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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

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

Angela Bain .....Appellant

v.

Denise C. Lawson and Kenneth L. Childs..... Respondents.

RESPONDENT KENNETH L. CHILDS' PETITION FOR RECONSIDERATION AND MOTION FOR REHEARING EN BANC

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CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CERTIFICATE OF COUNSEL

I, Michael H. Montgomery, counsel for Kenneth L. Childs, Respondent, certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 221, SCACR, Rule 240, SCACR and S.C. Code Ann. §14-8-90.

MOTION

Pursuant to Rules 221(a) and 240 of the South Carolina Rules of Appellate Procedure, Respondent Kenneth L. Childs ("Childs") files this Petition for Rehearing and Rehearing en Bank regarding the Court's decision filed July 14, 2021. Bain v. Lawson, No. 2018-001991, 2021 S.C. Unpub. Lexis 283 (S.C. App. July 14, 2021) (Unpublished Opinion No. 2021-UP-272). In its opinion, the three-judge panel of this Court reversed the lower court's finding that Childs was immune from suit because he was acting as an attorney for the Chester County School Board and/or Defendant Lawson at all times relevant to the Complaint.

Rule 221(a) SCACR permits a party that 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). Respondent Kenneth L. Childs submits that the Court overlooked and misapprehended applicable law to support its finding that a genuine issue of fact exists as to Childs' status as an attorney in this matter and whether he acted outside that role. In addition, Childs asserts that the Court overlooked or misapprehended points of law or fact when it determined that Summary Judgment was inappropriate as to the Civil conspiracy Claim.

Childs further asserts that the issue of Attorney immunity and the potential effects of this decision present a question of exceptional importance that requires a decision by the full Court to

maintain uniformity of the Court's decisions. For that reason, he requests that the Court rehear this matter *en banc*.

Childs' reasoning and argument is set out herein.

QUESTIONS PRESENTED FOR REHEARING AND RECONSIDERATION

1. Did the Panel err in finding that Childs was not the School District's Attorney, and therefor immune from suit as a matter of law?

2. Does Respondent's Petition for Rehearing present a question of exceptional importance, and/or require a decision by the full court to secure or maintain uniformity of the Court's Decisions so as to require a rehearing *en banc*.

STATEMENT OF THE CASE

Appellant, Angela Bain ("Bain"), then Superintendent of Schools of Chester County, filed a civil complaint against Respondents Kenneth Childs ("Childs"), an outside attorney representing the Chester County School District, and Denise Lawson ("Lawson") then the Chair of the Chester County School Board, on July 23, 2018, alleging defamation and civil conspiracy against both defendants. Her Complaint is a collection of conclusory statements.

At all times relevant to this case, Childs was a member of the Duff & Childs law firm and was giving legal advice to Lawson as either the Chair of the School Board or individually. Lawson filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP on August 8, 2018. Childs filed a

Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP and in the alternative a motion for Judgment on the Pleadings under Rule 12(c), SCRCP on August 17, 2018. On that same date, Childs also filed a separate Motion to Strike and Memorandum in support of his Motions. On September 18, 2018, Bain filed three memoranda in opposition to each of the motions filed by Respondents.

The Honorable Brian M. Gibbons held a motion hearing and heard argument on the motions in the Chester County Courthouse on September 26, 2018. After Oral Arguments, Judge Gibbons asked the parties for additional briefing on the Attorney-Client privilege issues argued during the hearing. Each of the parties submitted supplemental memoranda in support of their positions. Notably, both the Complaint and Memoranda submitted by the parties included additional materials relevant to the question of whether Childs was acting as attorney for the district, including policies, correspondence, and e-mails from the Plaintiff to Childs and others. Judge Gibbons considered these documents because they were submitted without objection by either party.

Judge Gibbons issued his Order granting Childs' 12(b)(6) Motion and dismissing Bain's Claims against Childs on October 26, 2018. Judge Gibbons' Order also denied Lawson's motion to dismiss the defamation action but granted Lawson's motion to dismiss the conspiracy action based upon Childs' Dismissal from the case. The Court further determined that because of the dismissal, Child's motion to strike was moot.

Bain moved for reconsideration on November 2, 2018. Judge Gibbons denied her Motion for Reconsideration in an Order dated November 5, 2018. Bain timely filed a Notice of Appeal on November 8, 2018.

Bain appealed Judge Gibbons' decision to the Court of Appeals. The Court of Appeals issued its Order Reversing and Remanding Judge Gibbons decision on July 14, 2021.

In that decision, the Court agreed that the acquiescence of the parties to the materials attached to the Complaint and filed with their memoranda and determined that in accord with *Higgins v. Med. Univ. of S. C.*, 329 S.C. 592, 598, 486 S.E. ed 269, 272 (Ct. App. 1997) that the parties were "fairly apprised that the court would look beyond the pleadings," and agreed that the motions were properly decided under Rule 56, SCRCP.

Respondent Childs now timely files this Motion for Reconsideration and Rehearing *en banc*.

FACTS

Plaintiff Bain was the Superintendent of the Chester County Schools. As Superintendent she is an employee of the Board of Trustees, *see S.C. Code Ann., 1976* §59-19-10 (2020) . Board policy BDG dictates how attorneys are approved and selected. The Board, not the Superintendent selects and approves attorneys. The Duff and Childs firm and its lawyers were approved attorneys for the Board of Trustees for the Chester County School District during the time in question. Administrative Regulation BDG-R provides that the Board Chair may seek representation. The Superintendent's consent is not required. It is also axiomatic that the Board would not select the Superintendent's preferred lawyer to represent it in dealing with questions about the Superintendent's contract.

The Complaint endeavors to gild the lily[1] as it relates to Childs's relationship with the School District, confusing facts relating to his previous employment and representation of the Chester County School District. With those relevant to the issue at hand while the firm of Childs and Halligan ceased working with the district in 2015, Childs was subsequently employed with

[1] "An idiom arguably a condensation of Shakespeare's statement in King John (4.2) meaning to pile excess on excess.

Duff and Childs. Duff and Childs was one of the successor firms resulting from the breakup of Duff White & Turner. Plaintiff admits, Duff, White and Turner, was an approved firm. Compl. ¶14. (R.O.A. p 004) Notably, while the Plaintiff wishes to assert that a single attorney was appointed, the firm was hired[2]. Thus, the allegations that Childs' firm did not represent the district are red herrings[3] belied not only by the facts, but by the Plaintiff's own Complaint and the attachments submitted by the parties.

The gravamen of Appellant's Complaint was that Lawson consulted with Childs about her contract and she was unhappy about that. The balance of her Complaint consists of unfounded allegations and legal conclusions that fail to support any claim that Childs made any false or defamatory statement, much less that he and Lawson conspired to do so. The conclusory allegations in her Complaint are disproven by the contemporaneous documents included in the record and considered by both the Trial Court and the Appellate Panel.

On June 2, 2017, Bain e-mailed Mr. Childs and his partner David Lyon and said:

> *Good morning, David and Ken!*
> *Thanks for the memo! Yes, this is fine to go ahead and send to the board with a cc to me. Would you be able to do this today?*
>
> *Thanks!*
> *Angela.*

(R.O.A. p. 160)

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[2] Paragraph 17 of the Complaint alleges that the Superintendent chose to use Andrea White "to conduct the district's legal business." This allegation misstates fact, and the Superintendent's legal authority.

[3] A clue or piece of information that is intended to be misleading or distracting.

Here, plaintiff requested that the very attorneys she alleges did not represent the district, perform work for the district. This fact demonstrates her recognition of the attorney-client relationship that she attempts to plead away in the Complaint. It is also an admission that the Court of Appeals should have found dispositive.

The record further reflects that on June 6, 2017, Bain sent an e-mail to the School Board – including Mrs. Lawson. That e-mail read:

> *Hi All,*
> *Here is something I am getting ready to send to our media outlets at the advice of Ken Childs, one of our attorneys. I wanted to be sure we were in compliance with Board meeting announcements and FOIA.*
> *Having not sent out an agenda for a meeting., it cannot be viewed as a board meeting. Wanted to be sure we were all clear on that.*
>
> *See attached.*
> *Thanks.*
> *Angela.*

(ROA p. 163)

Once more, Bain acknowledges and admits what she asserts is false in her Complaint. Childs is and remained an approved attorney for the Chester County school district.

Next Bain sent an email to both firms (Duff and Childs and White and Story). Duff and White had heretofore practiced together:

> *Hi all, please deliver all electronic and hard copy files form the old firm to Andrea White at 3614 Landmark Drive, Suite EF. We hope to be able to use both firms going forward.*
> *Thank you.*
>
> *Angela.*

(R.O.A. p. 162)

This document again demonstrates a continuing and anticipated future attorney client relationship with Duff and Childs.

On August 22, 2017 Bain wrote a letter to David Lyon, Esquire at Duff & Childs, LLC complaining and asking for clarification about three items on the July 2017 invoice from the law firm. She states *inter alia*,

> *"After a review of your August 8, 2018 memo and attached bill received in my office on August 14, 2017, I have concerns about the charges listed on the bill for the month of July 2017. I will outline those below.*

After raising three questions, she states,

> *I do not believe our district should be billed for these items as they were not authorized by me . Please review and get back with me on this. Going forward, please notify me prior to taking any action on behalf of Chester County School District so that I have a chance to authorize expenses.*

(R.O. A. p. 148)

Notably once again, Bain acknowledges that Duff & Childs, and its attorneys are approved attorneys for the district, are performing work and have an attorney client relationship. Moreover, as approved attorneys, they are available for consultation with the Board through the Board chair pursuant to District Policy. While Plaintiff introduced this letter, it is also notable for the fact that it documents the attorney client relationship that the Appellate Panel found to be a question of fact. Non-clients neither receive invoices from lawyers nor ask questions about them. Bain did not write that "you're not our lawyers, what are you doing sending us bills, although Plaintiff argues that is the case and the Panel was misapprehended or failed to consider all of the facts in reaching its conclusion to reverse.

On June 26, 2018, Childs met with the Board during a Special Called Meeting of the board of School Trustees to discuss the superintendent contract and related matters. According to the Complaint the meeting was called on June 16, 2018 by the Board Chair. ¶47 Compl. (R.O.A. p. 9)

By Chester County School Board Policy, the Board, not the superintendent, selects and approves attorneys and Bain's own conduct recognizes that Childs was an approved attorney that the Board Chair could choose to use pursuant to Policy BDG-R.

The only facts in the record support a finding that Childs was an attorney and was acting in that capacity when the Board consulted him about Bain's contract. These facts demonstrate that the Appellate Panel erred in finding that his representation was a question of fact, the finding that led to the Trial Judge's decision being reversed and remanded.

ARGUMENT

I. THE COURT MISAPREHENDED THE FACTS IN THE RECORD AND MISAPPLIED THE LAW WHEN IT CONCLUDED THAT THERE WAS A MATERIAL QUESTION OF FACT AS TO WHETHER OR NOT CHILDS WAS THE DISTRICT'S ATTORNEY.

In determining that there was a question of fact as to whether Childs was the School District's Attorney, the Court erroneously relied upon one piece of evidence which was misconstrued. In doing so, it misapprehended the effect of that evidence and failed to consider the objective facts and law. The Court seems to have relied almost solely on a phrase in the August 8, 2017, letter (R.O.A. p. 148) to the law firm questioning charges for the month of July 2017. The court found that the pertinent part of that letter was the following statement, "Going forward, please notify me prior to taking any action on behalf of Chester County School District so that I

have a chance to authorize expenses. *Bain v. Childs*, 2021 S.C. App. Unpub. Lexis 283, 10; 2021 WL 2947804.

This error is apparent, because the letter does not question that an attorney client relationship exists between the District and Childs, instead the Superintendent is seeking to regulate that attorney-client relationship in contravention of Board Policy. Her instructions are contrary to Board Policy and practice. The Board policy and regulation both afford the Board Chair the ability to communicate with and engage attorneys to assist the Board. It is axiomatic that where the Board had questions about a Superintendent's contract, it may not wish to notify the Superintendent of an engagement with one of the district's lawyers. Moreover, the idea that a question about an invoice from a client brings into question the attorney –client relationship may have profound consequences. Such a holding will have pervasive effect on privilege, for example, one can envision the argument , Judge, "Defendant testified that he questioned charges on his bill, she has waived the attorney-client privilege, and it shows that she and her attorney were conspiring against my client."

Even more concerning, the opinion concludes that this letter "Appellant explicitly states that the firm was not authorized to do legal work on behalf of the district without her prior approval. *Bain v. Childs, supra,* 2021 S.C. Unpub. Lexis 283, p. 12.

It was clearly error for the Court to rely on this statement to create a question of fact solely based upon that letter – but it did, holding, "her August 22, 2017 letter provides enough ambiguity regarding the attorney-client relationship between the District and Childs (and his firm) that judgment as a matter of law on this issue is inappropriate." *Id.* In doing so the court misapprehended the law and held that a school Superintendent, not a school board, has the authority to dictate what attorneys represent a school district. That error merits reconsideration,

rehearing and a new opinion. *S.C. Code Ann.* §59-19-90(3) (2020) provides that the board of trustees shall also "promulgate rules and regulations. . . ."

S.C. Code Ann. §59-19-110 (2020) provides that

> *The boards of trustees of the several school districts may prescribe such rules and regulations not inconsistent with the statute law of this State as they may deem necessary or advisable to the proper disposition of matters brought before them. This rule-making power shall specifically include the right, at the discretion of the board, to designate one or more of its members to conduct any hearing in connection with any responsibility of the board and to make a report on this hearing to the board for its determination.*

The Chester County School Board exercised that authority. It adopted Policy BDG and the administrative rule to that policy. Policy BDG, referred to in the Plaintiffs' Complaint (R.O.A. p. 016), provides

> *The increasing complexity of school board operations requires the frequent procurement of legal services.*
>
> *Consequently, the board, by majority vote, may designate an attorney to counsel the board and administration on legal matters involving the district's welfare. The attorney will serve at the pleasure of the board and will be paid for services rendered.*
>
> *The board may ask the attorney to attend such board meetings or other meetings as may be needed. A decision to seek legal advice or assistance on behalf of the school system will normally be made by the superintendent. Such action will be taken as consistent with board policy and as it meets an obvious need of the board. It may take place as a consequence of formal board direction.*
>
> *Except in unusual circumstances,* ***the board will make all communications to the school attorney through the*** *superintendent or* ***board chairman****. [Exhibit B to the Complaint]*

[emphasis added]

The Administrative Rule, AR BDG-R further clarifies the Board Chair's ability to consult with District Counsel on her own (and/or the Board's) initiative. It requires District employees to

make requests, for legal services, only with the superintendent's express consent. Board members' access to legal services are not controlled by the Superintendent. Board members may make request for "legal advice from the district's appointed attorney without the knowledge of the superintendent" by making a request to the board chair.

The Plaintiff complains that "a special board Meeting was called by Lawson for June 18, 2018 Comp. ¶47 (R.O.A. p. 009) and that "Childs presented to the entire School board and to individual board members the alleged violations of contract and law made against the plaintiff for her consulting work." Comp. ¶48. (R.O.A. p. 009). This meeting was properly called and held because the Board Chair and School Board have the legal authority and right – without the consent of the Superintendent, to consult District counsel about the Superintendent's contract without her knowledge – although the public meeting agenda and minutes reflect that this meeting was anything if not public and the Superintendent had notice of the meeting.

Notably, the public record minutes of that minutes reflect that "the board voted unanimously to approve the agenda as presented" which was to "discuss the superintendent contract and related matter." Those minutes available at https://www.chester.k12.sc.us/cms/lib/SC50000477/Centricity/Domain/39/JUNE%2026%202018%20MINUTES.pdf reflect that Mr. Childs and Mr. Lyon, attorneys from Duff & Childs, LLC were present. The public record clearly demonstrates that Mr. Childs was the Board's attorney during the meeting. This is consistent with the allegation that a Board meeting took place, and he was called upon to report to the Board on a matter of the Superintendent's contract.

Every bit of this claim is consistent with Childs being properly consulted by the Board Chair about concerns relating to the Superintendent's contract. The letter submitted by the Superintendent confirms that he and his firm were approved attorneys for the district. While she

questioned billed charges, she certainly didn't say "your firm does not represent our district", nor did she argue no fees were due. Her other communications during that same summer reflect a continued relationship between Childs' firm and the school district.

It was clear error for the Panel to hold that there was a material question of fact as to whether or not Childs was the District's Attorney. He was, the Board chair had every right to consult him about the Superintendent's contract and conclusory allegations to the contrary, there is not basis to reverse the Circuit Judge on this basis.

II. *STILES V. ONORATO* IS INAPPLICABLE TO THE FACTS IN THIS CASE

The Court misapprehended *Stiles v. Onorato*, 318 S.C. 297,300 457 S.E.2d 601,602 (1995). Theat Opinion cites a holding that noted that an attorney had to breach an independent duty to a third person or act in his own personal interest, outside the scope of his representation of the client' to be sued for civil conspiracy. While the Court articulated those principles, it is notable that in *Stiles*, the Court found that "nowhere in the Complaint does Onorato allege in what manner Bowen acted outside his role as Stiles' attorney nor does he allege that Bowen breached some independent duty owed to Onorato. Therefore, on the face of his Complaint, the only reasonable inference is that Bowen was acting at all times in his capacity as Stiles' attorney. Under *Gaar*, (*Gaar v. North Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct. App. 1986)) Bowen is immune for any activities taken in his professional capacity. Accordingly, under *Gaar,* Onorato's Complaint was fatally deficient, and Bowen's Rule 12(b)(6) motion was properly granted." *Stiles, supra* at 318 S.C. 300, 457 S.E.2d 603.

The idea that Childs acted other than as the district's attorney is belied by the facts considered by the Court and adopted by the Appellate Panel. Like Bowen, Childs is immune for any activities taken in his professional capacity and the Court should reconsider the Panel's decision *en banc* and issue a new Order affirming the Trial Judge.

Plaintiff realized the peril in a finding that Childs was the district's attorney. She made every effort to fill her Complaint with conclusory allegations that he wasn't. *See. e.g.*, ¶¶ 17, 26, 49, 56, 72, and others. While Plaintiff's Complaint alleges that Childs was not the District's Attorney, her contemporaneous communications to Childs and the Board reveal that she held him out to be one of the district's attorneys. Her allegations are inconsistent with the documents filed and exhibits attached to her pleading. In that case, the exhibits control.

Where there is a conflict between allegations in a pleading and exhibits attached thereto, the exhibits control. *Hoefling v. City of Miami*, 811 F.3d. 1271, 1277, (11th Cir 2016), *Crenshaw v. Lister*, 553 F.3d. 1283, 1292 (11th Cir. 2009); *Wydler v. Bank of America, N.A.*, 360 F.Supp. 2d 1302, 1306 n.1 (S.D. Fla. 2005); *Wilbesan Charter Sch., Inc. v. School Bd. of Hillsborough County*, 447 F. Supp. 2d. 1292, 2302 (M.D. Fla. 2006). This logic has been adopted in South Carolina's Federal Courts as well.

In evaluating a motion to dismiss under Rule 12(b)(6), the court may consider "documents attached or incorporated into the complaint without converting the motion to dismiss into a motion for summary judgment." *Floyd v. Mgmt. Analysis & Utilization, Inc.*, C.A. No. 7:13-01971-JMC, 2014 U.S. Dist. LEXIS 31837, 2014 WL 971937, at *11 (D.S.C. Mar. 12, 2014) (citation omitted).

Moreover, "when a defendant attaches a document to its motion to dismiss, 'a court may consider it in determining whether to dismiss the complaint [if] it was integral to and explicitly

relied on in the complaint and [if] the plaintiffs do not challenge its authenticity.'" *Id.* (quoting *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004).

Plaintiff incorporated the Board Policies in her Complaint. Those policies show the folly of her argument that she decides who represents the district. Policy BDG (R.O.A. p. 16) provides that "The attorney will serve at the pleasure of the board and will be paid for services rendered." That Policy also states, "**the board will make all communications to the school attorney through the** superintendent or **board chairman.**" [Emphasis added] The administrative regulation to the policy BDG-R further demonstrates the propriety of Lawson's necessary communications with Childs. It provides, *inter alia*, "A decision to seek legal advice and assistance on behalf of the district may be made by the board (individually or collectively) . . .." The Board Policies and Administrative Regulations, the letter exhibit to Bain's supplemental brief and the attachments to Childs' memo are authentic, incorporated and dispositive. The Plaintiff cannot question the veracity or authenticity of her own letters and electronic mails. It was clear error for the three-judge panel to allow her to and to take a single communication out of context and imply that the Superintendent had legal authority to choose district counsel, when that authority lies exclusively with the Board of Trustees.

The Court properly admitted and considered the correspondence in this case. Nothing in that correspondence indicates anything but that at all times in question, Childs and the firm of Duff and Childs were attorneys for the district, available to be consulted by the Board of Trustees and board chair and that such a consultation was an attorney-client interaction. Childs properly enjoyed the protections and immunity outlined in *Gaar*. He was acting in his professional capacity and immune from suit.

The Lower Court's finding of the Attorney-Client relationship was correct. Childs is immune from suit and the Court should reconsider the decision to the Contrary and reverse its decision.

III. APPELLANTS' PETITION FOR REHEARING PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE, AND/OR REQUIRES A DECISION BY THE FULL COURT TO SECURE OR MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS SO AS TO REQUIRE A REHEARING EN BANC.

The issue of whether or not every attorney can be sued in an action for slander or civil conspiracy or otherwise for advice given a client is a pervasive one. Looking at the Panel's decision here and coupling it with the Supreme Court's question in *Paradis v. Charleston County School District* Opinion No. 28030, 2021 S.C. Lexis 56 cited by the Panel in its decision will almost make it incumbent upon every plaintiff to bring an action against attorneys consulting clients in employment and other claims. If a bare allegation that an attorney acted outside of the attorney client relationship is enough to create a question of material fact in those cases, our entire Justice system is in peril. Such a holding exuberates reasons that attorneys have enjoyed these protections since the advent of the common law, As Justice Few noted in his Dissent in Paradis "Now any plaintiff may 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." Coupling Paradis with this panel's decision will allow the Plaintiff to allege the defendant's attorney was a co-conspirator and that whether or not such attorney was, in fact, acting as an attorney in that instance is a question of fact assuredly opens pandora's box and chills the ability of members of the bar to advise and discuss strategies with their clients because doing so may make them a conspirator – and because it certainly creates a situation where they might become a co-defendant in a potentially adverse position to their client,

with questions of privilege and the nature of a protected relationship at risk for both attorney and client.

This impact includes, damages to the system of justice, increases in the costs of malpractice coverage, increases in the number and types of frivolous suits overwhelming our courts.as well as an uptick in jury trials for cases where the attorney and client are alleged to conspire. This is because, as Justice Few pointed out "the undefined theory of civil conspiracy leaves courts and juries free to determine civil liability – both of the alleged tortfeasor and the supposed conspirator – not based on the law, but by using the individual judge or juror's sense of fairness or responsibility."

Clearly, this matter involves a question of exceptional importance, and/or requires a decision by the full Court to secure or maintain uniformity of the Court's decisions, Appellants respectfully request pursuant to SCAR 219 that Appellant's Petition for Rehearing be heard *end banc.*

IV. WITH LEAVE OF THIS COURT, RESPONDENT CHILDS 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.[4]

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. *Paradis v. Charleston Cty. Sch. Dist.*, 2021 S.C. LEXIS 56, 2021 WL 1992245 (Supreme Court of South Carolina May 19, 2021) (Shearhouse Adv. Sh. No. 17 at 26–27).

[4] 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.

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 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), SCRCP, and there is not a shred of evidence in the record that could sustain this point under Rule 56, SCRCP. 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

This Court should grant Respondent Childs' motion for rehearing and en banc review of this case, reverse the three-judge panel, and substitute an opinion affirming the Trial Judge that Mr. Childs is immune from suit as all of his actions were taken as the district's attorney as a matter of law. The court should also dismiss the civil conspiracy cause of action because without Childs, there is only one alleged actor and no cause for civil conspiracy is available.

Respectfully submitted,

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APPEAL FROM CHESTER COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

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

Angela Bain .....**Appellant**

v.

Denise C. Lawson and Kenneth L. Child.....**Respondents**

CERTIFICATE OF SERVICE

I certify that I have served Respondent Kenneth L. Childs' Motion for Rehearing and Rehearing en banc upon J. Lewis Cromer, Shannon M. Polvi and Eugene H. Matthews by depositing it in the United States Mail, postage prepaid on July 29, 2021, addressed to them at the following addresses:

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