THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas
Brian M. Gibbons, Circuit Court Judge

Case No.: 2018-CP-12-0334
Appellate Case No. 2018-001991

Angela H. Bain,

Appellant,

v.

Denise C. Lawson and Kenneth L. Childs,

Respondents.

INITIAL BRIEF OF RESPONDENT DENISE C. LAWSON

RICHARDSON PLOWDEN & ROBINSON, P.A.

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STATEMENT OF THE CASE

Appellant, Angela Bain, is employed as the Superintendent of the Chester County School District (the "School District"). She has attempted to sue (1) Denise Lawson, the former Chair of the Board of Trustees ("Board") of the School District, and (2) Kenneth Childs, a lawyer currently practicing with the law firm of Duff & Childs. (Complaint, ¶¶ 1-3).

Appellant initiated this lawsuit on or about July 23, 2018, bringing two causes of action against Lawson and Childs for (1) defamation and (2) civil conspiracy. Appellant alleged that, in 2015 and 2016, Childs gave legal advice to the Board and to Lawson in her capacity as a Board member. (Complaint, ¶ 9). Appellant also alleged that, sometime in March 2016, she began to direct the District's legal affairs to a newly formed firm, White & Storey. (Complaint, ¶ 17).

Regarding the allegations upon which Appellant apparently relies to support her civil conspiracy claim against Lawson, Appellant presumes "upon information and belief" that Lawson "from time to time met with others, including [unnamed] public officials of Chester County, without the consent of School Board members and without them present, to plan and conspire to remove the Plaintiff from her position as Superintendent in large measure because she did not support bringing back Childs and his law firm to engage in legal work and receive compensation from the district [*sic*]." (Complaint, ¶ 33).

Appellant also alleges, "[u]pon information and belief, Lawson was meeting planning and conspiring [*sic*] with Childs to look for ways to remove the [Appellant]

from her position and to put in her position someone they could manipulate." (Complaint, ¶ 35).

Later, she alleges in conclusory fashion that Lawson and Childs "met, schemed, planned, and conspired with [unnamed] others to terminate Plaintiff's contract with Chester County School District, remove her from the position of Superintendent, and to prevent [Appellant] from any future employment with Chester County School District or any other school district by defaming her." (Complaint, ¶ 70) (emphasis added).

Finally, she alleges that as a consequence of this alleged conspiracy, she has been "ostracized and blacklisted in her field and profession and has incurred the costs and fees of prosecuting this action, has suffered loss of sleep, loss of companionship, and severe mental anguish as a result of the same." (Complaint, ¶ 75). Notably, in relation to her defamation claim, Appellant claims that she "has been embarrassed, humiliated, and has sustained mental anguish, reputational loss, diminished future earning capacity, and lost reputation as well as embarrassment, humiliation and mental suffering, and she is entitled to award of actual damages against the Defendants as well as punitive damages." (Complaint, ¶ 68).

Following the parties' submission of pleadings and oral argument, the trial court granted the Motion to Dismiss and/or Motion for Judgment on the Pleadings (1) to Childs as to both claims, and (2) to Lawson on the civil conspiracy claim. In its order, the trial court noted that the communications alleged by Appellant in support of its civil conspiracy claim were firmly within the scope of the attorney-client privilege, and for that reason, "no actionable conspiracy exists as a matter of law." (Order, p. 11).

Appellant timely filed this appeal, which is now before this Court.

STANDARD OF REVIEW

In deciding whether a claim should be dismissed pursuant to Rule 12(b)(6) or 12(c), SCRCP, this court should consider whether Appellant has alleged facts – not legal conclusions – sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP, "retains the Code Pleading standard ... rather than the more lenient notice pleading standard found in the federal rules." *Gaskins v. S. Farm Bureau Cas. Ins.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (S.C. App. 2000). When a party's claim relies on legal conclusions, a claim should fail. *Talbott v. Padgett*, 30 S.C. 167, 171, 8 S.E. 845, 847 (1889); *Caroline Winds Owners' Ass'n, Inc. v. Joe Holden Builder. Inc.*, 297 S.C. 74, 76, 374 S.E.2d 897, 899 (S.C. App. 1988) ("A motion under Rule 12(b)(6) or Rule 12(c) 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.").

ARGUMENT

I. DID THE TRIAL COURT CORRECTLY DISMISS THE CIVIL CONSPIRACY CLAIM AGAINST LAWSON BASED ON AN ATTORNEY CLIENT-PRIVILEGE BETWEEN LAWSON AND CHILDS?

Appellant makes few, if any, factual allegations regarding the alleged "civil conspiracy" in which Lawson purportedly engaged. In fact, Appellant primarily confines her allegations to the legal conclusion that communications between Lawson and Childs were not protected by attorney-client privilege, and then alleges "on information and belief" that they were conspiring to injure Appellant.

Indeed, many of the "factual allegations" raised by Appellant indicate only that Lawson was doing things that the School Board can do, should do, and actually do. For instance, Appellant alleges that, in "February of 2018, Lawson began to raise questions about the Appellant's contract and amendments and suggest to others that the Appellant was taking advantage of the District and charging more money and benefits than she properly should be receiving." (Complaint, ¶ 34). Notably, even if true, there is absolutely nothing wrong with a School Board member "raising questions" about the conduct of a District Superintendent's job performance or compensation, or discussing the Superintendent's job performance or even removal with other Board members or other public figures.

Regarding the "attorney-client privilege" attaching to communications between Lawson and Childs, under South Carolina law, there are no "magic words" required to form an attorney-client relationship. Under South Carolina law, a person is deemed a client when she (1) seeks legal advice, (2) discusses those matters with a lawyer, and (3) does so in confidence for the purpose of obtaining such advice. *In re Carter*, 400 S.C.

170, 176, 733 S.E.2d 897, 900 (2012); *Marshall v. Marshall,* 282 S.C. 534, 539, 320 S.E.2d 44, 47 (S.C. App. 1984) (a person attains the status of "client" when that person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice, and a signed retainer agreement is not essential to create such a relationship).

Therefore, under South Carolina law, where a person consults in confidence with a lawyer for the purpose of obtaining legal advice, those consultations are protected by the attorney-client privilege. Such is the case in this matter. As Appellant has alleged, Lawson clearly knew and understood that Childs was an attorney, and according to Appellant's own Complaint, often met with him to seek his counsel. (Complaint, ¶ 70).

The policy underlying the principle of applying an absolute privilege to attorney-client communications – and forbidding parties from using them to support tort claims against the attorney and client – is self-evident. As one court recently articulated:

> Subjecting a client to liability, or indeed to the burden of defending against a defamation action, for statements made to his attorney pertinent to and during the course of legal representation would seriously impair the full and frank discussions that the attorney-client privilege is designed to protect.... On balance, the plaintiff's desire for civil damages in defamation is not sufficiently compelling to warrant abrogation of the attorney-client privilege.

Chamberlin v. 101 Realty, Inc., 626 F.Supp. 865, 871 (D.N.H. 1985) (citations omitted). Similarly, communications enjoying absolute privilege cannot be used to support a civil conspiracy claim.

The ruling of Justice Toal, sitting as a trial judge, in *Kovach v. Whitley*, 2015-CP-08-2380, in the Court of Common Pleas for Berkeley County, is instructive on this point. In that case, the plaintiff brought a civil conspiracy claim against several defendants,

which was found defective (and actually worthy of sanction) for several reasons that are relevant here:

- The plaintiff's factual assertions related to the alleged conspiracy were actually actions that the defendants had the right to take. (Kovach Order, pp. 17-18).
- Bringing the plaintiff's alleged criminal activity to the attention of authorities was "not actionable as a matter of law." (Kovach Order, p. 18). The order specifically referenced *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 170, 628 S.E.2d 261, 262 (2006), noting that "Defendants had every legal right as citizens to report Ms. Kovach's illegal acts to authorities." (Kovach Order, P. 18).
- The plaintiff failed to properly allege "special damages." (Kovach Order, P. 19).
- Perhaps most relevant to the instant appeal, Justice Toal also noted that the alleged acts of the "conspirators" were actually privileged, and "cannot be the basis for a civil conspiracy claim." (Kovach Order, pp. 18-19, quoting *Crowell v. Herring*, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (S.C. App. 1990)).

Indeed, under Appellant's theory of the case, a party may eviscerate the attorney-client privilege of another party merely by alleging in a complaint – "upon information and belief," no less – that the opposing party's communications with her lawyer were for some purpose other than seeking legal counsel. Quite frankly, this is an absurdity. Lawson – in either her official or individual capacity – is permitted to seek legal advice

from any attorney she wishes, and to act on that advice accordingly, regardless of whether the attorney is also "officially" serving the Board. In the course of seeking and receiving that advice, the communications between attorney and client are privileged, and as noted in Kovach, privileged communications cannot form the basis of a civil conspiracy claim.[1]

For these reasons, this Court should affirm dismissal of Appellant's civil conspiracy claim.

II. ARE THERE ALTERNATIVE GROUNDS TO AFFIRM THE TRIAL COURT'S DECISION TO DISMISS THE CIVIL CONSPIRACY CLAIM AGAINST LAWSON?

This Court may review a respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

In this case, this Court may affirm the decision to dismiss the civil conspiracy claim because Appellant failed to adequately set forth "additional acts" or "special damages" related only to the claim.

The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing special damage. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (S.C. App. 2009). "The difference between civil and criminal conspiracy is in criminal conspiracy, the gravamen of the offense is the agreement itself, whereas, in civil

[1] Notably, if this Court accepted Appellant's argument, nothing would prevent Lawson or Childs from suing Appellant and her counsel under the same theory.

conspiracy, the gravamen of the tort is the damage resulting from an overt act done pursuant to a common design." *Id.* Further, a claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint. *Id.* Because the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." *Id.*

Failing to adequately allege either (1) additional acts or (2) special damages is fatal to a civil conspiracy claim. In this case, Appellant failed to do either.

In Paragraph 70 of her Complaint, Appellant alleged that Lawson's "conspiracy" was aimed at injuring Appellant by "defaming" her. In essence, Appellant's civil conspiracy claim is a warmed-over version of her defamation claim. Further, there are no specific allegations, other than formulaic and conclusory accusations, that hint as to how Lawson acted outside the scope of her duty as a Board Member. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 565, 626 S.E.2d 884, 887 (2006).

Furthermore, Appellant's recitation of purported "special damages" was formulaic and was likewise rejected in *Paradis v. Charleston County School District, Paradis v. Charleston Cty. Sch. Dist.*, 424 S.C. 603, 615, 819 S.E.2d 147, 154 (S.C. App. 2018), *reh'g denied* (Oct. 18, 2018), *abrogated on other grounds by Skydive Myrtle Beach, Inc. v. Horry Cty.*, 2019 WL 1146068 (S.C. Mar. 13, 2019), where this Court found as follows:

> The circuit court found "[t]he only mention of special damages in Plaintiff's complaint, beyond the conclusory statement that she sustained them generally, is that she has been ostracized or blacklisted from the profession of education and that she incurred legal fees to pursue the claims set forth in her [c]omplaint." However, the circuit court found "Plaintiff fails to plead any specific facts to support such an assertion,

> such as an inability to obtain other employment in the education profession." The circuit court further noted Paradis's "alleged damages of being blacklisted and ostracized are simply a re-wording of the 'injury to her professional reputation' that are the claimed damages under her defamation cause of action." Finally, the circuit court found Paradis could not rely on the costs she bore for prosecuting her civil conspiracy claim as special damages.
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> . . .
>
> She claims the reputational damages she asserts in her defamation claim are separate and distinct from the "alleged damages of being blacklisted and ostracized." However, those reputational damages are precisely the damages one would expect from defamatory statements. Furthermore, in her brief, Paradis fails to address the circuit court's decision that her attorney's fees would not constitute special damages.

424 S.C. at 615-16, 819 S.E.2d at 154.

For these additional reasons, Appellant's civil conspiracy claim as to Lawson should be dismissed with prejudice.

III. DID THE TRIAL COURT CORRECTLY DENY APPELLANT'S REQUEST FOR LEAVE TO AMEND HER PLEADINGS?

While Appellant asks in her appellate brief for leave to amend her complaint, she never actually filed a Motion to Amend her Complaint under Rule 15, SCRCP, in this action, and certainly never attached a proposed amended pleading. In essence, Appellant asks this Court to affirm a Motion to Amend that has never been made. As observed by the federal court in South Carolina:

> Plaintiff did not file a motion with the Court, but requested leave to amend in the last paragraph of his response to Defendant's motion to dismiss. Additionally, Plaintiff did not provide the Court with a proposed amended complaint or provide any explanation as to why these unidentified, "alternative claims" could not have been brought earlier. Plaintiff's request failed to qualify as a motion for leave to amend, *see* Fed.R.Civ.P. 7(b), 15(a), and the Court finds that such a request would be futile. *See Cozzarelli v. Inspire Pharms., Inc.*, 549 F.3d 618, 630–31 (4th Cir. 2008) ("[W]e cannot say that the district court abused its discretion by

> declining to grant a motion that was never properly made."); *see e.g., United States ex rel. Williams v. Martin–Baker Aircraft Co.*, 389 F.3d 1251, 1259 (D.C.Cir. 2004) ("While Federal Rule 15(a) provides that leave to amend shall be freely given when justice so requires, a bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which amendment is sought—does not constitute a motion with the contemplation of Rule 15(a)." (citing *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1280 (D.C.Cir.1994))).

Woods v. Boeing Co., 841 F. Supp. 2d 925, 930–31 (D.S.C. 2012).

Furthermore, where the proposed amendment is futile, remand is not allowed. *Skydive Myrtle Beach, Inc. v. Horry Cty.*, 2019 WL 1146068, at *7 (where the appellate court determines that an amendment is futile, instead of remanding, it "may in its discretion affirm the dismissal of the complaint with prejudice."). In this case, the purported amendments Appellant references in her brief do not address the underlying weaknesses in her Complaint as set forth above.

CONCLUSION

For the reasons set forth above, Respondent Lawson respectfully requests that this Court affirm the dismissal with prejudice of Appellant's claim for civil conspiracy, and for any other such relief as this Court deems just and proper.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHESTER COUNTY
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Case No.: 2018-CP-12-0334
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Respondents.

CERTIFICATE OF SERVICE

I, the undersigned employee for Richardson Plowden & Robinson, P.A., counsel for the Respondent Denise C. Lawson, do hereby certify that I have served a copy of the Respondent Denise C. Lawson's Initial Brief and Designation of Matter by causing a copy of the same to be personally deposited in a United States Postal mail box, postage prepaid, with the return address clearly visible, addressed to the counsel of record for Appellant and counsel of record for Respondent Kenneth L. Childs as indicated below on this 10th day of April, 2019:

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Dated this 10th day of April, 2019.

Respectfully submitted,

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April 10, 2019

Via Hand Delivery

Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Angela H. Bain v Kenneth L. Childs, and Denise C. Lawson
Appellate Case Number: 2018-001991
Civil Action Number: 2019-CP-12-00334
Our File Number: 1148-076

Dear Ms. Kitchings:

Enclosed herewith for filing are the Respondent Denise C. Lawson's Initial Brief and Designation of Matter concerning the above referenced matter, together with the Certificate of Service.

With best regards, I remain

Sincerely,

Eugene H. Matthews

EHM/mjw

cc: Shannon Polvi
Michael H. Montgomery