RECEIVED
Jul 01 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Bentley Price, Circuit Court Judge

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

Andrew Halevi, Ph.D.,

Appellant,

v.

Charleston County School District,

Respondent.

FINAL BRIEF OF RESPONDENT

RICHARDSON PLOWDEN & ROBINSON, P.A.

Eugene H. Matthews
Post Office Drawer 7788
Columbia, South Carolina 29202
T: (803) 771-4400
F: (803) 779-0016

Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES .... ii, iii, iv

STATEMENT OF THE ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 2

STATEMENT OF THE FACTS 3

ARGUMENTS

1. DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S DEFAMATION BY INNUENDO CAUSE OF ACTION? 11

2. DID THE LOWER COURT ERR IN HOLDING AS A MATTER OF LAW THAT CHARLESTON COUNTY SCHOOL DISTRICT BAOARD MEMBER CHRIS COLLINS WAS NOT SPEAKING IN HIS OFFICIAL CAPACITY WHEN HE MADE DEROGATORY COMMENTS ABOUT APPELLANT? 14

3. 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? 15

4. DID THE LOWER COURT FIND THAT STATEMENTS OF OPINION CANNOT BE DEFAMATORY? 18

5. 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? 19

6. 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? 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) 23, 24

Benekritis v. Johnson, 882 F. Supp. 521, 528 (D.S.C. 1995) 15

Collins v. Taos Bd. of Educ., 893 F. Supp. 2d 1193, 1205 (D.N.M. 2012) 16

Cronin v. Pelletier, 2018 WL 3965004, at *2 (Conn. Super. Ct. July 26, 2018) 16

Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff,
420 S.C. 305, 315, 803 S.E.2d 280, 285-86 (2017) 19

David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).........................3

Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 466-67, 629 S.E.2d 653, 665 (2006)
....18

Farr v. Lott, 2019 WL 2051300, at *1 (S.C. App. May 8, 2019) 15

Foreman v. Griffith, 81 Fed. App'x 432, 439-440 (4th Cir. 2003) 21

Fountain v. First Reliance Bank, 398 S.C. 434, 441-442, 730 S.E.2d 305, 309 (2012)
....11, 13, 14

Gause v. Doe, 317 S.C. 39, 42, 451 S.E.2d 408, 409 (S.C. App. 1994) 18

Gecy v. S.C. Bank & Tr., 422 S.C. 509, 516, 812 S.E.2d 750, 754 (S.C. App. 2018)...............3

Hampton v. Conso Prod., Inc., 808 F.Supp. 1227, 1237 (D.S.C. 1992) 13

Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).......................3

Henry-Davenport v. School District of Fairfield Co.,
391 S.C. 85, 89, 705 S.E.2d 26, 28 (2011) 20, 24

Horton v. Darby Elec. Co., 360 S.C. 58, 599 S.E.2d 456 (2004) 25

Jee v. New York Post Co., 671 N.Y.S.2d 920, 924 (Sup. Ct. 1998), *aff'd*, 260 A.D.2d 215, 688
N.Y.S.2d 49 (1999) 16

Johnson v. Dillard's Inc., 2007 WL 2792232, at *18 (D.S.C. Sept. 24, 2007) 12

Johnson v. Morris, 903 F.2d 996, 999-1000 (4th Cir. 1990) 21

Johnson v. Robbinsdale Indep. Sch. Dist. No. 281, 827 F.Supp. 1439, 1443 (D. Minn. 1993) 16

Johnson v. Spartanburg County School Dist. No. 7, 314 S.C. 340, 444 S.E.2d 501 (1994)) 20

Junior–Spence v. Keenan, 1990 WL 17241, at *4 (Tenn. Ct. App. Feb. 28, 1990) 16

Kapiloff v. Dunn, 27 Md. App. 514, 343 A.2d 251, 258 (1975 17

Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976) 21

McGlothlin v. Hennelly, 2020 WL 1876275, at *11 (D.S.C. Apr. 15, 2020) 18

Palmer v. Bennington School District, 159 Vt. 31, 615 A.2d 498 (1992) 16

Reaves v. Foster, 200 So.2d 453, 456 (Miss. 1967) 17

RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 472, 597 S.E.2d 881, 884 (S.C. App. 2004) 23, 24

Scott v. McClain, 272 S.C. 198, 250 S.E.2d 118, 120 (1978) 18

Seaton v. City of N. Charleston, 2012 WL 6186158, at *2 (D.S.C. Dec. 12, 2012) 18

Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 251, 481 S.E.2d 706 (1997) 19

Simmons v. Sci. Int'l Applications Corp., 2012 WL 761716, at *3-4 (D.S.C. Feb. 13, 2012), *report and recommendation adopted,* 2012 WL 761726 (D.S.C. Mar. 8, 2012). *See also, Fredrich v. Dolgencorp, LLC*, No. 3:13-CV-01072-JFA, 2014 WL 4417407, at *16 (D.S.C. Sept. 8, 2014)...13

Snipes v. McAndrew, 280 S.C. 320, 323, 313 S.E.2d 294, 296 (1984) 19

State v. Defley, 395 So.2d 759, 761 (La. 1981) 17

Stevens v. Tillman, 855 F.2d 394, 403 (7th Cir. 1988) 17

Sundberg v. DiRocco, 2017 WL 3394314, at *13 (M.D. Pa. Aug. 8, 2017) 21

Tharpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970) 23

Warren v. Birmingham Bd. of Educ., 739 So. 2d 1125, 1133 (Ala. Civ. App. 1999) 16

Williams v. Detroit Bd. of Educ., 523 F. Supp. 2d 602, 610 (E.D. Mich. 2007), *aff'd,* 306 Fed. App'x 943 (6th Cir. 2009) 16

State Rules

Rule 401 19

Rule 56, SCRCP 2, 3, 19

Statutes

S.C. Code Ann. § 15-78-30(i) 15

S.C. Code Ann. § 15-78-60(17 .... 15, 18

S.C. Code Ann. § 59-24-15 .... 20, 24

Title 59, Article 3 of Chapter 19 20

Title 59, Article 5 of Chapter 25 20

STATEMENT OF THE ISSUES ON APPEAL

I. DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S DEFAMATION BY *INNUENDO* CAUSE OF ACTION?

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?

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?

IV. DID THE LOWER COURT ERR IN HOLDING AS A MATTER OF LAW THAT STATEMENTS OF OPINION CANNOT BE DEFAMATORY?

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?

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?

STATEMENT OF THE CASE

Appellant is a former principal at Clark Academy, an alternative program within the Charleston County School District ("Respondent" or "CCSD") for at-risk high school students. He was eventually reassigned from this position in May 2016 based on an incident related to his actions regarding a sixteen (16) year-old female student named Erica Hamilton ("Erica"), in which Appellant boarded a school bus, demanded that Erica remove pants she was given due to a perceived dress code violation, and return the pants to him. After retrieving the pants, Appellant left Erica without pants and scantily-clad in front of fellow students on the bus.

Appellant was reassigned from his position at Clark Academy, and following an investigation into the matter, he ultimately accepted a teaching position at another high school within CCSD for the 2016-2017 school year. Appellant grieved his reassignment from Clark Academy, which was ultimately denied by CCSD's Board of Trustees. Appellant voluntarily resigned his employment following the 2016-2017 school year, and now works overseas.

Appellant filed the underlying Complaint on or about January 11, 2018, alleging causes of action against CCSD for (1) defamation, (2) violation of due process, and (3) breach of contract based on the covenant of good faith and fair dealing.

CCSD filed a Motion for Summary Judgment on May 12, 2020, as to each cause of action, to which the Appellant responded on June 16, 2020. Following argument on June 24, 2020, before the Honorable Judge Bentley Price, on the next day, the trial court issued a Form 4 Order denying the motion.

On July 6, 2020, CCSD filed a Motion to Alter or Amend the order, to which the Appellant responded on August 5, 2020.

On September 23, 2020, the parties argued the Motion to Alter or Amend before Judge Price. The trial court issued a Form 4 Order on October 7, 2020, granting the motion as to each claim and dismissing the case with prejudice.

On October 16, 2020, the trial court entered its written order. Appellant served his Notice of Appeal on October 28, 2020.

STANDARD OF REVIEW

When considering a Motion for Summary Judgment under Rule 56, SCRCP, a court does not decide genuine issues of material fact or make determinations of

credibility. However, summary judgment is completely appropriate when a properly supported motion sets forth facts that (1) remain undisputed or (2) are contested in a deficient manner. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). Thus, summary judgment under Rule 56, SCRCP, is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 516, 812 S.E.2d 750, 754 (S.C. App. 2018). "[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-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

STATEMENT OF FACTS

A. Appellant's Confrontation with Erica.

On April 22, 2016, Appellant was serving as the principal of the Clark Academy, an alternative high school with a small enrollment and very low teacher-student ratio designed to assist troubled students to graduate from high school. One of the students, Erica Hamilton, was then 16 years old, and arrived at school that day in a dress that Appellant thought violated the school's dress code. **(ROA pp. 97-99)**. Erica was wearing "boxer" style or "boy short" style panties under her dress. **(ROA pp 231-233)**. Appellant insisted that Erica put on pants – like hospital scrubs – in order to return to class, but throughout the morning, Erica refused to do so. After the lunch period, Erica agreed to wear the hospital scrubs and returned to class. **(ROA pp. 97-99)**.

Following the lunch period, but allegedly unknown to Appellant, Erica exchanged clothes with one of her friends and was no longer wearing her dress. Instead, she was wearing the pants, an "Aeropostale" jacket, and her underwear. **(ROA pp 234-237)**.[1]

Erica had not returned the pants by the end of the school day, so Appellant "boarded bus 808 to ask for the pants." **(ROA pp. 97-99)**. Appellant reported that he saw Erica in the last row of the bus, and told her he needed the pants before allowing the bus to proceed. **(ROA pp. 97-99)**. While students on the bus were yelling, Appellant repeated that the bus would depart when he retrieved the pants. **(ROA pp. 97-99)**.[2] Appellant did not confirm that Erica was still wearing her blue dress shirt, but "could see that Erica had a blue top on and I assumed it was the same blue shirt dress that she came to school with and that I saw her wearing all day." **(ROA pp. 97-99)**. The bus driver offered to bring the pants back to school on the following Monday, but Appellant refused the offer. After about 5 minutes, Erica took off the pants and threw them towards Appellant.

---

[1] In his statement, Appellant states that he saw Erica in the "blue shirt dress" at the final change of classes. **(ROA pp. 97-99*; ROA p. 193, lines 10-16*)**. It is undisputed that this was not the case when Erica was on the bus. Rather, at that time, Erica was wearing the pants, and "Aeropostale" jacket, and her underwear.

[2] At his deposition, Appellant attempted to distance himself from his statement by arguing that he was "trying to give a broad summary – of what happened. So if I had had more time and had the ability to explain, I would have said – I would have written that I told her that I needed to speak with her about the pants and other issues before I can let the bus proceed." **(ROA p. 201, *lines 4-10*)**. Appellant later admitted that he told Erica that he "needed the pants before allowing the bus to leave," but that his command was a "part of a larger context in which I asked Erica to come off the bus." **(ROA p. 202, *lines 1-13*)**. There is no dispute, however, that Appellant demanded that Erica return the pants before the bus could leave. In fact, he admitted that "I don't think it's unreasonable for someone to say that he seemed to be focused on the pants, but that was – but that's not an accurate estimation of what I was doing on that bus." **(ROA p. 202, *line 25; ROA p. 203, lines 1-3*)**.

(ROA pp. 97-99).

After retrieving the pants, according to Appellant, he heard Erica shouting through a bus window that "she was in her underwear." **(ROA p. 194, *lines 14-23*).** The bus driver and/or the School Resource Officer confirmed to Appellant that Erica was wearing a different blue top and "sitting in her panties." **(ROA pp. 97-99; ROA P. 195, *lines 4-24; ROA pp 199-200*).**

Shortly thereafter, Appellant returned the pants to Erica, who put them on and exited the bus. She left school after her mother arrived to pick her up. **(ROA pp. 97-99; *pp. 199-200*).**

B. <u>CCSD's Investigation of Appellant's Confrontation with Erica.</u>

Immediately following Appellant's confrontation with Erica on the bus, Appellant called Jennifer Coker, CCSD's Executive Director for Alternative Programs, to report the incident. Appellant also indicated to Coker that, due to a religious holiday, he would be unavailable until Sunday. **(ROA p 210, *lines 1-8; ROA* p. *212, lines 4-8*).** Separately, Coker also received a call from CCSD's Director of Security, Michael Reidenbach, who told Coker that police were investigating the incident. **(ROA p. 211, *lines 23-25*).**

On Sunday evening, Coker told Appellant that CCSD was placing him on an administrative leave with pay during the investigation. **(ROA p. 212, *lines 13-24*).** Coker thought that it was "egregious" that Appellant had left a student on the bus with no pants. **(ROA p. 213, *lines 15-17*).**

CCSD Employee Relations officials Will Suggs and Beverly Varnado assisted Coker with the investigation into the incident, which concluded in one week. In addition to his statement of April 22, 2016, Suggs and Varnado interviewed Appellant on

Monday, April 25, 2016. (**ROA pp 214-217; *ROA p. 204, lines 5-20; ROA pp. 250-253 and ROA pp. 238-241***). In his interview, Appellant took no responsibility for the confrontation, and blamed Erica entirely, based in part on his belief that Erica should have stopped the confrontation on the bus by explaining to him why she did not want to return the pants to him. (**ROA pp. 250-253 and ROA pp. 238-241**). CCSD also reviewed statements by various staff members, and because Erica would not come to school to be interviewed, CCSD referred to her statement to police. (**ROA pp 218-220**) (**ROA pp 100-125**).

By April 29, 2016, CCSD had finished its investigation into the incident and issued an internal report, which found as follows:

> This investigation into allegations that Andrew HaLevi acted in an aggressive, inappropriate, and unprofessional manner toward a student has not revealed any reason to believe his actions were of criminal intent. The investigation did reveal many concerns, including the following:
>
> - Dr. HaLevi does not appear to have the skills needed to manage student behavior.
> - Dr. HaLevi has not taken any responsibility for his failure to manage the incident that led to the investigation; rather, he has deflected all blame to others and has refused to see how he had multiple opportunities to make decisions that may have led to a positive outcome.
> - Dr. HaLevi has jeopardized any confidence the stakeholders of Clark Academy may have had in his ability to lead the school.

(**ROA p. 126**).

C. Appellant's Paid Administrative Leave and Reassignment.

On May 2, 2016, Coker contacted Appellant to tell him that he was going to be replaced at Clark Academy, and on May 3, 2016, CCSD sent Appellant a letter informing

him about the results of the investigation. (**ROA pp 221-222; *ROA p. 135***). In her letter of May 3, 2016, Executive Director Michele English-Watson indicated that three issues had "collectively compromised the District's confidence in your ability to lead a school" – failing to issue contracts appropriately, failure to manage the incident of April 22, 2016 appropriately, and systemic issues related to Appellant's ineffective decisions.

The letter also advised Appellant that "[w]ork assignments for you will be forthcoming," and that she had not yet "determined what role you may have in Charleston County School District for the 2016-2017 school year; that information will be shared with you once a decision is made." (**ROA pp. 135-137**).

Appellant sent a lengthy response to the District Superintendent on May 9, 2016, to which the District Superintendent responded by letter on May 13, 2016. (**ROA pp 138-142; ROA pp. 143-144**). Superintendent Postlewait stated that she approved the recommendation to place Appellant on administrative leave and to place an interim leader at Clark Academy, and that she would be involved in any decisions regarding Appellant's future role in the District. (**ROA pp. 143-144**).

While on administrative leave, on July 26, 2016, Appellant met with Associate Superintendent Terri Nichols and Executive Director English-Watson, and indicated at the meeting that he would be open to accepting a teaching position. (**ROA pp. 145-146**). At the meeting, he accepted a position as an English teacher at Stall High School for the 2016-2017 school year without loss of pay. (**ROA p. 207, *lines 7-25;* ROA pp. 145-146**).

D. <u>Statements made by Board Member Chris Collins</u>

The incident of April 22, 2016, was reported in the news media, but was not reported to Appellant's satisfaction. Appellant wrote his own letter to the *Post and Courier*, which was published on May 4, 2016, in which he criticized the newspaper for "failing to follow basic principles of journalism when covering complex issues at Charleston area schools." (**ROA pp. 179-180**).

On the same day, another Charleston newspaper, *The Chronicle*, published a story by Barney Blakeney entitled "Local Principal Likely to Be Reassigned after Demanding Student Take Off Her Pants." (**ROA pp. 181-182**). The article reported that CCSD Board Member Chris Collins had opined that Appellant "should have been arrested when the incident occurred and then fired," although Collins also noted that "CCSD administrators have indicated that HaLevi won't be fired, but most likely will be moved to another position." (**ROA pp. 181-182**). Collins also opined that Appellant should not have demanded the pants, that "[y]ou don't embarrass a child or cause her to be exposed in front of other students," and that he thought Appellant should be fired, but did not think that there was board support to do it. (**ROA pp. 181-182**).

At his deposition, Collins confirmed that, in making these comments, he was <u>not</u> speaking for the Board of Trustees or CCSD, and that his comments "absolutely" did "not reflect the opinions of the school district or its board." (**ROA p. 228, *lines 17-25; p. 229 lines 1-3***). He also never claimed to be speaking on behalf of CCSD, and actually admitted that he had not even spoken to other Board Members about firing Appellant. (**ROA *p. 226, lines 16-18***).

In fact, Collins intended his statements to be very <u>critical</u> of CCSD, in that he believed that CCSD's African-American employees were treated more harshly than white

CCSD employees, and that he believed Appellant would not be fired because he is white. (**ROA p. 224, *lines 7-25; ROA p. 225, lines 1-15***). Doubling down on his criticism of CCSD, Collins testified that he believed that "certain board members…didn't want African-Americans to be in a high position" and specifically accused Board Members Coats and Ducker of harboring these racist sentiments. (**ROA p. 227, *lines 15-18***).

E. Appellant's Grievances

After accepting his position at Stall High School, Appellant filed a grievance with CCSD on August 29, 2016, which *inter alia* alleged that he had been denied "due process rights" and demanded that CCSD's Board of Trustees hear his case in executive session. (**ROA pp. 147-149**). The Chair of the Board of Trustees, Cindy Coats, responded by letter on October 18, 2016, and directed Appellant to follow the proper grievance process described in Policy GBK. (**ROA pp. 150-151**). After Appellant requested and received guidance from CCSD's General Counsel as to the grievance process, Appellant's grievance went through the following steps:

- Appellant submitted his grievance to Jennifer Coker on or about November 7, 2016. (**ROA pp. 152-153**). Appellant met to discuss his grievance with Coker on November 28, 2016, and received a five-page written response from Coker dated December 12, 2016. (**ROA pp. 154-159**). Coker addressed each of Appellant's issues except his complaint about the comments of Board of Trustee member Chris Collins.

- Appellant appealed Coker's decision to the next-level supervisor, Executive Director Michele English-Watson, which was heard on January 11, 2017. English-Watson issued a written response on January 26, 2017, in which she upheld Coker's decision. (**ROA pp. 160-162**).

- Appellant appealed English-Watson's decision to the next appropriate official, Interim Chief Academic Officer Valerie Evans Harrison, which was heard on February 15, 2017. Following her review,

Harrison issued a written response on March 2, 2017 upholding CCSD's decision to transfer Appellant from Clark Academy. (**ROA pp. 163-165**).

- Appellant appealed Harrison's decision to Superintendent Postlewait, who held the grievance conference on April 20, 2017. Following her review of the case, Superintendent Postlewait found that "the heart of the matter is whether you exercised good judgment in the handling of the April 22, 2016, incident" and that she did not believe Appellant exercised such good judgment. She also pointed to perceived inconsistencies in his representations to the District, and noted that Appellant had received significant due process. She also noted that she based her decision on Appellants' handling of the incident of April 22, 2016, and <u>not</u> on the other issues referenced in English-Watson's letter of May 3, 2016. (**ROA pp. 166-70**).

- Appellant appealed Superintendent Postlewait's decision to CCSD's Board of Trustees, which was placed on the Board's agenda for the Board's meeting on June 26, 2017. Following executive session, the Board voted to uphold Superintendent Postlewait's decision by a vote of 9-0. (**ROA pp. 171-176**). The Board Chair notified Appellant of its decision by letter dated June 29, 2017. (**ROA pp. 177-178**).

Following the 2016-17 academic year, Appellant turned down the teacher contract that CCSD offered him for the 2017-18 academic year. (**ROA p. 188, *lines 6-24***). Shortly thereafter, he left for Israel and began teaching in the fall of 2017 at the Jerusalem School for the Arts. (**ROA p. 186*, lines 23-25; ROA p. 187, lines 1-2***).

F. <u>S.C. Department of Education's Licensure Inquiry and Hearing</u>

Although irrelevant to this case, Appellant has referenced the actions taken by the South Carolina Department of Education ("SCDE") regarding his educational license. Following Appellant's confrontation with Erica Hamilton on April 22, 2016, and Appellant's subsequent reassignment from Clark Academy to teach at Stall High School, SCDE contacted Appellant on September 8, 2016, concerning the potential suspension of his teaching license ("Educator Certificate"). SCDE convened a hearing on July 14, 2017

– notably after Appellant had completed his teaching assignment at Stall High School for the 2016-17 academic school year – to present evidence to a hearing officer concerning its inquiry into Appellant's fitness to hold his teaching license. According to the Order of the State Board, "[b]oth SCDE and HaLevi made appearances and presented evidence at the hearing." Again, CCSD was not a party to the hearing. After the hearing on July 14, 2017, Appellant left the country to begin teaching in Israel, where he continues to teach today.

On September 12, 2017, the State Board convened to consider the hearing officer's report and ruled that SCDE presented insufficient evidence to justify suspension or revocation of Appellant's license. As a result, SCDE's administrative proceeding regarding Appellant's teaching license was concluded and dismissed.

ARGUMENT

I. DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S DEFAMATION BY *INNUENDO* CAUSE OF ACTION?

In his discussion of the "innuendo" theory of defamation, Appellant's argument fails because it inadequately addresses the requirement that an "insinuation" may be actionable only if (1) it is false and malicious, and (2) its meaning is plain. *Fountain v. First Reliance Bank*, 398 S.C. 434, 441-442, 730 S.E.2d 305, 309 (2012). For this reason, Appellant's reliance on this theory of defamation is misplaced.

Appellant alleged that CCSD defamed him by "innuendo," specifically by placing him on a paid leave after the incident of April 22, 2016, and by "failing to return Appellant to work promptly after the incident and a subsequent demotion of Appellant

from administrator to teacher were defamatory." (**ROA p. 190, *lines 10-20***). These reasons – and the others Appellant has belatedly mentioned in his appellate brief, such as CCSD's "not defending him in the press" – do not create a genuine issue of material fact. Rather, the trial court correctly applied the legal standard articulated in *Fountain* and in the other cases it cited to find that Appellant's allegations simply do not amount to defamation by innuendo.

Indeed, the trial court's reasoning bears repeating. CCSD placed Appellant on a paid leave while CCSD investigated the incident by questioning students, staff members, and Appellant himself. This is the normal protocol followed by CCSD in like instances. (**ROA pp. 250-253 and ROA pp. 238-241**). The investigation found, as Appellant himself admits, that he took Erica's pants and left her exposed to other students only in her panties. It is unsurprising that CCSD (1) took the time necessary to complete its investigation, (2) took time over the summer to determine Appellant's next assignment, and (3) lost faith in Appellant's ability as a leader due to his mishandling of the incident.

Further, it also does not matter that Appellant thought that CCSD could have handled the matter differently. CCSD followed normal protocol, and was well within its authority to investigate the matter, interview witnesses, and draw the conclusion that it did, which notably did <u>not</u> result in Appellant's termination. (**ROA pp. 238-241; ROA pp. 250-253**).

In this regard, Appellant's claim even pales in comparison to other "defamation by *innuendo*" claims that have been dismissed where employees <u>were actually fired</u>. For instance, in *Johnson v. Dillard's Inc.*, 2007 WL 2792232, at *18 (D.S.C. Sept. 24, 2007), there was no defamation by "innuendo" even where the employee could show that she

was escorted out of the store by the off-duty police officer, because there was no evidence that the "positive assertion" was false and malicious and that its meaning was plain. In *Hampton v. Conso Prod., Inc.*, 808 F.Supp. 1227, 1237 (D.S.C. 1992), the court found that a reasonable trier of fact could not find that the defendant acted maliciously in requesting the employee to go on medical leave and receive medical treatment at the defendant's expense, where the employee alleged that these acts gave the impression to others that the Appellant was mentally ill and/or in need of medical confinement. Likewise, the court dismissed an "innuendo" claim where the employee was fired in close proximity to an altercation between the employee and his supervisor, allegedly leaving other employees "with the mindset that [the employee] had done something improper," because the employee "has not alleged facts to show that the meaning was plain." *Simmons v. Sci. Int'l Applications Corp.*, 2012 WL 761716, at *3-4 (D.S.C. Feb. 13, 2012), *report and recommendation adopted,* 2012 WL 761726 (D.S.C. Mar. 8, 2012). *See also, Fredrich v. Dolgencorp, LLC*, No. 3:13-CV-01072-JFA, 2014 WL 4417407, at *16 (D.S.C. Sept. 8, 2014) ("Aside from bare allegations and the fact that he was terminated, Plaintiff has failed to provide evidence that the Defendant's actions on the day of his termination amounted to any defamatory conduct insinuating that he stole money, that he was incompetent as a store manager, or that he was prejudice. An employer terminating an employee for misconduct cannot by itself be held to be defamatory, something more is needed.").

Furthermore, and similar to the finding in *Fountain*, it is also absolutely true that Appellant's actions – that he admitted and that CCSD's investigation confirmed – compromised CCSD's faith in Appellant's ability to serve in an administrative leadership

role. As in *Fountain*, this is a complete bar to this basis of Appellant's defamation claim.[3]

For this reason alone, Appellant's reliance on this argument to support his defamation claim is unavailing, and this Court should affirm the trial court and dismiss the appeal.

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?

Other than making conclusory remarks that Chris Collins was acting within the scope of his position as a member of CCSD's Board of Trustees to the press concerning the incident, Appellant has failed to cite any authority supporting his position. He simply restates the legal conclusions that the trial court properly rejected.

It bears noting that the trial court relied on Collins's own sworn testimony, and the undisputed facts that Collins's statements were very critical of CCSD's decision not to fire Appellant – including accusations that fellow Board members were racists – in finding that Collins was not acting as an agent of CCSD, or a spokesman for CCSD or its Board, when he opined on a matter of undeniable public concern. The South Carolina Tort Claims Act (SCTCA) expressly states that "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" is an exception to South Carolina's waiver of immunity. S.C. Code Ann. § 15-78-60(17). "Scope of official duty" means (1) acting in and about the official business of a governmental entity and (2) performing official duties. S.C.

---

[3]CCSD asserted "truth" as a defense in this action. (ROA p. 47).

Code Ann. § 15-78-30(i). *Benekritis v. Johnson*, 882 F. Supp. 521, 528 (D.S.C. 1995) (suit barred under SCTCA where after-school pickup basketball game conducted in gymnasium one mile from the school was not "official business" of school district and its employee participants were not performing "official duties"); *Farr v. Lott*, 2019 WL 2051300, at *1 (S.C. App. May 8, 2019) (lawsuit barred against governmental entity under SCTCA where public employee was not acting in the scope of his employment).

For this reason alone, CCSD is not a proper defendant concerning Appellant's defamation claim, and this Court should affirm the trial court and dismiss the appeal.

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?

As an initial matter, Appellant's claim that he was not a "principal" while employed at Clark Academy flies directly in the face of his own sworn testimony. The trial court correctly found that "there is a voluminous and undisputed record of [Appellant's] own sworn testimony establishing that both CCSD and [Appellant] considered him to be the 'Principal' of Clark Academy. Indeed, Appellant identified himself in his sworn testimony on multiple occasions as the "Principal" of Clark Academy.

The trial court also properly found, as a matter of first impression, that a principal of a school is a "public official" for purposes of adjudicating defamation claims. While Appellant pointed to two cases that found to the contrary, he failed to present to this Court with the voluminous authority that led the trial court to find that "the preponderance of courts that have considered the matter have found that principals <u>are</u>

public officials for these purposes." *See Cronin v. Pelletier*, 2018 WL 3965004, at *2 (Conn. Super. Ct. July 26, 2018) (principal of a public high school was a public official under the principles of the law of defamation); *Collins v. Taos Bd. of Educ.*, 893 F. Supp. 2d 1193, 1205 (D.N.M. 2012) ("After considering the case law, the Court predicts that the New Mexico Supreme Court would classify a public school principal as a public official within the meaning of *Rosenblatt.*"); *Williams v. Detroit Bd. of Educ.*, 523 F. Supp. 2d 602, 610 (E.D. Mich. 2007), *aff'd,* 306 Fed. App'x 943 (6th Cir. 2009) ("This Court is persuaded by the Supreme Court of Vermont's reasoning in *Palmer* and the opinions of other courts concluding that principals are public officials to the extent their defamation claims involve communications relating to their conduct as principals."); *Warren v. Birmingham Bd. of Educ.*, 739 So. 2d 1125, 1133 (Ala. Civ. App. 1999) (affirming trial court's holding that an elementary school principal was a public official); *Jee v. New York Post Co.,* 671 N.Y.S.2d 920, 924 (Sup. Ct. 1998), *aff'd,* 260 A.D.2d 215, 688 N.Y.S.2d 49 (1999) (Principal must be considered a "public official" for the purposes of the defamation law.); *Johnson v. Robbinsdale Indep. Sch. Dist. No. 281,* 827 F.Supp. 1439, 1443 (D. Minn. 1993) (finding that "public school principals criticized for their official conduct are public officials" where principal sued students' parents after they wrote a letter critical of the principals' conduct); *Palmer v. Bennington School District,* 159 Vt. 31, 615 A.2d 498 (1992), (summary judgment properly granted to the school district on the principal's defamation claim, holding that he was a "public official" and that he failed to show that the school board published the statements with "actual malice."); *Junior–Spence v. Keenan,* 1990 WL 17241, at *4 (Tenn. Ct. App. Feb. 28, 1990) (finding that principal was a public official because she

was an authority figure and a government representative to the students and parents with whom she dealt and her actions affected the taxpayers in the State); *Stevens v. Tillman,* 855 F.2d 394, 403 (7th Cir. 1988) (finding that principal was a public official where "her performance as public official was open to public comment" and, while not an elected public official, "she possessed great discretion over the operation of the [school]" and "how she used that discretion was the subject of legitimate public debate"); *State v. Defley,* 395 So.2d 759, 761 (La. 1981) (concluding that a school supervisor would be considered a public official because the position " 'is such that the public has an independent interest in the qualification and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees,'"); *Reaves v. Foster,* 200 So.2d 453, 456 (Miss. 1967) (holding that school principal was a public official, reasoning that statements criticizing her acts were "fair comment in a matter concerning a large sector of the county's population, in the handling of a matter connected with government, and in an effort by those involved to better conditions in the school as they deemed it" and that the State Constitution "provides ... a common school system, and the laws provide for the selection of the trustees and county superintendents, and the appointment by the superintendent and board of trustees of the principal to be in charge of a school where the young of the county are given an opportunity to secure an education at the taxpayers' expense."); *Kapiloff v. Dunn,* 27 Md. App. 514, 343 A.2d 251, 258 (1975) (finding that a high school principal was a public official under the *New York Times* standard and that the principal's "suitability for the position was a matter of public or general interest or concern").

Because Appellant was a "public official," he could only be defamed if the defendant acted with "actual malice," and for that reason, CCSD was not a proper defendant to the defamation action. S.C. Code Ann. § 15-78-60(17); *Scott v. McClain*, 272 S.C. 198, 250 S.E.2d 118, 120 (1978); *Gause v. Doe*, 317 S.C. 39, 42, 451 S.E.2d 408, 409 (S.C. App. 1994).

On this point, Appellant entirely omits from his argument that "common law malice" is a concept that is distinct from "actual malice." *McGlothlin v. Hennelly*, 2020 WL 1876275, at *11 (D.S.C. Apr. 15, 2020). "Common law malice" means the defendant acted with ill will toward the plaintiff, or acted recklessly or wantonly, *i.e.*, with conscious indifference of the plaintiff's rights. "Actual malice" means the defendant published the statement with knowledge it was false or with reckless disregard of whether it was false or not. *Erickson v. Jones St. Publishers, LLC,* 368 S.C. 444, 466-67, 629 S.E.2d 653, 665 (2006); *Seaton v. City of N. Charleston*, 2012 WL 6186158, at *2 (D.S.C. Dec. 12, 2012). Appellant's attempt to import an argument on this point based on "common law malice" against a "public official" must be "presumed" is directly contrary to the precedents of South Carolina law and should be rejected.

For these reasons, this Court should affirm the trial court and dismiss the appeal.

IV. <u>DID THE LOWER COURT FIND THAT STATEMENTS OF OPINION CANNOT BE DEFAMATORY?</u>

Curiously, Appellant argues that the trial court found that "any criticism of Appellant's conduct was protected fair comment," and that for that additional reason, CCSD could not be held liable for Collins's comments. In this respect, the undersigned

has examined the trial court's order thoroughly, and the trial court does not appear to make this finding at all.

In his appellate brief, Appellant has cryptically linked references to Collins's alleged "protected fair comment" with SCDE's decision concerning his license. This theory is very difficult to understand, especially since any references to the SCDE decision or proceedings would be inadmissible, and therefore unavailing under Rule 56, SCRCP. *CCSD's Motion in Limine; see also Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 251, 481 S.E.2d 706 (1997); *Snipes v. McAndrew*, 280 S.C. 320, 323, 313 S.E.2d 294, 296 (1984) ("We are of the opinion that policy decisions concerning where an employee will best serve the school district are better left to school officials, not the courts. Unless the legislature decides to require full, adversarial hearings for teachers upon their transfer, reassignment, or demotion to another certificated position, this Court will not require such a hearing."); *Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff*, 420 S.C. 305, 315, 803 S.E.2d 280, 285-86 (2017) (Settlement Agreement was not relevant evidence as defined in Rule 401, and was therefore inadmissible at the PSC hearing, where the applicant seeking rate increases was not party to the agreement).

In any event, it appears uncertain why Appellant has raised this issue, as it does not appear in the trial court's opinion and order dismissing the lawsuit.

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's argument on this point is especially hard to follow. As an initial matter, Appellant's argument does not appear related at all to the due process claim that

he actually made in his Complaint, in which he alleged that he was deprived of a "property interest" in continued employment, which is not relevant in any manner to this case, as CCSD never deprived Appellant of continued employment or other legally-recognized property interest. As set forth in South Carolina law, Appellant could not grieve "position or salary" as an administrator under the Teacher Employment and Dismissal Act. *Henry-Davenport v. School District of Fairfield Co.*, 391 S.C. 85, 89, 705 S.E.2d 26, 28 (2011) (the legislature, in enacting S.C. Code Ann. § 59-24-15,[4] overruled *Johnson v. Spartanburg County School Dist. No. 7,* 314 S.C. 340, 444 S.E.2d 501 (1994)).

> The legislature enacted section 59-24-15 after the *Johnson* decision, and the plain language of the statute directly contradicts the holding in *Johnson.* The statute plainly states that an administrator has no rights in her "position or salary," and the legislature made no exception or distinction concerning the administrator's status as a certified educator.

391 S.C. at 89, 705 S.E.2d at 28.

For this reason alone, Appellant cannot maintain a "due process" claim, as the State has explicitly determined – both through the legislature and the courts – that he has no property right to the position or salary of an administrator, and that he remained employed with CCSD until he voluntarily resigned.

Furthermore, even if Appellant could demonstrate that he was denied a "property interest" – which he cannot – he cannot show that he was deprived of "due process." If anything, he received <u>significant</u> due process, including several stages of an internal

---

[4] S.C. Code Ann. § 59-24-15 provides that "Certified education personnel who are employed as administrators on an annual or multi-year contract will retain their rights as a teacher under the provisions of Article 3 of Chapter 19 and Article 5 of Chapter 25 of this title **<u>but no such rights are granted to the position or salary of administrator</u>**.

grievance where he presented the evidence he believed was favorable to him, meetings and reviews by numerous officials including the District Superintendent herself, <u>and review by the Board of Trustees</u>. "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976); *Sundberg v. DiRocco*, 2017 WL 3394314, at *13 (M.D. Pa. Aug. 8, 2017) ("Due process does not require flawless or perfect process. Neither does it require courtesy. Constitutionally adequate process alone suffices."). It is ludicrous to argue that Appellant did not receive significant "due process" in this matter.

Finally, in his argument before the trial court, Appellant appeared to abandon his "property interest" due process argument, and instead argue in favor of a claim entirely absent from his Complaint – specifically, that he was deprived of a "liberty" interest in his reputation. Even if such a claim was properly before the trial court – which it was not – the trial court properly disposed of it on the grounds articulated in *Johnson v. Morris,* 903 F.2d 996, 999-1000 (4th Cir. 1990) and *Foreman v. Griffith*, 81 Fed. App'x 432, 439-440 (4th Cir. 2003) ("Because the plaintiff remained employed by his public employer, we concluded that he suffered no damage to his employment status, and thus, could not be heard to complain that he had been made unemployable as the result of the publication...We also concluded that any harm to the plaintiff's chances for career advancement with his public employer did not result from the publication of the reasons for his demotion, but from the reasons for the demotion itself.") (citing *Johnson*).

For these reasons, this Court should affirm the trial court and dismiss the appeal.

Any such administrator who presently is under a contract granting such rights shall retain

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?

As an initial matter, Appellant defined the basis of his claim for Breach of the Covenant of Good Faith and Fair Dealing as follows:

> Q. Okay. So the contract you believe was breached is Exhibit 10 [***"ROA pp 183-184***]?
>
> A. Yes.
>
> Q. Okay. And the way that you believe the contract, Exhibit 10, was breached was detailed in paragraph 98?
>
> A. Yes.
>
> Q. Okay. Is there any other reason you believe that the district breached its contract?
>
> A. Not that I'm aware of.

(**ROA p. 208, *lines 8-17***). Paragraph 98 of his Complaint states as follows:

> 98. The District's deliberate failure to publically support Dr. HaLevi in his administrator position; its failure to properly investigate the bus incident; its failure to publicize accurate facts about the bus incident; its refusal to restore Dr. HaLevi to his administrator position; and its failure to correct the public record and restore Dr. HaLevi's reputation after the Department of Education found there was no basis for any disciplinary action against him, breach the covenant of good faith and fair dealing in Dr. HaLevi's employment contract.

(**ROA p. 43, ¶ 98**).

The trial court properly found that Appellant's contract entitled him to none of these alleged "rights" under his contract, and that he otherwise failed to raise any genuine

---

that status until the expiration of that contract." (emphasis added).

issue of material fact that CCSD actually breached any specific provision of its employment agreement with him.

Under South Carolina law, an implied covenant of good faith and fair dealing exists in every contract. *Tharpe v. G.E. Moore Co.*, 254 S.C. 196, 174 S.E.2d 397 (1970). However, there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave it the right to do. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995).

Furthermore, and importantly, South Carolina law does not recognize a separate cause of action for "breach of an implied covenant of good faith and fair dealing." *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 472, 597 S.E.2d 881, 884 (S.C. App. 2004).

Naturally, Appellant does not – and cannot – claim that CCSD terminated his employment.[5] Rather, in his Complaint and at his deposition, Appellant based his claim on his complaints that CCSD did not do what he wanted it to do – namely, (1) agree to conduct an investigation into the Erica Hamilton incident as he, not CCSD, saw fit, (2) have CCSD publicly agree that Appellant did nothing wrong in demanding that Erica remove her pants on the bus, and publish only those facts and opinions that he – not CCSD or other witnesses – believed were important, and (3) immediately restore him to his administrative position at Clark Academy. CCSD had absolutely no contractual duty to do any of these things.

Appellant may be dissatisfied with CCSD's investigation, or the fact that the investigation unsurprisingly found that he had acted improperly in demanding that Erica

---

[5] Indeed, because Appellant resigned voluntarily before his pay was reduced, it is

Hamilton remove her pants on the bus, or the fact that CCSD placed him on leave until the parties agreed that he could teach at Stall High School without loss of pay for the 2016-2017 academic year. If so, his dissatisfaction does not amount in any regard to a "breach of contract."

As stated above, Appellant had absolutely no contractual or statutory right to remain in the principal's position at Clark Academy. Under South Carolina law, Appellant had no right to the position or salary of an administrator. *Henry-Davenport*, 391 S.C. at 89, 705 S.E.2d at 28 (plain language of S.C. Code Ann. § 59-24-15 states that a school administrator has no rights in her "position or salary" and the legislature made no exception or distinction concerning the administrator's status as a certified educator). Indeed, the contract at issue states clearly as follows:

> The District's administrative assignments are discretionary with the Superintendent. In the event of any change in the District's organizational chart, reduction in force, or whenever it is deemed in the best interest of the District, the Superintendent may reassign, upon notice to and consultation with the affected employee, consistent with S.C. Code Ann. § 59-24-15 (Supp. 1999).

(ROA pp. 183-184)

Further, Appellant has failed abjectly to point to anything in the contract, the record, or the law that gave him the right to direct how CCSD conducts investigations into his own conduct, or to require CCSD to follow his instructions as to how it responds to the findings of the investigation, or to grieve to any official and in any manner that he saw fit. In short, Appellant attempted – and failed – to conjure a claim for breach of the implied covenant of good faith and fair dealing without producing evidence of a breach of contract. *Adams*, 320 S.C. at 277, 465 S.E.2d at 85; *RoTec Servs.*, 359 S.C. at 472,

---

difficult to divine what his damages would be for an alleged "breach of contract."

597 S.E.2d at 884; *Horton v. Darby Elec. Co.*, 360 S.C. 58, 599 S.E.2d 456 (2004) (former employee had no right of recovery against employer based on breach of employment contract and implied covenant of good faith and fair dealing, where the employer had good faith belief that it had sufficient good cause to terminate employee).

For these reasons, the Court should affirm the trial court's dismissal of Appellant's claim for breach of the implied covenant of good faith and fair dealing.

CONCLUSION

For the reasons set forth above, Respondent Charleston County School District respectfully requests that this Court affirm the Order granting the Motion for Summary Judgment, and for any other such relief as this Court deems just and proper.

June 29, 2021

Respectfully submitted,

RICHARDSON PLOWDEN & ROBINSON, P.A.

Eugene H. Matthews, SC Bar #: 10193
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
Facsimile (803) 779-0016
E-mail: gmatthews@RichardsonPlowden.com

COUNSEL FOR RESPONDENT CHARLESTON COUNTY SCHOOL DISTRICT