THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Circuit Court Judge Bentley Price

Case 2018-CP-10-00123
Appellate Case No. 2020-001460

Andrew HaLevi, Ph.D., Appellant,

vs.

Charleston County School District, Respondent.

REPLY BRIEF OF APPELLANT

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I. Did the Lower Court err in granting summary judgment on Appellant's defamation by *innuendo* cause of action?

Respondent's defamation by *innuendo* defense is predicated on a disputed issue of fact. Respondent states as fact in its Response that it followed its "normal protocol" when it placed Appellant on leave and in doing so precluded a finding of defamation by *innuendo*. Whether Respondent followed its "normal protocol" or not, is a disputed issue of fact. The Lower Court erred when it assumed Respondent followed its normal protocol in deciding as a matter of law that Appellant's defamation by *innuendo* cause of action failed.

Appellant presented facts from which a jury could conclude Respondent did not follow any established process when investigating the dress code incident and Appellant's actions. First, there is no evidence in the Record as to what Respondent's "normal protocol" is. At no point in this litigation has Respondent ever produced any written policy or document explaining what is the "normal protocol" for investigations. According to Appellant's supervisor, an investigation by the Employee Relations Office started on Monday after the incident. (R. pp. 362-363.) An "Internal Report of Investigation" was prepared by Will Suggs on April 29, 2016, five (5) work days after the investigation began. (R. pp. 127-130.) Appellant was handed a suspension letter before any questions were asked of him during an interview on April 25th and he testified the questions that were asked were not designed to obtain information from him regarding the context of the dress code incident or why he took the actions he did. (R. pp. 313-314.) Respondent named Appellant's replacement before Will Suggs' investigation was completed. (R. pp. 313-314, 330, 366-367.) Respondent did not follow its policy of transferring administrative staff by conference and written notice. (R. p. 397.) Respondent did not publicly support Appellant although it had publicly

supported a principal in a different school when there was a similar dress code incident. (R. p. 301.) Respondent applied an unofficial, draft grievance policy to Appellant. (R. pp. 408-409.) A jury could find based on these facts that Respondent did not follow its normal protocol and its actions subsequent to the dress code violation insinuated Appellant had done something wrong.

Further, it is for a jury to decide whether Respondent's actions and insinuations were false and malicious and whether the meaning or those actions and insinuations are plain. If there was no misconduct, as the South Carolina Department of Education found (R. pp. 413-425), then Respondent's actions and insinuations were false and a jury could find they were malicious.

II. **Did the Lower Court err in holding as a matter of law that Charleston County School District Board Member Chris Collins was not speaking in his official capacity when he made derogatory comments about Appellant?**

As Respondent points out, the Lower Court's holding that Mr. Collins' comments to the Post & Courier were not made in his official capacity was based on Mr. Collins' deposition testimony. Mr. Collins' deposition testimony establishes his lay opinion and does not determine as a matter of law whether or not his statements were made within or outside the scope of his official duties as Respondent's Board member. Further, Mr. Collins' deposition testimony contradicts his previous statements to the Post & Courier, where he was identified as a Board member and reported what action he thought (as a Board member) Respondent should take, and what he believed Respondent's Board would do regarding Appellant's employment. (R. p. 394.)

Mr. Collins testified he learned of the dress code incident from Respondent's Superintendent at a meeting held in executive session and he inferred the Superintendent thought Appellant had done something wrong. (R. pp. 500-501.) Mr. Collins did not know the student or her family. (R. pp. 499-500.) Clearly, Mr. Collins' involvement in the dress code issue was only

due to his position as a Board member. Further, Mr. Collins' testimony puts his credibility at issue, and the credibility of witnesses is an issue for a jury to determine, not a judge at the summary judgment stage. It was error for the Lower Court to decide disputed facts in favor of Respondent.

III. Did the Lower Court err in holding as a matter of law that Appellant was a "public official" for purposes of the defamation cause of action?

The Lower Court's holding that Appellant is a public official is based on a disputed issue of fact. Appellant was a program director, not a principal and this is a distinction that has a direct bearing on this case. The Lower Court ignored Appellant's deposition testimony in which he explained that Clark Academy was a "program" not a regular public school and he was the Program Director. The Lower Court also failed to properly consider Respondent's documents referring to Appellant as a program director and associate or assistant Principal. (R. pp. 278, 327, 342-343, 511-513.) Further, the Lower Court ignored an email sent to all program directors by Respondent's Executive Director of Human Resources, William Briggs, indicating program directors are considered on the same pay grade as assistant principals. (R. pp. 511-513.) The fact that a program director may be occasionally referred to as a principal, does not make the program director a principal or change his pay grade or his contract. There is ample evidence in the Record indicating program directors are on the same level as associate or assistant principals. The Lower Court erred in ignoring facts confirming Appellant was a program director and concluding as a matter of law that Appellant was a principal. (R. pp. 296, 298, 302, 305, 311, 314, 323.) As Appellant was a program director (which is on the same grade as an assistant or associate principal), per the holding in Goodwin v. Kennedy, 347 S.C. 30, 552 S.E.2d 312 (Ct. App. 2001), Appellant is not a public

official and, therefore, he did not need to prove actual malice to prevail on a defamation claim.[1]

IV. Did the Lower Court err in holding as a matter of law that statements of opinion cannot be defamatory?

In holding that Appellant was a public official, the Lower Court cited Reeves v. Foster, 200 So.2d 453, 456 (Miss. 1967) for the proposition that critical statements about a principal were "fair comment" under Mississippi law because a principal was a public official. (R. p. 21.) The Lower Court twice used the words "opined" to describe Mr. Collins' statements to the Post & Courier. (R. pp. 11-12.) Appellant's argument about opinion was made to emphasize that labeling a statement by a person who is not a public official as an opinion does not necessarily shield the statement from being found as defamatory. If Appellant is on the level of an assistant or associate principal, as Bill Briggs' email and Appellant's contracts state, then Mr. Collins' statements, even if they are his opinion, could still be found by a jury to be defamatory. Milkovich v. Lorain J. Co., 497 U.S. 1, 19, 110 S. Ct. 2695, 2706 (1990).

V. Did the Lower Court err in holding as a matter of law that Appellant could not bring a cause of action for violation of his due process rights?

Appellant did not specify in his Complaint whether his due process cause of action concerned a property interest or liberty interest, and he did not limit this cause of action to a property interest. (R. p. 42.) In fact, Appellant alleged in several paragraphs of his Complaint facts that support the deprivation of a liberty interest. (R. pp. 32-35, 41.)

[1] Additionally, Respondent misconstrues Appellant's distinction between common law malice and actual malice. Appellant is merely emphasizing that common law malice is presumed in defamation *per se* and, therefore, there is no need to prove actual malice. As there is no need to prove actual malice, the Tort Claims Act does not provide Respondent immunity for the defamatory statements Mr. Collins made to the Post & Courier regarding Appellant being unfit for his position.

Appellant outlined the deprivation of a property interest in his Response to Defendant's Motion for Summary Judgement only because that was the only interest Respondent addressed in Appellant's deposition. (R. pp. 90-92.) During oral argument at the Summary Judgment hearing, Appellant's counsel argued to the Lower Court that Appellant was also denied due process when he was deprived of a liberty issue. (R. pp. 589-90.) As there was argument was presented to the Lower Court that Appellant was deprived of a liberty interest, the Lower Court erred in limiting this cause of action to the deprivation of a property interest only and dismissing the due process claim.

VI. Did the Lower Court err in holding as a matter of law that Appellant could not bring a breach of covenant of good faith and fair dealing cause of action?

Appellant was under a continuing administrator's contract at the time he was placed on leave. (R. p. 343.) Appellant's employment contract altered his at-will status and contained a covenant of good faith and fair dealing. Shelton v. Oscar Mayer Foods Corp., 319 S.C. 851, 459 S.E.2d 851 (Ct. App. 1995), 481 S.E.2d 706 (1997). A breach of the covenant of good faith and fair dealing is a breach of the underlying contract. Rotec Servs. v. Encompass Servs., 359 S.C. 467, 471-472, 597 S.E.2d 881, 883-884 (Ct. App. 2004).

Appellant cited multiple facts in his Initial Brief on pages 19-20 from which a jury could conclude Respondent acted in bad faith and breached the covenant of good faith and fair dealing. Additionally, Respondent falsely reported to the press that Appellant had been reassigned when he had not. (R. p. 301.) Appellant eventually requested a teaching position only because Respondent refused to transfer him to any administrative position contrary to its own transfer policy. (R. pp. 296, 301-302.)

Finally, a South Carolina Department of Education (SCDE) Order is relevant to this cause

of action and the Lower Court erred in holding the SCDE Order was irrelevant on the basis that Appellant had testified in his deposition that he was not relying on that Order to support his defamation cause of action. The SCDE Report and Recommendations and Order may not be relevant to the defamation cause of action, but they are certainly relevant to Appellant's breach of the covenant of good faith and fair dealing cause of action as there was a finding that Appellant's actions during the dress code incident did not rise to the level of inappropriate or unprofessional conduct. The SCDE Order indicated, among other things, that Respondent's counsel participated in the hearing on the side of the Department of Education which was attempting to revoke Appellant's teaching license. This fact is certainly relevant to the issue of Respondent's motive.

Further, the Lower Court never ruled on Respondent's Motion in *Limine* regarding the use of the SCDE Order at trial. The Lower Court stated in a footnote in its Order that the Order was inadmissible based on the arguments in Defendant's Motion in *Limine*, but that Motion was not before the Lower Court; it was only Defendant's Motion for Summary Judgment that was noticed and argued on June 24, 2020. Appellant argued in its Response to Defendant's Motion in *Limine* that the Order was public record and admissible for several purposes. (R. pp. 68-70.) The Lower Court erred in holding that the SCDE Order was not relevant, as it is relevant as to motive.

CONCLUSION

Based on the foregoing facts and case law, Appellant Andrew HaLevi respectfully requests this Court reverse the Lower Court's grant of Summary Judgment with respect to all causes of action and remand the case for trial on all causes of action.

Respectfully Submitted,

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