THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Doyet A. Early, Circuit Court Judge

C.A. No.: 2018-CP-40-02425
Appellate Case No.: 2019-000648

Jefferson Davis, Jr. .....Appellant,

v.

Ellen Weaver, Chad Connelly, Oran P. Smith, Neil J. Mellen, Howard S. Rich, Rick Reames, Stephen D. Kirkland, Palmetto Promise Institute, Palmetto Family Council, Palmetto Family Alliance, South Carolinians for Responsible Government, SCRG Foundation, Access Opportunity South Carolina, Friedman Foundation for Education Choice, Inc., Cato Institute, South Carolina Educational Credit for Exceptional Needs Children Fund, South Carolina Education Oversight Committee, South Carolina Department of Revenue, South Carolina Department of Labor, Licensing and Regulation, First Impressions, Inc., d/b/a Richard Quinn & Associates, First Tuesday Strategies, LLC, Bill Wilson, Jason Bedrick, Jim DeMint, Randy Page, Tony Denny, Phillip Cease, Melanie Barton, Doris Cubitt, Susan Thomas, John McCormick, Nate Leupp, Institute of Management Consultants USA and John Doe(s) 1-40.....Respondents.

FINAL BRIEF OF RESPONDENTS SOUTH CAROLINA EDUCATION OVERSIGHT COMMITTEE AND MELANIE BARTON

BOYKIN & DAVIS, LLC

Kenneth A. Davis, Esq. (SC Bar #66416)
Tierney F. Dukes, Esq. (SC Bar #102035)

BOYKIN & DAVIS, LLC
220 Stoneridge Drive, Suite 100
Columbia, South Carolina 29210
(803) 254-0707

kdavis@boykinlawsc.com
tdukes@boykinlawsc.com

Attorneys for Respondents South Carolina Education Oversight Committee and Melanie Barton

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Doyet A. Early, Circuit Court Judge

C.A. No.: 2018-CP-40-02425
Appellate Case No.: 2019-000648

Jefferson Davis, Jr. .....Appellant,

v.

Ellen Weaver, Chad Connelly, Oran P. Smith, Neil J. Mellen, Howard S. Rich, Rick Reames, Stephen D. Kirkland, Palmetto Promise Institute, Palmetto Family Council, Palmetto Family Alliance, South Carolinians for Responsible Government, SCRG Foundation, Access Opportunity South Carolina, Friedman Foundation for Education Choice, Inc., Cato Institute, South Carolina Educational Credit for Exceptional Needs Children Fund, South Carolina Education Oversight Committee, South Carolina Department of Revenue, South Carolina Department of Labor, Licensing and Regulation, First Impressions, Inc., d/b/a Richard Quinn & Associates, First Tuesday Strategies, LLC, Bill Wilson, Jason Bedrick, Jim DeMint, Randy Page, Tony Denny, Phillip Cease, Melanie Barton, Doris Cubitt, Susan Thomas, John McCormick, Nate Leupp, Institute of Management Consultants USA and John Doe(s) 1-40.....Respondents.

FINAL BRIEF OF RESPONDENTS SOUTH CAROLINA EDUCATION OVERSIGHT COMMITTEE AND MELANIE BARTON

BOYKIN & DAVIS, LLC

Kenneth A. Davis, Esq. (SC Bar #66416)
Tierney F. Dukes, Esq. (SC Bar #102035)

BOYKIN & DAVIS, LLC
220 Stoneridge Drive, Suite 100
Columbia, South Carolina 29210
(803) 254-0707

kdavis@boykinlawsc.com
tdukes@boykinlawsc.com

Attorneys for Respondents South Carolina Education Oversight Committee and Melanie Barton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes

Rules

Other

STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT PROPERLY DISMISS APPELLANT'S CLAIMS AGAINST SOUTH CAROLINA OVERSIGHT COMMITTEE ("EOC") AND MELANIE BARTON ("BARTON") WHERE APPELLANT FAILED TO SERVE THE RESPONDENTS IN ACCORDANCE WITH THE TRIAL COURT'S PREVIOUS ORDER?**

2. **DID THE TRIAL COURT PROPERLY DISMISS APPELLANT'S CLAIMS AGAINST THE EOC AND BARTON WITH PREJUDICE BECAUSE APPELLANT FAILED TO COMPLY WITH THE COURT'S PREVIOUS ORDER GRANTING HIM LEAVE TO AMEND?**

3. **WAS THE DISMISSAL OF APPELLANT'S CLAIMS AGAINST THE EOC AND BARTON FURTHER SUPPORTED BY ADDITIONAL SUSTAINING GROUNDS AS APPELLANT FAILED TO ALLEGE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION PURSUANT TO RULE 12(b)(6), SCRCP?**

STATEMENT OF THE CASE[1]

Appellant filed his original Complaint in this action on May 3, 2018, against Respondent Ellen Weaver, Palmetto Promise Institute ("PPI"), and twenty (20) pseudonymous defendants (Does 1-20). Appellate alleged causes of action for: (1) defamation, (2) false light publicity, (3) invasion of privacy, (4) negligence, (5) intentional infliction of emotional distress, (6) tortious interference with prospective contractual relations, (7) unfair trade practices, (8) pierce the corporate veil, and (9) conspiracy. Appellant's original complaint did not name Respondent South Carolina Education Oversight Committee ("EOC") and Respondent Melanie Barton ("Barton") as defendants. (ROA p. 17).

On October 1, 2018, the trial heard oral arguments on Weaver and PPI's motion to dismiss. By Order dated October 29, 2018, the court granted in part Weaver's and PPI's motions dismiss. (ROA p. 1). The order dismissed plaintiff's causes of action for false light publicity, tortious interference with prospective contractual relations, and unfair trade practices. Further, the trial court order required Appellant to amend his Complaint to name each of the pseudonymous "John Does" and serve each new defendant within fifteen (15) days. Specifically, the Order provided:

> "IT IS THEREFORE ORDERED each John Doe referenced in the complaint shall be specifically named and served. This court allows the Appellant 15 days to appropriately amend the pleadings."

The trial court filed an Amended Order the next day; however, the Amended Order did not amend its ruling that Appellant specifically name and serve the pseudonymous John Does within fifteen (15) days. (ROA p. 6). Appellant did not file a motion to alter or amend the ruling.

---

[1] Respondents EOC and Barton incorporate by reference the Statement of the Case set forth in the Initial Brief of co-Respondents Cato Institute and Howard S. Rich to supplement the included Statement of the Case.

On November 19, 2018—four days after the 15-day deadline—Appellant filed his Amended Complaint naming Respondents EOC and Barton, along with others, as defendants. Appellant did not serve the Amended Complaint within the 15-day period. Respondents EOC and Barton accepted service of the Amended Summons and Complaint on December 14, 2018.[2] (ROA p. 176).

On December 28, 2018, EOC and Barton along with the other newly named defendants filed and served a Motions to Dismiss the Amended Complaint on several grounds. (ROA p. 198). The EOC and Barton supported its motion with a Memorandum of Law filed with the Court on February 6, 2019. (ROA p. 284).

On February 12, 2019, the trial court heard arguments on several motions to dismiss. At the hearing, the trial court found that pursuant to the trial court's previous order granting Appellant leave to amend, Appellant was required to both amend his Complaint and serve the additional defendants within fifteen (15) days, which he did not do. Therefore, Appellant failed to timely amend his pleadings. While, Respondents EOC and Barton in their Motion to Dismiss raised several arguments, the parties did not have the opportunity to present their arguments to the trial court during the hearing.

On February 19, 2019, the trial court issued an Order striking Appellant's Amended Complaint and dismissing the action with prejudice as to EOC and Barton, and each newly named defendant because Appellant had failed to comply with the trial court's previous order to serve the new defendants within 15 days. (ROA p. 10). On March 6, 2019, Appellant filed a motion to alter and/or amend the trial court's order dismissing the newly named defendants with prejudice. By

[2] Appellant attempted to serve Respondents EOC and Barton by certified mail on November 30, 2018—outside of the 15-day period; however, such service was not effective pursuant to Rule 4(d)(5), SCRCP.

order filed March 27, 2019, the trial court denied Appellant's motion to alter and/or amend. (ROA p. 14). Appellant now appeals.

STATEMENT OF FACTS ALLEGED AGAINST EOC AND BARTON

Appellant's Amended Complaint generally alleges causes of action for (1) defamation per se and per quod; (2) defamation by innuendo; (3) invasion of privacy; (4) negligence; (5) intentional infliction of emotional distress; (6) tortious interference with prospective contractual relations; (7) unfair trade practices; (8) pierce the corporate veil; and (9) conspiracy against EOC and Barton.

As alleged by Appellant, Respondent EOC is a governmental agency for the State of South Carolina. (ROA p. 31, ¶ 18). Respondent Barton is the Executive Director for the EOC and held this same position at all times relevant to this action. (ROA p. 31, ¶ 29). Appellant alleges that he is a founder of Palmetto Kids FIRST Scholarship Program, Inc. ("Palmetto Kids FIRST"), a nonprofit corporation incorporated in the State of South Carolina which engaged in the business of accepting donations, which were used to facilitate school choice for special needs children. (ROA p. 31, ¶ 44).

As alleged by Appellant, in the summer of 2013, the South Carolina Legislature passed a proviso to give tax credits to persons or organizations which donated to programs like Palmetto Kids FIRST. (ROA p. 31, ¶ 39). These tax credits were first authorized in 2014. *Id.* Pursuant to the proviso which created these tax credits, the legislature gave the EOC the responsibility of authorizing entities like Palmetto Kids FIRST (called "Scholarship Funding Organizations" or "SFOs") to begin accepting donations. (ROA p. 31, ¶ 39).

The crux of Appellant's specific allegations against Respondents EOC and Barton appear in Paragraph 52 of Appellant's Amended Complaint. Appellant alleges that in December of 2013,

Respondents listed Palmetto Kids FIRST as an approved SFO on the EOC website, but then removed Palmetto Kids FIRST from the website after Respondent Barton allegedly consulted with Respondent Neil Mellen. (ROA p. 31, ¶ 52). Appellant alleges that Palmetto Kids FIRST lost millions of dollars in donations as a result of its name being removed as an authorized SFO on January 1, 2014. (ROA p. 31, ¶ 60). Appellant further alleges that Palmetto Kids FIRST was placed back on the EOC website after pressure from the local news. (ROA p. 31, ¶ 56). Appellant does not asset any additional allegations against EOC and Barton.

STANDARD OF REVIEW

The trial court dismissed Appellant's claims for failure to comply with the Amended Order dated October 30, 2018. The interpretation of an order is a question of law that is reviewed *de novo*. Doe v. Bishop of Charleston, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014).

Further, the dismissal of Appellant's claims against EOC and Barton are supported by additional sustaining grounds. In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247-48 (2007). (citations omitted). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on the allegations set forth in the complaint. *Id.* Under Rule 12(b)(6), SCRCP, a Court should dismiss the complaint "if the facts alleged and inferences reasonably deductible therefrom, when viewed in the light most favorable to the plaintiff," would not entitle the plaintiff to relief on any theory. McNeil v. S.C. Dep't of Corr., 404 S.C. 186, 190-91, 743 S.E.2d 843, 846 (Ct. App. 2013). Whether a claim is dismissed with prejudice is governed by Rule 41(b), SCRCP and is within the discretion of the trial court. The decision of the trial court

will be reversed only for an abuse of discretion. See Berry v. McLeod, 328 S.C. 435, 449-50, 492 S.E.2d 794, 802 (Ct. App. 1997); Newman v. Old West, Inc., 286 S.C. 394, 334 S.E.2d 275 (1985).

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S CLAIMS AGAINST THE EOC AND BARTON WITH PREJUDICE BECAUSE APPELLANT FAILED TO SERVE RESPONDENTS WITH THE AMENDED COMPLAINT WITHIN 15-DAYS AS REQUIRED BY THE COURT'S PREVIOUS ORDER.

Respondents EOC and Barton hereby adopt and incorporate by reference and join in the arguments set forth in the Initial Brief of co-Respondents Cato Institute and Howard S. Rich, Section I, filed on October 7, 2019, and any other applicable arguments asserted by other co-Respondents. See Rule 208(b)(6), SCACR.

II. NOTWITHSTANDING APPELLANT'S FAILURE TO TIMELY SERVE RESPONDENTS WITH THE AMENDED COMPLAINT, APPELLANT'S CLAIMS AGAINST RESPONDENTS EOC AND BARTON SHOULD BE DISMISSED AS APPELLANT LACKS STANDING TO BRING THESE CLAIMS, SUCH CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS, AND APPELLANT HAS FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

Pursuant to South Carolina Appellate Court Rule 220(c), the appellate court may affirm "any ruling, order, decision or judgment upon any ground(s) appearing in the record on appeal." Rule 220(c), SCACR. A respondent, on appeal, may assert any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the trial court. I'on, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000); see also Sims v. Amisub of S.C., Inc., 408 S.C. 202, 214, 758 S.E.2d 187, 197 (Ct. App. 2014).

Here, while Respondents EOC and Barton raised several grounds for dismissal in their Motion to Dismiss, the trial court dismissed Appellant's claims against Respondents for failure to

timely serve the Amended Complaint as required by the trial court's previous. While the arguments were asserted in Respondents' Motion to Dismiss and supporting memorandum, Respondents EOC and Barton did not present their arguments to the court at the February 12, 2018, hearing. Nonetheless, this Court may affirm the trial court's dismissal on any ground appearing in the record. Potomac Leasing Co. v. Otts Mkt., Inc., 292 S.C. 603, 6060, 358 S.E.2d 154, 156 (Ct. App. 1987) (finding that the appellate court may affirm a trial court's decision on any ground in the record, thus, affirming the trial court's correct result even though it may have erred on some other ground); see also Fay v. Grand Strand Reg'l Med. Ctr., 412 S.C. 185, 195, 771 S.E.2d 639, 645 (Ct. App. 2015); Thomas v. 5 Star Transp., 412 S.C. 1, 16, 770 S.E.2d 183, 191 (Ct. App. 2015).

Thus, for the reasons set forth below, this Court should affirm the dismissal of Appellant's claims against Respondents EOC and Barton.

A. Appellant does not have standing to bring the present action against Respondents.

Appellant's actions against Respondents are subject to dismissal as all damages allegedly incurred as a result of Respondents' actions were sustained by Palmetto Kids FIRST, and not Appellant.

Standing to sue is a fundamental requirement in instituting an action. Blandon v. Coleman, 285 S.C. 472, 475, 330 S.E.2d 298, 299 (1985). As a general rule, to have standing, one must generally have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest. Evins v. Richland Cty. Historic Pres. Comm'n, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000). A shareholder may maintain an individual action against a third party for an injury if the shareholder can show that the wrongdoer owed him a special duty or that his injury is separate and

distinct from any damage suffered by the corporation. See generally Rice-Marko v. Wachovia Corp., 398 S.C. 301, 728 S.E.2d 61 (Ct. App. 2012).

As discussed above, Appellant's causes of action against Respondents emanate from the removal of Palmetto Kids FIRST as an approved SFO from the EOC website. (ROA p. 31, ¶ 52). As alleged by Appellant, Palmetto Kids FIRST lost donations during the time it was removed from the EOC website. *Id.* Conversely, Appellant does not assert that he, individually, was approved to accept donations as an SFO, nor does he assert he applied to become an authorized SFO.

Because Appellant has failed to allege how he, individually, incurred damages as a result of the alleged wrongful actions of Respondents or that the Respondents owed him a special duty distinct from that allegedly owed to Palmetto Kids FIRST, Appellant does not have standing to maintain any of his causes of action against Respondents.

B. Appellant's claims against Respondent EOC are barred by the applicable statute of limitations as set forth in the South Carolina Tort Claims Act.

South Carolina governmental entities may only be sued in tort pursuant to the terms of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* S.C. Code Ann. § 15-78-110 provides the applicable statute of limitations for actions brought pursuant to the Tort Claims Act. A claim is forever barred unless an action is commenced within two (2) years after the date the loss was or should have been discovered.[3] *Id.*

While Rule 8(c) lists statute of limitations as an affirmative defense, "[m]ost courts allow [affirmative] defenses to be raised in a motion to dismiss under Rule 12(b) 'when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the

[3] This two-year period can be extended to three years if a plaintiff has filed a "verified complaint" within one year following the injury. See S.C. Code Ann. §§ 15-78-80; 15-78-110; Pollard v. County of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).

face of the pleadings, and realistically nothing can be developed by pretrial discovery or a trial on the issue raised by the defense.'" Spence v. Spence, 368 S.C. 106, 124, 628 S.E.2d 869, 878 (2006) (quoting 5 Wright and Miller, Federal Practice and Procedure Civil 3d, § 1277 (2004)). As courts are required to base their 12(b)(6) rulings solely on allegations set forth in the complaint, an affirmative defense may be asserted in a 12(b)(6) motion to dismiss if the allegations of the complaint demonstrate the existence of the affirmative defense. Id. at 874. Because Respondent EOC is state agency, Appellant's Amended Complaint which alleges causes of action based in tort should have been brought within the two-year statute of limitations prescribed by the Tort Claims Act.[4]

Appellant's Amended Complaint only alleges acts by Respondent EOC which occurred in December of 2013 when Appellant's organization was removed from the EOC website as an approved SFO. Appellant's Amended Complaint was filed in November of 2018, approximately five years after the alleged wrongdoing. Because Appellant relies on conduct which occurred prior to November 2016 to support his claims against Respondent EOC, his Complaint is untimely and Respondent EOC is entitled to an order dismissing Appellant's claims brought against it.

C. Appellant has failed to bring his claims against Respondent Barton within any applicable statute of limitations period.

As outlined above, the only allegations against Respondent Barton in Appellant's Amended Complaint occurred in December of 2013, almost five years prior to the filing of Appellant's Amended Complaint first naming Respondent Barton. The longest statute of limitations period for any of Appellant's claims against Respondent Barton is three years. Because Appellant relies on conduct which occurred prior to November 2015 to support his claims against

[4] Because Appellant does not allege that he filed a "verified complaint" regarding his alleged claims, the three-year statute of limitations is inapplicable in this instance.

Respondent Barton, his Complaint is untimely, and Respondent Barton is entitled to an order dismissing Appellant's claims brought against her.

D. Alternatively, Appellant's claims against Respondent Barton should be dismissed as Appellant has failed to allege conduct by Respondent Barton which was outside the scope of her official duties or conduct which constituted actual fraud, actual malice, an intent to harm, or a crime involving moral turpitude.

Pursuant to the Tort Claims Act, an employee of a governmental entity who commits a tort while acting within the scope of her official duty is immunized from suit. S.C. Code Ann. § 15-78-70(a). Governmental employees may only be sued in their individual capacity if it is proven that the employee's conduct was not within the scope of her official duties or that the employee's conduct constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann. § 15-78-70(b).

As alleged by Appellant, Respondent Barton was the Executive Director for the EOC at all relevant times in this action; and, thus, a governmental employee as defined by the Tort Claims Act. (ROA p. 31, ¶ 29).

The acts allegedly committed by Respondent Barton were squarely within the scope of her employment, as these acts were in furtherance of her job duties. Specifically, the acts alleged by Respondent Barton were performed to carry out the responsibilities placed on the EOC by the legislative proviso outlined in Appellant's Amended Complaint. (ROA p. 31, ¶ 39). These duties involved implementing the process of authorizing SFOs to receive donations. See ROA p. 285, Exhibit A.[5]

[5] Pursuant to 2013-2014 General Appropriations Act 101, Section 1.85(G)(2)(a), the legislature granted Respondent EOC the responsibility of determining which nonprofit corporations were to appear on the EOC website as approved SFOs. In analyzing a 12(b)(6) motion, a court may consider documents incorporated into the complaint by reference as well as matters of which a

The conduct of Respondent Barton alleged by Appellant in his Amended Complaint were acts which carried out this approval process.

Because Appellant has failed to allege any conduct by Respondent Barton which was not within the scope of her official duties or that constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude, Respondent Barton should be dismissed as a party to this lawsuit.

E. Appellant has failed to allege a cause of action for defamation per se or defamation per quod against Respondents.

The Appellant in a defamation action must prove "1) a false and defamatory statement was made; 2) the unprivileged publication was made to a third party; 3) the publisher was at fault; and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." Paradis v. Charleston Cty. Sch. Dist., 424 S.C. 603, 609, 819 S.E.2d 147, 150 (Ct. App. 2018).

Appellant's Amended Complaint fails to allege any of the above elements against either Respondent. Specifically, Appellant has failed to allege any statement made by either Respondent about the Appellant which could be construed as defamatory. Appellant has failed to allege that any statement by either Respondent was unprivileged, nor has he set forth with any specificity what the alleged false statements were. These deficiencies entitle Respondents to an order of dismissal of Appellant's defamation claim. See generally, McNeil v. S.C. Dep't of Corr., 404 S.C. 186, 195, 743 S.E.2d 843, 848 (Ct. App. 2013); see also Odom v. CVS Caremark Corp., 2014 U.S. Dist. LEXIS 181471 No. 3:14-456-MGL-SVH *11 (finding that a Appellant must identify the

---

court may take judicial notice. Tellabs. Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). For these reasons, Respondents offer the proviso for the Court's consideration.

individual who made the false statement, the contents of such false statement, and to whom such statement was allegedly published).

Accordingly, Appellant's defamation claim against Respondents should be dismissed.

F. Appellant's action for defamation by innuendo is not a recognized cause of action.

In Appellant's original Complaint, he alleged a cause of action for "false light publicity." By way of his Amended Complaint, Appellant renamed this claim as "defamation by innuendo." Respondents assert that Appellant's restyled "false light" claim is unrecognized in South Carolina. See Brown v. Pearson, 326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct. App. 1997) (citing F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts 453 (1990)). Accordingly, Appellant's false light claim is subject to dismissal.

Notwithstanding the above, should Appellant's cause of action for defamation by innuendo be a recognized claim, Respondents assert that it is subsumed in his first cause of action which is subject to dismissal for all reasons previously stated.

G. Appellant has failed to plead facts sufficient to allege a cause of action for invasion of privacy.

For Appellant to succeed in his claim for invasion of privacy, he must demonstrate the 1) publicizing, 2) absent any waiver or privilege, 3) private matters in which the public has no legitimate concern, 4) so as to bring shame or humiliation to a person of ordinary sensibilities. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 478, 514 S.E.2d 126, 131 (1999).

Appellant's Amended Complaint fails to allege any conduct by Respondents which could be construed as meeting any of the above elements. As such, Respondents are entitled to an order of dismissal regarding Appellant's claim for invasion of privacy.

H. Appellant has failed to plead facts sufficient to allege a cause of action for negligence.

To establish a cause of action for negligence, an Appellant must prove the following three elements: 1) a duty owed by Respondent to Appellant; 2) breach of that duty by a negligent act or omission; and 3) damages proximately resulting from the breach. Shaw v. City of Charleston, 351 S.C. 32, 40, 567 S.E.2d 530, 534 (Ct. App. 2002). "An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the Respondent to the Appellant. Without a duty, there is no actionable negligence. The existence of a duty owed is a question of law for the courts." Doe v. Greenville County Sch. Dist., 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007).

Appellant's Amended Complaint fails to allege any facts which support his claim for negligence. Specifically, Appellant has failed to allege how Respondents owed Appellant, individually (and not Palmetto Kids FIRST), a legal duty which could serve as a basis for his negligence claim. As alleged by Appellant, Palmetto Kids FIRST was undergoing the SFO approval process, not Appellant. Consequently, any duty which may have arisen during the approval process would have been owed to Palmetto Kids FIRST alone.

As Appellant has failed to allege facts to support his claim for negligence, Respondents are entitled to an order of dismissal regarding this claim.

I. Appellant has failed to plead facts sufficient to support his cause of action for intentional infliction of emotional distress.

To establish the tort of intentional infliction of emotional distress or outrage, the Appellant must establish the following: 1) the Respondent intentionally or recklessly inflicted severe emotional distress, or knew that distress would probably result from his conduct; 2) the Respondent's conduct was so extreme and outrageous that it exceeded all possible bounds of decency and was furthermore atrocious, and utterly intolerable in a civilized community; 3) the

actions of the Respondent caused the Appellant's emotional distress; and 4) the emotional distress suffered by the Appellant was so severe that no reasonable person could be expected to endure it. Hainer v. Am. Med. Int'l, 320 S.C. 316, 324, 465 S.E.2d 112, 117 (Ct. App. 1995).

Appellant's Amended Complaint fails to allege any facts which support this claim. Specifically, Appellant has failed to allege any conduct by Respondents which was "so extreme and outrageous" as to exceed all possible bounds of decency. Due to Appellant's pleading deficiency regarding this cause of action, this claim is subject to dismissal.

J. Appellant has failed to plead facts sufficient to support a cause of action for tortious interference with prospective contractual relations.

To recover on a cause of action for intentional interference with prospective contractual relations, the Appellant must prove: 1) the Respondent intentionally interfered with the Appellant's potential contractual relations; 2) for an improper purpose or by improper methods; 3) causing injury to the Appellant. Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990). An appellant must demonstrate, at the outset, that he had a truly prospective contract with a third party by alleging some reasonable expectation of benefits from the alleged lost contract. United Educ. Distribs., L.L.C. v. Educ. Testing Serv., 350 S.C. 7, 15, 564 S.E.2d 324, 329 (Ct. App. 2002) (dismissing claim based on Appellant's failure to allege a reasonable probability of entering into a specific contract).

Appellant has failed to meet the first element in this cause of action as he does not allege that he, individually, was party to potential contractual relations; rather, Appellant's Amended Complaint asserts that Palmetto Kids FIRST engaged in potential contractual relations with potential donors.[6] (ROA p. 31, ¶ 60). Appellant has not alleged that he, individually, reasonably

[6] Because Appellant does not have standing to bring this cause of action, Respondents forego the opportunity to distinguish the concepts of a promise to make a charitable donation and the

expected to personally benefit from such pledges nor how he individually was injured. Instead, Appellant asserts that Palmetto Kids FIRST lost almost all of its previously pledged donations and the reasonably expected additional pledges. As previously discussed, assuming Respondents' conduct is actionable, Palmetto Kids FIRST, and not Appellant, is the true injured party.

Because Appellant has failed to allege how he was individually injured by the loss of donations to the organization, his claim for tortious interference is subject to dismissal.

K. Appellant's claim for civil conspiracy is subject to dismissal as Appellant has failed to allege that he incurred special damages.

Civil conspiracy is defined as 1) a combination of two or more persons, 2) for the purpose of injuring the Appellant, and 3) causing Appellant special damage. Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). "[B]ecause the quiddity of a civil conspiracy claim is the special damage resulting to the Appellant, the damages alleged must go beyond the damages alleged in other causes of action." *Id.* Similarly, Appellants are required to allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint. *Id.*

In the present case, Appellant has failed to allege how he incurred special damages beyond the damages alleged in his other causes of action. Further, as previously discussed, any damages which would have been suffered as a result of Respondents' acts were suffered by Palmetto Kids FIRST, and not Appellant. Additionally, Appellant failed to allege actions by the Respondents which are "separate and independent from other wrongful acts alleged in the complaint." *Id.* at 115. Instead, in support of his conspiracy claim, Appellant merely states,

---

formation of a binding contract. For the purposes of their Motion to Dismiss only, Respondents concede the pledged donations were potential contracts but preserve the argument for a later juncture in these proceedings if necessary.

"[d]efendants conspired and colluded together and amongst themselves to execute the above stated Cause of Action" indicating his reliance on acts which are the basis for his other causes of actions to support the claim, specifically the temporary removal of Palmetto Kids FIRST from the EOC's website. (ROA p. 31, ¶ 250). Consequently, Appellant's claim for civil conspiracy should be dismissed as to these Respondents.

L. Notwithstanding the above, Appellant's claims against Respondent EOC for defamation per se & per quod, defamation by innuendo, intentional infliction of emotional distress, tortious interference with prospective contractual relations, and civil conspiracy are subject to dismissal as these claims require a showing of conduct by an employee outside the scope of their employment or conduct which evidences actual malice or an intent to harm.

Appellant's claims against Respondent EOC for defamation per se and per quod, defamation by innuendo, intentional infliction of emotional distress, tortious interference with prospective contractual relations, and civil conspiracy are subject to dismissal as each of these claims involve conduct by an employee outside the scope of their employment or conduct which evidences actual malice or an intent to harm.

Pursuant to the Tort Claims Act, governmental entities cannot be held liable for "employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60(17). Accordingly, Respondent EOC is entitled to dismissal of these claims.

Intentional infliction of emotional distress requires a showing that an EOC employee "intentionally or recklessly inflicted severe emotional distress." Hainer, 320 S.C. at 324, 465 S.E.2d at 117. Additionally, the Tort Claims Act explicitly excludes intentional infliction of emotional distress as a recoverable loss. S.C. Code Ann. § 15-78-30(f). Tortious interference with prospective contractual relations requires a showing that an EOC employee "intentionally interfered with the Appellant's potential contractual relations" which caused "injury to the

Appellant." Crandall Corp., 302 S.C. at 266, 395 S.E.2d at 180. Civil conspiracy requires a showing that an EOC employee conspired with one or more other persons "for the purpose of injuring the Appellant." Hackworth, 385 S.C. at 115, 682 S.E.2d at 874. Lastly, in regard to Appellant's two defamation claims, Appellant alleges that Respondent EOC made defamatory statements "with malice and with the specific intent to harm" the Appellant. (ROA p. 31, ¶¶ 224, 227).

Because Appellant cannot succeed on these claims without proving conduct by an EOC employee which constitutes actual malice or which evidences an intent to harm, Respondent EOC cannot be held liable for these claims.

M. Appellant has failed to plead sufficient facts to support his cause of action for unfair trade practices.

Appellant's claims against Respondents for violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") should be dismissed as Respondents are immune from suit under the SCUPTA.

The SCUTPA declares as unlawful any unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. S.C. Code Ann. § 39-5-20(a). Persons aggrieved by an unfair trade practice may bring a civil action for damages pursuant to S.C. Code Ann. § 39-5-140(a). As defined by the SCUPTA, "trade" or "commerce" includes the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State. S.C. Code Ann. § 39-5-10(b).

Certain transactions, however, are exempt from the SCUPTA's provisions. Notably, the SCUPTA is inapplicable to actions or transactions permitted under laws administered by any

regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law. S.C. Code Ann. § 39-5-40(a).

Assuming Respondents were engaging in transactions, these transactions would be exempt from any action brought under the SCUPTA as Respondents are a State agency and its Executive Director, and therefore, are immune from claims brought under the SCUPTA. Further, as Respondents were not engaged in "trade" or "commerce" as defined by the SCUPTA, Respondents are not subject to suits brought pursuant to the SCUPTA.

Accordingly, Appellant's claims alleging violations of the SCUPTA are subject to dismissal.

N. Appellant's claim for piercing the corporate veil should be dismissed as Respondents do not possess a corporate form.

The remedy of piercing the corporate veil is administered by the court when the corporate form is used to protect fraud, justify wrong, or defeat public policy. See Sturkie v. Sifly, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984).

In the present case, Respondents do not possess a corporate form, but are a State agency and its executive director. As such, the remedy of piercing the corporate veil is inapplicable as to these Respondents.

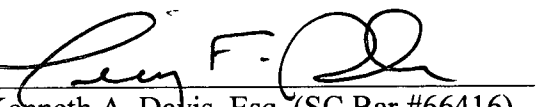
CONCLUSION

For the foregoing reasons, the Circuit Court's dismissal of Appellant's claims with prejudice against Respondent's EOC and Barton should be affirmed.

[SIGNATURE ON NEXT PAGE]

Respectfully Submitted,

BOYKIN & DAVIS, LLC

By: 

Kenneth A. Davis, Esq. (SC Bar #66416)
Tierney F. Dukes, Esq. (SC Bar #102035)

P.O. Box 11844
Columbia, South Carolina 29211
Telephone: 803-254-0707
Facsimile: 803-354-5609

Attorneys for Respondents Education Oversight Committee and Melanie Barton

March 18, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Doyet A. Early, Circuit Court Judge

C.A. No.: 2018-CP-40-02425
Appellate Case No.: 2019-000648

Jefferson Davis, Jr. .....Appellant,

v.

Ellen Weaver, Chad Connelly, Oran P. Smith, Neil J. Mellen, Howard S. Rich, Rick Reames, Stephen D. Kirkland, Palmetto Promise Institute, Palmetto Family Council, Palmetto Family Alliance, South Carolinians for Responsible Government, SCRG Foundation, Access Opportunity South Carolina, Friedman Foundation for Education Choice, Inc., Cato Institute, South Carolina Educational Credit for Exceptional Needs Children Fund, South Carolina Education Oversight Committee, South Carolina Department of Revenue, South Carolina Department of Labor, Licensing and Regulation, First Impressions, Inc., d/b/a Richard Quinn & Associates, First Tuesday Strategies, LLC, Bill Wilson, Jason Bedrick, Jim DeMint, Randy Page, Tony Denny, Phillip Cease, Melanie Barton, Doris Cubitt, Susan Thomas, John McCormick, Nate Leupp, Institute of Management Consultants USA and John Doe(s) 1-40.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent Respondents South Carolina Education Oversight Committee and Melanie Barton complies with Rule 211(b), SCACR.

BOYKIN & DAVIS, LLC

By: _____

Kenneth A. Davis, Esq. (SC Bar #66416)
Tierney F. Dukes, Esq. (SC Bar #102035)

220 Stoneridge Drive, Suite 100
Columbia, South Carolina 29210
(803) 254-0707

kdavis@boykinlawsc.com
tdukes@boykinlawsc.com

Attorneys for Respondents South Carolina Education Oversight Committee and Melanie Barton

March 18, 2020
Columbia, South Carolina