THE STATE OF SOUTH CAROLINA
In the 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.

BRIEF OF APPELLANT

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II. STATEMENT OF THE CASE

Appellant filed a Complaint on January 11, 2018 alleging three (3) causes of actions against Respondent: defamation *per se*, violation of due process under the State Constitution, and breach of the covenant of good faith and fair dealing. (R. pp. 41-43.) On February 7, 2018, Respondent filed an Answer. (R. pp. 45-49.) On May 11, 2020, Respondent filed a Motion and Memorandum in Support of Summary Judgment. (R. pp. 71-259.) Appellant filed a Response to the Motion for Summary Judgment on June 3, 2020. (R. pp. 260-513.) Respondent filed a Reply to the Response on June 5, 2020. (R. pp. 514-535.)

On June 24, 2020, a hearing was held before Judge Bentley Price. (R. pp. 571-592.) On June 25, 2020, Judge Price issued a "Form 4" Order denying Respondent's Motion for Summary Judgment in its entirety. (R. pp. 3-5.) On July 6, 2020 Respondent filed a Rule 59 (e) Motion to Alter or Amend the Judgment of the Court (R. pp. 536-541.) Plaintiff filed a Response to the Motion to Amend or Alter on August 5, 2020. (R. pp. 542.) Respondent's Rule 59 (e) Motion was heard by Judge Price on September 23, 2020. (R. pp. 593-610.) On October 16, 2020, Judge Price issued an Order granting Respondent's Motion for Summary Judgment (R. pp. 6-28) and this appeal followed.

III. STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

IV. FACTS

Appellant obtained a B.A. in English from Skidmore College, a Masters in Reading and Language from Harvard, and started his Ph.D. in English and Education at the University of Michigan; Appellant's Ph.D. was awarded by the University of South Carolina after completion of his dissertation. (R. pp. 275-276.) Appellant was employed by Respondent from 1995 until 2017. (Id.) Appellant began employment with Respondent as an English teacher at Burke High

School from 1995-2006, during which time he was named Respondent's Teacher of the Year and served as a Teacher Specialist on Site for the S.C. State Department of Education. (Id.) In 2009, Appellant became the Program Coordinator (also referred to as Program Director) of Clark Academy, an alternative program for at-risk high school students.[1] (R. p. 278.) The position of Program Coordinator is classified by Respondent as on the level of Assistant Principal. (R. pp. 342-343, 511-513.)

On Thursday, April 21, 2016, Respondent's newly hired Superintendent, Dr. Postlewait, whom Appellant had never met, called Appellant out of a large staff meeting to ask him if he was involved with the Charleston Teacher Alliance (CTA) and why he appeared so uncomfortable when she was speaking earlier that day about her frustrations with that group. (R. pp. 329-330.) Appellant told Dr. Postlewait he had not been involved with that teachers' group since he had become an administrator ten (10) years earlier. (Id.)

A few days after this conversation, on Friday afternoon April 22, 2016, an incident involving a dress code violation occurred at Appellant's school. (R. pp. 286, 294.) Specifically, a student came to school in a dress that was too short and she refused to put medical scrub pants on under her dress, which was the usual solution to dress code violations at the school unless the student wanted to go home or have different clothes brought to school. (R. p. 327.) The student eventually agreed to wear the scrubs after being required to sit in the cafeteria and being told to do so by her mother. (R. pp. 327-328.)[2] Appellant told the student to return the scrubs to the office

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[1] The Order appealed from erroneously states on page 1 that Appellant was the former principal of Clark Academy. (R. p. 6.) Appellant was never a principal; he was an assistant principal. This fact is relevant to the determination as to whether Appellant was a public official under South Carolina law. See Argument 1.d. herein.

[2] Following a hearing pursuant to S.C. Code Ann. § 59-5-70 (B), a S.C. Department of Education hearing officer found as fact that the student was a significant offender, was verbally abusive, and had previous dress code violations. (R. p. 419.)

before she went home that day. (R. p. 328.) When Appellant learned that the student had not returned the scrub pants before leaving the school building, he sent a staff member to the bus to retrieve the scrubs. (Id.)

The staff member reported that the student refused to return the scrubs so Appellant went to the bus, boarded it and asked the student, who was seated in the back of the bus, to come to the front of the bus to talk to him. (R. p. 306.) When the student refused to come to the front of the bus to talk to Appellant and started cursing, Appellant told the student he was not going to let the bus leave until she gave him the scrubs; the student then threw the scrubs to the front of the bus. (Id.)

Unbeknownst to Appellant, the student had switched clothes with another student at the end of the day so instead of going home in the dress she had worn to school, she was wearing a jacket and shirt over the loaned scrub pants when she got on her bus. (R. p. 308.) When Appellant got off the bus with the scrubs the student had thrown at him, he had no idea the student was not wearing the same dress on the bus that she had worn to school. (R. pp. 308, 328.) Appellant was standing near the bus when the student rolled the bus window down and told him she was sitting in her panties. (R. p. 328.) Appellant immediately sent a female staff member to the bus to return the scrubs to the student and remove her from the bus.[3] (R. pp. 308-309.)

Appellant was almost immediately placed on administrative leave "pending an investigation" due to his handling of the dress code incident and allegedly for two (2) other issues, which two (2) additional issues Respondent later admitted had no basis in fact. (R. pp. 295-296,

[3] There are material issues of fact regarding the dress code incident; specifically, the student's and Appellant's statements and interactions prior to, during, and after the student boarded the school bus on April 22, 2016 and whether Appellant's actions as Assistant Principal were appropriate. (See, e.g., R. pp. 307-309, 327-330, 427-430, 440-446, 415-420, 451-492.)

327-329, 334-335, 337-340, 357, 376-377.) At the time, Appellant was employed under an annual administrator's contract which ran through the academic year 2016-2017. (R. p. 343.)

Appellant's supervisor Jennifer Coker told Appellant the administrative leave would likely only be for two (2) days and that she was placing him on leave primarily based on social media posts made by the uncle of the student involved in the dress code incident. (R. pp. 330, 347-348.) When Ms. Coker placed Appellant on leave after the incident, she had only been his supervisor for about three (3) months and she had no information other than she had been told by another of Respondent's employees that the police were investigating the incident. (R. pp. 356-357, 362-364.)

Appellant objected to being placed on leave as he knew his sudden absence from Clark Academy would make it appear that he had done something improper. (R. p. 330.) Jennifer Coker started and completed her "investigation" within a week without speaking to the student involved in the dress code incident.[4] (R. pp. 302, 334-335, 362-365.)

On April 26, 2016, *The Post and Courier* published two (2) articles about the incident with Appellant's photograph and reported twice that Respondent had no comment. (R. pp. 383-388.) Previously, Respondent had responded to dress code violation issues by defending its administrators. (R. p. 301.) For instance, when there was a dress code violation at Moultrie Middle

[4] There are material issues of fact regarding Respondent's motives and good faith when it removed Appellant so quickly as Program Director at Clark Academy. For instance, whether it was relevant that Dr. Postlewait singled Appellant out in a meeting the day before he was placed on administrative leave after falsely identifying him as being involved with a teachers' group she criticized (R. p. 330); why Respondent decided so quickly that Appellant had mishandled the dress code incident and failed to defer to his judgment regarding this disciplinary issue (Id., R. pp. 362-365, 371); why two (2) of the allegations made against Appellant allegedly justifying his immediate removal were never mentioned prior to the dress code incident and then were dropped by Respondent (R. pp. 334-335, 337-340, 357, 362-365, 371, 376-377); why Appellant's successor was hired within a matter of days; why Ms. English-Watson stated Ms. Coker decided to remove Appellant from his administrative position although Ms. Coker denied that she made this decision (R. pp. 161-162, 369-370); and why Respondent failed to follow its written policy regarding the transfer of administrators. (R. pp. 396-397.)

School, Respondent actively provided information to the newspaper and stated it had confidence in the principal of that school. (R. pp. 301, 320.) Although Respondent had worked cooperatively and collaboratively with principals before and had assumed their disciplinary actions were appropriate, in this case Respondent did not defend Appellant. (R. p. 301.)

On Wednesday, April 27, 2016, only three (3) days into Jennifer Coker's investigation, Appellant was notified by several co-workers that another assistant principal had introduced himself to the students at Clark as "the Program Director for the remainder of the year" and told them that "things had been done wrong around here for a long time." (R. p. 302.) On Friday, April 29, 2016, Appellant was approached by a neighbor, who told him that an assistant principal at Burke High School sent an e-mail to the Burke faculty saying farewell as she had been asked to be the Interim Program Director of Clark through the end of the year. (Id.)

On May 1, 2016, Appellant sent an e-mail to Dr. Postlewait and other District administrators with an advanced copy of an Op-Ed that he had written regarding the Post and Courier's coverage of the disciplinary incident, requesting Respondent provide correct information to the public. (R. pp. 390-392.) When Ms. Coker learned about Appellant's letter to the editor, Appellant testified that Ms. Coker told a colleague of his, "Things are going to get much worse for Andrew in the District," although Ms. Coker testified, she did not recall saying that. (R. pp. 320, 367.)

On May 3, 2016, Appellant met with administrators Michele English-Watson, Jennifer Coker, and Will Suggs. Ms. English-Watson gave Appellant a letter notifying him that he was being removed from his position as Program Director at Clark Academy due to: 1) contract issuance problems (which Ms. Coker later testified at her deposition had been resolved prior to the dress code incident) (R. pp. 282-283, 301-302); 2) concerns about Appellant's leadership (which had ever been communicated to Appellant); and 3) failure to handle a dress code incident properly.

(R. pp. 334-335.) Appellant was told that he would remain on paid administrative leave, that he needed to be ready to report to a new work assignment at any time, and that he could not appeal. (R. p. 330.) Respondent's Transfer of Administrative policy states, "employees affected by a transfer shall be advised in a conference, followed by written notice, of the new assignment." (R. p. 397)[5]

On May 4, 2016, Respondent's Board Member Chris Collins, without talking to Appellant or knowing any of the details of the dress code incident, based only on what he inferred from comments made to him by Dr. Postlewait, told the Chronicle newspaper that he thought Appellant should be fired due to how he handled the dress code incident. (R. pp. 394, 499, 501-509.) Appellant was never fired but he was also never transferred to a different administrative position.

Throughout the summer of 2016, Appellant waited to be informed of his new administrative assignment but he never received a call, letter or other indication as to where Respondent was planning to transfer him. (R. pp. 301-302.) In July 2016, Respondent falsely stated to the Post & Courier that Appellant had been reassigned, although a month later in August there were still no plans to reassign Appellant to a different administrative position. (R. pp. 296, 301-302, 396-397.)

In July 2016, one week prior to the start of the 2016-17 school year, Appellant was called to a meeting with Terri Nichols. Appellant asked directly about his administrative transfer and was told by Ms. Nichols that she had no information about his transfer. (R. pp. 324, 399.) Appellant was concerned about the damage to his professional reputation from remaining out of work for so long so he offered to work as a teacher and he was assigned to teach English at Stall High School. (R. pp. 324, 330.)

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[5] Why Appellant was never transferred is an issue of fact relevant to Appellant's defamation and breach of the covenant of good faith and fair dealing causes of action.

Appellant filed a grievance per Respondent's grievance policy against Jennifer Coker, Michele English-Watson, Dr. Postlewait, and Chris Collins in August of 2016 due to their refusal to transfer him to a different administrative position. (R. pp. 296-299, 401.) Six (6) weeks after Appellant submitted his grievance, on October 18, 2016, Respondent's Board Chair told Appellant that she was returning his grievance because the policy "requires that you start with your immediate supervisor and work your way up the chain of command." (R. p. 403.) Three (3) of the four (4) people Appellant had filed a grievance against were decisions-makers in his grievance process. On October 31, 2016, Appellant requested a copy of the written procedures regarding the grievance process from Respondent's attorney John Emerson. (R. pp. 405-406.) On November 15, 2016, Appellant received a letter from a different attorney working for Respondent that contained a different employee grievance process Appellant was told he had to follow. (R. pp. 408-411.) Appellant was told in the letter that the new grievance procedures "have not been submitted in final form to the Superintendent" but that "Dr. Postlewait has reviewed the procedures and maintains a copy in her office."[6] (R. p. 408.)

On November 28, 2016, three (3) months after his original grievance was submitted, Appellant was asked to present his grievance in a meeting to Ms. Coker, his immediate supervisor, and then in a meeting with his next immediate supervisor, English-Watson. (R. pp. 296-299.) Appellant was next told to meet with Dr. Harrison, who was not involved in any of the decisions regarding Appellant's failure to be transferred. (Id.) On March 8, 2017, Appellant formally

[6] Why Respondent required Appellant to use an unapproved grievance procedure rather than the published and approved grievance procedure is an issue of material fact relevant to Appellant's due process cause of action as the approved grievance had administrative procedures whereas the unapproved policy did not. The decision to change grievance policies allowed Appellant's grievance to drag on and on. Further, the first grievance policy allowed a hearing before the full Board whereas the second grievance policy made the Superintendent the final decisionmaker. (R. pp. 401, 408-411.)

appealed to Dr. Postlewait (the third person who was the subject of his grievance.) (Id.) On May 17, 2017, Appellant notified Dr. Postlewait that he wanted a hearing before the full Board. (R. pp. 321-322.) Appellant never received a grievance hearing before the Board. (Id.)[7]

The S.C. Department of Education investigated Appellant's handling of the dress code violation in order to determine whether or not to remove his teacher's license. (R. pp. 413-420.) The hearing officer issued a Report and Recommendation finding, "[Appellant's] judgment in demanding the return of the scrubs without knowing with certainty how the student was attired was flawed. However, such does not rise to the level of inappropriate or unprofessional conduct." (R. p. 420.) Respondent was represented at the hearing by legal staff who argued against Appellant's interests (R. pp. 413-420) and the S.C. Department of Education's determination that Appellant had acted properly during the dress code incident was never communicated to Respondent's Board. (R. pp. 506-507).

V. LEGAL ARGUMENTS

1. Appellant presented sufficient evidence from which a jury could find he was defamed.

a. The Lower Court erred in granting summary judgment on Appellant's defamation by *innuendo* cause of action as a jury could find Respondent's placement of Appellant on leave and its subsequent failure to transfer him or defend his actions as Program Director plainly meant Respondent believed Appellant was unfit for his job.

The Lower Court held the facts in this case were similar to the facts in Fountain v. First Reliance Bank and Respondent's conduct fell short of establishing an implied defamatory meaning. (R. pp. 15-16.) Conduct and insinuations can be defamatory. "To render the defamatory

[7] Why Appellant was refused a full hearing before Respondent's Board is also in dispute and relevant to Respondent's motives.

statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain." Tyler v. Macks Stores of S.C., Inc., 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980) (quoting Timmons v. News & Press, Inc., 232 S.C. 639, 644, 103 S.E.2d 277, 280 (1958)). In Fountain v. First Reliance Bank, 398 S.C. 434, 441–42, 730 S.E.2d 305, 309 (2012), the Supreme Court quoted the Tyler case:

> The plaintiff contends that his discharge, following the giving of a polygraph test and the immediate firing of the manager thereafter, gave fellow employees and others the feeling and belief that he had been discharged for some wrongful activity. He concludes that this insinuation and inference of wrongdoing can amount to the publication of defamatory matter. It is established that **a defamatory insinuation may be made by actions or conduct as well as by word**. 50 Am. Jur.2d Libel and Slander, Section 26, page 539.

275 S.C. at 458, 272 S.E.2d at 634 (emphasis added).

A jury could find that Respondent's actions clearly inferred that Appellant was unfit for his job. Specifically, Respondent's decision to treat Appellant's dress code incident differently than it had other administrators' dress code incidents by not defending him in the press; its immediate removal of Appellant as Program Director before giving him the chance to explain his actions and before the investigation was complete; its creation of two (2) false reasons to support removing Appellant from his job; and its refusal to ever transfer Appellant to an administrative position, are all actions from which a jury could find that Respondent communicated its belief that Appellant was not fit for his position, and support a defamation by *innuendo* cause of action. There was certainly a scintilla of evidence from which a jury could have found Respondent's actions defamed Appellant. Therefore, the Lower Court's holding Respondent's conduct fell short of establishing a defamatory meaning was erroneous and should be reversed.

b. Respondent is liable for Board Member Chris Collins' statements under the Tort Claims Act as there was ample evidence from which a jury could find Collins was speaking in his official capacity, and as malice is presumed in defamation *per se*, Appellant's defamation cause of action is not barred by the Tort Claims Act.

The Tort Claims Act provides immunity to a governmental entity such as Respondent for losses resulting from an employee acting outside the scope of his official duties and when an employee acts with actual malice. S.C. Code Ann. § 58-78-60 (17). Despite the fact that there was ample evidence that Chris Collins' defamatory statements were made in his official capacity as one of Respondent's board member, the Lower Court erroneously ignored or discounted this evidence and held that because Collins stated in his deposition he was not acting as CCSD's agent when he made statements to the newspaper, he was therefore, acting outside the scope of his official duties. (R. p. 19.) Chris Collins' opinion regarding his authority to make statements months after the statements were made is irrelevant as at the time the statements were made, it was clear Collins was making the statements in his official capacity as a board member. The newspaper article containing Collins' defamatory statements identified Collins as one of Respondent's board members and Collins published what action he believed Respondent's board should take - specifically, fire the Appellant. (R. p. 394.) Collins mentioned Respondent specifically in his statement, "I think he should be fired, but I don't think there is board support to do that." (Id.) Nothing in this statement indicated Collins was speaking in any capacity other than officially in his capacity as Respondent's board member.

Collins testified in his deposition he never met or spoke to Appellant and he knew nothing about Appellant's teaching or administrative background; he was just repeating what he had inferred from Respondent's Superintendent's report to Respondent's Board - that Appellant had done something bad. (R. pp. 499-503, 508.) Additionally, Collins testified in his deposition that

board members often went to the Superintendent to ask that someone be fired. (R. p. 503.) This statement is further evidence that Collins' statements about Appellant were made in his official capacity. There were sufficient facts to establish Collins' statements were made based on his official position and were not, therefore, personal statements. The lower court erred by concluding as a matter of law that Collins' statements were not made in his official capacity.

Additionally, the Tort Claims Act does not bar Appellant's defamation cause of action, as malice is presumed in defamation *per se*. Castine v Castine, 403 S.C. 259, 743 S.E.2d 93 (Ct. App. 2013). Here, malice is presumed in Appellant's cause of action for defamation *per se* because Collins' statement that Appellant should be fired charged Plaintiff with being unfit for his job. Fountain v. First Reliance Bank, 398 S.C. 434, 442, 730 S.E.2d 305, 309 (2012) (quoting Goodwin v. Kennedy, 347 S.C. 30, 36, 552 S.E.2d 319, 322–23 (Ct. App. 2001)). As Plaintiff does not have to prove "actual" malice because it is presumed, his defamation *per se* cause of action is not barred by the Tort Claims Act under S.C. Code Ann. § 58-78-60 (17).

c. The Lower Court erred in finding Appellant was a "public official" for purposes of his defamation cause of action, as in the Charleston County School District a program director is not a principal; a program director is a position equal in pay and grade to that of an assistant principal.

Respondent's argument that Appellant was a public official because he was a Principal and, thus, must prove actual malice, fails as Appellant was never a Principal, he was always on the same level as an Assistant Principal as he was a Program Coordinator (Program Director.) Appellant's title as Program Director was acknowledged repeatedly by Respondent as well as by Appellant during Appellant's deposition. (R. pp. 293, 296, 298, 300, 302, 305, 311, 314.) A Program Director is a position equal in grade and pay to that of an Assistant or Associate Principal in Charleston County. (R. pp. 511-513.) Plaintiff's contract states he is an Assistant Principal. (R.

p. 343.) Further, Respondent admits there is no South Carolina case that holds a principal is a public official. (R. p. 80.)[8]

Current South Carolina case law holds that assistant principals are not public officials. "[Plaintiff] was an assistant principal whose duties included ninth-grade discipline. In the context of this case, we believe [he] was not a public official. His position as assistant principal is not one "among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Goodwin v. Kennedy, 347 S.C. 30, 45, 552 S.E.2d 319, 327 (Ct. App. 2001) (quoting Rosenblatt v. Baer, 383 U.S. 75, 85, 86 S. Ct. 669, (1966)). As the evidence indicates Appellant was an assistant principal and South Carolina law holds assistant principals are not public officials, the Lower Court erred in finding as a matter of law that Appellant was a public official so Appellant had to prove malice. (R. p. 22.)

d. The Lower Court erred in finding as a matter of law that because Chris Collins' statements were about a public official, his statements were fair comment and, therefore, not defamatory.

There is no constitutional value in false statements of fact. Gertz v. Welch, 418 U.S. 323, 339-40, 94 S. Ct. 2997 (1974). Therefore, an expression of opinion by a private citizen that conveys

[8] Many other states have held that principals are not public officials. See, e.g., Ellerbee v. Mills, 422 S.E.2d 539 (Ga. 1992) (a high school principal is not a public official as they are removed from the general conduct of government and are not policy makers); Richmond Newspapers, Inc. v. Lipscomb, 362 S.E.2d 32 (Va. 1987), cert denied, 486 U.S. 1023, 108 S. Ct. 1997 (1988) (public high school teacher was not a public official as he did not influence or control any public affairs or school policy); McCutcheon v. Moran, 425 N.E.2d 1130 (Ill. App. Ct. 1981) (relationship a public school teacher or principal has with the conduct of government is far too remote to justify a qualifiedly privileged assault upon their reputation.) Franklin v. Benevolent etc. Order of Elks, 97 Cal. App. 3d 919 (1979) (public high school teachers are not public officials). As this issue has not been decided in South Carolina, the Lower Court erred in finding as a matter of law that Appellant was a public official.

a false and defamatory statement of fact can be actionable. "It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Milkovich v. Lorain J. Co., 497 U.S. 1, 19, 110 S. Ct. 2695, 2706 (1990) (noting "a wholesale defamation exemption" was not created "for anything that might be labeled 'opinion'" because "it would ... ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact") (internal citations omitted.)

The lower court erred in holding any criticism of Appellant's conduct was protected fair comment. (R. pp. 21-22.) The lower court erroneously found Appellant was a principal (Id.), and then applied the fair comment exception to him based on cases from other states that held principals were public officials. As explained above, that is not the law in this State.

Further, the reference to "opinion" in dictum in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340, 94 S. Ct. 2997, 3006-3007(1974), did not create a wholesale defamation exemption for opinion. "Read in context, the Gertz dictum is merely a reiteration of Justice Holmes' 'marketplace of ideas' concept... Simply couching a statement- 'Jones is a liar'-in terms of opinion- 'In my opinion Jones is a liar'—does not dispel the factual implications contained in the statement." Milkovich v. Lorain J. Co., supra, 497 U.S. at 2, 110 S. Ct. at 2697 (1990) (internal citations omitted).

Here, Collins' statements contained assertions of fact that are disputed and which a jury could find were false. Specifically, Collins stated, "[Appellant] should have known whether the child was wearing a dress"; [Appellant] should not have demanded she take off the pants while on the bus"; and "You don't embarrass a child or cause her to be exposed in front of other students." (R. p. 394.) These facts were disputed; specifically, Appellant testified he asked the student to come to the front of the bus and she refused; he saw her several times during the day wearing the scrubs under the same dress she came to school in and he could not see what she was wearing on

the bus as she was seated in the back and he was standing in the front; he tried not to embarrass her by asking her only to come to the front of the bus so he could talk to her; and he did not demand the student take her pants off or expose herself in front of other students. (R. pp. 327-329.)

Although the burden is on a plaintiff to show that false connotations in statements of opinion involve some level of fault, fault is a factual issue. A jury could find that Collins was at fault for making statements about matters of which he admitted in his deposition he had no independent knowledge.

Additionally, in this case, the S.C. Department of Education subsequently found that Appellant had acted appropriately towards the student in the dress code incident. Any legal determination regarding whether Collins' statement implied objective facts about Appellant necessarily requires a judge to weigh evidence and make determinations of credibility. Hunt v. Cromartie, 526 U.S. 541, 549, 551-52, 119 S. Ct. 1545, 1551-52 (1999). For these reasons the Lower Court erred in finding as a matter of law that Collins' statement was not defamatory merely because it represented his opinion- an opinion that a jury could find contained false statements of fact.

2. The Lower Court erred in finding as a matter of law that Appellant could not bring a cause of action for violation of his due process rights as Appellant was denied the right to grieve his removal as Program Director in a timely manner and he was denied a hearing before Respondent's Board, which he contends ultimately resulted in the loss of his administrator position and made him unemployable.

The Lower Court erred in relying on two federal cases in which the Fourth Circuit Court of Appeals held that because a plaintiff remained employed, he could not claim he was unemployable and thus had suffered loss of a liberty interest[9], and that a different plaintiff's poor

[9] Foreman v. Griffith, 81 Fed. App'x 432, 439-440 (4th Cir. 2003).

chance for career advancement was not due to statements made about him by his employer.[10] These two federal cases are differentiated factually and are not determinative of whether or not Appellant was unemployable due to Respondent's actions. For instance, the case of Johnson v. Morris, cited by the lower court, is not on point as in that case, the plaintiff was charged with bribery, terminated, and then given several opportunities to rebut the charges. Here, Appellant was placed on administrative leave for months and not given any chance to present his grievance to the Board. Appellant testified in his deposition that as the result of Respondent's failure to give him a meaningful opportunity to be heard, he had to leave the country to find a job. (R. p. 331.)

The U.S. Constitution and South Carolina Constitution both mandate that no person shall "be deprived of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. An essential part of due process is a party's right to notice and opportunity to be heard, which "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. St. 1187 (1965); See also, Weaver v. S.C. Coastal Council, 309 S.C. 368, 373-374, 423 S.E.2d 340, 343 (1992) (denial of respondent's permit was a violation of her equal protection *and due process rights under the federal and state constitutions* as Council's decision was based upon matters not properly before the agency) (emphasis added).

Appellant has a liberty interest in his good name and reputation. The Supreme Court has acknowledged that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573, 92 S. Ct. 2701, 2707 (1972) (internal quotations omitted) "The purpose of such notice and hearing is to provide the person an opportunity to clear his name." Id. 408 U.S. at 573 n. 12, 92 S. Ct. at 2707 n. 12. The

[10] Johnson v. Morris, 903 F.2d 996, 999-1000 (4th Cir. 1990).

interest protected is "not to remain employed ... but ... merely to 'clear [one's] name' against unfounded charges." Boston v. Webb, 783 F.2d 1163, 1167 (4th Cir.1986). Respondent's refusal to give Appellant a hearing before the full Board meant Appellant had no opportunity to clear his name.

Appellant presented evidence from which a jury could conclude Appellant was denied substantive due process. The grievance policy in existence when Appellant first filed a grievance in August of 2016 established a procedure for the "expeditious resolution of employee concerns" and stated it was "important that grievances be settled as quickly as possible. (R. p. 401.) The policy provided for an appeal to the Board. (Id.) In fact, in October, Respondent's Board Chair sent Appellant a letter stating he could not appeal directly to the Board and he would have to start the grievance process over beginning with his immediate supervisor.

After months of Respondent refusing to follow its Transfer of Administrative Staff policy and Appellant being without any administrative job, Appellant was then told in November he should follow a draft grievance policy which did not provide for a hearing before the full Board. (R. pp. 408-409.) "The grievance may be appealed through each supervisory or administrative level *to the Superintendent's level.*" (Id., emphasis added.) It was unclear why Appellant was required to use the draft grievance policy seven (7) months after he was removed as Program Director; a jury could find that the reason for the late policy change was to prevent Appellant from presenting his case to Respondent's Board. Clearly, there are issues of fact relating to the fairness of Respondent's grievance process, whether Appellant was given a meaningful opportunity to clear his name, and whether he was unemployable as the result of Respondent's actions.

3. The Lower Court erred in finding as a matter of law that Appellant could not bring a breach of covenant of good faith and fair dealing cause of action as there was a contract between the parties that was breached, and whether Respondent acted with good faith and dealt fairly with Appellant is an issue of fact.

The Lower Court granted Respondent's Motion for Summary Judgement in regards to the cause of action for breach of the covenant of good faith and fair dealing based on the Court's determination that there was no breach of Appellant's administrator contract. (R. pp. 26-27.) In fact, the contract incorporated Respondent's policies (R. p. 343) and Appellant produced evidence from which a jury could have found Respondent failed to follow those policies.

A covenant of good faith and fair dealing is implied in employment contracts in South Carolina. Shelton v. Oscar Mayer Foods Corp, 459 S.E. 2d 851 (Ct. App. 1995), 481 S.E.2d 706 (1997) and Commercial Credit Corp. v. Nelson Motors, Inc., 147 S.E.2d 481 (1966) (the covenant of good faith and fair dealing is merely another term of the contract at issue). Appellant did not plead a separate breach of contract cause of action so the covenant of good faith and fair dealing is not subsumed in any other contract cause of action.

The South Carolina Court of Appeals, in Shelton v. Oscar Mayer Foods Corp., 459 S.E.21d at 857 (Ct. App. 1995), recognized the covenant of good faith and fair dealing is implied in employment contracts that alter the at-will employment status. Appellant was not an employee at will; it is undisputed that he had a continuing annual contract with Respondent as a certified administrator. (R. p. 343.) Thus, the covenant was implied in his contract.

Appellant's contract stated Appellant's employment was subject "to the conditions contained in the policies and procedures of the Charleston County School District." (Id.) Contrary to Respondent's contention that Respondent did nothing other than what it was authorized to do (R. p. 85), Respondent failed repeatedly to follow its own policies which it was required to do by

contract. The following material issues of fact are evidence from which a jury could conclude Respondent breached the covenant of good faith and fair dealing contained in Appellant's administrator's contract by failing to apply the following policies to him:

a. Respondent's failure to defer to Appellant as Program Director of Clark Academy regarding disciplinary issues[11] (R. p. 370);

b. Respondent's inadequate investigation and its removal of Appellant as Program Director (R. pp. 148-149, 153, 362-365, 371);

c. Respondent's failure to follow its Transfer of Administrative Staff policy (R. p. 397);

d. Respondent's attendance at the S.C. Department of Education hearing on behalf of Respondent when it was not the party filing a complaint with the Department of Education against Appellant (R. pp. 413-420);

e. Respondent's voluntary participation in a proceeding that could have resulted in the revocation of Appellant's teaching license (Id.); and

f. Respondent's decision to apply an unapproved and draft grievance policy to Appellant. (R. pp. 401, 408-411.)

Additionally, why Respondent was represented by legal staff who argued against Appellant's interests at the hearing (R. pp. 413, 415-416) and why the S.C. Department of Education's Order finding Appellant had acted properly during the dress code incident was never communicated to Respondent's Board, are material facts relevant to the issues of whether the duty of good faith and fair dealing was breached. As there are material facts as to whether Respondent breached the implied duty of good faith and fair dealing in Appellant's administrator's contract

[11] Principals (or Program Directors) are the persons charged with disciplining students in the Charleston County School District.

when it failed to follow so many of its own policies and did not deal with Appellant fairly, the Lower Court erred in granting summary judgment as to this cause of action.

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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Dated: June 18, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Circuit Court Judge Bentley Price

Case 2018-CP-10-00123

Andrew HaLevi, Ph.D., Appellant,

vs.

Charleston County School District, Respondent.

CERTIFICATION OF COUNSEL AND CERTIFICATION OF COMPLIANCE WITH SCACR, Rule 211 (b)

I, Nancy Bloodgood, Esquire, hereby certify, pursuant to Rule 211 (b) of the South Carolina Appellate Court Rules, that Appellants' final briefs are identical to the briefs previously served under SCACR, Rule 208 except for revised references to the Record and the correction of typographical errors. No other changes have been made.

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