

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTER)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

Angela H. Bain,)
)
Plaintiff,)

Civil Action No: 2018-CP-12-0334

v.)

ORDER GRANTING MOTION AND
DISMISSING ACTION
AGAINST DEFENDANT CHILDS

Denise C. Lawson and)
Kenneth L. Childs, Defendants.)
_____)

This matter is before the Court on Motions by Defendant Kenneth L. Childs to Dismiss the Complaint against him pursuant to Rule 12(b)(6) and in the alternative for Judgment on the Pleadings or an Order striking Portions of the Complaint.

The Court heard the motions during a hearing held in the Chester County Courthouse on September 26, 2018. At that hearing, Plaintiff Angela Bain was present and represented by Shannon Polvi. Defendant Childs was present and represented by Michael H. Montgomery. The matter was argued and briefed extensively by the parties.

INTRODUCTION:

Plaintiff Angela Bain, the Superintendent of Schools for the Chester County School District, (“Bain”) brings this conspiracy and defamation action against Denise C. Lawson, (“Lawson”) Chair of the Board of Trustees of the Chester County School District and Kenneth L. Childs (“Childs”) an attorney who engages in the practice of school law and has represented and represents the Chester County School District.

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Bain alleges that Childs and Lawson engaged in a conspiracy to cause her to lose her employment and defamed her by publishing false information designed to discredit her and cast her in an unfavorable light.

Before the Court are Childs' Motion to Dismiss or in the Alternative for Judgment on the Pleadings and Childs' Motion to Strike. Because the Court grants the Motion to Dismiss, no ruling is made on the Motion to Strike. For the reasons discussed below, the Court GRANTS Childs' Motion to Dismiss. The Court also Dismisses the Conspiracy cause of action against all Defendants.

FACTUAL BACKGROUND

Bain, became employed as Acting Superintendent and then as Superintendent of Schools for the Chester County School District in May 2016 (Complaint ¶5). Lawson has served on the Board of Trustees for the Chester County School District for many years and has been Board Chair, most recently, since January 2018 (Complaint ¶7). Childs is an attorney, who has represented school districts in South Carolina, including the Chester County School District (Complaint ¶8). Bain represented that Childs is "one of the district's attorneys" on several occasions by e-mails sent to both Childs and Lawson, as well as other school board members. (See Exhibits 1, 2 and 3 Childs' Supplemental Memorandum in Support of Motion to Dismiss). While the Complaint alleges that Childs was not the District's attorney, at least after March 17, 2018 (Complaint ¶¶9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 49, 56, 57 and 71), additional information provided in reference to the Complaint reveals Bain's e-mail of June 6, 2017, to the School Board – including Mrs. Lawson. That e-mail reads:

Hi All,

Here is something I am getting ready to send to our media outlets at the advice of Ken Childs, one of our attorneys. I wanted to be sure we were in compliance with board meeting announcements and FOIA.

Having not sent out an agenda for a meeting, it cannot be viewed as a board meeting. Wanted to be sure we were all clear on that.

See attached.

Thanks.

Angela.

Bain alleges that Childs and Lawson defamed her by “falsely accusing her of defrauding the Chester County School District by accepting compensation from outside sources and being incompetent or unfit for her job due the same.” (Complaint ¶ 60). She also alleges that “Defendant further accuse the Plaintiff of violations of state law by falsely alleging that her contract with Chester County School District is breached by the Plaintiff by earning compensations from other districts. (Complaint ¶60). Plaintiff also alleges that “Defendants allege the Plaintiff violates her contract and her actions interfere with her job with Chester County School District and that she fraudulently was a partner or owner of a business to promote these outside activities.” (Complaint ¶60). Bain further alleges that Childs (and Lawson) insinuated that she was guilty of malfeasance and receiving excessive compensation and “as such was incompetent in the performance of her job and engaging in improper, unethical and unlawful conduct.” (Complaint ¶61). Bain also claims that the Defendants have published and republished these allegations on numerous occasions “leading up to the probable if not likely termination of the Plaintiff’s contract with said School District.” (Complaint ¶61). The Complaint alleges that the statements were published to “persons within and outside the School District in the absence of a need to know basis.” They were also allegedly published to “the Superintendent of the Marlboro County School District and to the News

& Reporter.” (Complaint ¶62). The Complaint alleges that these public actions “was made during 2017 and 2018” (Complaint ¶63). The only allegation of malice in the Complaint avers “Such statements and actions have been published and disseminated widely to third persons and were don so maliciously and in bad faith.” (Complaint ¶66).

The Attorney-Client Privilege

The attorney-client privilege protects communications between a client and her attorney in two key ways: (1) by prohibiting the attorney from disclosing the communications, and (2) by protecting the client from being compelled to disclose the communication in legal proceedings. In South Carolina, the privilege the Common Law governs the Attorney-Client Privilege. (*SCRE* Rule 501). The seminal case on the Attorney-Client Privilege is *Drayton v. Industrial Life & Health Ins.*, 205 S.C.98, 31 S.E.2d 148 (1944). There the Court held “The general rule excludes from evidence confidential communications of a professional nature between attorney and client, unless the client, for whose benefit the rule is established, waives the privilege.” *Clary v. Blackwell*, 160 S.C. 142, 158 S.E. 223; *State v. Chandler*, 126 S.C. 149, 119 S.E. 774; *State v. Rook*, 174 S.C. 225, 177 S.E. 143. Rule 502 *Federal Rules of Evidence* further establishes the protections afforded the confidential communications between Attorney and Client. Other Common Law authorities have defined the basic elements of the attorney-client privilege: (1.) a communication; (2.) made between privileged persons (i.e., attorney, client or agent); (3.) in confidence; and (4.) for the purpose of obtaining or providing legal assistance for the client. The purpose of the privilege is the promotion of unrestrained communication and contact between the lawyer and client in matters in which the attorney’s professional judgment is sought. The attorney-client privilege has developed from two assumptions: (1) good legal assistance requires full disclosure of a client’s legal problems, and (2) a client will reveal details required for proper representation only if his

confidences are protected. But because the privilege can prevent a judge and jury from learning of otherwise relevant and admissible evidence, courts construe the privilege narrowly. There are two fundamental aspects of the attorney-client privilege, both of which must be met for the privilege to apply. The first is that the communication must have been made to obtain legal advice, rather than business or other advice. The second is that there must be an expectation that the communication will not be disclosed.

Here, the pleadings establish an attorney-client relationship despite Plaintiff's efforts to plead legal conclusions to the contrary.

Even considering the allegations Plaintiff's complaint in a light most favorable to the Plaintiff, the Communications between Mr. Childs and Mrs. Lawson, both individually and as Board Chair of the School District meet the requirements. The effort to plead around the privilege with various legal conclusions reveals that even the Plaintiff recognizes the privilege and that it existed here and realizes that her claims against Childs will fail as a matter of law unless she can plead around the attorney-client relationship.

The Plaintiff's Complaint and Attachments Confirm that an Attorney-Client Relationship Existed Between Childs and the School District.

The exhibits to the Complaint and the supplemental information provided by the Plaintiff, demonstrate that Superintendent Bain was questioning legal bills of Mr. Childs after the time frame where Plaintiff alleges that his representation was terminated and he was no longer an attorney for the School District. The Exhibits to the Complaint demonstrate that "Except in unusual circumstances, the board will make all communications to the school attorney through the superintendent or board chairman. (Board Policy BDG, Complaint, Exhibit B) These documents

arguably establish an attorney-client relationship between Childs and the School district and that Lawson was a proper person, as Board Chair, to communicate with Childs on behalf of the District.

The Superintendent's e-mail communications attached to Defendant Childs Supplemental Memorandum confirm the attorney-client relationship evident in the Complaint, exhibits and supplemental documents filed by the Plaintiff.

On April 3, 2017, Dr. Bain sent an e-mail to both firms (Exhibit 1):

*Hi all,
Please deliverer all electronic and hard copy files from the old firm to
Andrea White at 3614 Landmark Drive Suite EF
We hope to be able to use both firms going forward.
Thank you.
Angela*

On June 2, 2017, Dr. Bain sent an e-mail (Exhibit 2) to Mr. Childs and his partner David Lyon which states:

*Good morning, David and Ken!
Thanks for the memo! Yes, this is fine to go ahead and send to the board with a cc
to me. Would you be able to do this today?
Thanks!
Angela.*

And on June 6, 2017, Dr. Bain sent an e-mail (Exhibit 3) to the School Board – including Mrs. Lawson. That e-mail reads:

*Hi All,
Here is something I am getting ready to send to our media outlets at the advice of
Ken Childs, one of our attorneys. I wanted to be sure we were in compliance with
board meeting announcements and FOIA.
Having not sent out an agenda for a meeting, it cannot be viewed as a board
meeting. Wanted to be sure we were all clear on that.
See attached.
Thanks.*

Angela.

[Emphasis added]

Dr. Bain's e-mails demonstrate that in June of 2017 she was asking for legal work from Mr. Childs and directing him to transmit this to the Board. She directly referred to him, in an e-mail to the School Board as "one of our attorneys." Her own words contradict the allegations contained in her complaint. This e-mail, coupled with the letter provided by Plaintiff dated August 22, 2017, complaining about charges on several matters unequivocally demonstrates that the firm of Duff & Childs (and Mr. Childs had an attorney-client relationship with the School District. Mrs. Lawson is the Board Chair. Mrs. Lawson had every reason to understand that Mr. Childs was an approved attorney representing the District and there is no factual averment after the date of the Superintendent's e-mails to suggest anything to the contrary -- even construing those allegations in a light most favorable to the Plaintiff. Mr. Childs acting as Ms. Lawson's attorney cannot be held personally liable under the Plaintiff's theory of the case.

Where there is a conflict between allegations in a pleading and the exhibits attached thereto the exhibits control. *Hoefling v. City of Miami*, 811 F.3d. 1271, 1277, (11th Cir 2016), *Crenshaw v. Lister*, 553 F.3d. 1283, 1292 (11th Cir. 2009); *Wydler v. Bank of America, N.A.*, 360 F.Supp. 2d 1302, 1306 n.1 (S.D. Fla. 2005); *Wilbesan Charter Sch., Inc. v. School Bd. of Hillsborough County*, 447 F. Supp. 2d. 1292, 2302 (M.D. Fla. 2006). This logic has been adopted in South Carolina Federal Courts as well.

In evaluating a motion to dismiss under Rule 12(b)(6), the court may consider "documents attached or incorporated into the complaint without converting the motion to dismiss into a motion for summary judgment." *Floyd v. Mgmt. Analysis & Utilization, Inc.*, C.A. No. 7:13-01971-JMC, 2014 U.S. Dist. LEXIS 31837, 2014 WL 971937, at *11 (D.S.C. Mar. 12, 2014) (quotation

omitted). Moreover, "when a defendant attaches a document to its motion to dismiss, 'a court may consider it in determining whether to dismiss the complaint [if] it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity.'" *Id.* (quoting *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004)).

Plaintiff attached the Board Policies to her complaint. The letter exhibit to her supplemental brief and the attachments to her memo are authentic, incorporated and dispositive of the fact that there was an attorney-client relationship between Childs and the Chester County School District. The Plaintiff cannot question the veracity or authenticity of her letter and electronic mails.

CONCLUSIONS OF LAW

A. Standard of Review.

A Rule 12(b)(6) motion to dismiss should be granted when the pleadings, construed in the light most favorable to the non-moving party, fail to allege sufficient facts to state a cause of action. Rule 12(b)(6), *SCRCP, Haskell Co. v. Morgan*, 274 S.C. 261, 262 S.E.2d 737 (1980). As the Court stated in *DeBerry v. McCain*, 275 S.C. 569, 274 S.E. 2d 293 (1981)

A motion to dismiss admits the facts well pleaded in the complaint but does not admit the inferences drawn by the plaintiff from such facts. In short, a motion to dismiss a complaint does not admit conclusions of law pleaded therein.

274 S.E.2d at 296; *Carolina Winds Owners Ass'n v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S.E.2d 897, 899 (Ct. App. 1988) ("A motion under Rule 12(b)(6) . . . admits the well-pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law.") An allegation of a mere legal conclusion is insufficient to state a cause of action. *Jones v. Gilstrap*, 288 S.C. 525, 343 S.E.2d 646 (1986); *Russell v. City of*

Columbia, 301 S.C. 117, 390 S.E.2d 463 (Ct. App. 1989) (“The court must take well-pleaded factual allegations as true. However, allegations which are conclusory rather than factual should be disregarded.”) To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which, when taken as true, “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation. *Ashcroft, Id.* at 556 US 678.

"A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the **factual** allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (quoting *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). [emphasis added]

Rule 702 S.C.R.E. prevents the admission of legal conclusions as they are strictly within the purview of the court. The question before the court here is one that as a matter of law, from her own pleadings, the Plaintiff cannot aver the legal conclusion that there was no attorney-client or other privileged relationship, the absence of which undergirds her entire claim. Her writings belie the legal conclusions pled in her complaint. Here, Plaintiff merely attempts to plead opinion as fact and relies on those legal conclusions as her only basis to survive dismissal. In general, expert testimony on issues of law is inadmissible. *See generally* Note, Expert Legal Testimony, 97 *Harv.L.Rev.* 797, 797 (1984); see also *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) (where the court disallowed a legal expert's opinion on whether corporate officers and directors breached their fiduciary duties because "such testimony is a legal opinion and inadmissible."); *United States v. Sinclair*, 74 F.3d 753, 758 n.1 (7th Cir. 1996) (commenting that Federal Rules of Evidence 702

and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case).

B. Plaintiff's Defamation Claim against Childs is Dismissed as a Matter of Law.

1. *Childs was the District's Attorney and is Immune From Liability.*

"An attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Gaar v. North Myrtle Beach Realty Co., Inc.*, 287 S.C. 525,528-529. 3239 S.E.2d 887, 889 (Ct. App. 1986). To sustain the cause of action against Childs, it is necessary for the Plaintiff to have pleaded that Childs breached some independent duty to her outside the scope of representation of the client. Here, even looking at the pleadings in a light most favorable to the Plaintiff, Childs was asked to review and comment upon Bain's actions by Lawson and the School Board and his communications, including inquiries and opinions about those actions are not outside the scope of that representation as a matter of law. The facts here establish the attorney-client relationship and the facts alleged and reasonably deducible from the complaint cannot, as a matter of law entitle the Plaintiff to relief on any theory of the case.

2. **Plaintiff's Civil Conspiracy Claim is Dismissed as a Matter of Law.**

A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). Civil conspiracy consists of three elements: 1) a combination of two or more persons, 2) for the purpose of injuring the Plaintiff, 3) which causes the Plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). *Cf., Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) (If a Plaintiff merely repeats the damages from another claim instead of

specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed). It is essential that a plaintiff prove all of these elements in order to recover. *Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938). "[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); *accord. Cowburn v Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005).

Plaintiff has failed to show in her pleadings that the actions that form the apparent basis of Plaintiff's conspiracy claim were done outside the scope and course of the attorney-client relationship, such that no actionable conspiracy exists as a matter of law.

Construing the factual allegations within the Complaint in a light most favorable to Plaintiff, the Court cannot find that the alleged actions of Defendant Childs were beyond the scope of his attorney-client relationship with Defendant Lawson and/or the School District. Since the Court has dismissed Mr. Childs as a party in this matter based upon attorney-client privilege, there is no combination of two or more persons to support a civil conspiracy claim. Plaintiff cannot as a matter of law plead a cause of action for conspiracy under South Carolina Law. Because of this, Childs and Lawson are entitled to dismissal of the Plaintiff's conspiracy cause of action as a matter of law.

CONCLUSION

While Plaintiff is not required to prove any of her claims at this juncture, she is required to state plausible causes of action against Mr. Childs which she has not done, and cannot do. The Complaint against Mr. Childs is therefore subject to dismissal in its entirety, as Plaintiff can prove no set of facts that would entitle her to relief against him on any of her claims. Accordingly, the

Motion to Dismiss the Complaint by Kenneth L. Childs is **GRANTED**. Because Childs is Dismissed from the Complaint entirely, Lawson's Motion to Dismiss is also **GRANTED** as it relates to the Plaintiff's Second Cause of Action alleging Civil Conspiracy. Because the Court has **GRANTED** the Motion to Dismiss, Childs' Motion to Strike is dismissed as Moot.

AND IT IS SO ORDERED THIS _____ Day of October, 2018.

Judge Brian M. Gibbons



Chester Common Pleas

Case Caption: Angela H Bain VS Denise C Lawson , defendant, et al

Case Number: 2018CP1200334

Type: Order/Dismissal

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge