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Jul 29 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

Angela H. Bain,

Appellant,

v.

Denise C. Lawson and Kenneth L. Childs,

Respondents.

**RESPONDENT DENISE C. LAWSON'S
PETITION FOR REHEARING**

Pursuant to Rules 221(a) and 240 of the South Carolina Rules of Appellate Procedure, Respondent Denise C. Lawson ("Respondent" or "Lawson") respectfully files this Petition for Rehearing regarding the Court's decision filed July 14, 2021. *Bain v. Lawson*, No. 2018-001991, 2021 WL 2947804 (S.C. Ct. App. July 14, 2021) (Unpublished Opinion No. 2021-UP-272). In its opinion, this Court reversed the lower court's finding that because Childs was acting in his scope as an attorney, Lawson's Motion to Dismiss must be granted as it relates to Appellant's Civil Conspiracy claim.

Rule 221(a), SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law and/or facts to petition for rehearing. *Arnold v. Carolina Power &*

Light Co., 168 S.C. 163, 167 S.E. 234 (1933). For the following reasons, Respondent Denise C. Lawson submits the Court misapprehended applicable law to support a finding that a genuine issue of fact exists as to whether Childs acted outside his role as her attorney, and that Summary Judgment is inappropriate as to the Civil conspiracy claim.

ARGUMENTS

I. THIS COURT'S DECISION DID NOT ADDRESS WHETHER RESPONDENT HAD FORMED AN ATTORNEY-CLIENT RELATIONSHIP WITH CHILDS ASIDE FROM CHILD'S ROLE AS AN ATTORNEY FOR THE SCHOOL DISTRICT.

The trial court in this matter found that the civil conspiracy claim against Respondent Lawson should be dismissed. The trial court based its decision on its finding that Childs was acting within an attorney-client relationship with Lawson, and a would-be plaintiff cannot maintain a civil conspiracy claim against two parties based on acts that occur within the scope of an attorney-client relationship. Specifically, in its order, the trial court noted that the communications alleged by Appellant in support of its civil conspiracy claim were firmly within the scope of the attorney-client privilege, and for that reason, "no actionable conspiracy exists as a matter of law." (Rec. on App. p. 240, Order).

Respectfully, it appears that this Court did not address substantively the argument that Respondent Lawson had an attorney-client relationship with Childs regardless of whether Childs was the District's attorney.

Under South Carolina law, a person is deemed a client when she (1) seeks legal advice, (2) discusses those matters with a lawyer, and (3) does so in confidence for the purpose of obtaining such advice. *In re Carter*, 400 S.C. 170, 176, 733 S.E.2d 897, 900 (2012); *Marshall v. Marshall*, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (S.C. App. 1984) (a person attains the status of "client" when that person seeks legal advice by communicating in confidence with an attorney for the purpose

of obtaining such advice, and a signed retainer agreement is not essential to create such a relationship).

Therefore, under South Carolina law, where a person consults in confidence with a lawyer for the purpose of obtaining legal advice, those consultations are protected by the attorney-client privilege. Such is the case in this matter. As Appellant has alleged, Respondent Lawson clearly knew and understood that Childs was an attorney, and according to Appellant's own Complaint, often met with him to seek his counsel. (Rec. on App. p. 13, Complaint, ¶ 70).

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

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

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

Respondent Lawson respectfully commends to this Court the ruling of Justice Toal, sitting as a trial judge, in *Kovach v. Whitley*, 2015-CP-08-2380, in the Court of Common Pleas for Berkeley County. In that case, the plaintiff brought a civil conspiracy claim against several defendants, which was found defective (and actually worthy of sanction) for several reasons that are relevant here:

- The plaintiff's factual assertions related to the alleged conspiracy were actually actions that the defendants had the right to take. (Rec. on App. p. 175, Kovach Order, pp. 17-18).

- Bringing the plaintiff's alleged criminal activity to the attention of authorities was "not actionable as a matter of law." (Rec. on App. p. 176, Kovach Order, p. 18). The order specifically referenced *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 170, 628 S.E.2d 261, 262 (2006), noting that "Defendants had every legal right as citizens to report Ms. Kovach's illegal acts to authorities." (Rec. on App. p. 175, Kovach Order, p. 18).
- Perhaps most relevant to the instant appeal, Justice Toal also noted that the alleged acts of the "conspirators" were actually privileged, and "cannot be the basis for a civil conspiracy claim." (Rec. on App. p. 175-176, Kovach Order, pp. 18-19, quoting *Crowell v. Herring*, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (S.C. App. 1990)).

Respectfully, it is not merely a part of a "parade of horrors" to note that, under Appellant's theory of the case, any party may eviscerate the attorney-client privilege of another party merely by alleging in a complaint – "upon information and belief," no less – that the opposing party's communications with her lawyer were for some purpose other than seeking legal counsel. Under South Carolina law, Respondent Lawson – in either her official or individual capacity – is permitted to seek legal advice from any attorney she wishes, and to act on that advice accordingly, regardless of whether the attorney is also "officially" serving the Board. In the course of seeking and receiving that advice, the communications between attorney and client are privileged, and as noted in *Kovach*, privileged communications cannot form the basis of a civil conspiracy claim.¹

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

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

II. WITH LEAVE OF THIS COURT, RESPONDENT LAWSON INTENDS TO ARGUE AGAINST PRECEDENT AND IN FAVOR OF JUSTICE FEW'S DISSENT IN THE INTERVENING HOLDING IN *PARADIS* THAT THE TORT OF CIVIL CONSPIRACY SHOULD BE ABOLISHED.²

As this Court correctly noted, while this matter was pending, our state's supreme court held in *Paradis v. Charleston Cty. Sch. Dist.* that a plaintiff asserting a civil conspiracy claim need not plead special damages. 2021 WL 1992245, Op. No. 28030 (S.C. Sup. Ct. filed May 19, 2021) (Shearouse Adv. Sh. No. 17 at 26–27).

In the same opinion, Justice Few wrote persuasively that, in removing the requirement to prove special damages – which heretofore “prevented civil conspiracy from being a significant cause of action in civil litigation” – any plaintiff could now “bring a civil conspiracy action against any defendant—even for lawful, non-tortious conduct—and the law imposes no meaningful standards on courts and juries by which they must judge the defendant's conduct. I disagree with the majority that we should unleash this still-undefined and now-unrestrained menace on the public as an independent tort.” 2021 WL 1992245, at *8.

Justice Few’s description of the ill effects of allowing the tort of civil conspiracy is especially relevant to the instant case. Here, Appellant has sought to convert her defamation claim into a separate claim for civil conspiracy and to eviscerate the protections of attorney-client privilege with the barest of allegations. Moreover, as earlier argued by Respondent Lawson, Appellant’s own allegations established that the Respondents’ alleged conspiracy involved meeting with each other to scheme, plan, and conspire with one another and others to terminate her contract with the District, remove her from the position of Superintendent, and prevent her from obtaining any future employment with the District or any other school district by defaming

² The undersigned understands that he must file a motion under Rule 217, SCACR, for leave to engage in oral argument against precedent at least fifteen (15) days prior to oral argument.

her.” 2021 WL 2947804, at *2. Notably, Appellant’s claim that “all such communications and actions between Respondents were within the ‘crime fraud’ exception to the attorney-client privilege” is a legal conclusion that is not considered as a factual allegation under Rule 12(b)(6), SCRCF, and there is not a shred of evidence in the record that could sustain this point under Rule 56, SCRCF. 2021 WL 2947804, at *2.

In the words of Justice Few, “[d]efamation defenses do not apply to civil conspiracy, which – as confirmed by the majority to be an independent tort – permits the court and jury to impose liability for lawful, non-tortious conduct based on a court or juror’s sense of fairness or responsibility. In other words, the civil conspiracy claim we remand for trial permits a court and jury to impose liability for defamation despite the fact the law provides valid defenses that prevent liability.” 2021 WL 1992245, at *9.

Thus, Appellant seeks to do exactly what Justice Few warned against – using a civil conspiracy claim as an “end-around” of (1) the defenses of a defamation claim and (2) the attorney-client privilege by permitting her to sue the Respondents because they conferred with each other. This Court should not permit her to do so.

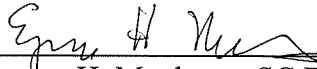
CONCLUSION

For these reasons, Respondent respectfully requests that the Court should reconsider its decision and either grant the Petition for Rehearing and/or affirm the decision of the trial court in this matter.

Signature page to follow

Respectfully submitted,

RICHARDSON PLOWDEN & ROBINSON, P.A.



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PROOF OF SERVICE

I, the undersigned employee for Richardson Plowden & Robinson, P.A., counsel for the Respondents Denise C. Lawson, do hereby certify that I have served a copy of the PETITION FOR REHEARING by causing a copy of the same to be deposited in the United States mail, first class postage prepaid, addressed to the counsel of record and via electronic mail on this 29th day of July, 2021:

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July 29, 2021

Via Hand Delivery

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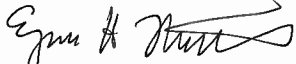
Re: Angela H. Bain v Kenneth L. Childs, and Denise C. Lawson
Appellate Case Number: 2018-001991
Civil Action Number: 2019-CP-12-00334
Our File Number: 1148-076

Dear Ms. Kitchings:

Enclosed herewith for filing is the original and six copies of the Petition for Rehearing concerning the above referenced matter, together with the Proof of Service, and a check in the amount of Fifty (\$50.00) Dollars.

With best regards, I remain

Sincerely,


Eugene H. Matthews

EHM/mjw

cc: Shannon Polvi
Michael H. Montgomery