryzikos, 293 S.C. 8, 13-14, 358 S.E. 2d 173, 176 (Ct. App. 1987)." The facts show an oral agreement existed as Ostendorff gave up his City of Charlotte employment and the additional North Carolina Retirement System for which he would have received had stayed, Ostendorff was working at the School district at time he was fired, was compensated by the School District while working there, the School District made contributions to Ostendorff's South Carolina Retirement System account. The agreement had been partially executed by Ostendorff working at the School District since late June 2008 until being fired on March 1, 2011 (and February 28, 2011). Ostendorff had completed to date and was willing and able to complete the balance of his part of the oral agreement as he had not gone to work for anyone else at the time when he was fired.

In Player v. Chandler, 299 S.C. 101, 382 S.E. 2d 891 (1989), "In order for part performance of an oral agreement to remove the agreement from operation of the Statute of Frauds and permit specific performance, the appellants must establish acts which relate clearly and unequivocally to the agreement, exclusive of any other relation between parties touching such agreement. Aust v. Beard, 230 S.C. 515, 96 S.E. (2d) 558 (1957); Gibson v. Hryzikos, 293 S.C. 8, 358 S.E. (2d) 173 (S.C. App 1987)." Ostendorff had no other relation or act between the School District that would touch the oral agreement. The Movant, the School District, et al, provided no other relation that would prevent the agreement from being removed from the Statute of Frauds. Ostendorff's acts as stated in the earlier case reference show acts that are clear and unequivocal to the agreement.

In ATLANTIC WHOLESALE COMPANY, INC., v. Solondz 283 S.C. 36, 320 S.E. 2d 720 (Ct App. 1984), "While the authorities are in conflict as to whether equitable estoppel may be invoked to bar the defense of the statute of frauds,....., the rule appears to be in South Carolina that estoppel may be used. In Collins Music Co. v. Cook, 316 S.E. (2d) 418, 420 (S.C. App. 1984), a case involving the general statute of frauds contained in Section 32-3-10 of the Code, this court addressed the issue of whether the doctrine

8

of estoppel could bar the defense of frauds. There, we said:

Our Supreme Court has acknowledged that, in a proper case, the doctrine of estoppel may be invoked to prevent a party from asserting the statute of frauds. See Florence Printing Co. v. Parnell, 178 S.C. 119, 182 S.E. 313 (1935). In order to overcome the statutory requirement of a writing however, the party asserting then estoppel must show that he has suffered a definite, substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position. It is not sufficient to show merely that he has lost an expected benefit under the contract." Ostendorff lost his income, lost any future SC Retirement benefits, and was only minimally able to mitigate his loss in the School District's breach of that contract.

If the Court needs further authorities, I will provide them.

Very truly yours,

Mark Ostendorff

4

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

CLERK OF COURT
PICKENS COUNTY COURT OF COMMON PLEAS
SOUTH CAROLINA

2014 FEB 28 P 1:31

Mark D Ostendorff

Plaintiff

v.

School District of Pickens County

Board of Trustees, School District of

Pickens County

Alex Saitta

Judy Edwards

Jimmy Gillespie

Herbert Cooper

Jim Shelton

Ben Trotter

Kelly Pew

Henry Hunt

Robert Folkman

Co-Defendants

JUDICIAL CIRCUIT

Case No.

2014-CP-39-259

COMPLAINT

WRONGFUL DISCHARGE

JURY TRIAL DEMANDED

Comes now, Ostendorff, Plaintiff, to this Court, jury trial demanded, seeking recovery of monetary damages from injury caused to him by the above Co-Defendants. Ostendorff seeks damages for lost income from lost employment and lost retirement that he would be entitled to had he not been wrongfully discharged. Ostendorff was employed as a Project Manager in the Building Program for the School District of Pickens County.

Ostendorff also seeks monetary damages from the Co-Defendants in his loss of ten (10) weeks of SC Unemployment Insurance compensation. This damage to Ostendorff was caused by Robert Folkman

5.

That Folkman was the Building Program Administrator and Ostendorff's supervisor at the time of Ostendorff's discharge.

6.

That the defendants engaged in fraud , intentional fraud, civil conspiracy, false testimony under sworn oath, subordination of false testimony under sworn oath, negligence, gross negligence, reckless (willful) negligence, retaliatory discharge, unequal treatment, and wrongful discharge of Ostendorff's employment with the School District of Pickens County (SDPC).

7.

That the defendants damaged Ostendorff for reasons of personal gain , political and , or financial gain or prevention of financial loss. Their actions were for their own benefit and not to the public school students of Pickens County.

8.

That Ostendorff was aware of the defendants' misappropriation of School District (SDPC) funding . The defendants found through a third party that Ostendorff was aware of misappropriation of SDPC funding. The motive of the defendants to wrongfully discharge was to prevent Ostendorff from finding , or being more aware of, additional misappropriation of School District (SDPC) funding. The defendants devised a fraudulent plan to get rid of Ostendorff under the pretense of Ostendorff taking unauthorized time off.

9.

That the defendants engaged in false testimony under oath to hide the true motive of wrongfully discharging Ostendorff. The false testimony under sworn oath was given to an investigative official of the State of South Carolina of the Department of Employment and Workforce. The false testimony under oath materially damaged Ostendorff in being penalized ten weeks of unemployment insurance compensation. Ostendorff is of information and belief that all defendants were involved in the false testimony and subordination of that false testimony under sworn oath. All defendants were given opportunity to explain their involvement in Ostendorff's wrongful discharge but none responded , except Trotter's telephone discussion with Ostendorff after receiving Ostendorff's appeal for reinstatement letter addressed to all Board members

111

10.

That Ostendorff was wrongfully discharged from his employment with the School District of Pickens County on Tuesday, March 1, 2011. Ostendorff came to employment on June 20, 2008. Ostendorff left employment with The City of Charlotte, North Carolina, where he was an active member of the North Carolina Retirement System. Ostendorff is currently receiving early monetary benefits for his prior participation while being employed with the City of Charlotte.

11.

That Ostendorff was assured that his employment with the School District of Pickens County would be at a minimum of five (5) years, up to seven (7) years. The length of employment from minimum of 5 to 7 years would depend on the completion of the Building Program. Ostendorff accepted the employment offer from the School District of Pickens County with the limiting condition of least 5 years of consecutive employment. The 5 years would meet the minimum requirement to receive a retirement benefit of \$ 400.00 per month for life from the South Carolina Retirement System starting at age 60. Ostendorff was an active member of the SC Retirement System at the time he was wrongfully discharged.

12.

That Ostendorff is owed for 2 years and 4 months at his prior salary of \$ 70,000.00 per year. This amount is lessened by the amounts Ostendorff received from SC Unemployment Insurance and employment he had from the period March 2, 2011, through June 30, 2013. The amount owed Ostendorff may or may not be lessened from money he received in March from unused personal time or vacation. Ostendorff was of the understanding that unused vacation or personal time was a "use it or lose it" policy when leaving employment. The amount may be increased or lessened from any net affect of income taxes due.

13.

That Ostendorff was wrongfully discharged because he had a conversation with a friend of a new school board member about the possible shortfall of the Building Program construction budgets with public funding. Also discussed was the application of Act 388 for funding of school operations and not

12

to be used for new construction. That discussion was on either Tuesday, February 22, 2011, or Tuesday, February 15, 2011.

14.

That through the conversation with his friend , the new school board member knew that Ostendorff was aware that the Building Program salaries were being paid from the School District Operations fund. ACT 388 is for the Operations of the School District and is funded through SC sales tax . The Building Program is funded by bond and is repaid through Pickens County property tax receipts. They are to be separate .

15.

That Ostendorff was discharged to try to silence him and not enable him to discover any other misappropriation of ACT 388 money .

16.

That the School Board knew that were South Carolina Statutes that provide severe penalties for School Board Members and Superintendents who misappropriate school funding.

17.

That on Tuesday, March 1, 2011, around 7:30 AM, Ostendorff received an e-mail from Robert Folkman , Building Program Administrator, instructing him to see him in his office. Folkman then discharged Ostendorff. Folkman told Ostendorff that " I'm (Folkman) having to spend too much of my time on RC Edwards and McKissik and going to have to let you go." This made absolutely no sense since Ostendorff had numerous other projects in work that that would require even more of his time .

18.

That on Tuesday, March 1, 2011, in the AM, Ostendorff went to see Kelly Pew, Director of Human Relations , at the School Districts main office to find the real reason why Ostendorff had been discharged. While waiting to see Pew, the School District's Benefit Specialist informed Ostendorff that

13

she had received word that Ostendorff was no longer employed with SDPC ,but she received that word on Monday ,February 28, 2011, a day before Folkman discharged Ostendorff.

19.

That on Tuesday , March 1, 2011, in the AM, Ostendorff then met with Kelly Pew, then the Director of Human Relations, to ask why Ostendorff had been discharged. Ostendorff was told that that Folkman told her that Ostendorff had been discharged because of "failure to complete assignments, failure to maintain regular work hours, and taking unapproved time off". Ostendorff replied that " well, that's the first I've ever heard of it". Pew quickly walked up to Ostendorff, shook his hand and said "good luck in future employment", and escorted Ostendorff out of her office. Pew made no effort to support what Folkman had told her.

20.

That on Tuesday, March 1, 2011, during the short discussion between Pew and Ostendorff, Pew never mentioned any appeal process within in SDPC policies regarding discharge. Folkman neither mentioned any appeal policies within SDPC. All defendants conspired in a plan not to notify Ostendorff of any appeal process because they knew that if Ostendorff did not make an appeal under SDPC policy within in a prescribed timeframe , Ostendorff would lose all rights to bring about any legal action to recover damages.

21.

That on Tuesday, March 1, 2011, Ostendorff returned to his SDPC office to gather his construction reference books, he found his office ransacked. Ostendorff's computer was gone in which a mess was made of his desk in removing cables, etc. It also appeared that someone had been rifling through Ostendorff's files. It was obvious that someone was in a hurry to find what Ostendorff knew.

22.

That on Tuesday, March 1, 2011, Ostendorff requested the balance of the day off. Ostendorff filled out his request for time form which was signed by Tim Newman. Folkman was not in the office to sign the form.

14

23.

That on the evening of Tuesday March 1, 2011, Ostendorff called the Senior Project Manager regarding about Folkman discharging Ostendorff. The Senior Project Manager told Ostendorff that "you shouldn't have bad mouthed him". Ostendorff replied that "I've never badmouthed him". The Senior Project Manager said "during the Monday morning meeting he (Folkman) asked us (SDPC Building Program employees) if we heard anything about Mark (Ostendorff) badmouthing the Building Program to anyone on Chastain Road". Ostendorff told the Senior Project Manager to "make sure you write that down with today's date." Ostendorff was out sick Monday, February 28, 2011, due to allergies.

24.

That the conversation with the friend of the SDPC Board member on February 22 or 15, 2011, revealed that Ostendorff was aware of probable misappropriation was the real cause of Ostendorff's discharge. The conversation came about during road work along Chastain Road in front of the son of the friend of the Board member. Ostendorff had been negotiating with the friend for several months regarding the slope of the road work and the resulting affect on his son's property.

25.

That during the conversation with the friend of the Board member, the friend told Ostendorff that he had a friend that was one of the new School Board Members and he (the new member) said "the construction (program) money was a mess". Ostendorff then said to the affect "that could be true as I heard that the Financial Director told Alex Saitta during a School Board meeting that the Construction Program salaries were coming out of the general fund". Ostendorff also said to the affect "I don't think that's allowed under the new state funding guidelines separating new construction based on property taxes and the general fund which is funded out of Columbia from state sales taxes". Ostendorff also said to the affect "if the construction budget was short then they (School Board) will have to put Folkman in charge of Operations so he can siphon money over to the Building Program to complete anything not covered in the bond money." Ostendorff said to the affect that "Folkman was trying to get rid of everyone (Building Program) so no one would be watching him and he could get his 5 years in to get retirement money".

15

26.

That shortly after being discharged , Ostendorff applied for Unemployment Insurance through South Carolina Department of employment and Workforce (SCDEW). SCDEW notified Ostendorff that was denied benefits because SDPC discharge him for cause. Ostendorff promptly contacted SCDEW and was given allegations made by SDPC. The allegations were given to Ostendorff via telephone as SCDEW will not provide allow a written copy to be sent to the clamiant (Ostendorff). Ostendorff responded to the allegations to SCDCEW. SCDEW determined that Ostendorff was not eligible for benefits.

27.

That on March 11,2011, Ostendorff sent a letter addressed to Alex Saitta , SDPC Board Chairman, appealing his discharge. A copy was also sent to each SDPC Board member. The letter also made a claim for monetary damages. Ostendorff sent the letter as he found no appeal policy from SDPC, but found on the SDPC website that employees being laid off for budget reasons could appeal to the SDPC Board.

28.

That shortly after sending the letter , Trotter called Ostendorff in which he was not aware that Ostendorff was discharged. He said that Judy Edwards called him to ask if he knew anything about Ostendorff's discharge.

29.

That shortly after sending the letter to Saitta , Ostendorff received a voice mail from Saitta informing Ostendorff that Henry Hunt, then SDPC Superintendent, would contact me on the SDPC policy to any appeal.

30.

That Ostendorff later received a voice mail for me to have a conference with Hunt for March 17,2011. Ostendorff had a discussion with Hunt on that date in Hunt's office. Hunt did not appear of knowledge of my discharge prior to my letter to Saitta of March 11,2011. In that discussion with Hunt, Ostendorff explained his position of his wrongful discharge. In that discussion, Ostendorff assured that it was the conversation with the friend with the new school board member was the reason for Ostendorff's discharge, not the reasons Kelly Pew provided Ostendorff on March 1, 2011. Ostendorff also stated he was due monetary compensation for the additional 2 years and 4 months as for

Ostendorff's assurance of 5 years , up to 7 years, of employment and also the retirement money he would receive after the 5 years of employment. Hunt informed Ostendorff that Hunt would investigate the matter.

31.

That on the March 17, 2011, meeting with Hunt, Ostendorff was given Kelly Pew's letter dated March 16, 2011, addressed to Ostendorff.

32.

That on April 5, 2011, Ostendorff sent a letter to Pew regarding her letter of March 16, 2011. Ostendorff in his letter stated that Bob Folkman did not talk to Ostendorff on Monday , February 28, 2011, as Ostendorff was out sick on Monday , February 28, 2011, which was consistent with what Ostendorff informed Pew on the March 1, 2011, discussion that Ostendorff had with Pew. Ostendorff further reiterated Ostendorff's the very short conversation with Folkman on March 1, 2011, which was consistent with Ostendorff's assertion that Folkman discharged Ostendorff because "he was having to spend too much of his time on RC Edwards and McKissik."

33.

That on March 23, 2011, Hunt sent a letter to Ostendorff of Hunt's investigation and findings.

Item 1- Retribution- Hunt stated that " I talked to the board member and he does not recall any comments that would cause Mr. Folkman to retaliate against you." Ostendorff has never talked to or ever met the board member whom was the friend of the father of the property owner on Chastain Road.

Hunt also stated " Also , Mr. Folkman stated that no board member had talked with him about you."

Items 2 and 3- Regarded my assertion of politics and ulterior motives.

Item 4 – Malicious Intent- Hunt stated " You feel that Mr. Folkman planned to deny you insurance coverage for a month by terminating you on February 28. Your termination date was set as March 1 and your coverage continues to March 31. Mr. Folkman does not handled insurance issues and was unaware of the length of time insurance coverage continues after termination."

The March 1, 2011 date for termination was only set for Ostendorff's insurance because of the March 1, 2011 conversation with the Benefit Specialist that Ostendorff's insurance had stopped as of February 28, 2011. Ostendorff then told Pew and Pew then called the Benefit Specialist to correct the

insurance to run through March 2011, as Ostendorff had not actually been terminated by Folkman until the morning of March 1, 2011, and not February 28, 2011.

Ostendorff was not paid for his day of employment of March 1, 2011.

Ostendorff received health insurance through March 2011.

Hunt's investigation was not credible. Hunt was willfully negligent in his investigation and also in his decision not to reinstate Ostendorff or compensate him for at least the remaining 2 years and 4 months along with retirement benefits.

34.

That on April 5, 2011, Ostendorff sent a letter to Hunt appealing his decision from his letter dated March 23, 2011, as required by the SDPC Grievances Policy. That policy was attached to Hunt's letter of March 23, 2011. A copy of Ostendorff's letter was sent to all board members with attachments.

The letter had attachments of Hunt's letter, Pew's letter, Ostendorff's response to Pew, and Ostendorff's response to SCDEW.

Ostendorff pointed out numerous inconsistencies with Ostendorff's discharge and Folkman's comments to Hunt.

The main point being- how did Folkman know if Ostendorff took Friday, February 25, 2011, off or not? The only thing Folkman knew was that he found a request for time off by Ostendorff in his in-basket on Monday, February 28, 2011.

The board members knew that Ostendorff was applying for unemployment insurance benefits.

Ostendorff made a monetary claim in that letter.

35.

That on Monday, February 28, 2011, Folkman terminated Ostendorff for the only reason being that he found a piece of paper that requested time off. The day requested off was Friday, February 25, 2011.

Folkman would not of been of knowledge if Ostendorff was at work or not on Friday, February 25, 2011, because Folkman was not at work on Friday 25, 2011.

18

Ostendorff was out sick on Monday, February 28, 2011. Folkman could not of asked Ostendorff if Ostendorff took off Friday, February 25, 2011, because Ostendorff was unavailable to answer Folkman on Monday , February 28, 2011.

In an earlier instance, Ostendorff requested, through the same method of requesting time off on the Thursday before a Friday, the following Friday off and the request was approved by Folkman. Ostendorff later decided that he needed to come in to work to monitor a subcontractor that was filling an underground storage tank at RC Edwards. Ostendorff drove his own vehicle to RC Edwards. While at RC Edwards , Folkman asked Ostendorff to locate a Consulting Inspector who was late for the pre-construction meeting being held at RC Edwards. Folkman knew that Ostendorff sometimes used his own vehicle and not always his assigned SDPC vehicle. Thus, weather or not Ostendorffs personal vehicle is at his office is no indication if Ostendorff is at work. Ostendorff never retracted his approved Friday off although he worked the entire day that approved for time off.

SDPC does not terminate employment for employees placing requests for time off in their supervisor's in-basket. That is what the employee is asked to do.

It was a fraudulent plan of Folkman and the other defendants that fell apart . The plan was devised the defendants who didn't "cover their tracks".

36.

That a letter dated April 6, 2011, from Hunt to Ostendorff informed Ostendorff that Hunt would present Ostendorff's letter requesting an appeal to the Board of Trustees.

37.

That a letter dated April 13,2011, from Hunt to Ostendorff stating that the Board of Trustees voted in public session to deny Ostendorff's request for a hearing.

38.

That in March 2011, Ostendorff applied for unemployment insurance benefits from South Carolina Department of Employment and Workforce (SCDEW).

39.

That in March 2011, Ostendorff was contacted by SCDEW regarding allegations by SDPC regarding Ostendorff's discharge. The allegations were read to Ostendorff by SCDEW over the

telephone as SCDEW will not provide a written copy to a claimant. Ostendorff was told by SCDEW that the initials on the allegations were RB/RM.

40.

That Ostendorff responded in writing to SCDEW regarding the SDPC allegations in a letter dated March 27, 2011. The allegations were more of a post-termination performance evaluation in which the employee would have no notification of. Ostendorff responded to all allegations in which most ended with that SDPC would need to be specific and not just general statements.

41.

That the letter Ostendorff sent to Hunt on April 5, 2011, had attached a copy of Ostendorff's letter responding to SCDEW of SDPC's allegations. All Board Members were sent a copy of the letters.

42.

That Ostendorff received letter from SCDEW informing him that he was to be penalized fourteen weeks (14) of unemployment insurance benefits. Ostendorff sent an appeal request to SCDEW on April 7, 2011.

43.

That Ostendorff received a notice from SCDEW dated April 20, 2011, notifying Ostendorff of a SCDEW hearing to consider my appeal of the 14 week penalty. The hearing would be May 4, 2011.

44.

That during the May 4, 2011, SCDEW appeal hearing, Folkman gave false testimony under sworn oath.

The SCDEW hearing officer asked Folkman of what he (Folkman) said at the time when Folkman discharged Ostendorff.

Folkman replied to the affect that "I told him he took time off without authorization. At this point of the Building Program we cannot have employees taking time off."

Folkman produced Ostendorff's request for time off for Friday, February 25, 2011. On that form submitted at the hearing Ostendorff saw comments written request was denied and dated 2/28/2011.

Ostendorff asked Folkman in cross examination to the affect " if you weren't at work on Friday, how would you know if I was at work or not?"

Folkman presented no evidence, no witnesses but just replied " I asked somebody".

Folkman would not say who he asked simply because he didn't ask anyone. Even if he did ask someone, that someone's response would only be hearsay. Folkman was not prepared to come with an answer in advance of Ostendorff's question.

Folkman gave false testimony in the hearing that he discussed the time off request with Ostendorff but Ostendorff was already terminated the day before. That false testimony caused Ostendorff to be penalized 10 weeks of benefits of \$ 326.00 per week.

45.

That upon leaving the hearing room on May 4, 2011, Ostendorff found Folkman waiting on him. Ostendorff, though very surprised at Folkman's waiting, comforted Folkman of his false testimony. Folkman laughed and said "our conversation (discharge on March 1, 2011) wasn't recorded and it would be just your word against mine". Folkman followed Ostendorff to his car when he volunteered "Kelly Pew sent me here."

46.

That Folkman terminated Ostendorff on Monday, February 28, 2011, and the weight of the evidence presented to the triers-of-fact will show that to be factual. The weight of the evidence will show that Ostendorff was not a work on Monday, February 28,2011.

47.

That Folkman and the defendants devised a fraudulent plan to lure Ostendorff into the usual and accepted method of requesting time off then terminating him for taking unauthorized time off. The plan was flawed as it did not take into consideration that Ostendorff would be sick from work on the following Monday. Keeping to the devised plan, Folkman terminated Ostendorff on Monday, although he was not there.

Folkman told the Building Program employees during the usual Monday morning meeting on February 21, 2011, that he was going to take off the following Friday, February 25, 2011.

Folkman deliberately did not tell Ostendorff that Folkman was also going to take off Thursday afternoon February 24, 2011.

Ostendorff had used this same procedure for requesting time off for Fridays. Ostendorff would wait until at least until Thursday to request time off after he conferred with Folkman and the other two Project Managers. If nothing was pending for Friday, then Ostendorff would then submit the form to Folkman.

Sometimes Folkman was in his office, sometimes not when Ostendorff submitted the request form.

If Folkman was in his office, he would sign the request form. Ostendorff would then give the approved form to the clerk.

If Folkman was not in his office, Ostendorff would leave in the request form in Folkman's in-basket in his office. Folkman would then give the approved form to the clerk.

Folkman knew this was the certain method always used by Ostendorff.

Folkman never denied Ostendorff taking a Friday off.

Folkman never informed Ostendorff that Ostendorff would have to see the form with a signature approving the request before taking that time off.

Ostendorff discussed, as usual, with the Senior Project Manager on Thursday, February 24, 2011, if there was anything pending on Friday, February 25, 2011. If not, then Ostendorff would take Friday, February 25, 2011, off and would put the request form in Folkman's in-basket. The Senior Project Manager said ok to take the Friday off. The Senior Project Manager was delegated by Folkman to handle the Building Program when Folkman was out of the office.

48.

That Ostendorff was treated unequally as compared to the other two Project Managers. As examples, Ostendorff was required to be clean shaven every day, whereas another Project Manager would not shave for two or three days on a regular basis. Ostendorff was required to keep his assigned SDPC clean every day, whereas another Project Manager would have dirt covering almost half of his assigned SDPC vehicle for a week at a time without washing it.

22

49.

That Ostendorff in September 2012, requested of SDPC the home address or email address of Hunt, then the former Superintendent, so Ostendorff could request of Hunt the information he gathered during his investigation of Ostendorff's discharge. Hunt would not respond to give his address only that he wanted SDPC involved in giving me any information.

50.

That Ostendorff is defamed as his name in the public. All employment applications ask for reasons leaving previous employers and if ever been terminated or asked to resign.

51.

That the Building Program lacked transparency in funding and monies allocated and spent. Only a graph was produced showing the overall projected Program spending as compared to actual by the month. Ostendorff never saw an auditor or was ever audited for his projects to ensure no impropriety or any appearance of impropriety. It appeared to Ostendorff that the almost one-third billion dollar building program was lacking in oversight.

52.

That Folkman received a promotion shortly after discharging Ostendorff to Director of Operations along with his position of Building Program Administrator. Ostendorff is of information and belief that Folkman received a substantial pay increase at that new promotion. Pew was soon chosen as Superintendent. Ostendorff is of the information and belief that Pew received a substantial pay increase at that new promotion. Both Folkman and Pew were rewarded for their efforts in discharging Ostendorff and providing cover for the Board's handling of public funds.

Damages

Ostendorff seeks actual, compensatory, and punitive damages under breach and tort for wrongful discharge.

Ostendorff seeks actual and punitive damages under tort for civil conspiracy in the wrongful discharge.

Ostendorff seeks actual and punitive damages under tort for negligence , gross negligence, reckless (willful) negligence for not reinstating and compensating Ostendorff.

Ostendorff seeks actual and punitive damages under tort for fraud and intentional fraud in the origination of the scheme to discharge Ostendorff.

Ostendorff seeks actual and punitive damages under tort for civil conspiracy in the fraud and intentional fraud of the scheme to discharge Ostendorff.

Ostendorff seeks actual and punitive damages under tort for malice in backdating discharge date to reduce health insurance coverage.

Ostendorff seeks actual and punitive damages under tort for fraud and intentional fraud for the false testimony at the SCDEW hearing.

Ostendorff seeks actual and punitive damages under tort for civil conspiracy in the false testimony in the SCDEW hearing.

Ostendorff seeks actual and punitive damages under tort for negligence, gross negligence, and gross(willful) negligence in subordinating false testimony at the SCDEW hearing.

Ostendorff seeks general damages for defamation. Special damages will be sought if discovery reveals monetary loss to Ostendorff due to fraudulent opinions given to prospective employers of Ostendorff's past work history and discharge.

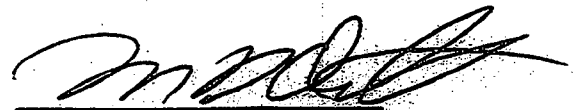
Ostendorff demands of this Court a judgment for relief of his damages the sum of \$ 254,631.00 as well as punitive damages and other relief that the triers of fact (jury) and Court find proper and just to Ostendorff.

Ostendorff affirms :

That I have prepared this pleading and it is to the best of my knowledge

That I have contacted all defendants in writing and have acted in good faith to resolve this matte

February 28 ,2014



Mark D Ostendorff
135 Cedar Creek Circle
Central , SC 29630

24

2

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS

Mark D. Ostendorff,)
)
Plaintiff,)

C.A. No. 2014-CP-39-00259

vs.)

**ANSWER AND
AFFIRMATIVE DEFENSES**

School District of Pickens County, Board)
of Trustees, School District of Pickens)
County, Alex Saitta, Judy Edwards,)
Jimmy Gillespie, Herbert Cooper, Jim)
Shelton, Ben Trotter, Kelly Pew, Henry)
Hunt, Robert Folkman,)
)
Defendants.)

Defendants, School District of Pickens County and the Board of Trustees of the School District of Pickens County, and all individually-named Defendants, by and through their undersigned counsel, hereby respond to the Complaint of Plaintiff, Mark D. Ostendorff, in accordance with the numbered paragraphs thereof, as follows:

1. Denied as stated. Defendants admit only that Ostendorff was formerly employed with the School District of Pickens County, South Carolina.
2. Admitted.
3. Admitted.
4. Denied as stated. Defendants admit only that Dr. Pew was the Assistant Superintendent for Human Resources for the School District of Pickens County at the time of Ostendorff's discharge from employment.
5. Admitted.
6. Denied.
7. Denied.
8. Denied.

9. Denied.

10. Denied in part, and denied in part for lack of knowledge. Defendants deny that Ostendorff was wrongfully discharged from his employment with the School District of Pickens County. The remaining allegations of this paragraph are denied for lack of knowledge.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

16. Admitted in part and denied in part. Defendants admit only that Defendant School Board members and Superintendent are aware that penalties exist for misappropriation of school funds. Defendants vehemently deny any misappropriation of school funds or any other allegation of this paragraph.

17. Admitted in part on information and belief and denied in part. Defendants admit only on information and belief that on Tuesday, March 1, 2011, at 7:30 a.m., Ostendorff received an e-mail from Robert Folkman instructing Ostendorff to see Folkman in the latter's office, and that Folkman terminated Ostendorff's employment effective that date. The remaining allegations of this paragraph are denied or denied for lack of knowledge.

18. Admitted in part and denied in part. Defendants admit only that Plaintiff came to Dr. Pew's office on or about March 1, 2011 to discuss his termination. The remaining allegations of this paragraph are denied for lack of knowledge.

19. Admitted in part and denied in part. Defendants admit only that on or about Tuesday, March 1, 2011, Ostendorff met with Dr. Pew, then Assistant Superintendent of Human Resources, in her office, and inquired as to his discharge; that Pew related that Ostendorff had been discharged because of failure to complete assignments, failure to maintain regular work

hours, and taking unapproved time off, and that Pew shook Ostendorff's hand and wished him good luck in future employment. Any remaining allegations of this paragraph are denied.

20. Denied.

21. Denied.

22. Admitted in part and denied in part for lack of knowledge. Defendants admit only that Plaintiff submitted a leave form bearing what appears to be a signature of Mr. Newman for March 1, 2011. All remaining allegations are denied for lack of knowledge.

23. Denied for lack of knowledge.

24. Denied.

25. Denied for lack of knowledge.

26. Admitted in part and denied in part for lack of knowledge. Defendants admit only that Ostendorff applied for unemployment insurance through the South Carolina Department of Employment and Workforce, and that Ostendorff was determined to be disqualified for benefits. Any remaining allegations of this paragraph are denied for lack of knowledge.

27. Admitted in part and denied in part. Defendants admit only that Plaintiff sent a letter dated March 11, 2011 appealing his discharge. The remaining allegations of this paragraph are denied.

28. Denied for lack of knowledge.

29. Admitted on information and belief.

30. Admitted in part and denied in part. Defendants admit only that Ostendorff had a discussion on March 17, 2011, in Henry Hunt's office; that Ostendorff explained his wrongful discharge theory to Hunt; that Ostendorff alleged that he was due monetary compensation; and that Hunt informed Ostendorff that he would investigate. Any remaining allegations of this paragraph are denied or denied for lack of knowledge.

31. Defendants admit on information and belief only that Ostendorff was provided a copy of Dr. Pew's March 16, 2011 letter on March 17, 2011 during his meeting with Hunt.

32. Admitted in part and denied in part. Defendants admit only that Plaintiff's April 5 letter speaks for itself. Any remaining allegations of this paragraph are denied.

33. Admitted in part and denied in part. Defendants admit only that on or around April 5, 2011, Ostendorff sent a letter appealing Hunt's decision; that the grievance policy was attached to Hunt's letter of March 23, 2011; that a copy of Ostendorff's letter was sent to all Board members with attachments; that the attachments were Hunt's letter, Pew's letter, Ostendorff's response to Pew and Ostendorff's response to the South Carolina Department of Employment and Workforce; that Ostendorff received insurance through March 31, 2011; and that Ostendorff made a monetary claim in that letter. The remaining allegations of this paragraph are denied.

34. Defendant admits only that on or about April 5, 2011, Ostendorff submitted a written appeal of Hunt's decision, that the letter had attachments and speaks for itself, and board members received the letter and attachments. Any remaining allegations of this paragraph are denied.

35. Denied.

36. Admitted.

37. Admitted.

38. Admitted on information and belief.

39. Denied for lack of knowledge.

40. Denied for lack of knowledge.

41. Admitted.

42. Admitted on information and belief.

43. Admitted on information and belief.

- 44. Denied.
- 45. Denied.
- 46. Denied.
- 47. Denied.
- 48. Denied.
- 49. Denied for lack of knowledge.
- 50. Denied.
- 51. Denied.
- 52. Admitted in part and denied in part. Defendants admit only that Folkman's title changed and Dr. Pew became Superintendent after Plaintiff's termination. Any remaining allegations or insinuations of any connection between Plaintiff's termination and these events is further denied.

Damages

- 53. Defendants deny that Plaintiff is entitled to any damages or any other relief in this matter.
- 54. Any allegations not specifically admitted herein are denied.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state claims upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery for defamation because Plaintiff consented to any alleged publication of facts about his private life by Defendants, which Defendants expressly deny.

THIRD AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery for defamation because any alleged defamatory statements made by Defendants were true or substantially true.

FOURTH AFFIRMATIVE DEFENSE

Any alleged defamatory statements made by Defendants were qualifiedly privileged and/or made in good faith, and do not constitute actionable defamation.

FIFTH AFFIRMATIVE DEFENSE

Any alleged defamatory statements made by Defendants were self-publicized by Plaintiff, and thus do not constitute actionable defamation.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery for civil conspiracy because Defendants were acting in their official capacities at all times the alleged conspiracy occurred.

SEVENTH AFFIRMATIVE DEFENSE

On information and belief, Plaintiff's claim is barred, in whole or in part, by Plaintiff's failure to mitigate his alleged damages.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery for civil conspiracy because Plaintiff has failed to plead special damages aside from the damages already alleged for Plaintiff's defamation claim.

NINTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery for civil conspiracy because Plaintiff was an at-will employee.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's conspiracy claim fails because there can be no liability against corporate officers or directors discussing in good faith whether to terminate an employee.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's conspiracy claim fails because there was no concerted activity, nor was there any intent or purpose to injure Plaintiff.

TWELFTH AFFIRMATIVE DEFENSE

All individual Defendants are immune from liability in their individual capacities under the South Carolina Tort Claims Act and other applicable law because at all relevant times the individual Defendants were acting within the scope of their official duties or employment.

THIRTEENTH AFFIRMATIVE DEFENSE

Defendants, at all times, acted in good faith.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff has failed to properly plead the elements of a claim for fraud

FIFTEENTH AFFIRMATIVE DEFENSE

At all times, Plaintiff was an at-will employee.

SIXTEENTH AFFIRMATIVE DEFENSE

To the extent that Plaintiff seeks punitive damages from Defendant, an award of such damages is precluded by the Tort Claims Act, and further, such an award would violate Defendant's rights to due process and equal protection under the Constitution of the United States and South Carolina.

SEVENTEENTH AFFIRMATIVE DEFENSE

All actions by Defendant were taken for legitimate business reasons.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by contributory/comparative negligence in that Plaintiff contributed to any negligence or gross negligence, which is denied, to a greater degree than Defendant.

WHEREFORE, having fully answered Plaintiff's Complaint, the Defendants respectfully request that the Complaint be dismissed with prejudice and that the Defendants be awarded the costs of this action, together with a reasonable attorney's fee as permitted by law or equity.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

Allison Aiken Hanna, S.C. Bar No. 15668
ahanna@childs-halligan.net

Thomas K. Barlow, S.C. Bar No. 8995
tbarlow@childs-halligan.net

P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Defendants

March 31, 2014

Columbia, South Carolina

6

OK COPY

STATE OF SOUTH CAROLINA)

) COURT OF COMMON PLEAS

COUNTY OF PICKENS)

) 2014-CP-39-00259

ORIGINAL

MARK OSTENDORFF)

PLAINTIFF)

vs.)

) TRANSCRIPT OF RECORD

SCHOOL DISTRICT OF PICKENS)

COUNTY, ET AL)

DEFENDANTS)

April 1, 2015
Pickens, South Carolina

B E F O R E:

THE HONORABLE LEE S. ALFORD, Judge.

A P P E A R A N C E S:

MARK OSTENDORFF, PRO SE

THOMAS BARLOW, ESQ.
Attorney for the Defendants

APRIL HERRON
Official Court Reporter

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

There were no witnesses.

There were no exhibits.

» > o < «

Certificate of Reporter 22

1 THE COURT: Next case is Mark Ostendorff vs.
2 School District of Pickens County.

3 All right, I believe we're on the Defendant's
4 motion for summary judgment, is that correct?

5 MR. BARLOW: That's right, Your Honor. May it
6 please the Court?

7 THE COURT: Yes, sir.

8 MR. BARLOW: I'm Todd Barlow, with Childs &
9 Halligan in Columbia. We represent the school
10 district. Mr. Ostendorff is pro se. We have worked
11 pretty well together in this case. The issue's right
12 for summary judgment now. Briefly, the facts of this
13 case are that Mr. Ostendorff was a former employee of
14 the school district. He worked in the building
15 program. He was an at-will employee and he was --
16 that was confirmed with him in writing. He admitted
17 that in his deposition. His employment was
18 terminated March 1st of 2011. He had taken too much
19 time off without approval, he failed to maintain work
20 hours and not complete assigned tasks.

21 He filed this case the end of February 2014, so
22 more than two years later. The cause of action he
23 asserts in this claim are these are the labels he's
24 give them are fraud, intentional fraud, civil
25 conspiracy, false testimony under sworn oath,

1 negligence, gross negligence, reckless negligence,
2 retaliatory discharge, unequal treatment and wrongful
3 discharge. The individuals that he sued were
4 dismissed. That case -- the claim against the
5 individuals is pending in the Court of Appeals right
6 now. Judge Hamilton dismissed the claims against the
7 individuals last July. So, the only defendant left
8 in the case is the Pickens County School District.

9 So, we move for summary judgment on several
10 basis. The first one is a statute of limitations.
11 All these claims that have been alleged in the
12 complaint are tort claims. And under the South
13 Carolina Tort Claim Act, 1-57-110, a claim against --
14 tort claims against the government, entity like the
15 school district has to be brought within two years.
16 His employment was terminated March of 2011, he
17 didn't file the case until February of 2014. There
18 was a little discussion, I think, after his
19 termination, maybe I guess, you could call it
20 informal agreements which was complete, certainly by
21 May of 2011.

22 So, all these claims are also untimely and we
23 believe that's dispositive of the issue. I'm happy
24 to address the merits if the Court wants but I think
25 the statute of limitations is clear, he didn't file

1 these tort claims in time, they should be dismissed
2 on that basis.

3 THE COURT: All right, Mr. Ostendorff, you're
4 representing yourself?

5 MR. OSTENDORFF: Yes, sir.

6 THE COURT: What's your response to their. . .

7 MR. OSTENDORFF: Can I give you my opposition?
8 I was short on time, I didn't get it to Mr. Barlow
9 until Friday. That right there's my opposition.
10 There's a couple of affidavits and a couple of
11 exhibits on there. First of all, we're going to go
12 to the statute of limitations. I made a claim, a
13 couple of times for money. And I believe what the
14 statute of limitations says that if you make a claim
15 for money then it goes for three years. Within the
16 two year period, you know, then it goes to three.

17 THE COURT: Claim for money, are you suing them
18 under Tort Claims Act, Tort Claims Act controls
19 governmental entities being sued.

20 MR. OSTENDORF: Yes, sir.

21 THE COURT: All right. And just because you say
22 I want money from them, doesn't take it out of the
23 Tort Claims Act.

24 MR. OSTENDORF: Yes, sir, I understand it's
25 under tort claims, yes, sir, very much. But the

1 code -- statute of limitations as provided -- except
2 as provided 5-30-40, any action brought or barred
3 unless to commence for two years after the date of
4 loss or should have been discovered. Provided that
5 the claimant first filed a claim pursuant to this
6 chapter, then the action for damages based upon the
7 same occurrence is forever barred unless the action
8 is commenced within three years of date of loss was
9 or should have been discovered.

10 So, in going back to -- we have to do an appeal
11 if you lose your job. Anytime you got a job with the
12 government you have to do an appeal. And I did it
13 within that timeframe. And within that time -- along
14 with that appeal I told them I needed to be made
15 whole. I told them, I said, I want money. I think
16 one of the things I got in there, Henry Hunt, I
17 wanted my money. Because there's really no way that
18 they were ever giving me my job back. The way all
19 this happened, how I got fired, I didn't think that
20 was ever going to work. So, I knew I had to ask for
21 money anyway. So, I still think that statute of
22 limitations is three years. Because that wasn't
23 claimed. That's the finding in the Tort Claims Act
24 when there's a claim--

25 THE COURT: You said you filed an appeal about

1 your discharge?

2 MR. OSTENDORF: Yes, sir.

3 THE COURT: And that's administrative kind of
4 appeal?

5 MR. OSTENDORF: Yes, sir.

6 THE COURT: To whom?

7 MR. OSTENDORF: To the school district.

8 THE COURT: Okay, when was that heard?

9 MR. OSTENDORF: I did that, I think, it was in
10 15 days. That was back in, I believe, March 2000.

11 THE COURT: He's saying that he filed it in May
12 of 2011, there was some discussion about it. Is that
13 what you're talking about, counselor?

14 MR. OSTENDORFF: It would have been completed by
15 May of 2011.

16 THE COURT: So, all the administrative appeal
17 you might have to the school board was completed in
18 May of 2011?

19 MR. OSTENDORF: Yes, sir.

20 THE COURT: And what did you do after that then?

21 MR. OSTENDORF: I made a demand for money. A
22 couple of letters along with--

23 THE COURT: Demand for money for what?

24 MR. OSTENDORF: For the loss of my job, I'm
25 sorry. I had a bilateral agreement with Reggie Hall,

1 who I came to work for originally. So, I worked five
2 years at \$70,000 a year, for each year. And if the
3 building program went past the five years, then it
4 maybe to seven and we would talk about that later.
5 But I came with that understanding, I was going to be
6 five years. Because I gave up my job in Charlotte
7 where I had the retirement money for five years. I
8 had the discussion with Reggie, said, I'm not giving
9 up my Charlotte retirement money in Charlotte unless
10 I can get five years in South Carolina. Because
11 North Carolina and South Carolina, they're different.

12 I said, I got to have five years minimal in
13 South Carolina to receive some retirement money.

14 THE COURT: Mr. Hall work for the school
15 district?

16 MR. OSTENDORF: Yes, sir. He was the original
17 building administrator.

18 THE COURT: So, he actually worked for the
19 school district?

20 MR. OSTENDORF: Yes, sir.

21 THE COURT: I'm asking counsel.

22 MR. OSTENDORF: Oh, I'm sorry.

23 MR. BARLOW: Yes, he did, Your Honor. He was
24 replaced at some point during Mr. Ostendorf's
25 employment.

1 THE COURT: You had no written contract for five
2 years?

3 MR. OSTENDORF: No, sir, it was an oral
4 agreement.

5 THE COURT: They would do that. I'm certain if
6 there's any question that -- all right, so you're
7 saying then you made a demand for money?

8 MR. OSTENDORF: Yes, sir.

9 THE COURT: Based on what?

10 MR. OSTENDORF: My losses because we work -- I'd
11 worked two years, eight months. I still had two
12 years, four months.

13 THE COURT: Okay, you don't have a contract?
14 You're an employee at-will.

15 MR. OSTENDORF: I wasn't an employee at-will. I
16 considered myself as a--

17 THE COURT: You got a written contract?

18 MR. OSTENDORF: No, sir, it was oral. And
19 Reggie had made several references and have got in
20 the affidavits about -- sometimes we'd have meetings
21 and he'd say, This is our last meeting because
22 everybody there, as soon as the building program was
23 done, we we're going on South Carolina retirement.
24 So, I mean, it was very much known that the agreement
25 was for five years.

1 THE COURT: The difference between the
2 expectation is fine, you know, whether there was a
3 contract for five years or some kind of understanding
4 that the project was going to be five years. You
5 understand the difference?

6 MR. OSTENDORF: I'm sorry, my hearing's a little
7 clogged, I got hay fever really bad right now.

8 THE COURT: I'm saying there's a difference
9 between an expectation that the job might take five
10 years and contract for employment for five years.
11 Now, there's a difference between the two. Now, are
12 you saying you had a contract or not?

13 MR. OSTENDORF: I had a contract, a oral
14 contract with Reggie to work five years. I told him
15 there's no way -- I'm going to have to be assured
16 five years, I'm not coming.

17 MR. BARLOW: Your Honor, with regard, there's
18 three problems with that I see. First of all,
19 there's not any allegation in the complaint for a
20 breach of contract. Second, I'm going to read from
21 his June 3rd, 2010 Notice of Intent to Employee.
22 Number seven in there, this is attached to our
23 summary judgment submission.

24 Number seven says, If employed the undersigned
25 will be an at-will employee whose employment may be

1 terminated by the super intendant when it's
2 determined to be in the best interest of the
3 district, upon notice to and consultation with the
4 employee. It also reads, The language used in this
5 document does not create an employment contract with
6 the School District of Pickens County. This document
7 does not create any contractual rights or
8 entitlements. No promises or assurances, whether
9 written or oral, which are contrary to or
10 inconsistent with the terms of this notice of intent
11 to employee, create any contract of employment.

12 That's the second problem. The third problem is
13 that with the statute of frauds, a five year contract
14 can't be completed within one year and the statute of
15 frauds 32-3-10. It wouldn't satisfy the statute of
16 frauds to have a five year oral employment contract.
17 So, that's -- to the extent he's trying to allege a
18 breach of contract now, I don't think that that's --
19 doesn't have any traction.

20 THE COURT: And Mr. Ostendorff, what do you say
21 happened after that? You made a demand for money,
22 when did you do that?

23 MR. OSTENDORF: I think one of the last ones,
24 probably the last letter I sent to Henry Hunt, in
25 that file folder I gave you. On April -- April 5th,

1 '11 to Henry Hunt.

2 On the last page I say, Can is SDPC make
3 Ostendorff whole again? This would require. . .

4 THE COURT: When was that done?

5 MR. OSTENDORF: May [verbatim] 5th of 2011.

6 That would be, I guess, a month -- a month and a half
7 after I got fired.

8 THE COURT: What's that based on? Money based
9 on what?

10 MR. OSTENDORF: Well, the two year, four months
11 was salary to go to five years. Because I worked two
12 years, eight months. So, I had two years, four
13 months left. And 75 --

14 THE COURT: That would be a breach of contract.
15 You haven't alleged a breach of contract in your
16 complaint. And that would be a breach of contract
17 if, in fact, you had a contract. What counsel says
18 is what was signed was not a contract you agreed that
19 you're an employee at-will. So, you know, you're
20 basing it on a contract, I still -- that employee to
21 be paid for another two years, right?

22 MR. OSTENDORF: Yes, sir. As far as that thing
23 I had to sign, we are coerced into signing that
24 thing. Just to be honest. The -- I got it my
25 affidavit, You sign it, part of your job is to sign

1 it. And nobody wants to sign it but they coerced
2 everybody into signing the thing. And it was an
3 issue of budget. Because that's what -- about 388,
4 the whole thing. When -- when the state cut back
5 everybody's money, they had a lot of problems.

6 THE COURT: I understand all that, things
7 happen, you know.

8 MR. OSTENDORF: Yes, sir.

9 THE COURT: People say I got a job, you can work
10 here, and all of a sudden the company falls apart.
11 They don't have any money, they gone broke. They
12 still got to pay, you know. If you ain't got a
13 written contract or some kind of contract for that,
14 you don't have that. Things happen. People have
15 expectations. Somebody expects the bank to renew a
16 loan. All of a sudden, the bank's -- the money dries
17 up and the banks don't renew the loan.

18 MR. OSTENDORF: I understand that.

19 THE COURT: You know, economic conditions are
20 such that it -- a job, you know, for whatever you
21 done for the school district, whatever that job was,
22 is going to be funded with some funds from certain
23 sources. Funds dry up. I mean, those things happen.
24 The question is though, you haven't alleged a breach
25 of contract. You didn't bring suit or allege in your

1 complaint for a breach of contract. And so, and --
2 that's what you're basing your money on?

3 MR. OSTENDORF: Yes, sir.

4 THE COURT: But this is not a contract action.
5 You brought an action for tort claims which is
6 something other than contract. You know. And so,
7 that's what counsel's saying is covered by the two
8 year statute of limitations of the Tort Claims Act.
9 Which is the only way you can sue a governmental
10 entity. At one time you couldn't sue them at all.
11 But the legislature enacted the Tort Claims Act and
12 allow you to sue them under certain conditions. And
13 so, but if -- the Tort Claims Act would control if
14 you're suing in tort. If it's a statute of
15 limitations.

16 MR. OSTENDORF: Sir, I think there's one other
17 thing about limiting. Condition limiting --
18 condition on -- for an at-will, to exclude somebody
19 from at-will, I think that's Small vs. Springs.

20 THE COURT: Yeah. They're certain conditions
21 under which at-will doesn't apply.

22 MR. OSTENDORF: Yes, sir --

23 THE COURT: -- to get around that. But you
24 haven't -- I read that in these briefs but you
25 haven't alleged or shown any evidence of any of those

①

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS

Mark D. Ostendorff,)
)
Plaintiff,)
)
vs.)
)
School District of Pickens County,)
)
Defendant.)

C.A. No. 2014-CP-39-00259

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Defendant, School District of Pickens County, by and through its undersigned counsel, hereby moves this Court, on the tenth day after service hereof, or soon thereafter as counsel may be heard, for an order pursuant to Rule 56(b) of the SCRCF, granting Defendant summary judgment on the following grounds:

- (1) Plaintiff's tort claims are time barred by the two-year statute of limitations set forth in the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-110.
- (2) The South Carolina Courts do not recognize a cause of action for "negligence," "gross negligence," or "reckless negligence," on the facts alleged in the Complaint and/or those developed during discovery to permit an at-will employee to recover damages for termination of employment.
- (3) Plaintiff cannot prove the elements of a cause of action for defamation as a matter of law. Specifically, Plaintiff cannot show an unprivileged false statement that was published to anyone. *See Williams v. Lancaster Cnty. Sch. Dist.*, 369 S.C. 293, 302-03, 631 S.E.2d. 286, 292 (Ct. App. 2006). In addition, any alleged defamatory statement alleged by Plaintiff was subject to qualified privilege as a matter of law.

55

(4) Plaintiff cannot establish the essential elements of a wrongful termination claim because he was an at-will employee at the time of his discharge, and the facts do not support that the District violated a clear mandate of public policy.

(5) Plaintiff cannot establish that Defendant engaged in any civil conspiracy against Plaintiff as a matter of law.

(6) Plaintiff has failed to properly plead a cause of action for fraud and cannot forecast evidence to establish a claim of fraud.

The grounds for the Defendant's summary judgment motion will be more fully set forth in a supporting memorandum of law, which will be filed with the Court prior to the hearing. In addition to its memorandum of law, the Defendant will also rely on pleadings, papers, records, files, depositions, and other discovery in this matter, as well as the applicable statutory and case law and the South Carolina Rules of Civil Procedure.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

Thomas K. Barlow, S.C. Bar No. 8995
tbarlow@childs-halligan.net

Mary Allison Caudell, S.C. Bar No. 101187
macaudell@childs-halligan.net

P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Defendant

February 9, 2015

Columbia, South Carolina

9

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS

Mark Ostendorff,

Plaintiff,

Case No. 2014-CP-39-00259

v.

School District of Pickens County, Board of Trustees,
Alex Saitta, Judy Edwards, Jimmy Gillespie,
Herbert Cooper, Jim Shelton, Ben Trotter, Kelly Pew,
Henry Hunt, Robert Folkman,

Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Ostendorff went to work with the School District of Pickens County in June 2008. He was hired as a Project Manager for the duration of their Building Program. Ostendorff was hired by Reggie Hall, then the building program administrator and operations manager.

Ostendorff was assured by Hall of at least five years of employment, possibly seven, to complete the Building Program. After the Building Program was completed, there would no longer be a position for him.

Ostendorff had known Hall very well from previous construction employment while both worked for Duke Power Company at the McGuire Nuclear Power Plant in the 1970's and early 1980's. Ostendorff trusted Hall and relied on Hall's assurance of employment to meet the five year requirement to receive retirement benefits under the South Carolina Retirement System. Ostendorff would have never left the City of Charlotte and the North Carolina Retirement System without that assurance.

Ostendorff was currently working for the City of Charlotte where he was an active member of the North Carolina Retirement System. With five years with the South Carolina Retirement System,

57

Ostendorff would receive retirement benefits after his employment with the School District was over .
The retirement benefit with SC Retirement would be almost the same if he stayed with the NC
Retirement System at the City of Charlotte.

Ostendorff came to the School District with his duration of employment and retirement benefits
as a bilateral contract. In Small v. Springs , if an employer represents that it will act in a particular way
given certain circumstances , and if the employee could reasonably rely upon the representation, then
the employer has a contractual obligation to act as it represented that it would.

PLAINTIFF'S STATEMENT OF RELEVANT FACTS

Reggie Hall left the School District soon after the School District Superintendent left. Bob Folkman
was hired later to be the Building Program Administrator. Folkman was the person that terminated
Ostendorff.

Ostendorff was fired by Folkman within a two week period after Ostendorff had a discussion with a
friend of a School Board member regarding probable misappropriation of public funding in the School
District.

Ostendorff disputes that he was an at-will employee. He came to the School District with a very
definite time limitation of employment and that time frame was a bilateral contract . " A bilateral
contract consists of mutual promises, made in exchange for each other by each of the two contracting
parties." Ref: A. L. Corbin, Corbin on Contracts sect 21 (1952).

Ostendorff is well aware that anyone can be fired anywhere ,anytime but that individual may have
recourse for his damages. Sports coaches are often fired but must be made whole to the terms of their
employment agreements. If one can be prohibited from entering employer's premises and no longer
receives a paycheck, then he is fired. He may recourse for his damages, but nonetheless, he is still fired.

2 58

The School District's Notice of Intent to Employ document:

Ostendorff was already employed. Ostendorff, along with all other School District employees was coerced to sign the document. This is addressed in Ostendorff's affidavit (second).

The School District has failed to provide any evidentiary support in its statement of performance concerns, taking time off without approval, failing to maintain established work hours, and not completing assigned tasks.

PLAINTIFF'S OPPOSITION FOR MOTION

Plaintiff Ostendorff opposes Defendant's Motion for Summary Judgment. Plaintiff asserts that there are numerous genuine issues of material fact and therefore Defendant's Motion should be denied.

Plaintiff Ostendorff demanded a jury trial. In *Anderson v. Liberty Lobby* 477 U.S. 242 (1986), "... summary judgment will not lie if the dispute about a material fact is "genuine", that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party..."

This case is currently at the South Carolina Court of Appeals. Judge Verdin allowed discovery to continue while the case is at the Court of Appeals. Defendant has received available discovery from Ostendorff. Defendant has refused to provide any discovery whatsoever, with exception of a copy of a "request for time off", which was provided prior to this lawsuit. Discovery from the defendants will show what was discussed with the board member and Folkman just before Ostendorff was fired. Discovery will also show what Board Members, if any, attempted to protect Ostendorff in carrying out his duties.

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baird v. Charleston County*, 333 S.C. 519, S.E. 2d 69 (1999). Summary Judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed

3 59

factual issues.

Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. Rice v. School Dist of Fairfield, 317 S.C. 87, 452 S.E.2d 352, 96 Ed. Law Rep. 1210(Ct App.1994); Moshtaghi v. The Citadel, 314 S.C. 316, 443 S.E.2d 915, 91 Ed Law Rep. 686 (Ct App. 1994); Koester v. Carolina Rental Center, Inc., 313 S.C. 490, 443 S.E. 2d 392, Prod. Liab. Rep. (CCH) P 13862 (1994).

Questions of credibility make summary judgment inappropriate. Hansen v. DHL Laboratories, Inc., 316 S.C. 505, 450 S.E. 2d 624 (Ct App. 1994). Bob Folkman is not a credible person.

Defendant claimed that Ostendorff was terminated with cause. Defendant has failed to provide any affidavits whatsoever or any evidence in support of terminating Ostendorff's employment.

The notice from Henry Hunt that Ostendorff's employment would end on June 30, 2011 has no bearing on anything. Ostendorff would still make demand for damages for the remaining time of his employment in both lost salary and lost retirement benefits if was ever laid off. After Ostendorff was fired, he was quickly replaced by Bob Cooke as a project manager for the duration of the building program. Other project managers were notified of future layoffs but no one was ever laid off.

~~Defendant's claim to time limitations:~~

S.C. Code Section 15-78-110 provides a three year limit for action. "; provided, that if claimant first filed a claim....the action is commenced within three years of the date of the loss...."

Plaintiff made claims in his correspondence with the School District immediately after his termination.

A 60

Defendant denies that Plaintiff states any claim on the merits:

Plaintiff has shown existence of evidence in his pleadings and affidavits of underlying improper motivations. Defendants have provided no explanations through correspondence nor affidavits as to why plaintiff was terminated. Plaintiff has requested discovery from defendants but they have only "stonewalled".

The issue of defamation:

The case is still in the discovery process. Prospective employers have not offered any response that they made have received from the School District regarding Ostendorff's previous employment. Ostendorff's present employer, Food Lion, did not check, nor does it check previous employers before hiring a new employee.

No monetary claim has been made for defamation of character. This issue should not be barred if damages are discovered during Ostendorff's continued job search.

Plaintiff's Civil Conspiracy Claim:

The three criteria for civil conspiracy are met for both Ostendorff's termination and also his loss of ten weeks of unemployment insurance benefits.

The employment termination- Bob Folkman and Kelly Pew, with possibly one or more school board members conspired to fire Ostendorff. Henry Hunt's letter to Ostendorff dated March 23, 2010, Exhibit A, in which Hunt stated "I talked with the board member and he does not recall any comments that would cause Mr. Folkman to retaliate against you." Kelly Pew knew of Ostendorff's termination on Monday prior to Ostendorff being fired by Folkman on Tuesday. Folkman stated that he talked to Kelly Pew in approving Ostendorff's firing. Ostendorff talked to Kelly Pew on Tuesday shortly after being fired by Folkman. Pew confirmed that she had previously discussed with Folkman about firing Ostendorff.

5 61

The ten week penalty for unemployment insurance benefits- Bob Folkman gave false testimony under sworn oath at the SCDEW hearing. As Folkman followed Ostendorff to his car, Folkman volunteered that he was sent there by Kelly Pew. Any reasonable person could conclude that the HR manager (Pew) would be the contact person between the School district and SCDEW and that Pew would attend the hearing or delegate others to attend. Pew knew that Folkman would willingly provide false testimony, and that is why Folkman was the only representative at the hearing from the School District.

Pew and Folkman acted outside the scope of their official duties. Discharging a public servant for discussing probable misappropriation of public funding is outside the scope of official duties. Discharging a public servant discussing probable misappropriation of public funding is in one's own interest.

All Defendants are applicable as the Order Granting Motion to Dismiss Individual Defendants is currently under appeal within the South Carolina Court of Appeals. The SC Court of Appeals still considers the individuals as still part of the original action.

Whether the School District is liable for Ostendorff's damages under strict liability and contributory negligence is an issue of fact to be decided by the triers of fact, the jury. Ostendorff demanded a jury trial.

~~The issue of negligence~~

The School District, School Board, Board members, Pew, Hunt all were negligent in not protecting Ostendorff as a public servant carrying out his duties. They all knew, or should of known, that Folkman was not a credible person. Ostendorff showed in his correspondence with the School Board and Hunt, that Folkman was not a credible person yet they failed to protect Ostendorff . They also failed to make Ostendorff " whole again".

6 62

~~The issue of fraud:~~

The fraud lies in that Bob Folkman did tell an untruth in that the SCDEW investigative officer asked to the affect "what was said the morning of dismissal of Ostendorff?" That is when Folkman presented Ostendorff's Request for Time Off and said it was not approved. Folkman never said anything the day of dismissal to Ostendorff about taking the day off in question. Per the SCDEW decision, Ostendorff was penalized by SCDEW ten weeks based on Folkman's fraudulent testimony.

Ostendorff followed the well-established method of requesting time off, as the SCDEW hearing concluded. Had Folkman not presented the document at the SCDEW hearing, Ostendorff would not of been penalized the ten weeks of benefits.

Past practice is admissible evidence .

Henry Hunt's letter , Exhibit A, dated March 23, 2010, shows that Bob Folkman is not a credible witness. In that letter, any reasonable person would conclude that Folkman retaliated against Ostendorff for discussing probable School District funding misappropriation.

Any reasonable person (a jury member) would evaluate all facts associated with the request for time off document and conclude that it was just a botched plan by Folkman to hide the real motivation to get rid of Ostendorff, especially since Folkman could not of known whether Ostendorff was at work or not on the day in question.

A jury would conclude that the motivation to fire Ostendorff was that Ostendorff was aware of probable misappropriation of public funding and the misappropriation was criminal in nature and carried a mandatory prison time for at least the board members, the superintendent(s), and likely all others knowingly involved.

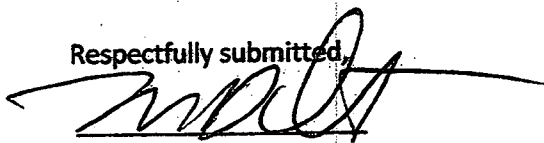
7 63

CONCLUSION

Plaintiff asks of this Court to deny Defendant's Motion for Summary Judgment, compel discovery by defendants, and let the SC Court of Appeals decide who is party to this action.

MARCH 30, 2015

Respectfully submitted,



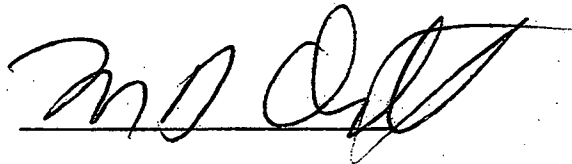
Mark Ostendorff
Plaintiff, Pro Se

8 64

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed and not any other material.

May 26, 2017



Mark Ostendorff
135 Cedar Creek Circle
Central, SC 29630
(864) 640-3340
Appellant, pro se

RECEIVED

JUN 13 2017

SC Court of Appeals

65